LONG-TERM SHAREHOLDERS AND TIME-PHASED VOTING

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ABSTRACT

We explore Time-Phased Voting ("TPV"), an arrangement in which long-term shareholders receive more votes per share than short-term shareholders. TPV has gained prominence in recent years as a proposed remedy for perceived corporate myopia.

We begin with theory, situating TPV relative to other corporate voting structures, such as one-share-one-vote and dual-class stock. By decreasing the influence of short-term shareholders, TPV may encourage managers to act in the long-term interests of their firms. It may also facilitate controlling shareholder diversification and firm equity issuances by enabling controlling shareholders, who are generally long-term shareholders, to maintain their control with lower levels of ownership. In this respect, it resembles a milder form of dual-class stock, but is more targeted toward myopic behavior.

We then investigate U.S. companies' experiences with TPV in practice. Due to limited U.S. experience with TPV, our sample size is small from a statistical standpoint. Nevertheless, our findings are consistent with our theoretical analysis. Our ownership and voting data suggest that TPV empowers long-term shareholders but does little to encourage long-term shareholding; this may be due to a lack of investor awareness regarding the few companies that have TPV. In the short term, TPV empowers insiders, increasing their control and creating a wedge between their ownership and control of the firm (though a smaller

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wedge than is typical of dual-class firms). However, in the long term, we find that TPV is associated with reduced insider ownership and control. We see a transition in TPV companies, which are mainly mature, family-owned companies, from a concentrated to a more dispersed ownership structure. Relatedly, we find that TPV is associated with significant insider diversification and the issuance of additional equity.

Overall, TPV firms significantly outperformed the market as a whole; an investor who invested in our TPV firm index in 1980 would have more than six times as much money at the end of 2013 as an investor who invested in the S&P 500. While it is not clear that TPV contributed to this strong performance, we believe that shareholders and corporations should be free to experiment with reasonable TPV plans if they so choose.

TABLE OF CONTENTS

I. INTRODUCTION 543
II. CORPORATE FINANCE THEORY BACKGROUND 553
A. *The Short-Termism Debate* 553
1. Share Prices and the Efficient Capital Markets Hypothesis 553
2. The Short-Termist Critique 555
3. Short-Termism and Short-Term Investors 561
B. *Time-Phased Voting* 564
1. The Arguments Against Time-Phased Voting 565
2. The Arguments in Favor of Time-Phased Voting 568
a. *Responses to Managerial-Entrenchment Arguments* 568
b. *Reduction of Managerial Myopia* 570
c. *Potential Efficiency Benefits in Public Corporations with Dominant Shareholders* 572
d. *Summary* 576
III. THE RESULTS OF DUAL-CLASS STOCK STUDIES 578
A. *Descriptive Statistics* 578
B. *Family Ownership* 580
C. *The Wedge Between Ownership and Control* 581
D. *Performance of Dual-Class Firms* 583
IV. EMPIRICAL STUDY OF TPV COMPANIES 592
A. *Descriptive Information About TPV Companies* 593
B. *The Terms of TPV Plans* 599
C. *Companies' Stated Reasons for TPV Implementations and Rescissions* 604
1. Implementations 604
a. *Arguments Raised in Favor* 604
b. *Possible Adverse Consequences* 608

2. Rescissions 611
D. *Beneficial Ownership and Voting Control of TPV Firms* 615
1. Beneficial Ownership 615
a. *Insider Beneficial Ownership* 619
b. *Founding Family Beneficial Ownership* 621
c. *Principal Outside Shareholder Beneficial Ownership* 622
d. *Institutional Investor Beneficial Ownership* 623
e. *Beneficial Ownership by Different Types of Institutional Investors* 625
2. Long-Term Shareholding 628
a. *Long-Term Share Ownership at Reporting TPV Companies* 628
b. *Insider Long-Term Share Ownership at Reporting TPV Companies* 631
c. *Long-Term Share Ownership by Principal Outside Shareholders* 633
3. Voting Power and the Wedge Between Ownership and Control 634
a. *Voting Power and Wedge for Long-Term Shareholders at Reporting TPV Companies* 635
b. *Voting Power and Wedge for Insiders at Reporting TPV Companies* 636
4. Diversification and New Equity Issuances 639
a. *Insider Diversification* 640
b. *Issuance of Shares* 642
5. TPV and Firm Performance 643
V. CONCLUSION 645

"A management team distracted by a series of short term targets is as pointless as a dieter stepping on a scale every half hour." Larry Page and Sergey Brin, *"An Owner's Manual" for Google's Shareholders*.[1]

I. INTRODUCTION

When Google went public in 2004, its registration statement was accompanied by a short letter from founders Larry Page and Sergey Brin. This unusual document, entitled *"An Owner's Manual" for Google's Shareholders*, laid out the authors' vision for how Google should operate

[1]Larry Page & Sergey Brin, Letter from the Founders—"An Owner's Manual" for Google's Shareholders, Google Inc., Registration Statement (Form S-1) at i (Apr. 29, 2004), *archived at* http://perma.cc/HZG5-CWWY.

going forward. In particular, the founders stressed that Google would remain focused on the long term and resist market pressures that, in their view, push public companies toward a myopic focus on short-term results.[2] Many other business leaders,[3] scholars,[4] and commentators[5]

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[2] *Id.*

[3] *See, e.g.*, ASPEN INST., OVERCOMING SHORT-TERMISM: A CALL FOR A MORE RESPONSIBLE APPROACH TO INVESTMENT AND BUSINESS MANAGEMENT 2 (2009), *archived at* http://perma.cc/J9KY-PP66 [hereinafter ASPEN INST.] (arguing for management emphasis on long-term considerations in a paper signed by Berkshire Hathaway CEO Warren Buffett, Vanguard Group founder John Bogle, and retired IBM CEO Louis Gerston, Jr., among other noted business leaders); CFA CTR. FOR MARKET INTEGRITY & BUS. ROUNDTABLE INST. FOR CORP. ETHICS, BREAKING THE SHORT-TERM CYCLE: DISCUSSION AND RECOMMENDATIONS ON HOW CORPORATE LEADERS, ASSET MANAGERS, INVESTORS AND ANALYSTS CAN REFOCUS ON LONG-TERM VALUE 1 (2006) [hereinafter CFA CTR.], *archived at* http://perma.cc/6947-AEM4; COMM. FOR ECON. DEV., RESTORING TRUST IN CORPORATE GOVERNANCE: THE SIX ESSENTIAL TASKS OF BOARDS OF DIRECTORS AND BUSINESS LEADERS (2010) [hereinafter RESTORING TRUST], *archived at* http://perma.cc/ND64-SWRG; MATTEO TONELLO, CONFERENCE BD., REVISITING STOCK MARKET SHORT TERMISM (2006), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=938466 (reporting on research based on meetings with industrial leaders and major investors).

[4] *See* Part II.A.2-3, *infra*, and sources cited therein. *See also, e.g.*, PAVLOS E. MASOUROS, CORPORATE LAW AND ECONOMIC STAGNATION: HOW SHAREHOLDER VALUE AND SHORT-TERMISM CONTRIBUTE TO THE DECLINE OF WESTERN ECONOMIES 23 (2013) (expressing concern over the "dominance of short-term horizons in corporate decisionmaking under the influence of non-controlling equityholders"); John Asker, Joan Farre-Mensa & Alexander Ljungqvist, *Corporate Investment and Stock Market Listing: A Puzzle?* 28 REV. FIN. STUD. 342, 344 (2015) (concluding that "short-termist pressures induce public firms to invest myopically"); William R. Baber, Patricia M. Fairfield & James A. Haggard, *The Effect of Concern About Reported Income on Discretionary Spending Decisions: The Case of Research and Development*, 66 ACCT. REV. 818, 828 (1991) (concluding that firms underinvest in research and development to bolster quarterly earnings); Sanjeev Bhojraj, Paul Hribar, Marc Picconi & John McInnis, *Making Sense of Cents: An Examination of Firms that Marginally Miss or Beat Analyst Forecasts*, 64 J. FIN. 2361, 2385 (2009) (concluding that firms that avoid projects expected to cause a short-term stock price decrease "underperform at a longer horizon"); John R. Graham, Campbell R. Harvey & Shiva Rajgopal, *The Economic Implications of Corporate Financial Reporting*, 40 J. ACCT. & ECON. 3, 47 (2005) (finding that 78% of executives surveyed "admit that they would sacrifice . . . [long-term] value to achieve a smoother earnings path"); James M. Poterba & Lawrence H. Summers, *A CEO Survey of U.S. Companies' Time Horizons and Hurdle Rates*, 37 MIT SLOAN MGMT. REV. 43, 43 (1995) (suggesting that differences in "time horizons" may be responsible for the decline in U.S. industrial competitiveness); Michael E. Porter, *Capital Disadvantage: America's Failing Capital Investment System*, HARV. BUS. REV., Sept.-Oct. 1992, at 65, 67 ("The U.S. system first and foremost advances the goals of shareholders interested in near-term appreciation of their shares—even at the expense of the long-term performance of American companies"); Alfred Rappaport, *The Economics of Short-Term Performance Obsession*, 61 FIN. ANALYSTS J. 65, 72 (2005) (asserting that "[m]ost CEOs . . . are obsessed with . . . short-term share price[,] . . . [s]acrificing the company's long-term prospects . . . in an attempt to temporarily boost the stock price"); Sugata Roychowdhury, *Earnings Management Through Real Activities Manipulation*, 42 J. ACCT. & ECON. 335, 364-65 (2006) (finding that firms myopically discount product prices to boost sales in order to meet short-term earnings forecasts); Jeremy C. Stein, *Efficient Capital Markets, Inefficient Firms: A Model of Myopic Corporate Behavior*,

have similarly argued that public corporations accord too much weight to short-term concerns, at the expense of long-term decision-making.[6]

Many critics contend that shareholders with short-term investment horizons are an important cause of public companies' alleged myopic behavior.[7] The basic logic of this argument is as follows: Short-term

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104 Q.J. ECON. 655, 655 (1989) ("[E]ven a fully efficient market can lead managers who care about stock prices to behave myopically").

[5]*See, e.g.*, Dominic Barton, *Capitalism for the Long Term*, HARV. BUS. REV., Mar. 2011, at 85, 86-88; Jill Priluck, *The Dark Side of Shareholder Activism*, REUTERS (Apr. 12, 2013), *archived at* http://perma.cc/4C8U-LN2A (arguing that short-termism is rampant in U.S. public corporations).

[6]This article takes no view on the question of whether corporations act myopically, and we note that this point remains hotly contested. For articles that challenge short-termism concerns, see, for example, George W. Dent, Jr., *The Essential Unity of Shareholders and the Myth of Investor Short-Termism*, 35 DEL. J. CORP. L. 97, 122-28 (2010) (arguing that shareholders "favor steps that increase long-term value") (emphasis omitted); Mark J. Roe, *Corporate Short-Termism—In the Boardroom and in the Courtroom*, 68 BUS. LAW. 977, 1005 (2013) (arguing that evidence regarding short-termism is not sufficient to support measures that have the effect of insulating corporate boards); Joe Nocera, *A Defense of Short-Termism*, N.Y. TIMES, July 29, 2006, at C1, *available at* http://www.nytimes.com/2006/07/29/business/29nocera.html?_r=0&pagewanted=print ("Baruch Lev, the well-known accounting professor at New York University . . . scoffs at the notion that short-termism is even a problem."); *see also* Jesse M. Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, 124 YALE L.J. 1554, 1561-62 (2015) (arguing that maximizing long-term shareholders' returns can be more inefficient than maximizing short-term stock prices); Luigi Zingales, *The Future of Securities Regulation*, 47 J. ACCT. RES. 391, 415 (2009) ("While popular, I do not know of any empirical support for this view."); Michael C. Jensen, *The Takeover Controversy: Analysis and Evidence*, 4 MIDLAND CORP. FIN. J. 5, 11-14 (1986) (arguing that financial markets are not myopic).

[7]*See, e.g.*, ASPEN INST., *supra* note 3, at 2 (explaining that boards and managers have allowed short-term considerations to effect desirable long-term growth and profit); Patrick Bolton & Frédéric Samama, *Loyalty-Shares: Rewarding Long-Term Investors*, 25 J. APPLIED CORP. FIN. 86, 86-88 (2013) (discussing the relationship between managerial myopia and short-term investors); CFA CTR., *supra* note 3, at 3 (explaining that one of the most cited concerns today is effective management in the context of today's short-term investor expectations); RESTORING TRUST, *supra* note 3, at ix, xii, 10, 14-15 (discussing the effect short-termism has on corporate management and possible solutions to the problem); JANE AMBACHTSHEER ET AL., MERCER, STIKEMAN ELLIOT LLP & GENERATION FOUND., BUILDING A LONG-TERM SHAREHOLDER BASE: ASSESSING THE POTENTIAL OF LOYALTY DRIVEN SECURITIES 11 (2013); TONELLO, s*upra* note 3, at 5 (raising concerns about corporate and investor short-termism that "undermines confidence in the soundness of the underlying economy, favors opacity on strategic goals, and encourages opportunistic behaviors by a few to the detriment of the many"); Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 296-310 (2012) (discussing short-term investors as one factor contributing to short-termism); Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 745-46 (2007) (arguing that empowering short-term-oriented shareholders "invites directors to abandon their long-term focus"); Priluck, *supra* note 5 (arguing that shareholders "advance some of the most destructive short-term thinking in business today"); Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 16-18 (2010) (expressing concern that a

shareholders anticipate selling their stock in the near future, and they want to receive the highest possible price. Accordingly, their chief concern is the price of the company's stock in the short term. If stock markets do not fully incorporate companies' long-term prospects into share prices, short-term shareholders will want the company to take actions that maximize its stock price in the short term, even if doing so reduces the company's long-term value. Under this view, firms behave myopically because managers are serving short-term shareholders' interests; in short, managers are simply giving a powerful constituency what it wants.

One prominent proposal put forward to mitigate this dynamic, both in the United States[8] and elsewhere,[9] is Time-Phased Voting ("TPV").[10]

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shareholder electorate with a short-term investment horizon will provide corporate managers with inappropriate incentives). *But see* Francois Brochet, George Serafeim & Maria Loumioti, *Short-Termism: Don't Blame Investors*, HARV. BUS. REV., June 2012, at 28 (concluding "that although short-termism may be fueled by investor pressure, its equally true that investors select companies" that have executives with short-term orientations).

[8]*See, e.g.*, Barton, *supra* note 5, at 91; Tamara C. Belinfanti, *Shareholder Cultivation and New Governance*, 38 DEL. J. CORP. L. 789, 834 (2014) (discussing TPV as a possible solution to short-termism and suggesting the NYSE reconsider its one-share-one-vote policy); Martin Lipton, Jay W. Lorsch & Theodore N. Mirvis, *A Crisis Is a Terrible Thing to Waste: The Proposed "Shareholder Bill of Rights Act of 2009" Is a Serious Mistake*, WACHTELL, LIPTON, ROSEN & KATZ, 2 (May 12, 2009), *archived at* http://perma.cc/82PQ-P7QY (assessing the Shareholder Bill of Rights Act of 2009 as a potential solution to short-termism); Charles M. Nathan, *"Empty Voting" and Other Fault Lines Undermining Shareholder Democracy: The New Hunting Ground for Hedge Funds*, M&A Deal Commentary (Sept. 2009), http://www.lw.com/upload/pubcontent/_pdf/pub1689_1.pdf (explaining that time-phased voting is a possible solution to short-termism, but is barred by the NYSE); P. Alexander Quimby, Note, *Addressing Corporate Short-Termism Through Loyalty Shares*, 40 FLA. ST. U. L. REV. 389, 400-01 (2013) (discussing the option of loyalty shares provisions as possible solution to short-termism); Edward B. Rock, *Shareholder Eugenics in the Public Corporation*, 97 CORNELL L. REV. 849, 903-04 (2012) (discussing whether firms should consider adopting dual class or TPV capital structures midstream); Simon C.Y. Wong, *Rethinking "One Share, One Vote"*, HARV. BUS. REV. (Jan. 29, 2013), *archived at* https://perma.cc/LD3A-NPNP (stating that some U.S. commentators have advocated bolstering voting rights of long-term shareholders); ASPEN INST., *supra* note 3, at 3 (discussing a comprehensive solution to short-termism).

[9]*See, e.g.*, HOUSE OF COMMONS, BUS., INNOVATION & SKILLS COMM., THE KAY REVIEW OF UK EQUITY MARKETS AND LONG-TERM DECISION MAKING, THIRD REPORT 2013-2014 52-53 (2013) [hereinafter KAY THIRD REPORT], *archived at* http://perma.cc/ALV8-UK95 (recommending a feasibility study on TPV); Alex Barker, *Brussels Aims to Reward Investor Loyalty*, FIN. TIMES (Jan. 23, 2013, 8:19 PM), http://www.ft.com; Priluck, *supra* note 5; Franziska Ruf, Louis-Martin O'Neill, & Nicolas Morin, *Task Force on the Protection of Quebec Businesses Proposes Bold Measures Against Unsolicited Take-over Bids*, DAVIES (Feb. 21, 2014), *archived at* http://perma.cc/BWF4-3T4V; *cf. European Commission Green Paper on Long-Term Financing of the European Economy* 15 (2013), *archived at* http://perma.cc/4UU5-56LH.

[10]Time-phased voting goes by many other names as well. *See, e.g.*, KAY THIRD REPORT, *supra* note 9, at 53 (referring to "differential votes . . . based on the length of time a share has been held"); SHEARMAN & STERLING LLP ET AL., REPORT ON THE

Most U.S. corporations have a one-share-one-vote voting structure; each share entitles its owner to cast one vote in shareholder elections. In contrast, corporations with TPV arrangements accord long-term shareholders more votes per share than they accord short-term shareholders. For example, each shareholder might be entitled to cast ten votes for every share that she has owned for four years or more, but only one vote for each share that she has owned for a shorter period of time. Proponents contend that TPV arrangements will encourage more shareholders to take long-term views of their investments and will empower long-term shareholders relative to their short-term counterparts. This shift in power should make managers relatively more responsive to long-term shareholders' interests and relatively less responsive to short-term shareholders' interests, thereby reducing myopic behavior.[11]

In contrast, skeptics argue that the primary effect of TPV arrangements will be to enrich corporate insiders, such as managers and founding families, at outside shareholders' expense. Corporate insiders often hold their shares for long periods of time, making them disproportionately likely to be long-term shareholders.[12] Thus, critics contend that TPV arrangements will increase insiders' voting power relative to other shareholders. Because insiders' interests diverge from other shareholders' interests in some important respects,[13] TPV skeptics argue that, by further empowering insiders, TPV arrangements will ultimately make shareholders as a group worse off.

Yet the arguments of TPV proponents and critics are largely compatible: Managers may both be more concerned about the company's long-term prospects than shareholders and seek private benefits from their operation of the company. Thus, if TPV arrangements give managers more independence from shareholders, that could translate into both reduced myopia, which would increase the company's long-term

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PROPORTIONALITY PRINCIPLE IN THE EUROPEAN UNION 11 (2007) [hereinafter EU REPORT], *archived at* http://perma.cc/HA9P-JSY3 (referring to "loyalty shares"); Belinfanti, *supra* note 8, at 832-34 (referring to "time-weighted voting"); Rock, *supra* note 8, at 900 (referring to "tenured voting"). The term "loyalty shares" is also sometimes used to describe shares with warrants or call options that vest only when the shareholder has held the shares for a period of time. Bolton & Samama, *supra* note 7, at 40.

[11] *See, e.g.*, Belinfanti, *supra* note 8, at 834; Quimby, *supra* note 8, at 400-01; Rock, *supra* note 8, at 901-02; Lipton, Lorsch & Mirvis, *supra* note 8, at 1.

[12] *See, e.g.*, DALE A. OESTERLE, MERGERS AND ACQUISITIONS IN A NUTSHELL 263 (2d ed. 2006); Henry T.C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625, 698 (2008).

[13] For example, managers may prefer to do less work, and for more pay, than the shareholders would like. Also, managers might be averse to a takeover offer that gives shareholders a premium for their stock, but is likely to cost the managers their jobs. *See infra* Part II.B.1.

value, as well as increased agency costs, which would reduce the company's long-term value. How these effects net out may vary from firm to firm.

TPV may also be of particular interest for publicly traded firms that are dominated by a founder or founding family ("controlled firms").[14] Controlling shareholders value their control. There are many potentially overlapping reasons for this: They may wish to protect their substantial investment in the firm; they may believe that they are best suited to manage the company; or, they may want to extract excessive private benefits.

There are also competing forces that can push controlling shareholders to reduce their control over their companies. Their companies may need additional capital to pursue new business opportunities—but issuing new equity would dilute the controlling shareholders' control. Additionally, the controlling shareholders' ownership interests are often a large part of their total wealth. This sizable ownership stake exposes them to significant risk. They could reduce that risk by holding a more diversified portfolio, but selling shares in the controlled firms would mean reducing their control over them. Instead, controlling shareholders may reduce their risk by changing their companies' business strategies in ways that diversified shareholders may not like.[15] The need to raise new capital or to diversify can create a dilemma for controlling shareholders, in which they must choose between maintaining their control and pursuing other opportunities.

Because controlling shareholders are generally long-term shareholders, TPV enhances their voting power relative to their percentage of share ownership. Thus, TPV allows the controlling shareholders to reduce their ownership in their firms while maintaining control. This enables controlling shareholder diversification, which better aligns controlling shareholders' interests with the interests of diversified public shareholders. Similarly, the firms can issue new equity to finance firm growth without reducing their control.

TPV makes it easier for controlling shareholders to maintain control over the firm. The controlling shareholders are generally the largest shareholders in their firms, both before and after the implementation of TPV.[16] Their ownership interests in TPV firms are generally greater than the ownership interests of insiders in other public

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[14] *See infra* Part II.B.2.c.

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

[16] *Compare* Figures 2 and 3, *infra* (showing insider and founding family ownership), *with* Figure 4, *infra* (showing ownership by principal outside shareholders).

firms.[17] The larger someone's cash flow rights in a firm, the larger their financial interest in the firm's success. Thus, these firms may benefit from the entrepreneurial and monitoring efforts of the controlling shareholders. However, firms without controlling shareholders may have the benefit of monitoring by an independent board of directors or the market for corporate control. Thus, whether one views controlling shareholders' control over the firm as a positive or negative may depend on one's view of these different governance mechanisms.

TPV may also be a viable alternative to dual-class stock, a more common voting structure among controlled firms.[18] In a dual-class company, both classes of stock typically have similar economic rights, but one class of stock carries many more votes per share. This gives the owners of the "high-vote" stock voting control of the firm.[19] By separating ownership and control of the firm, a dual-class structure allows controlling shareholders to own a smaller percentage of the controlled firm while retaining control over it. Like TPV, this can allow major shareholders to diversify their investment portfolios and enable firms to issue additional equity without diluting dominant shareholders' control.

However, TPV is likely to empower insiders to a lesser degree than dual-class stock. Dual-class high-vote shares usually are not publicly traded and are thus unavailable to most shareholders.[20] In contrast, under TPV, each shareholder has access to shares with superior voting rights; all she must do is hold her shares for the requisite holding period. Thus, TPV does less to insulate managers from monitoring by public shareholders than dual-class stock. TPV also addresses short-termism concerns more directly than dual-class stock arrangements.

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[17] 2A HANDBOOK OF THE ECONOMICS OF FINANCE 235 (George M. Constantinides, Milton Harris & Rene M. Stulz eds., 2013) (stating that, for S&P 500 CEOs, median effective stock ownership in their firms ranged from 0.35% in 1992 to 0.69% in 2003 and fell to 0.38% in 2011); Beau Page, CEO Ownership and Firm Value: Evidence from a Structural Estimation 1 (Nov. 2011) (unpublished manuscript), *archived at* https://perma.cc/Z9VB-QYZ6 (stating that from 1992 to 2007 the average CEO's equity ownership in his firm was 3.6%); Michael C. Jensen & Kevin J. Murphy, *CEO Incentives—It's Not How Much You Pay, But How*, May-June 1990, at 138, 139-40, *archived at* https://perma.cc/TR7Z-9ZQV (noting that "[t]he median CEO of one of the nation's 250 largest public companies [in 1988] owns . . . less than 0.07% of the company's market value. Also, 9 out of 10 CEOs own less than 1% of their company's stock, while fewer than 1 in 20 owns more than 5% of the company's outstanding shares").

[18] *See infra* Part II.D and Part III.

[19] *See* Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051, 1058 tbl.2. (2010) (demonstrating the relationship between voting power and cash-flow ownership).

[20] *Id.* at 1053.

TPV provides additional votes to all shareholders who hold shares for a length of time. Dual-class stock arrangements only provide additional votes to owners of superior voting stock; they are indifferent to long-term ownership by owners of inferior stock.

TPV is extremely common in France, and to a lesser degree in other parts of Europe.[21] In contrast, TPV arrangements are rare among U.S. firms;[22] several major news outlets have even reported—incorrectly—that no U.S. firms have TPV arrangements.[23] Accordingly, prior discussion of TPV arrangements' effects on U.S. firms has largely been focused on theory, with empirical investigations of TPV limited to Europe.[24]

We expand on the academic literature regarding TPV in two ways. First, we synthesize the existing theoretical literature on TPV and situate TPV in corporate law theory. We explain why TPV may encourage managers to operate in the long-term interests of their firms by granting more voting power to long-term shareholders. We argue—contrary to existing writings[25]—that TPV is an intermediate step on a spectrum

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[21]France recently passed the Florange Act, which made time-phased voting mandatory for French public companies unless two-thirds of shareholders vote against it. *See, e.g.*, Michael Stothard, *French Companies Fight Back Against Florange Double-Vote Law*, FIN. TIMES (Apr. 16, 2015), http://www.ft.com/intl/cms/s/0/05314dfe-e27d-11e4-ba33-00144feab7de.html. Even prior to the passage of the Florange Act, time-phased voting was quite popular among French companies. *See, e.g.*, EU REPORT, *supra* note 10, at 44 (finding that 57% of French companies had TPV, including ten of the twenty largest companies and twelve of the twenty most recently listed companies); Chiraz Ben Ali, Disclosure and Minority Expropriation: A Study of French Listed Firms 18 (May 17, 2009) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406165 (looking at eighty-four of the largest French public companies and finding TPV in 64% of the sample); Yvan Allaire & Mihaela Firsirotu, Hedge Funds as "Activist Shareholders": Passing Phenomenon or Grave-Diggers of Public Corporations? 15 (Jan. 27, 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=961828.

[22]This rarity is partly due to regulatory reasons. *See infra* notes 221-228 and accompanying text.

[23]*See, e.g.*, *A Different Class: Would Giving Long-Term Shareholders More Clout Improve Corporate Governance?*, ECONOMIST (Feb. 18, 2010), *archived at* http://perma.cc/Y6XJ-U3E6 (discussing TPV in France and stating that "no American firms" have such arrangements); Jason Zweig, *Here Comes the Slow-Stock Movement*, WALL ST. J., Mar. 23, 2013, at B1, (stating that, to the author's knowledge, "no U.S. company" has TPV).

[24]*See, e.g.*, MASOUROS, *supra* note 4, at 256 n.154, 257 (discussing a French study of 190 large public French firms in which 68.4% of sample firms had TPV); EU REPORT, *supra* note 10, at 5, 44 (describing a factual investigation performed for the European Union that predominately involved European entities); Ali, *supra* note 21, at 3-4 (describing the study as limited to French companies). *But see, e.g.*, Jeffrey N. Gordon, *Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CAL. L. REV. 1, 84-85 (1988) (looking at five U.S. companies' implementation of TPV).

[25]*See, e.g.*, Richard M. Buxbaum, *The Internal Division of Powers in Corporate Governance*, 73 CAL. L. REV. 1671, 1718-19 (1985) (arguing that TPV is "even more problematical" than dual-class stock and an "absolute 'showstopper'" of a takeover defense).

between one-share-one-vote and dual-class stock and that it may be especially suitable for controlled firms and other public firms with relatively concentrated ownership. Second, we investigate the theory empirically by identifying and examining a dozen U.S. companies that have adopted TPV arrangements in the last thirty years. We examine the terms of TPV plans and companies' stated reasons for implementing and, when applicable, rescinding TPV. We also investigate trends in TPV companies' ownership, control, and performance following their adoption of TPV. We have several findings.

First, consistent with the claims of TPV advocates, TPV empowers long-term shareholders, defined by TPV companies as shareholders holding shares for three or four years. Our data suggests that, on average, long-term shareholders owned approximately 25% of outstanding shares and controlled 70% of the votes outstanding. Most of the long-term shares, roughly 75%, were held by outside shareholders, although typically not by principal shareholders—that is, those who own more than 5% of a corporation's stock.

At the same time, we find that the percentage of long-term shareholdings consistently trends downward following the adoption of TPV. Thus, the voting control of long-term shareholders as a group decreases over the years TPV is in effect—while leaving each remaining long-term shareholder holding a greater proportion of votes outstanding.[26]

Second, consistent with the critiques of TPV skeptics, TPV also empowers insiders. Our data suggests that, on average, almost two-thirds of insiders' shares were long-term shares—a much higher rate of long-term shareholding than outside shareholders exhibited. This gave insiders voting rights that substantially exceeded their share ownership; over the years that TPV was in effect, on average, insiders controlled approximately 22% of outstanding votes while owning only 11% of outstanding shares. We note that this sizable "wedge" between insiders' voting control and share ownership is approximately one-half the size of the wedge observed at U.S. dual-class firms, bolstering our view of TPV as an intermediate arrangement between one-share-one-vote and dual-class stock.[27]

Our data suggest a connection between the adoption of TPV and a shift from concentrated to dispersed ownership. While our data does not

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[26]This observation suggests that firms may wish to provide for the termination of their TPV plans if long-term ownership declines below a certain threshold.

[27]*See* Gompers, Ishii & Metrick, *supra* note 19, at 1058 tbl.2 (showing calculations by authors regarding dual-class stock).

allow us to make strong causal inferences, TPV may have facilitated these transitions: Insiders, usually a founding family, controlled most of the companies that we identify at the time they adopted TPV. Ten years after adopting TPV, observed insider share ownership at the median firm had fallen by almost 45%. This is significant, given that our data is primarily comprised of mature companies that have long histories of family control; many of the companies were over a century old when they adopted TPV.[28]

This reduction in insiders' ownership rendered their portfolios more diversified, better aligning their interests regarding firm investment strategies with those of outside shareholders. We also find some evidence that TPV facilitated new equity issuances. Five years after adopting TPV, three firms had increased their shares outstanding by 25% or more.[29] This rate of new equity issuance is approximately halfway between the rates that one-share-one-vote and dual-class firms exhibit, respectively.[30]

We also conduct a longitudinal study to examine the effect of TPV on institutional share ownership in TPV companies over time. We find no evidence that TPV increased or decreased ownership by institutional investors. Moreover, we find no evidence that TPV increased shareholdings by institutional investors with long-term investment horizons, or decreased shareholdings by institutional investors with short-term investment horizons.

Overall, the firms that adopted TPV significantly outperformed the market as a whole; an investor who invested $100 in our TPV firm index in 1980 would have had over $10,672 at the end of 2013, compared to only $1,748 if she had invested in the S&P 500.[31] At the same time, however, it is not clear that TPV contributed to this strong performance; measured relative to the S&P 500, most TPV companies performed better before they adopted TPV. Similarly, among those companies that repealed TPV, as many companies saw their performance improve afterwards as saw it decline.[32]

On balance, the evidence regarding TPV is mixed. Accordingly, we believe that some companies may wish to continue to experiment

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[28]Because companies are not required to disclose family ownership in their proxy statements, our data on family ownership is limited. We have found evidence that our data often understates family ownership, sometimes substantially. *See infra* Subpart IV.D.1.

[29]These shares-outstanding numbers are adjusted for the effects of stock splits. Interestingly, neither of the two firms that included facilitating equity issuances among their reasons for adopting TPV were among this group.

[30] *See infra* note 410.

[31]*See infra* Part IV.D.5.

[32]*See infra* Figure 14 and accompanying text.

with it, and that corporations and shareholders should have significant freedom to craft the terms of such agreements.

Part II of this Article provides the necessary background in corporate finance and corporate law theory to put the arguments surrounding TPV in context. Part III explores the empirical literature on dual-class stock arrangements and considers what insights it offers with respect to the likely effects of implementing TPV arrangements. Part IV presents our data regarding the experiences of the U.S. public firms that adopted TPV arrangements, including a discussion of the terms of their TPV plans and their stated reasons for implementing and rescinding TPV. Part V concludes.

II. CORPORATE FINANCE THEORY BACKGROUND

This Part provides the theoretical grounding necessary to place time-phased voting ("TPV") in context. Subpart A summarizes different perspectives in the short-termist debate. It explores the efficient capital markets hypothesis (the "EMH") and the "short-termist critique," including the roles of long- and short-term shareholders. With this background established, Subpart B outlines the theoretical case for and against TPV. Finally, Subpart C places TPV into context relative to other corporate voting structures.

A. *The Short-Termism Debate*

To understand the short-termist critique, one must first have an understanding of capital markets theory. Accordingly, we begin with the efficient capital markets hypothesis before turning to the short-termist critique and its relationship to short-term shareholders.

1. Share Prices and the Efficient Capital Markets Hypothesis

The EMH is the chief lens through which some economists 553nalyse financial markets,[33] and a long-standing principle underlying

[33] *See, e.g.*, ANDREI SHLEIFER, INEFFICIENT MARKETS: AN INTRODUCTION TO BEHAVIORAL FINANCE 1 (2000) ("The efficient market hypothesis (EMH) has been the central proposition of finance for nearly thirty years."); Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 NW. U. L. REV. 135, 136 (2002) (discussing EMH generally); Jeff Schwartz, *Fairness, Utility, and Market Risk*, 89 OR. L. REV. 175, 201-03 (2010) (discussing EMH in more detail).

U.S. securities laws.[34] The EMH posits that the prices of financial assets, such as stocks, that are traded in large, public markets reflect the best estimate of those assets' values based on the information available.[35]

The basic logic underlying this theory is straightforward: Investors care about the expected future profits of the firms in which they invest.[36] In large, public markets, many investors simultaneously search for the best investments—meaning those that, based on the information available, provide the greatest expected future payments relative to their purchase price. Under the EMH, markets react very quickly to new information, so outperforming the market is very difficult. However, this approach depends on fierce competition among investors that pushes stock prices to reflect the companies' expected future earnings.

For example, suppose that AcmeCo had one million shares outstanding and that AcmeCo's total expected future earnings were $50 million. Each AcmeCo share would therefore be expected to convey fifty dollars to its owner. If the market price of AcmeCo shares was less than fifty dollars—forty dollars, say—investors should flock to buy AcmeCo shares, because spending forty dollars would buy them a fifty-dollar value. It would be almost as if someone were selling twenty-dollar bills for fifteen dollars. As investors rush to buy AcmeCo shares, they will push up the price of AcmeCo shares; this process will continue until AcmeCo shares are priced at fifty dollars, their expected value.

The same dynamic would work in reverse if AcmeCo shares were priced above fifty dollars per share: if AcmeCo shares were trading for sixty dollars per share, an investor who owned a share would be wise to sell. In exchange for receiving sixty dollars now, she would only give up fifty dollars of expected payments, leaving her ten dollars better off than if she continued to hold her shares. As investors sell their shares, the price of AcmeCo shares should fall. This process should continue until AcmeCo shares are priced at their expected value of fifty dollars.

Thus, under the EMH, a public company's stock price accurately reflects all of the company's expected future earnings, including those

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[34] *See generally The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC. & EXCHANGE COMMISSION, *archived at* http://perma.cc/2L4J-HZLS (last modified June 10, 2013) (discussing the foundational principles of securities laws).

[35] More specifically, there are several different forms of the EMH. The difference between them pertains to which information they assume is incorporated into prices. Most EMH believers subscribe to some variant of the semi-strong version, which posits that prices incorporate all publicly available information. *See, e.g.*, IVO WELCH, CORPORATE FINANCE 305-07 (3d ed. 2014) (discussing the different versions of EMH).

[36] More precisely, investors price their investments based on the present value of the payments that they expect to receive as a result of owning the stock, adjusted for the risk of those payments. SHLEIFER, *supra* note 33, at 2.

that will not be earned until far in the future.[37] This conclusion yields a powerful corollary: all shareholders, regardless of their investment time horizons, want managers to maximize the company's long-term value.[38] If a company's stock price reflects the company's long-term value, then adopting a strategy that increases long-term value—even if it entails immediate costs and will only produce profits years later—will raise the company's stock price now.[39] Similarly, strategies that increase company profits in the short term but are costly in the long term will lower stock prices immediately. Accordingly, shareholders who plan to sell their stock in the immediate future will want the same thing as shareholders who plan to hold their stock in perpetuity—both want the company to take actions that maximize its profits over the long term.

2. The Short-Termist Critique

There are several potential problems with the assumptions underlying the EMH,[40] and scholars continue to debate the degree to

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[37]*See* Robert J. Shiller, *From Efficient Markets Theory to Behavioral Finance*, 17 J. ECON. PERSP. 83, 84-85 (2003). Note also that future earnings are discounted to present value. *Id.*

[38]This assumes shareholders are profit-driven; it does not apply to shareholders with some other interest in the corporation, such as employees or suppliers.

[39]*Cf.* John J. McConnell & Chris J. Muscarella, *Corporate Capital Expenditure Decisions and the Market Value of the Firm*, 14 J. FIN. ECON. 399, 419 (1985) (finding that stock prices respond positively to announcements of increased investment expenditures).

[40]*See generally* Othmar M. Lehner, *A Survey of Behavioral Finance*, 1 J. BANKING & FIN. 1, 8-17 (2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669967 (discussing various limitations to the concept of arbitrage as it relates to the efficient markets hypothesis); Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. CORP. L. 635, 651-59 (2003); William K.S. Wang, *Some Arguments that the Stock Market Is Not Efficient*, 19 U.C. DAVIS L. REV. 341, 394-402 (1986). For instance, transaction costs, such as commissions and taxes, associated with an investor's decision to buy and sell stocks can keep market prices from converging to their expected values. Lehner, *supra*, at 12-13 (listing three types of "implementation costs": commissions, interest paid on money borrowed for investment purposes, and time spent researching whether a stock is mispriced); Schwartz, *supra* note 33, at 211 (noting that these costs "may be substantial"); *see* Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393, 404-05 (1980) (arguing that, when information is costly, financial markets will not reflect all available information); Emanuela Sciubba, *Asymmetric Information and Survival in Financial Markets*, 25 ECON. THEORY 353, 372 (2005) (presenting a model under which costless information is a necessary condition for stock prices to fully reflect all available information). There are also studies whose findings seem hard to square with the classical version of the EMH described above. *See, e.g.*, Kenneth A. Froot & Emil M. Dabora, *How Are Stock Prices Affected by the Location of Trade*?, 53 J. FIN. ECON. 189, 190 (1999) (finding that asset prices are affected by the location of trades); Philip S. Russel, *The Enigma of Closed-End Funds Pricing: Twenty-Six Years Later*, 16 INT'L J. FIN. 2985, 2986-87 (2004) (describing persistent mispricing of closed-end funds relative to net

which financial markets are efficient.[41] For example, the accuracy of market prices depends on investors' ability to access and process information.[42] Firms may not disclose bad information, may hide it in lengthy or opaque descriptions, and some information, such as the overall risk of the firm's derivative transactions, may be too complex to convey clearly.[43] Processing disclosed information may also prove challenging. For example, are the firm's low profits today due to poor management or the firm's pursuit of a profitable long-term business strategy? Conversely, do a firm's high current profits reflect good management or a short-sighted strategy that ignores long-term consequences?

Moreover, an important assumption of the EMH is that investors are rational.[44] More specifically, it depends on there being enough rational investors for their valuations, and their decisions to buy and sell based on those valuations, to dominate the market.[45] It is unclear to what extent this assumption is true. On a micro level, not all investors are rational; some investors trade on the basis of stock price movements or trends.[46] Additionally, behavioral economists have found that even

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asset value); Jeffrey Wurgler & Ekaterina Zhuravskaya, *Does Arbitrage Flatten Demand Curves for Stock?*, 75 J. BUS. 583, 605 (2002) (finding overpricing of stocks included in indices). In addition, this Subpart cites other studies that take issue with the EMH for various reasons.

[41]The awarding of the 2013 Nobel Prize in Economics jointly to Eugene Fama, Robert Shiller, and Lars Hansen illustrates this debate well. Fama is perhaps the economist most closely identified with the EMH; Shiller is a leading proponent of behavioral finance models that contest the EMH; Hansen has developed statistical methods that have been used to investigate financial market efficiency. *See, e.g.*, Binyamin Appelbaum, *Economists Clash on Theory, But Will Still Share the Nobel*, N.Y. TIMES, Oct. 15, 2013, at A1.

[42]*See* Schwartz, *supra* note 33, at 183 ("According to EMH, as sophisticated investors trade based on their thorough analyses, market prices quickly adjust and come to reflect the information in SEC disclosures, as well as whatever other information is publicly available.").

[43]*E.g.*, Frank Partnoy & Jesse Eisinger, *What's Inside America's Banks?*, ATLANTIC, Jan.-Feb. 2013, at 60, 60-71; Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211, 216-36 (2009).

[44]*See* Schwartz, *supra* note 33, at 201 (citation omitted) (defining "rational" as having "unlimited willingness and ability to consider all relevant information and choices and . . . unlimited mental capacity upon which to draw in order to weigh their alternatives and reach a decision").

[45]*Cf.* SHLEIFER, *supra* note 33, at 2:

> The basic theoretical case for the EMH rests on three arguments which rely on progressively weaker assumptions. First, investors are assumed to be rational and hence to value securities rationally. Second, to the extent that some investors are not rational, their trades are random and therefore cancel each other out without affecting prices. Third, to the extent that investors are irrational in similar ways, they are met in the market by rational arbitrageurs who eliminate their influence on prices.

[46]Schwartz, *supra* note 33, at 206 (describing aspects of human nature that explain investors' tendencies to "pick stocks based on recent trends, fads, gut instincts, and tips from

sophisticated investors are prone to behavioral biases and emotions in making their investment decisions.[47] These informational processing biases and emotions such as "irrational exuberance" may distort investor profit expectations and lead to over- or under-reactions to new information.[48] If irrationality predominates in markets, prices may not reflect long-term values.[49]

For example, suppose again that AcmeCo stock currently trades at sixty dollars, but its expected future earnings are worth only fifty dollars. If investors are rational, as contemplated by the EMH, AcmeCo shareholders should sell, which will push down the price of AcmeCo stock. But suppose instead that there are many irrationally exuberant investors who want to buy AcmeCo stock. AcmeCo's stock price will rise, instead of fall, and drift even farther from AcmeCo's actual value.

Moreover, if a rational AcmeCo stockholder believes that irrationally exuberant investors will soon push AcmeCo's stock price up further, she may wish to *buy* more AcmeCo stock to profit from the price increase. Similar dynamics can arise if irrational investors systematically undervalue an asset. In other words, if there are enough irrational investors in the market, even rational investors may not choose to behave as the EMH would predict. Instead, they may push market prices even further away from long-term values.[50] Additionally, agency costs

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friends, rather than on the probabilistic computational form of analysis that the rational actor would employ").

[47]*Id.* at 219-20.

[48]Aydoğan Alti & Paul C. Tetlock, *Biased Beliefs, Asset Prices, and Investment: A Structural Approach*, 69 J. FIN. 325, 346-47 (2014) (modeling how overconfidence and extrapolation bias (the perception that past trends are likely to continue) can contribute to mispricing of firm productivity); Bolton & Samama, *supra* note 7, at 39 n.7 (summarizing studies on extrapolation bias); Martijn Cremers & Ankur Pareek, *Short-Term Trading and Stock Return Anomalies: Momentum, Reversal, and Share Issuance*, 19 REV. FIN. 1649, 1650-53, 1698-99 (2015); John C. Easterwood & Stacey R. Nutt, *Inefficiency in Analysts' Earnings Forecasts: Systematic Misreaction or Systematic Optimism?*, 54 J. FIN. 1777, 1778 (1999) (finding that over-optimism leads investors to "underreact to negative information and . . . overreact to positive information").

[49]*Cf.* Schwartz, *supra* note 33, at 213:

> EMH says that the equilibrium price that results from market pressures is an accurate one. Behavioralists posit a pricing equilibrium that is more subtle and complex. They see prices as resulting from a market process that involves two groups: irrational investors, who execute trades that pull prices away from fundamental value, and rational arbitrageurs, who sometimes join the irrational investors and sometimes trade against them, depending on the risks and costs of the trading strategies available. In this more intricate version of the market, prices can drift far away from their fundamental values.

[50]*See, e.g.*, Dilip Abreu & Markus K. Brunnermeier, *Synchronization Risk and Delayed Arbitrage*, 66 J. FIN. ECON. 341, 357 (2002) (showing that rational arbitrageurs delay arbitrage due to uncertainty regarding the timing of other investors' actions, including noise

between investors and asset managers can exacerbate market irrationality. For example, suppose that an asset manager believes that the market is under-valuing an asset. If she acts on her belief and loses money, she may look especially foolish in hindsight and may lose her job.[51] On the other hand, if she goes along with the market, she may be more likely to lose money—but no more than other asset managers, making her less likely to be singled out and fired. There is some evidence that this dynamic affects fund managers' investment decisions[52] and analysts' buy and sell recommendations.[53]

Corporate managers care a lot about their companies' stock prices, both because they are agents of their companies' shareholders and because their compensation is often tied to their companies' stock prices. Accordingly, when weighing competing courses of action, managers will seriously consider the effect that each action will have on their

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traders; thus, "there can be significant and long-lasting departures from efficient prices"); Patrick Bolton, José Scheinkman & Wei Xiong, *Executive Compensation and Short-Termist Behaviour in Speculative Markets*, 73 REV. ECON. STUD. 577, 578-79 (2006) (explaining that rational investors may trade based on their expectation of selling the stock to more optimistic buyers); Adam Brandenburger & Ben Polak, *When Managers Cover Their Posteriors: Making the Decisions the Market Wants to See*, 27 RAND J. ECON. 523, 526 (1996); Schwartz, *supra* note 33, at 213 ("In [behavioral] models, rational arbitrageurs, when facing constraints on their ability to bring prices to fundamental value, find it rational to foment bubbles rather than pop them."); *see also* Raghuram G. Rajan, *Has Financial Development Made the World Riskier?* 313, 316 (Nat'l Bureau Econ. Research, Working Paper No. 11728, 2005), *archived at* http://perma.cc/3529-85RU (stating that herd behavior tends to move stock prices away from fundamental values).

[51]She may also lose compensation because asset managers are usually rewarded on short-term quarterly results, often referred to as the "quarter sprint"; some argue this compensation practice encourages asset managers to adopt a short-term focus. CFA CTR., *supra* note 3, at 9-10; Robert C. Pozen, *Curbing Short-Termism in Corporate America: Focus on Executive Compensation*, GOVERNANCE STUD. (BROOKINGS INST.), MAY 2014, AT 7. Investors may also leave a fund if short-term performance is poor and investors are unable to judge the manager's long-term investment strategy. Dallas, *supra* note 7, at 295; Andrei Shleifer & Robert W. Vishny, *Equilibrium Short Horizons of Investors and Firms*, 80 AM. ECON. REV. 148, 149-50 (1990); *see also* Schwartz, *supra* note 33, at 214-15 (explaining that managers may ride a bubble due to the threat of investor withdrawal).

[52]*See* JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 32 (2006) ("[F]und managers and analysts find it more damaging to their careers to be individually wrong than collectively wrong . . . ."); Schwarcz, *supra* note 43, at 255 n.246; Schwartz, *supra* note 33, at 216 ("Because [fund managers] are compared against their peers, there is occupational safety in numbers. It is much better to be wrong when everyone else is wrong, than to be wrong when everyone else is right."); Lawrence H. Summers & Victoria P. Summers, *When Financial Markets Work Too Well: A Cautious Case for a Securities Transaction Tax*, 3 J. FIN. SERVICES RES. 261, 272-73 (1989).

[53]Bradford Cornell, *Is the Response of Analysts to Information Consistent with Fundamental Valuation? The Case of Intel*, 30 FIN. MGMT. 113, 131-33 (2001) (finding that analysts based recommendations on short-term performance rather than estimations of fundamental value, that their recommendations were procyclical, and that their motivations may have been political).

companies' stock prices.[54] If markets unduly reward short-term performance, this encourages managers to focus on short-term results at the expense of long-term value.[55]

When a firm takes an action to improve its stock price—at least for a while—but expecting that it will harm the firm over the long run, this is known as corporate myopia or "short-termism."[56] We note that short-termism is not defined by the type of action or length of its effect; the key question is whether the action is intended to enhance short-term profits at the expense of long-term value. Thus, in some instances, overinvestment in long-term projects may constitute short-termism.[57]

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[54]*See* Natalie Mizik, *The Theory and Practice of Myopic Management*, 47 J. MARKETING RES. 594, 595 (2010).

[55]Dallas, *supra* note 7, at 312; Simon Grant et al., *Information Externalities, Share-Price Based Incentives and Managerial Behaviour*, 10 J. ECON. SURVEYS 1, 2, 9-11 (1996); Merton H. Miller & Kevin Rock, *Dividend Policy under Asymmetric Information*, 40 J. FIN. 1031, 1040 (1985); Mizik, *supra* note 54, at 595-96; Stein, *supra* note 4, at 667; *see* John Asker, Joan Farre-Mensa & Alexander Ljungqvist, *Comparing the Investment Behavior of Public and Private Firms* 22-28 (Nat'l Bureau of Econ. Research, Working Paper No. 17394, 2011), *archived at* http://perma.cc/JFU7-YBU7 (finding that public firms in industries in which stock prices are more sensitive to earnings news are less responsive to investment opportunities than other public firms).

[56]Short-termism is generally used to refer to firms focusing too much on short-term results at the expense of long-term performance. CFA CTR., *supra* note 3, at 3 (defining short-termism as the "excessive focus of some corporate leaders . . . on short-term, quarterly earnings and a lack of attention to strategy, fundamentals, and conventional approaches to long-term value creation"); Mizik, *supra* note 54, at 594 (describing short-termism as "overemphasiz[ing] strategies with immediate payoffs at the expense of strategies with superior but more distant payoffs"). However, different scholars have defined short-termism in slightly different ways. *See, e.g.*, Kevin J. Laverty, *Managerial Myopia or Systemic Short-Termism? The Importance of Managerial Systems in Valuing the Long Term*, 42 MGMT. DECISION 949, 950 (2004) (using "short-termism" to refer to an organization's tendency to "overvalue[] short-term rewards and undervalue[] long term consequences" and "myopia" to refer to decisions); MICHAEL T. JACOBS, SHORT-TERM AMERICA: THE CAUSES AND CURES OF OUR BUSINESS MYOPIA (1991) (defining it as actions that secure short-term results but "preclude long-term achievement"); David Marginson & Laurie McAulay, *Exploring the Debate on Short-Termism: A Theoretical and Empirical Analysis*, 29 STRATEGIC MGMT. J. 273, 274 (2008) (defining short-termism as a preference for near-term actions "that have detrimental consequences for the long term" and distinguishing myopia as "the difficulty of assessing long-term consequences").

[57]*See* Lucian A. Bebchuk & Lars A. Stole, *Do Short-Term Objectives Lead to Under- or Overinvestment in Long-Term Projects?*, 48 J. FIN. 719, 719 (1993) ("[I]mperfect information, together with an emphasis on a firm's short-run valuation may lead . . . to overinvestment in long-run projects."); *see also* Brandenburger & Polak, *supra* note 50, at 526 (modeling comparable dynamics). For instance, suppose a company undertakes a particular avenue of research because the market thinks it will be profitable, even though the managers know it will not. Thus, studies showing positive market reactions to long-term investments do not necessarily disprove short-termism. *Cf.* McConnell & Muscarella, *supra* note 39.

One example[58] of myopic corporate behavior is earnings management—that is, behavior undertaken to bring quarterly earnings numbers more in line with predictions.[59] "Real" earnings management involves substantive changes to the company's operations, such as firing employees or decreasing research and development expenses.[60] These actions reduce expenses immediately, which can improve a firm's short-term financial reporting position, but can lower profits in the long term. "Accounting" earnings management refers to changes in the way the company accounts for revenues and expenses.[61]

Both types of earnings management behavior have serious long-term negative consequences for firms[62] and financial markets.[63] Some commentators have argued that earnings management is so common[64]

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[58]For other examples of myopic behaviors, see Dallas, *supra* note 7, at 278-81.

[59]*See, e.g.*, Brian J. Bushee, *The Influence of Institutional Investors on Myopic R&D Investment Behavior,* 73 ACCT. REV. 305, 307 (1998); Dallas, *supra* note 7, at 278-81.

[60]*See* Mizik, *supra* note 54, at 595; Roychowdhury, *supra* note 4, at 336.

[61]Mizik, *supra* note 54, at 594-95; Mark W. Nelson, John A. Elliot & Robin L. Tarpley, *How Are Earnings Managed? Examples from Auditors*, ACCT. HORIZONS 17, 29 (Supp. 2003). Companies have some discretion to determine when certain revenues and expenses are realized for accounting purposes. This discretion can be abused, producing a distorted picture of the company's financial position. For examples of real and accounting earnings management, see Dallas, *supra* note 7, at 278-80.

[62]*See, e.g.*, Mizik, *supra* note 54, at 599-604 (finding that firms that engaged in earnings management had lower long-term returns than matched firms and that "[t]he magnitude of the[se] negative returns increase[d]" over time); Siew Hong Teoh, Ivo Welch & T.J. Wong, *Earnings Management and the Underperformance of Seasoned Equity Offerings*, 50 J. FIN. ECON. 63, 64 (1998) (finding that firms that engaged in earnings management prior to seasoned equity offerings subsequently performed worse than firms that did not). *But see* Katherine A. Gunny, *The Relation Between Earnings Management Using Real Activities Manipulation and Future Performance: Evidence from Meeting Earnings Benchmarks*, 27 CONTEMP. ACCT. RES. 855, 856 (2010) (associating real earnings management with better future firm performance).

[63]Accounting earnings management increases the opacity and volatility of financial markets in general, making investors warier and potentially hindering economic growth. *See generally* Tonello, *supra* note 3, at 5 (expressing concern over short-termism that "undermines confidence in the soundness of the underlying economy, favors opacity on strategic goals, and encourages opportunistic behaviors by a few to the detriment of the many"); *see also* Dallas, s*upra* note 7, at 278 (discussing the connection between the Sarbanes-Oxley Act of 2002 and accounting earnings management at Enron and other companies).

[64]Surveys of CFOs suggest that earnings management is pervasive. *See* Ilia D. Dichev et al., *Earnings Quality: Evidence from the Field,* 56 J. ACCT. & ECON. 1, 30 (2013) (reporting that 20% of CFOs surveyed admitted to managing earnings, with approximately 10% of earnings typically being managed); Graham, Harvey & Rajgopal, *supra* note 4, at 32-35 (surveying CFOs on what they would do to hit quarterly earnings targets: 8% would decrease discretionary expenditures like advertising, research, and development; 55% would delay a new project, even if doing so lowered the project's value; 39% would give customers incentives to buy more products in the current quarter).

and so destructive[65] that firms should cease issuing quarterly earnings guidance altogether;[66] some firms have taken this suggestion to heart.[67]

3. Short-Termism and Short-Term Investors

Allegations of myopic managerial behavior are frequently linked to the presence of short-term shareholders. There are two broad reasons why this might be the case. First, short-term shareholders may increase firms' ability to engage in myopic behavior. Some studies have linked the presence of short-term shareholders with increased market inefficiency.[68] The more inefficient markets are, the more likely that an

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[65]Some scholars have deemed earnings management an important factor in the demise of Enron and other firms in the early 2000s. *See, e.g.*, Paul M. Healy & Krishna G. Palepu, *The Fall of Enron*, 17 J. ECON. PERSP. 3, 9-11 (2003); Rappaport, *supra* note 4, at 69.

[66]CFA CTR., *supra* note 3, at 2; U.S. CHAMBER OF COMMERCE, COMMISSION ON THE REGULATION OF THE U.S. CAPITAL MARKETS IN THE 21ST CENTURY: REPORT AND RECOMMENDATIONS 74-75 (2007), *archived at* http://perma.cc/5RV7-EJ8U. For a discussion of conflicting studies on whether this course of action is advisable, see Dallas, *supra* note 7, at 327 & nn.455-60.

[67]*See, e.g.*, Vahan Janjigian, *Gimme Guidance*, FORBES (Aug. 22, 2006, 12:10 PM), http://www.forbes.com/2006/08/22/earnings-guidance-dell-in_vj_0822soapbox_inl.html ("Among the widely held companies that have stopped giving estimates during the past year: Best Buy, Citigroup, Dell, Ford Motor and Motorola."). On the other hand, this may also create adverse consequences by making markets less informed.

[68]*See, e.g.*, Brian J. Bushee, *Do Institutional Investors Prefer Near-Term Earnings over Long-Run Values?*, 18 CONTEMP. ACCT. RES. 207, 213 (2001) (linking firms with more short-term shareholders to share prices that overweight near-term results); Martijn Cremers, Ankur Pareek & Zacharias Sautner, Stock Duration, Analysts Recommendations, and Misvaluation 25-26 (Dec. 2014) (unpublished manuscript), *available at* ssrn.com/abstract=2190437; *see also* Cristina Cella, Andrew Ellul & Mariassunta Giannetti, *Investors' Horizons and the Amplification of Market Shocks*, 26 REV. FIN. STUD. 1607 (2013) (finding that "stocks held to a larger extent by short-term investors experience more severe price drops and larger price reversals" when there are market-wide negative shocks). Short-term investors may also be overconfident. *See, e.g.*, Werner F.M. De Bondt & Richard H. Thaler, *Financial Decision-Making in Markets and Firms: A Behavioral Perspective*, *in* 9 HANDBOOKS IN OPERATIONS RESEARCH AND MANAGEMENT 385, 392-93 (Robert Jarrow et al. eds., 1995); J. Bradford De Long et al., *The Survival of Noise Traders in Financial Markets*, 64 J. BUS. 1, 6 (1991). *But cf., e.g.*, Xin Chang et al., Institutional Investor Horizons, Information Environment, and Firm Financing Decisions (Apr. 19, 2012) (unpublished manuscript), *presented at* 25th Australasian Finance and Banking Conference 2012, *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=2042476 (finding that short-term institutional investors improve firms' information environments more than long-term institutional investors do); Alex Edmans, *Blockholder Trading, Market Efficiency, and Managerial Myopia*, 64 J. FIN. 2481 (2011) (arguing that U.S. blockholders add value and influence management through their informed trading activities, and that short-term shareholders facilitate that); Xuemin (Sterling) Yan & Zhe Zhang, *Institutional Investors and Equity Returns: Are Short-Term Institutions Better Informed?*, 22 REV. FIN. STUD. 893 (2009) (finding that short-term investors are better informed, that this enables them to earn higher returns while increasing market efficiency, and that these returns are not caused by myopic behavior).

action can increase short-term stock price to the detriment of long-term value.[69]

Second, short-term shareholders may increase managers' incentives to engage in short-termism. Assume that stock market prices overvalue companies' short-term prospects and undervalue their long-term prospects. What will shareholders want managers to do?

Long-term investors may be drawn to companies that are not acting myopically:[70] They can buy and hold these companies' stocks. Eventually, those companies' long-term prospects will manifest themselves as realized profits and their stock prices will rise, netting the investor a tidy profit.[71]

Short-term investors, on the other hand, cannot employ this strategy because their investment horizons are too short. Their profits will depend on the stock's market price when they sell—which will be soon. Thus, it is rational for short-term investors to favor any action that raises the company's stock price in the short term, regardless of the effects on the company's long-term value, and they should pressure management to act accordingly.

Institutional investors with clients focused on the short term may have similar incentives. Many funds allow investors to quickly redeem their investments upon request.[72] A loyal asset manager who expects her clients to cash out soon, or who anticipates that short-term losses will cause clients to redeem their interests (at a loss), should focus on short-term stock prices. Asset managers may have additional reasons to focus on the short term, independently of their clients' interests.[73]

Several empirical studies have found connections between perceived myopic behavior and the presence of short-term shareholders.

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[69] *Cf.* Mizik, *supra* note 54, at 609 (studying 6,642 public U.S. firms from 1986 to 2005 and concluding that "financial markets take quite some time to fully incorporate the financial implications of myopic spending cuts into firm valuation").

[70] Or, equivalently, less myopically than others.

[71] This is a simplification. An investor with a long-term horizon who already owns stock might want the corporation to engage in myopic behavior if it produces an immediate stock price increase. The investor could then sell her holdings in that company and use the proceeds to purchase shares in another, less myopic company. *See generally* Fried, *supra* note 6, at 50-51 (describing dynamics created by long- and short-term shareholders' disparate interests when markets are inefficient).

[72] *See* 15 U.S.C. § 80a-22(e) (2006) ("No registered investment company shall suspend the right of redemption, or postpone the date of payment of satisfaction upon redemption of any redeemable security in accordance with its terms for more than seven days after the tender of such security to the company or its agent designated for that purpose for redemption . . . .").

[73] *See* Dallas, *supra* note 7, at 295; Schwartz, *supra* note 33, at 214 (explaining that managers may ride a bubble due to the threat of investor withdrawal); Shleifer & Vishny, *supra* note 51, at 149-50; *see also* CFA CTR., *supra* note 3, at 9-10; Pozen, *supra* note 51, at 17-18.

One group of studies looked at investments by so-called "transient" institutional shareholders.[74] These institutional shareholders have highly diversified portfolios characterized by significant use of momentum trading and high stock turnover; they may turn over more than 70% of their portfolio each quarter.[75] We note that transient institutional shareholders do not include high-frequency traders, whose activities are generally not captured by these studies.[76]

Studies have linked investments by short-term shareholders, including transient institutional shareholders, with a variety of negative investment outcomes and corporate behaviors. Firms with higher transient institutional ownership are more likely to engage in both real and accounting earnings management.[77] They are more likely to have materially weak internal controls, which make it easier for managers to engage in misconduct and are negatively associated with future operating performance and stock returns.[78] Significant stock ownership by short-term shareholders is associated with an increased likelihood of pursuing

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[74]These studies employ an institutional investor classification system developed by Bushee. Bushee, *supra* note 59, at 310; Bushee, *supra* note 68, at 213-14; Brian Bushee, *Identifying and Attracting the "Right" Investors: Evidence on the Behavior of Institutional Investors*, J. APPLIED CORP. FIN., Fall 2004, at 28, 29-31. Bushee's approach was inspired by the work of Michael Porter, who compared investments in U.S., German, and Japanese companies. MICHAEL E. PORTER, CAPITAL CHOICES: CHANGING THE WAY AMERICA INVESTS IN INDUSTRY 42-49 (1992). Other studies using this classification scheme are discussed later in this Subpart.

[75]*See* Bushee, *supra* note 68, at 214; Bushee, *supra* note 74, at 30.

[76]These studies get their institutional ownership data from 13-F filings, which are based on holdings at the end of the quarter. High-frequency traders frequently have little overnight exposure and thus are under-represented in 13-F filings. *See generally* Matthew O'Brien, *Everything You Need to Know About High-Frequency Trading*, ATLANTIC (Apr. 11, 2014), *archived at* http://perma.cc/8JB6-R43T.

[77]*See, e.g.*, Bushee, *supra* note 59, at 307, 330-31 (finding real earnings management activities, specifically cutting of research and development expenses, more common at such firms); Ping-Sheng Koh, *Institutional Investor Type, Earnings Management and Benchmark Beaters,* 26 J. ACCT. & PUB. POL'Y 267, 269-70, 294-95 (2007) (linking transient institutional ownership with accrual management to avoid earnings declines); Dawn A. Matsumoto, *Management's Incentives to Avoid Negative Earnings Surprises*, 77 ACCT. REV. 483, 511 (2002) (linking transient institutional ownership with "positive abnormal accruals" intended to "avoid negative earnings surprises"); Laura Yue Liu & Emma Yan Peng, Institutional Ownership Composition and Accruals Quality 3 (Sept. 2006) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929582 (linking transient institutional ownership with poor accrual quality); *see also* Natasha Burns, Simi Kedia & Marc Lipson, *Institutional Ownership and Monitoring: Evidence from Financial Misreporting*, 16 J. CORP. FIN. 443, 450, 453-54 (2010) (linking transient institutional ownership with greater likelihood and magnitude of financial restatements (i.e., misreporting)).

[78]Alex P. Tang & Li Xu, *Institutional Ownership and Internal Control Material Weakness*, 49 Q.J. FIN. & ACCT. 93, 94-95 (2010).

value-reducing acquisitions and overbidding for takeover targets.[79] One study linked higher stock turnover with poorer firm investment decisions.[80]

In contrast, studies have associated long-term institutional investors with corporate actions that are in shareholders' long-term interests.[81] For example, the presence of independent, long-term institutional shareholders with large stakes has been linked to more reliable earnings reporting[82] as well as positive post-merger performance.[83] Studies have also found that firms with such holdings are more likely to avoid unprofitable merger transactions.[84]

Finally, we note that there has been a continuing trend toward short-term shareholding over several decades.[85] Thus, if short-term investors cause corporations to act myopically, there is reason to believe that this problem will continue to grow.

B. *Time-Phased Voting*

Most U.S. corporations employ a one-share-one-vote voting structure. Time-Phased Voting ("TPV"), in contrast, entails giving longer-term shareholders more votes per share than shorter-term shareholders. For example, shareholders who own their shares for more

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[79]José-Miguel Gaspar, Massimo Massa & Pedro Matos, *Shareholder Investment Horizons and the Market for Corporate Control*, 76 J. FIN. ECON. 135, 138 (2005); *see also* Allaire & Firsirotu, *supra* note 21, at 12.

[80]Christopher Polk & Paola Sapienza, *The Stock Market and Corporate Investment: A Test of Catering Theory*, 22 REV. FIN. STUD. 187, 188, 205 (2009).

[81]*Cf.* Bushee, *supra* note 59, at 307, 330 (finding no link between non-transitory institutional shareholders and real earnings management); Burns, Kedia & Lipson, *supra* note 77, at 450, 453-54 (finding no relation between the likelihood and magnitude of restatements and non-transitory institutional investor share ownership); Tang & Xu, *supra* note 78, at 95 (finding no link between non-transitory institutional investors and weak internal controls).

[82]Liu & Peng, *supra* note 77, at 2 (finding that reported earnings of companies with dedicated institutional shareholders were more reliable than those of companies without such shareholders); *see also* Koh, *supra* note 59, at 270 (finding that "long-term institutional ownership constrains accruals management among firms that manage earnings to achieve earnings targets").

[83]Xia Chen, Jarrad Harford & Kai Li, *Monitoring: Which Institutions Matter?*, 86 J. FIN. ECON. 279, 281 (2007).

[84]*Id.*

[85]*See, e.g.*, Allaire & Firsirotu, *supra* note 21, at 3 (stating that the average annual turnover of stock increased from 12% in 1960 to 73% in 1987 and 87% in 2005); MERCER, INVESTMENT HORIZONS: DO MANAGERS DO WHAT THEY SAY? 1, 7-8, 20 (2010) (examining 900 actively managed long-only equity institutional portfolios from June 2006 to June 2009, finding average annual turnover of 72%, increased turnover for all investment styles over the period of the study, and that most investment strategies had higher actual turnover than expected). *But see* Cremers, Pareek & Sautner, *supra* note 68, at 10 (finding, under a different measure of stock holding time, that average stock duration increased 20% from 1985 to 2010).

than three years may get five votes for each share they own, while other shareholders would have only one vote per share. Many other TPV arrangements are possible, but the common theme among them is that they all accord increased voting power to shareholders who have owned their shares for longer periods of time.

TPV has been proposed as a remedy for perceived corporate myopia. It may also be of particular interest to controlled firms. Below we sketch out the basic arguments on both sides regarding TPV.

1. The Arguments Against Time-Phased Voting

Critics of TPV contend that TPV will increase agency costs, making shareholders affirmatively worse off.[86] In particular, they argue that TPV will undermine two related mechanisms that help discipline managers and encourage them to act in all shareholders' best interests. These mechanisms are shareholder voting and the market for corporate control.[87]

First, shareholders elect the corporation's board of directors. The canonical U.S. corporation gives each shareholder one vote for each share she owns.[88] The board of directors is charged with overseeing the managers and has vast power over the corporation, including the power to hire and fire the corporation's CEO.[89] The CEO, knowing that the board of directors she reports to is beholden to the shareholders, will presumably be more inclined to act in the shareholders' interests, and so on down the chain of command.

The second mechanism is the market for corporate control; essentially, the potential for a corporate takeover.[90] The orthodox view

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[86]They also question whether TPV will produce the benefits that its proponents claim. *See, e.g.*, AMBACHTSHEER ET AL., *SUPRA* NOTE 7, AT 12-13 (reporting that a majority of asset managers surveyed stated that increased voting rights were too weak an incentive to induce institutional investors to change their behavior).

[87]Other market and legal mechanisms also discipline management. For example, managers have incentives to perform well so that they can advance up the corporate ladder or be considered for more senior positions at other firms. *See* Jordan M. Barry & John William Hatfield, *Pills and Partisans: Understanding Takeover Defenses*, 160 U. PA. L. REV. 633, 638-39 (2012). However, TPV generally does not implicate these mechanisms.

[88]A large body of orthodox scholarship argues that these arrangements are efficient. *See, e.g.*, Sanford J. Grossman & Oliver D. Hart, *One Share-One Vote and the Market for Corporate Control*, 20 J. FIN. ECON. 175 (1988); *see also* Jordan M. Barry, John William Hatfield & Scott Duke Kominers, *On Derivatives Markets and Social Welfare: A Theory of Empty Voting and Hidden Ownership*, 99 VA. L. REV. 1103, 1112 (2013) (discussing and collecting sources).

[89]Barry & Hatfield, *supra* note 87, at 639.

[90]*Id*.

of why takeovers occur is as follows:[91] Suppose a corporation is mismanaged. The mismanagement will result in lower long-term profits, which will translate to a reduced stock price. A potential acquirer—be it a competitor, investment fund, or otherwise—could then seek to buy up that corporation's stock from its current shareholders. If successful, the buyer would become a controlling shareholder with the power to install a new board of directors, remove the existing managers, and install new, better managers who would run the corporation more efficiently. New, better management would make the acquired corporation more valuable, and the acquirer would earn a profit on the transaction. The threat that the corporation will be acquired, and that the managers will lose their jobs, encourages the managers to serve the shareholders' interests. In essence, a corporation's existing managers must compete against potential acquirers for the right to manage the corporation's resources.[92]

In fights for corporate control, control of the target firm's board of directors is often important.[93] Thus, shareholders' voting rights and the market for corporate control are tightly related.

Critics of TPV arrangements identify several ways that TPV would reduce shareholders' ability to discipline managers through the mechanisms described above. First, TPV will magnify managers' voting power. Because managers are less likely to actively trade the company's shares than other shareholders,[94] managers will own a larger percentage of their shares as long-term shares. Since TPV increases long-term shareholders' voting weight relative to that of other shareholders, managers' votes will comprise a greater share of total votes. This enhanced degree of influence will reduce other shareholders' ability to

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[91]Other views of takeovers have been proposed. Takeovers may occur due to empire-building motivations of senior executives and their over-optimism. *See, e.g.*, Nihat Aktas, Eric de Bodt & Richard Roll, *Corporate Serial Acquisitions: An Empirical Test of the Learning Hypothesis* 6 (UCLA, Anderson Sch. of Mgmt., Working Paper No. 06-07, 2007), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=885507; Bernard S. Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597, 624-28 (1989). Takeovers may also occur as a means to redistribute wealth from some stakeholders, such as bondholders and employees, to shareholders. *See, e.g.*, Morey W. McDaniel, *Stockholders and Stakeholders*, 21 STETSON L. REV. 121, 125-26 (1991); Andre Schleifer & Lawrence Summers, *Breach of Trust in Hostile Takeovers*, *in* CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 33 (Alan J. Auerbach ed., 1988). Takeovers may also occur due to disparities between share prices and underlying asset values of companies. This is referred to as the discount hypothesis. *See, e.g.*, Reinier Kraakman, *Taking Discounts Seriously: The Implications of "Discounted" Share Prices As an Acquisition Motive*, 88 COLUM. L. REV. 891 (1988). Another explanation for takeovers is tax savings. Shleifer & Summers, *supra*, at 53.

[92]*See* Barry & Hatfield, *supra* note 87, at 639-40.

[93]*See id.* at 643-45.

[94] *See* sources cited *supra* note 12.

discipline managers, rendering managers less accountable and increasing agency costs.[95]

Second, TPV might reduce managerial accountability by reducing would-be acquirers' voting power. Many acquisitions require a shareholder vote, either directly or indirectly. Acquirers often purchase a significant percentage of a target's outstanding shares before making an offer to purchase the rest of its outstanding shares. Acquirers can generally vote target shares they own in favor of the acquisition. However, as relative newcomers to the TPV company, would-be acquirers would have reduced voting power.[96] This reduced influence would discourage takeovers and takeover attempts, insulating managers from competition.

Third, TPV arrangements could potentially change the value of corporate assets to different acquirers relative to what they would be under one-share-one-vote arrangements. Acquirers may be drawn to target corporations not only by the stream of dividend payments they will produce, but also by the opportunity to extract excessive private benefits. If TPV arrangements reduce managers' accountability to shareholders through either of the methods described above, they could increase the private benefits available to managers. This would increase the frequency of corporate acquisitions by acquirers that are more motivated by the possibility of capturing private benefits. Compared to other acquirers, acquirers motivated by private benefits are less likely to be able to operate the business efficiently, potentially resulting in inefficiency. In short, TPV might prevent assets from ending up in the hands of their highest-value users.[97]

Finally, although TPV may ameliorate certain conflicts that arise in controlled firms between controlling and outside shareholders,[98] it can exacerbate others due to increased separation of ownership and control

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[95]The exact mechanism could take several forms. One way would be to deter takeovers. Alternatively, if managers feel less accountable to shareholders, they could foster a culture that downplays shareholders' preferences and generally is more permissive toward shirking, exorbitant perks, and similar behavior.

[96]In theory, an acquirer could purchase shares and then wait long enough to become a long-term shareholder. However, this seems unlikely to happen often in practice. *See* Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 927-29 (2002) (finding that incumbent management can almost always resist a takeover that requires the acquirer to win two shareholder votes that are at least one year apart); *see also* Barry & Hatfield, *supra* note 87, at 703; Mike Burkart, Denis Gromb & Fausto Panunzi, *Why Higher Takeover Premia Protect Minority Shareholders*, 106 J. POL. ECON. 172, 194 (1998).

[97]*See, e.g.*, Grossman & Hart, *supra* note 88 (arguing that one-share-one-vote arrangements are efficient).

[98]*See infra* Part II.B.2.c.

rights. Controlling shareholders often have voting rights that exceed their cash-flow rights; for example, if all shareholder votes depend on a majority of shares, a shareholder with 60% of shares has complete control, even though she is not entitled to 100% of corporate profits. This "wedge" between controlling shareholders' voting and cash-flow rights can be problematic.[99] TPV helps controlling shareholders maintain control over the firm while owning fewer cash-flow rights, making this wedge larger and more worrisome. This may create adverse incentives for controlling shareholders. More fundamentally, there is considerable debate about the relative merits of having a controlling shareholder versus more dispersed ownership,[100] and TPV may enable controlling shareholders to maintain control over the firm in circumstances in which they might otherwise have relinquished it.

2. The Arguments in Favor of Time-Phased Voting

A number of arguments have been offered in favor of time-phased voting.

a. *Responses to Managerial-Entrenchment Arguments*

Proponents of TPV argue that some hostile takeovers are pursued for reasons other than to displace poorly performing managers[101] and that hostile transactions are not the best way for firms to change control. They argue that individual shareholders are in a poor position to negotiate for higher premiums from hostile bidders.[102] Insiders of target

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[99] *See infra* Part III.C.

[100] *See, e.g.*, IRRC INST. & ISS, CONTROLLED COMPANIES IN THE STANDARD & POOR'S 1500: A TEN YEAR PERFORMANCE AND RISK REVIEW 3 (2012) [hereinafter "ISS REPORT"] (finding that, over the study periods ending Aug. 31, 2012, controlled firms with one-share-one-vote structures outperformed companies with dispersed shareholders, who outperformed dual-class firms); Taylan Mavruk, Do Ownership Concentration and Executive Compensation Exacerbate Managerial Myopia?: Evidence from Sweden 18-19 (Apr. 17, 2011) (unpublished manuscript), *available at* ssrn.com/abstract=1812922 (finding that higher ownership concentration promotes long-term investments by firms, suggesting a reduction of managerial myopia); Xia Chen et al., Are U.S. Family Firms Subject to Agency Problems? Evidence from CEO Turnover and Firm Valuation (Sept. 25, 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=930824 ("[O]ur results indicate that in the CEO turnover setting, family ownership, when separated from management, can mitigate agency problems as in professional CEO family firm, but when combined with management, can aggravate agency problems as in family CEO firms.").

[101] See footnote 91, *supra*, and sources cited therein.

[102] Burkart, Gromb & Panunzi, *supra* note 96, at 174.

companies can negotiate for higher premiums[103] and encourage competition among bidders for the firm, both of which may result in higher premiums for target shareholders.[104] Moreover, if firm insiders understand a firm's growth prospects better than the outside shareholders, TPV can forestall a takeover at an unreasonably low price.[105] Proponents also point to analogous dual-class arrangements; some studies find that changes in control are as likely in dual-class firms as in one-share-one-vote firms.[106]

Proponents of TPV also point to other benefits of managerial independence from hostile takeovers. This independence may provide managers with the space they need to focus on the needs of their businesses, pursue long-term business strategies, and avoid wasteful job retention efforts.[107] In addition, it can provide managers the incentive to

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[103]Daniel R. Fischel, *Organized Exchanges and the Regulation of Dual Class Common Stock*, 54 U. CHI. L. REV. 119, 138-39 & n.36 (1987).

[104]*See* Andrei Shleifer & Robert W. Vishny, *Greenmail, White Knights, and Shareholders' Interest*, 17 RAND J. ECON. 293, 294 (1986); Arnoud W.A. Boot et al., *The Entrepreneur's Choice Between Private and Public Ownership*, 41 J. FIN. 803, 809 (2006); Renée Adams & Daniel Ferreira, *One Share-One Vote: The Empirical Evidence*, 12 REV. FIN. 51, 53 (2008). Moreover, when the growth prospects of the firm are not readily understood by markets, controlling shareholders benefit from disparate voting arrangements when they forestall a takeover at an unreasonably low price. Valentin Dimitrov & Prem C. Jain, *Recapitalization of One Class of Common Stock into Dual-Class: Growth and Long-Run Stock Returns*, 12 J. CORP. FIN. 342, 343 (2006). On the other hand, if shareholders are fully diversified, any gains that this creates for them in their capacity as target shareholders will be canceled out by losses in their capacity as shareholders of the acquirer; moreover, assuming that takeovers generally benefit shareholders, and that takeover defenses reduce their frequency, shareholders would disfavor takeover defenses. Barry & Hatfield, *supra* note 87, at 692-93 (discussing this dynamic and its implications).

[105]Dimitrov & Jain, *supra* note 104, at 343.

[106]*See infra* note 188 and accompanying text.

[107]Independence from hostile takeovers may avoid costly signaling, such as myopic behavior, previously discussed in this article, as well as the considerable expenditure of time required of the manager to persuade public shareholders of the merits of their business plans. *See* Harry DeAngelo & Linda DeAngelo, *Managerial Ownership of Voting Rights: A Study of Public Corporations with Dual Classes of Common Stock*, 14 J. FIN. ECON. 33, 35 (1985); Kenneth Lehn, Jeffry Netter & Annette Poulsen, *Consolidating Corporate Control: Dual-Class Recapitalizations Versus Leveraged Buyouts*, 27 J. FIN. ECON. 557, 564 (1990); Asker, Farre-Mensa & Ljungqvist, *supra* note 55, at 29 ("[P]ublic firms are, on average, less responsive to investment opportunities than private firms, but also . . . this difference is increasing in the sensitivity of stock prices to earnings news in a firm's industry."); Shai Bernstein, *Does Going Public Affect Innovation?*, 70 J. FIN. 1365, 1397 (2015) ("[F]irms with nonentrenched managers experience a significant decline in innovation quality following the IPO, and inventors of these firms are more likely to leave. In contrast, such effects do not hold for firms with entrenched management.").

Alternatively, managerial resistance can benefit target shareholders if the market does not appreciate the target's true value. *See* Barry & Hatfield, *supra* note 87, at 654

make firm-specific investments in their firms.[108] Firm-specific investments increase the value of the managers to their firms, but do not add to the managers' value in external labor markets.[109] These investments are often appropriable by the new managerial group taking over the firm; thus, managers may not undertake them unless they are confident that a takeover will not happen without their approval.[110]

b. *Reduction of Managerial Myopia*

Proponents of TPV identify several mechanisms through which TPV arrangements might reduce corporate myopia by increasing the influence that long-term shareholders have on the firm. First, by giving long-term shareholders more votes per share than short-term shareholders, TPV increases long-term shareholders' electoral clout relative to short-term shareholders.[111] This increased clout may make managers more inclined to prioritize the goals and interests of long-term shareholders.[112] If long-term shareholders are more focused on the long-term health of the company than short-term shareholders,[113] TPV could reduce managers' incentives to engage in myopic behavior.

("[M]anagers' informational advantage . . . may cause defenses to benefit target shareholders, even though managers are unfaithful agents.").

[108]DeAngelo & DeAngelo, *supra* note 107, at 35 (noting that the threat of a takeover can prevent managers from making firm-specific human capital investments); Fischel, *supra* note 103, at 137. Examples of firm-specific managerial expertise include "mastery of particular production processes used in a limited number of firms; historical knowledge of customer relations; development of a particular software configuration; and know-how in maneuvering in a firm's culture." Gordon, *supra* note 24, at 18 n.46. They are summarized more broadly as specific skills relating to "a particular firm's investment opportunities, personnel, specific practices, and organization." Fischel, *supra* note 103, at 137; *see also* Lehn, Netter & Poulsen, *supra* note 107, at 563-65 (discussing disparate voting arrangements, which provide incentives for managers to make firm-specific investments, and suggesting that "shareholders may find it optimal to raise one type of agency cost (that associated with a weaker link between ownership of voting rights and rights to residual claims) to lower another type (subpar investment in firm-specific human capital)").

[109]*See* Fischel, *supra* note 103, at 137 (explaining this principle and noting that managers who gain firm-specific skills do so with an expectation of long-term employment with the company).

[110]DeAngelo & DeAngelo, *supra* note 107, at 36.

[111]Ideally, TPV would allocate votes based on prospective behavior instead of prior behavior—that is, shareholders who will not sell their shares for an extended period would receive more votes, instead of shareholders who have held their shares for several years. In practice, however, it is hard for firms to determine how shareholders will behave prospectively.

[112]Similarly, TPV could also make shareholders more likely to reject myopic actions that require a shareholder vote.

[113]*See supra* Part II.A.3.

Second, TPV arrangements might increase a firm's proportion of long-term shareholders through one of two means. One is that, by adopting TPV, a company will attract a higher percentage of long-term investors. The underlying logic is that adopting TPV could signal that the corporation is focused on long-term value.[114] A long-term focus could be more appealing to investors with longer time horizons and less appealing to those with shorter time horizons;[115] thus, the company's relative percentage of long-term shareholders would increase. The second mechanism is that TPV could lengthen the investment horizons of the company's existing shareholders. TPV grants long-term shareholders additional voting rights. The prospect of receiving additional votes could induce some shareholders to reduce the frequency with which they turn over their shares.[116] Regardless of the causal mechanism, a higher proportion of long-term shareholders could make managers more likely to focus on the company's long-term health instead of short-term stock price fluctuations.

Third, it is possible that TPV could impact firm and investment cultures generally. It could influence managers' and employees' beliefs about the proper objectives and goals of their firm. Firms could pay more attention to longer-term strategies, and increase their reliance on longer-term measures of firm and employee performance. An increase in long-term investment horizons could also change institutional investors' incentives. Asset managers might have less fear that poor short-term results will cause their investors to redeem their interests and might be more likely to make investment decisions based on long-term value expectations. These changes could change firm cultures or investment culture more generally in ways that make them more focused on the long-term.

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[114] *Cf.* Brochet, Serafeim & Loumioti, *supra* note 7, at 28 (finding that executives signaling a short-term orientation attract "investors who are fixated on quarterly numbers").

[115] *See supra* Part II.A.3.

[116] This outcome seems most plausible for shareholders who hold a significant bloc of shares over a long period while buying and selling frequently in an attempt to take advantage of short-term price swings. *See* Andy Puckett & Xuemin (Sterling) Yan, *The Interim Trading Skills of Institutional Investors*, 66 J. FIN. 601, 612 (2011) (finding that 20% of institutional investors' trading activity was intra-period churning of the same stock, and that this churning produced abnormal returns on the order of only 0.08%); E-mail from Brian Bushee to Lynne Dallas (Jan. 18, 2016) (confirming that approximately 20% of institutional investors changed category classification (transient, dedicated, quasi-indexer) over a three-year period).

c. *Potential Efficiency Benefits in Public Corporations with Dominant Shareholders*

Firms exist on a continuum: On one end lie firms in which managers are also large shareholders who, as a group, own virtually all voting and cash flow rights. On the other end lie public firms in which managers and shareholders are relatively distinct groups. In these firms, managers own a small fraction of voting and cash flow rights.[117]

In the United States, publicly traded firms typically lie on the latter side of this spectrum. Yet some firms, including all of the TPV firms we identified, have publicly traded shares, but are effectively controlled by a large shareholder or group of shareholders ("controlled firms"). The controlling shareholder(s) in such firms is usually the founder, or the family of a founder. To understand the efficiency benefits, as well as costs, of TPV for such firms, it is important to understand how controlled firms differ from typical publicly traded firms.

One important difference pertains to the agency costs that arise from conflicts of interest between management as agents and shareholders as principals. First, controlled firms are more likely to have large shareholders than are typical public firms, which tend to have more dispersed share ownership. Large shareholders have greater incentive to monitor managers than a small shareholder does. Second, in a controlled firm, there is often substantial overlap between managers and shareholders; major shareholders are often high-ranking managers, and vice-versa.[118] Managers with a greater economic interest in the firm's success are likely to do a better job. Even once TPV is in place, managers who are part of the controlling shareholder group have more cash-flow rights than managers of the typical public firm.[119] Both of these factors suggest that controlled firms would have lower agency costs than the typical public firm.

On the other hand, conflicts of interest can also arise between controlling shareholders and other shareholders in the controlled firm. Controlling shareholders can use their control power to benefit themselves at other shareholders' expense. For example, suppose a CEO founder owns 50% of outstanding shares and controls the company. Non-controlling shareholders will want to keep a lid on CEO compensation; every dollar the CEO is paid is a dollar that they will not receive in dividends. But the CEO founder will be more likely to favor

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[117] *See supra* note 17.

[118] For example, the company's CEO may be its founder. *See infra* Part IV.A.

[119] See sources cited in footnote 17, *supra*.

increases in CEO pay; every additional dollar that goes into her pocket in her capacity as CEO only costs her fifty cents in her capacity as a shareholder.[120] The incentives of CEOs of typical public firms will be even more dramatic because they usually own substantially fewer cash-flow rights than controlling shareholders in TPV firms, although pressure from shareholders, the board of directors, or the market for corporate control may provide additional constraints.

Conflicts may also arise between the controlling shareholders and outside, diversified shareholders in controlled firms due to differences in the nature of their investments. Diversified investors invest in a number of different firms. The diversified shareholder wants each firm to invest in business strategies that have the highest expected value. She is fairly indifferent to a particular firm going under; she has not put all—or even a large fraction—of her eggs in one basket. Thus, she does not care about the level of risk to any particular firm.[121] The overall value of her portfolio is maximized by firms maximizing their expected values.[122] Because she does not care about firm-specific risks, she is willing to accept a lower rate of return on her investment and, in general, this reduces the cost of capital to firms.[123]

A controlling shareholder is in a different situation from that of a diversified shareholder. A controlling shareholder's ownership interest in the firm is often a large part of his total wealth.[124] This lack of diversification exposes him to significant risk—if something bad happens to that firm, his total wealth could change dramatically. This encourages him to favor corporate strategies that carry less risk over

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[120] *Cf.* Ben Amoako-Adu, Vishaal Baulkaran & Brian F. Smith, *Executive Compensation in Firms with Concentrated Control: The Impact of Dual Class Structure and Family Management*, 17 J. CORP. FIN. 1580, 1592 (2011) (finding that family members in executive positions in dual-class firms traded on the Toronto Stock Exchange are paid significantly more than those of single-class firms with concentrated control).

[121] WELCH, *supra* note 34, at 193-202. Diversified shareholders remain exposed to one risk: if there is a recession (boom), most businesses will be negatively (positively) affected. Thus, the risk of a recession affects the entire market, and diversifying will not reduce one's exposure to this "market risk." In theory, market risk is the only kind of risk that diversified shareholders care about. *Id.*

[122] This assumes that one firm's successes or failures will not systematically influence the others' performance. *Cf.* John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 76-77 (2014) (arguing that behavior that maximizes the value of systemically important financial firms does not maximize the value of a diversified portfolio because such firms' failures produce large externalities).

[123] David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1312 (2007).

[124] Scott W. Bauguess, Myron B. Slovin & Marie E. Sushka, *Large Shareholder Diversification, Corporate Risk Taking, and the Benefits of Changing to Differential Voting Rights*, 36 J. BANKING & FIN. 1244, 1247 (2012).

riskier strategies with higher expected returns; a controlling shareholder may even favor risk-reducing strategies that reduce the controlled firm's value to diversified shareholders.[125] According to most economists, these less-risky investment strategies decrease the firm's value.

Why doesn't the controlling shareholder just diversify his investment? Diversifying his investment typically means reducing his stock ownership, which would also reduce his control over the corporation. There are several reasons why reducing his control over the corporation may be unattractive. He may plan to retain a substantial investment in the company and to keep control to protect his interests. Hhe might believe that his control of the firm provides more benefits to the firm than the value-increasing strategies favored by diversified shareholders. First, he may believe that if he doesn't maintain control, short-term investors would be able to pressure management to engage in myopic behavior that would decrease the long-term value of the firm.[126] There is some evidence that concentrated control is associated with more long-term decision-making.[127] Second, he may view his opinion as superior to that of the outside shareholders. This may be due to his greater access to information, expertise, and greater engagement with the firm due to the size of his investment. These reasons for maintaining control may benefit the other shareholders as well. Many have expressed concerns about short-termism; additionally, many scholars praise the

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[125] *See generally* Wayne O. Hanewicz, *Director Primacy, Omnicare, and the Function of Corporate Law*, 71 TENN. L. REV. 511, 542-46 (2004) (discussing an example of differing risk preferences and strategies between controlling shareholders and diversified shareholders); Richard A. Booth, *Stockholders, Stakeholders, and Bagholders (or How Investor Diversification Affects Fiduciary Duty)*, 53 BUS. LAW. 429, 433-34 (1998) (distinguishing controlling shareholders from undiversified investors). For example, the controlled firm could acquire a business in an unrelated industry. Doing so would reduce the controlling shareholder's risk because, if industry conditions deteriorate in the controlled firm's original business, the new, unrelated business is unlikely to be affected in a significant way. This effect may make the acquisition an attractive proposition to a controlling shareholder—even if the firm is likely to run the new business—with which it has no experience or expertise—less efficiently than its prior owners. *Cf.* Randall Morck, Andrei Shleifer & Robert W. Vishny, *Do Managerial Objectives Drive Bad Acquisitions?*, 45 J. FIN. 31, 46 (1990) ("The results . . . suggest that unrelated diversification is a bad idea from the point of view of the bidding firm's shareholders in the 1980s [and that] diversification can be understood as serving the objectives of managers.").

More generally, diversified shareholders only care about market risk; an undiversified controlling shareholder, in contrast, will care about all sorts of other risks. The strategies that minimize these firm-specific risks are unlikely to be those that minimize market risk.

[126] *See infra* Part IV.C.1 (discussing how some companies identified protecting long-term plans as a reason for adopting TPV).

[127] *See, e.g.*, Mavruk, *supra* note 100, at 1 (finding that companies with more concentrated ownership have longer investment horizons; a ten-percentage point increase in average ownership concentration corresponded to a seven-month increase in average investment length).

involvement of informed, active owners in firms.[128] However, the controlling shareholder may also want to maintain his control for ego-related reasons, or to expropriate value from other shareholders.[129] How the benefits and costs of the controlling shareholder's control will weigh out will most likely vary from firm to firm.

It is clear, however, that TPV does something that one-share-one-vote arrangements cannot: It provides a way for the controlling shareholders to diversify their investments while maintaining control of the firm. Doing so better aligns controllers' incentives regarding firm investment strategies with those of diversified shareholders, while potentially enabling them to pursue their entrepreneurial visions and resist pressures from short-term investors to engage in myopic decision making.

A related advantage of TPV is that it can encourage controlling shareholders to support their firm's issuance of new equity to public, diversified shareholders. Controlling shareholders may not want to put more money into the firm. Moreover, because a controlling shareholder already has a lot of her wealth tied up in the firm, making an additional investment in the firm increases her financial risk in a way that would not apply to a diversified shareholder. Thus, even if a controlling shareholder is willing to invest more money into the firm, the cost to the firm of obtaining money from the controlling shareholders may be higher than obtaining money from diversified shareholders. The firm could seek alternative sources of money, such as a bank loan, but doing so might cost the firm more than a new equity issuance to diversified shareholders.

In considering the issuance of new equity to the public, the controlling shareholders will worry that issuing new equity will dilute their control over the corporation. The failure to issue new equity may mean that the firm will be inefficiently under-capitalized, which may leave it unable to make potentially value-increasing corporate acquisitions. Nevertheless, if the firm has a one-share-one-vote structure, controlling shareholders may believe that the value of maintaining control exceeds these costs. With TPV, however, controlling shareholders have less fear that the issuance of new shares will dilute their control, at least initially, because the new shares will

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[128] *See, e.g.*, Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 785-86 (2003).

[129] *See* Amoako-Adu, Baulkaran & Smith, *supra* note 120, at 1581 (finding that family executives in dual-class firms had significantly higher pay than those at single-class firms with concentrated control).

have to be held for a period of time before they are entitled to multiple voting rights. Thus, controlling shareholders at TPV firms will be more likely to support the issuance of new equity by their firms.

d. *Summary*

In conclusion, proponents of TPV argue that TPV may produce efficiencies for firms. To the extent that TPV increases agency costs as TPV critics claim, there may be offsetting benefits to consider. First, regarding entrenchment, managerial independence may produce benefits. Managers may be in a superior position to negotiate acquisitions of the firm, and TPV may empower them to do so. In addition, with managerial independence, managers may pursue long-term strategies, avoid wasteful job retention efforts, and make firm-specific investments in their firms. Second, TPV may decrease the pressure on firms to engage in short-termism by empowering long-term shareholders, encouraging existing shareholders to become long-term shareholders, attracting long-term shareholders to invest in their firms, and changing firm and investment cultures to focus on long-term performance. Third, because controlling shareholders are often long-term shareholders, TPV tends to increase their voting power for any given level of ownership. Thus, TPV can enable controlling shareholders to maintain control over the controlled firm while owning fewer shares. This allows them to diversify their portfolios, aligning their interests with those of diversified shareholders. Such controlling shareholders may choose company strategies that more closely mirror diversified shareholders' preferences. Similarly, TPV may make controlling shareholders more willing to support new equity issuances that may enhance the value of their firms.

C. *Time-Phased Voting Compared to Other Voting Arrangements*

Corporate voting structures can be thought of as falling along a spectrum. The one-share-one-vote structure in place at most U.S. public companies lies at one end of that spectrum. It aligns voting and cash-flow rights; each common shareholder's voting rights correspond exactly to her cash-flow rights.[130]

Dual-class voting structures, in contrast, sit at the opposite end of the spectrum. Dual-class firms issue two classes of shares. Shares of

[130]This is an instructive simplification. There are many ways to separate the voting and control rights of U.S. firms (single-class or otherwise). Such arrangements are not necessarily problematic and are consistent with private ordering. *See, e.g.*, Barry, Hatfield & Kominers, *supra* note 88, *passim*.

each class typically have similar rights to receive dividends—that is, they have similar cash-flow rights—but one class of shares receives many more votes per share. Collectively, the high-vote shareholders—usually founders, managers, or their families—command a majority of voting rights, enabling them to dominate shareholder voting. Moreover, the low-vote shareholders cannot easily acquire the high-vote shares, which generally are not publicly traded and sometimes convert to low-vote shares upon sale. Thus, dual-class stock sharply separates voting rights and cash-flow rights.

TPV falls between one-share-one-vote and dual-class voting systems. Like dual-class stock, TPV gives some shareholders more voting rights than they would receive under one-share-one-vote, creating a disconnect between voting and cash-flow rights. However, the disconnect is less extreme than that created by dual-class stock; any shareholder can acquire superior voting rights by simply holding her shares for a specified period of time. Accordingly, TPV does less to insulate managers from monitoring by public shareholders than does dual-class stock, placing TPV on the spectrum somewhere between one-share-one-vote and dual-class stock. We note that this spectrum model of TPV is imperfect; TPV is not simply a weakened version of dual-class stock.[131] Nonetheless, we believe this framework is useful.

Only a dozen U.S. corporations have implemented TPV arrangements, which is too few for a thorough statistical analysis of TPV's costs and benefits. However, researchers have conducted many empirical studies examining dual-class firms and evaluating how they differ from firms with one-share-one-vote structures.[132] To the extent that TPV firms occupy a position between these voting structures, these studies can shed light on TPV firms. In short, we believe that the relationships these studies identify between one-share-one-vote and dual-class firms will also exist between one-share-one-vote and TPV firms. However, because TPV constitutes less of a departure from one-share-one-vote than does dual-class stock, these relationships should be smaller in magnitude.

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[131]For example, TPV is better tailored to address short-termism generated by short-term shareholders than dual-class stock. It gives extra voting power to shareholders who have held their shares for the requisite period of time. In contrast, dual-class stock gives short-term, high-vote shareholders extra votes but denies the same privilege to long-term, low-vote shareholders.

[132]*See infra* Part III.

III. THE RESULTS OF DUAL-CLASS STOCK STUDIES

We begin with some general background on the prevalence and basic characteristics of dual-class firms. We then consider the relationship of dual-class firms to family ownership and the magnitude of the gap between shareholders' voting and cash-flow rights. Finally, we consider the effects of dual-class stock on firm performance.

A. *Descriptive Statistics*

Many U.S. corporations employ a dual-class stock structure. A comprehensive recent study looked at roughly 7,000 publicly traded U.S. corporations from 1995 to 2012 and found that approximately 6% were dual-class firms.[133] Dual-class stock is more common among larger U.S. companies; approximately 12% of Fortune 500 companies have dual-class stock structures.[134] More generally, dual-class firms have larger asset values and market values than single-class firms.[135]

Dual-class firms span a wide range of industries, though they cluster in those industries in which control of a firm is thought to be particularly desirable.[136] For example, studies have consistently found that media firms are particularly likely to have dual-class stock structures.[137]

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[133]Gompers, Ishii & Metrick, *supra* note 19, at 1057. Gompers, Ishii & Metrick looked at all of the firms in the Compustat database that were not trusts, closed-end funds, ADRs, REITs, or units. *See also* Adams & Ferreira, *supra* note 104, at 56 (describing the Gompers, Ishii & Metrick study). Studies generally focus on public companies, about which more data is available.

[134]*See* Belén Villalonga & Raphael Amit, *How Are U.S. Family Firms Controlled?*, 22 REV. FIN. STUD. 3047, 3056-57 (2009); *id.* at 3075 (finding that approximately 21% of Fortune 500 companies had a dual-class stock structure for at least one year during the sample). Villalonga and Amit capture all companies in the Compustat database that were in the Fortune 500 at any point from 1994 to 2000 but not primarily engaged in the financial services, utilities, or government industries. *See* Adams & Ferreira, *supra* note 104, at 56.

[135]Gompers, Ishii & Metrick, *supra* note 19, at 1057 (reporting a median asset (market) value for dual-class firms of $482 million ($295 million), compared to $138 million ($100 million) for single-class firms). Looking at means produced similar results, though the size difference between dual-class and single-class firms was smaller. *See id.* at 1053 (finding that 6% of U.S. public firms are dual-class firms, but that their combined market capitalization constitutes 8% of U.S. public companies' total market capitalization).

[136]*Id.* at 1062-63.

[137]*See, e.g.*, Gompers, Ishii & Metrick, *supra* note 19, at 1062-63; Scott B. Smart & Chad J. Zutter, *Control as a Motivation for Underpricing: A Comparison of Dual and Single-Class IPOs*, 69 J. FIN. ECON. 85, 103-04 (2003); Laura Casares Field, Control Considerations of Newly Public Firms: The Implementation of Antitakeover Provisions and Dual Class Shares Before the IPO 19 (Feb. 10, 1999) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=150488.

The most typical arrangement in dual-class firms is for the high-vote shares to have ten votes per share, while the low-vote shares have one vote per share.[138] It is also worth noting that, in many instances, holders of high-vote shares also receive superior voting rights—above and in addition to the votes that they get by virtue of share ownership—with respect to the election of directors.[139] For example, in 1998, the *New York Times* had two classes of stock.[140] Class B shares constituted less than one half of 1% of shares outstanding, but carried the right to elect ten of the company's fifteen directors.[141] Thus, the Ochs-Sulzberger family, which owned 17.9% of the company's outstanding shares, but almost 90% of the class B shares, had control of the company's board of directors.[142] These types of additional rights to elect directors appear to be particularly common among firms in which the high-vote shares have a smaller increase in nominal voting power relative to the low-vote shares.[143]

In a large majority of cases, owners of both high-vote and low-vote shares have similar rights to dividends.[144] When the share classes have different dividend rights, owners of the low-vote shares usually have more rights to dividends than do owners of the high-vote shares.[145]

High-vote shares are primarily owned by corporate officers, directors, founders, and founding-family members (collectively,

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[138]Moreover, when this ratio is not 10:1, it tends to be higher than 10:1 rather than lower. Bauguess, Slovin & Sushka, *supra* note 124, at 1247 (reporting that at 68.8% of dual-class firms in their sample, the ratio was 10:1; the next-most-common arrangement was for the low-vote shares to receive no votes); Gompers, Ishii & Metrick, *supra* note 19, at 1057 (finding a 10:1 ratio most common; 795 (590) dual-class firm-years in their sample had higher (lower) voting ratios); Villalonga & Amit, *supra* note 134, at 3066 (finding 10:1 to be both the median and modal ratio); Luigi Zingales, *What Determines the Value of Corporate Votes?*, 110 Q.J. ECON. 1047, 1057 (1995) (finding 10:1 ratio at majority of sample firms).

[139]Gompers, Ishii & Metrick, *supra* note 19, at 1056-57 (finding such arrangements in over 30% of dual-class firm-years in their sample); Villalonga & Amit, *supra* note 134, at 3053-54, 3066.

[140]Villalonga & Amit, *supra* note 134, at 3061.

[141]*Id.*

[142]*Id.*

[143]*Id.* at 3066 (finding that in half of dual-class firms in which a high-vote share affords the same number of votes as a low-vote share, high-vote shares convey superior voting rights with respect to the election of directors). In these companies, the holders of high-vote shares have a larger share of corporate control than is apparent from the sheer number of votes that they control.

[144]*See* Gompers, Ishii & Metrick, *supra* note 19, at 1057, 1058 tbl.2.

[145]*See id.*; Villalonga & Amit, *supra* note 134, at 3067 (finding a median (mean) dividend payment ratio of 1:1 (0.89:1)); *see also* Steven R. Cox & Dianne M. Roden, *The Source of Value of Voting Rights and Related Dividend Promises*, 8 J. CORP. FIN. 337, 339 (2002) ("[When] low-vote shares [are promised higher dividends, they] are often promised 110% of the dividend paid to high-vote shares.").

"insiders").[146] In most cases, these shares give the insiders either an outright majority of outstanding votes[147] or a sufficiently large voting bloc as to effectively constitute a majority.[148]

For the vast majority of dual-class companies, the high-vote shares are not publicly traded.[149] Accordingly, the holders of high-vote shares often face obstacles if they wish to sell their shares. Such shares thus are not a good investment for shareholders with short investment time horizons, and the owners of high-vote shares tend to hold on to their shares for long periods of time.[150]

B. *Family Ownership*

Dual-class stock is more common at founder- and family-controlled firms than at other firms.[151] Although family-controlled firms comprise a minority of U.S. public corporations, they constitute a clear majority of U.S. dual-class firms.[152] Many firms adopt dual-class stock structures relatively early in their lifespans, when they are family-

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[146]Gompers, Ishii & Metrick, *supra* note 19, at 1055 (considering only directors and officers). We note that there is substantial overlap between the groups identified in text.

[147]*Id.* at 1058 tbl.2 (reporting that, in 69.3% of observations, insiders held an absolute majority of voting rights).

[148]*Id.* (reporting that, in 77.9% of observations, insiders held 40% or more of all voting rights).

[149]*Id.* at 1053 (finding, in the most comprehensive sample of dual-class firms of which we are aware, that the high-vote shares of approximately 85% of dual-class stock companies are not publicly traded); *see also* Adams & Ferreira, *supra* note 107, at 60; Villalonga & Amit, *supra* note 134, at 3064 (finding that one class of stock is not publicly traded in 70% of firm-years in their sample). High-vote shares may also convert to low-vote shares upon sale. *See, e.g.*, Ronald Barusch, *At Facebook, Governance = Zuckerburg*, WALL ST. J. DEAL J. (Feb. 1, 2012), http://blogs.wsj.com/deals/2012/02/01/at-facebook-governance-zuckerberg/.

[150]*See* Adams & Ferreira, *supra* note 104, at 60.

[151]*See, e.g.*, DeAngelo & DeAngelo, *supra* note 107, at 34; Gompers, Ishii & Metrick, *supra* note 19, at 1063; Field, *supra* note 137, at 18; *see also* Ben Amoako-Adu & Brian F. Smith, *Dual Class Firms: Capitalization, Ownership Structure and Recapitalization Back Into Single Class*, 25 J. BANKING & FIN. 1083, 1096 (2001) (finding that, for companies listing on the Toronto Stock Exchange, a large degree of family control pre-IPO was associated with a higher likelihood of dual-class structure at IPO).

[152]Studies agree that most U.S. dual-class stock companies are family- and founder-controlled, though they disagree on the precise proportion. *Compare* Tatiana Nenova, How to Dominate a Firm With Valuable Control? Dual Class Firms Around the World: Regulation, Security-Voting Structure, and Ownership Patterns 9, 22 tbl.6 (Apr. 2001) (unpublished manuscript), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=1017603 (reporting 95% of dual-class firms in the sample as family-controlled), *with* Villalonga & Amit, *supra* note 134, at 3064 (reporting that family-controlled firms account for 62% of dual-class firm years in their sample).

controlled, and the family subsequently sells to other owners;[153] thus, older dual-class firms are less likely to remain family-controlled.[154]

The difference between the voting power of high- and low-vote shares is more pronounced in family-controlled firms than in other firms.[155] Moreover, the ratio between the per-share dividends that low-vote shareholders receive and those that high-vote shareholders receive is generally higher for family-controlled firms than for non-family-controlled firms.[156] These findings are consistent with controlling families caring comparatively more about control relative to cash-flow rights than other controlling shareholders do.[157]

C. *The Wedge Between Ownership and Control*

In a single-class firm, shareholders hold votes in direct proportion to their ownership interest in the firm.[158] By design, dual-class stock gives the holders of high-vote stock more voting control over a company than their share ownership would otherwise afford them.[159] This additional power creates a "wedge" between controlling shareholders' voting and ownership interests.[160] This wedge raises a concern: The controlling shareholders are, in a sense, playing with other people's

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[153]Villalonga & Amit, *supra* note 134, at 3066.

[154]For example, one study examined fifty-two dual-class companies with voting structures established by a founding family. Of these, "in thirty-two it was set up by the founders, in fourteen it was set up by the second generation, and in six it was set up by the third or later generation. Among those, 21, 11, and 6, respectively" remained under family control at the end of the sample period. *Id.* at 3080.

[155]*Id.* at 3066 (finding that sixty-seven of the sixty-eight firms with 10:1 ratios were family owned, and eighteen of twenty-one firms with higher ratios were family owned, making a combined total of eighty-five out of eighty-nine such firms family owned). In contrast, over 70% of firms in which the ratio of votes per share from the high-vote shares vs. the low-vote shares was below median were non-family-controlled firms. *Id.* at 3066-67. Moreover, over 70% of the data on firms in which the high-vote shares had additional voting rights with respect to the election of directors was from family-owned firms. *Id.* at 3066.

[156]*Id.* at 3067.

[157]*See* Henrik Cronqvist & Mattias Nilsson, *The Choice Between Rights Offerings and Private Equity Placements*, 78 J. FIN. ECON. 375, 377 (2005) (finding that family-controlled firms tend to favor debt over additional equity issuances to avoid diluting their control over the company).

[158]*See, e.g.*, Villalonga & Amit, *supra* note 134, at 3065 tbl.2 (finding that, in firm-years in which high- and low-vote shares receive different dividends, the low-vote shares received higher dividends in 71% of firm-years at founder- and family-controlled firms, versus 16% of firm-years at other firms).

[159]*See id.* at 3051.

[160]This "wedge" between voting and ownershp interests is in addition to the separation between the ownership of the firm and the day-to-day control of its operations that corporate law creates between shareholders and management.

money, and they may deploy the resources they control in pursuit of their own interests instead of those of all shareholders.[161] Of course, majority voting in the typical public firm permits majority shareholders to use the money of minority shareholders. Additionally, managers of typical public firms have smaller ownership interests than controlling shareholders in controlled firms,[162] providing an even larger gap in incentives. In all of these instances, the sizes of these concerns increase with the size of the wedge between ownership and control.[163]

The holders of high-vote stock typically have a significant interest in the firm's profits, but a substantially larger voting interest in the firm.[164] At the median dual-class firm, insiders own roughly 60% of votes and 40% of cash-flow rights.[165] Most dual-class firms have a substantial wedge between insiders' voting and cash-flow rights.[166] We

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[161] *See* Belen Villalonga & Raphael Amit, *How Do Family Ownership, Control and Management Affect Firm Value?*, 80 J. FIN. ECON. 385, 388 (2006) (finding a negative value impact for family control in excess of share ownership); *see also* Stijn Claessens, Simeon Djankov & Larry H.P. Lang, *The Separation of Ownership and Control in East Asian Corporations*, 58 J. FIN. ECON. 81, 110 (2000) (reporting similar negative impacts for East Asian firms); Roberto Barontini & Lorenzo Caprio, *The Effect of Family Control on Firm Value and Performance: Evidence from Continental Europe*, 12 EUR. FIN. MGMT. 689, 721 (2006) (noting similar valuation impact for Continental European firms).

[162] *See supra* note 17.

[163] *See* Gompers, Ishii & Metrick, *supra* note 19, at 1053-55 (finding that, at U.S. dual-class firms, insider share ownership is associated with increased firm value, but that insider vote ownership is associated with decreased firm value); Hoje Jo & Young Sang Kim, Which Monitors Monitor the Most? Dual-Stock Structure, Analyst Following, and Corporate Governance 3 (Mar. 19, 2008) (unpublished manuscript), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=1108900 (finding that dual-class companies with larger wedges between insiders' voting and cash-flow rights have smaller Tobin's *q*); Ronald W. Masulis, Cong Wang & Fei Xie, *Agency Problems at Dual-Class Companies*, 64 J. FIN. 1697, 1722 (2009) (finding that dual-class companies with larger wedges between insiders' voting and cash-flow rights display signs of greater agency costs).

[164] *See, e.g.*, Gompers, Ishii & Metrick, *supra* note 19, at 1058 tbl. 2 (reporting that in over 90% of observations (i.e., 3273 of 3600), insiders held more than 10% of ownership); spreadsheet on file with authors; Villalonga & Amit, *supra* note 134, at 3078-79 (finding that, among founder- and family-controlled dual-class companies in which insiders' voting rights exceeded their cash-flow rights, the average wedge was 20.5%, corresponding to founding families having 2.55 times larger voting percentage as shares ownership percentage); Masulis, Wang & Xie, *supra* note 163, at 1702-03 (finding average insider voting rights of 66.8% and cash-flow rights of 39.4%).

[165] Gompers, Ishii & Metrick, *supra* note 19, at 1056-58; *see also* Bauguess, Slovin & Sushka, *supra* note 124, at 1248 tbl.2 (reporting that, three years after engaging in dual-class recapitalizations, the average ownership (voting control) of officers and directors was 42.4% (59.9%)). These numbers reflect only officers' and directors' interests.

[166] *See* Gompers, Ishii & Metrick, *supra* note 19, at 1058 tbl.2 (finding that the wedge between insiders' voting and cash-flow rights was five percentage points or more for 81.6% of the sample, and fifteen percentage points or more in 65.4% of the sample). Gompers, Ishii & Metrick report the number of firm-years for various insider ownership and voting combinations over the sample. Each combination represents a 5% range (for example, 10-15% cash-flow rights, 20-25% voting rights). We calculate the figures above by treating all firms

also note that these measures understate the effective gap between cash-flow and control rights because, in either a controlled or typical public firm, shareholders with a majority of votes control the firm to the exclusion of minority shareholders.[167]

D. *Performance of Dual-Class Firms*

Orthodox corporate law theory predicts that dual-class firms will have higher agency costs than single-class firms.[168] Studies have applied several different methodological approaches to investigate the effects of a dual-class stock structure on managerial entrenchment and firm performance.[169]

The first approach is to examine how a company's stock price changes when the company decides to adopt or eliminate a dual-class stock structure. The theory behind this approach is that shareholders rapidly incorporate news about the company into their valuation of its stock price; if they think the change will make the company more valuable, the stock price will rise, and vice versa.[170]

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as having the midpoint of both cash-flow and voting rights in their grouping (for example, 12.5% cash-flow rights, 22.5% voting rights). Making the most conservative possible assumption—that insiders had the maximum possible ownership within their grouping and the minimum possible voting rights—only reduces these estimates to 74.1% and 55.3%, respectively. Spreadsheet on file with authors. We also note that there are some documented cases of extremely large wedges. *See* Villalonga & Amit, *supra* note 134, at 3059 (discussing how owners of high-vote stock owned 6% of Ford Motor Company shares but 40% of votes; 13.3% of Viacom shares but over 67% of votes; and a mere 3.14% of Comcast shares but over 85% of votes).

[167]Thus, if insiders control 60% of the vote and own 40% of the cash-flow rights, the size of the wedge is closer to 60%—the difference between 100% of voting power and 40% of cash-flow rights—than to 20%—the difference between their voting percentage and cash-flow rights percentage. Studies often consider a much smaller voting percentage sufficient to give a shareholder control of a firm. *See* Villalonga & Amit, *supra* note 134, at 3052-53 (stating that prior studies had used thresholds of 10% or 20%).

In addition, at many dual-class firms, insiders have a greater ability to select corporate directors than their voting power suggests. *See id.* at 3075 (finding that, at over one-third of family-controlled, dual-class firms in their sample, controlling families were entitled to board control in excess of their shares' voting power). As electing board members is often considered the most important voting right that shareholders have, their effective voting rights are even larger than they appear.

[168]*See supra* Part II.B.1, C.

[169]*See* Adams & Ferreira, *supra* note 104, at 62-63 (discussing effects on both entrenchment and performance).

[170]We note that this technique is tightly linked to the EMH, discussed in Part II.A, *supra*. If markets fully and accurately incorporate information into stock prices, then the change in stock price will reflect both the magnitude and direction of the effect that an event has on a company's value. However, one can still draw more limited conclusions from stock price movements even if one does not fully accept the EMH.

These studies present a somewhat complex picture of the effects of dual-class stock on U.S. firms. Most, but not all, studies of dual-class recapitalizations conclude that they are not harmful to outside shareholders.[171] At the same time, studies also find that eliminating an existing dual-class structure usually has a positive effect on the company's stock price.[172] Taken together, these studies would seem to suggest the paradoxical result that implementing a dual-class structure does not decrease firm value—but eliminating a dual-class structure increases firm value. There are several ways to explain these seemingly contradictory results. One possibility is that dual-class structures create value in certain circumstances but destroy it in others, and that firms are

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[171] Bauguess, Slovin & Sushka, *supra* note 124, at 1247 (finding no significant change in stock prices on announcements of recapitalizations); Dimitrov & Jain, *supra* note 104, at 352-53 (finding that the three-day average abnormal return after a recapitalization announcement is indistinguishable from zero); M. Megan Partch, *The Creation of a Class of Limited Voting Common Stock and Shareholder Wealth*, 18 J. FIN. ECON. 313, 333 (1987) (finding nonnegative abnormal returns for a sample of forty-four U.S. dual-class recapitalizations during the period from 1962 to 1984 and significant positive abnormal returns in nine recapitalizations where managers owned votes sufficient to approve the recapitalization); OFFICE OF THE CHIEF ECONOMIST, SEC. & EXCHANGE COMM'N, THE EFFECTS OF DUAL-CLASS RECAPITALIZATIONS ON THE WEALTH OF SHAREHOLDERS (1987) (finding no statistically significant wealth effects for sixty-three firms adopting differential voting structures between 1976 and May 1986); OFFICE OF THE CHIEF ECONOMIST, SEC. & EXCHANGE COMM'N, UPDATE—THE EFFECTS OF DUAL-CLASS RECAPITALIZATIONS ON SHAREHOLDER WEALTH: INCLUDING EVIDENCE FROM 1986 AND 1987 (1987) (finding significant negative price effect for recapitalizations of ninety-seven U.S. firms from March 1986 to May 1987); Gregg A. Jarrell & Annette B. Poulsen, *Dual-Class Recapitalizations as Antitakeover Mechanisms: The Recent Evidence,* 20 J. FIN. ECON 129, 149 (1988) (finding significant negative abnormal returns); Gordon, *supra* note 24, at 26-28 (finding no significant wealth effects of recapitalizations of small sample of nineteen NYSE firms from 1984 to 1986); *see also* Jason W. Howell, No More Share Classes: A Study of U.S. Dual Class Stock Unifications 15-16 (Sept. 24, 2008) (unpublished manuscript) (finding significant negative returns on announcements of dual-class recapitalizations by firms that subsequently reunified), *archived at* https://perma.cc/XTF2-9VVL; James S. Ang & William L. Megginson, *Restricted Voting Shares, Ownership Structure, and the Market Value of Dual-Class Firms*, 12 J. FIN. RES. 301, 302 (1989) (finding a positive price effect for dual-class recapitalizations at British firms); Marcia Millon Cornett & Michael R. Vetsuypens, *Voting Rights and Shareholder Wealth: The Issuance of Limited Voting Common Stock*, 10 MANAGERIAL & DECISION ECON. 175, 186 (1989) (finding significant positive abnormal price increase from the creation of dual-class stock, although only 50% of the sample experienced such positive returns).

[172] *See, e.g.*, Scott B. Smart, Ramabhadran S. Thirumalai & Chad J. Zutter, *What's in a Vote? The Short- and Long-Run Impact of Dual Class-Equity on IPO Firm Values*, 45 J. ACCT. & ECON. 94, 97 (2008) (finding that dual-class IPO firms that unify their shares experience average value gains of 6% or more); Howell, *supra* note 171, at 34 tbl.10 (making similar findings); *see also* Adams & Ferreira, *supra* note 104, at 61, 64 (summarizing previous literature regarding unification and associated value increases); Ang & Megginson, *supra* note 171 (finding a positive price effect for dual-class unifications at British firms); Ingolf Dittmann & Niels Ulbricht, *Timing and Wealth Effects of German Dual Class Stock Unifications*, 14 EUR. FIN. MGMT. 163, 191 (2007) (finding a positive price effect for dual-class unifications at German firms).

more likely to adopt or abandon dual-class structures when doing so creates greater value.

Another complicating factor is that this methodology requires the researcher to correctly identify the time at which shareholders learn about the new development.[173] For example, suppose that news of a pending dual-class recapitalization leaks out, causing market prices to adjust to the news weeks before the company officially announces its recapitalization plans. In such circumstances, if a researcher focuses on the date of the official announcement, this methodology will not capture the recapitalization's effects on stock prices, no matter how large. Identifying the right time period may be difficult.[174]

Relatedly, determining whether a new development constitutes "good" or "bad" news is a relativistic endeavor: It depends on how shareholders perceive the company's prospects both before and after the news comes to light. For example, even if shareholders think that a dual-class recapitalization will reduce the company's value, the recapitalization announcement may nevertheless result in a stock price increase if the shareholders expected the company to do something even worse—such as a dual-class recapitalization in which the holders of low-vote shares receive a smaller dividend. Shareholders' perceptions may also vary across time and space, which can produce different initial effects on stock prices even if the ultimate effects on firm operations are identical.[175]

Similarly, the decision to adopt or eliminate a dual-class structure may affect stock prices by signaling something to shareholders about the

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[173] *See* Adams & Ferreira, *supra* note 104, at 63 (identifying this as a possible explanation for the conflicting results among event studies); Cornett & Vetsuypens, *supra* note 171, at 181 n.16 (conjecturing that they reach a different result than Jarrell and Poulsen because the latter relied primarily on the date that the proxy material describing the recapitalization was mailed to shareholders).

[174] Choosing a larger announcement window increases the likelihood of capturing the relevant time period, but creates other problems, such as increasing the number of other, confounding events that happen during the time period in question.

[175] *See* Adams & Ferreira, *supra* note 104, at 75-76; Hans Caspar von der Crone & Evgeny Plaksen, The Value of Dual-Class Shares in Switzerland 2 (Mar. 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542780 (suggesting that Swiss investors view dual-class structures more favorably than American investors do); *see also* Dimitrov & Jain, *supra* note 104, at 345 (questioning the value of short-term event studies of dual-class recapitalizations because the market's limited experience with dual-class recapitalizations creates a high probability of an incorrect initial market reaction to them).

nature of the firm or its insiders.[176] For example, firms that adopt dual-class structures typically have very high insider ownership beforehand.[177] Suppose that insiders conclude that the firm has strong growth prospects. In such circumstances, the insiders may move to implement a dual-class structure: Doing so would allow the firm to raise new equity financing to pursue these opportunities without diluting the insiders' control over the firm.[178] The announcement of a dual-class recapitalization might raise stock prices because shareholders infer that the firm has strong growth prospects,[179] even if they disfavor the dual-class structure itself.[180]

A second approach is to compare the performance of dual-class firms with the performance of non-dual-class firms. Studies that have looked at measures of firm value, such as Tobin's *q* or stock prices,[181] have found mixed results.[182] Studies that examine firm characteristics that are associated with agency costs generally find that dual-class firms perform worse,[183] but studies that look at measures of firm operating

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[176]*See* Gordon, *supra* note 24, at 37 ("[T]he immediate negative effects of a recapitalization are likely to be washed out by a positive signal carried by the recapitalization proposal, namely, that the firm has profitable investment opportunities to exploit.").

[177]*See, e.g.*, Dimitrov & Jain, *supra* note 104, at 346 (finding that share ownership is already highly concentrated before recapitalizations); Gordon, *supra* note 24, at 36-37 (noting median insider holdings of roughly 30% prior to recapitalization); Lehn, Netter & Poulsen, *supra* note 107, at 561 (noting average insider holdings of 43.1% before recapitalization).

[178]*See* Partch, *supra* note 171, at 315.

[179]The shareholders at least may conclude that the *insiders* believe in the firm's investment prospects. *See, e.g.*, Gordon, *supra* note 24, at 37-38. *But see* Lehn, Netter & Poulsen, *supra* note 107, at 565-66 (noting that expectations of equity offerings often have negative price impacts, presumably because of dilution concerns).

[180]Adopting a dual-class structure could also signal impending insider diversification, which could improve firm performance. *See supra* Parts II.B-C.

[181]Tobin's *q* is the ratio of a firm's market value to the replacement value of its assets; in a sense, it measures the value that the company has produced. *See* William C. Brainard & James Tobin, *Pitfalls in Financial Model Building*, 58 AM. ECON. REV. 99, 103-04 (1968). Financial economists typically use the ratio of a firm's market value to book value as a proxy. *See, e.g.*, Villalonga & Amit, *supra* note 134, at 3082-83.

[182]Gompers, Ishii & Metrick, *supra* note 19, at 1060-61 (finding no effect of dual-class stock on stock prices); *see also id.* at 1053-55 (finding that, across U.S. dual-class firms, insider share ownership is associated with increased firm value, but insider vote ownership is associated with decreased firm value); Smart, Thirumalai & Zutter, *supra* note 172, at 113 (finding that dual-class firms traded at a lower price relative to earnings and EBITDA than single-class firms, both at the time of IPO and five years later); Smart & Zutter, *supra* note 137, at 105-06 (finding that dual-class firms had lower price-to-earnings and price-to-sales ratios two years after IPO). *Compare* Villalonga & Amit, *supra* note 134, at 3083-86 (generally finding that dual-class firms have significant negative abnormal returns), *and* Howell, *supra* note 171, at 12 (demonstrating similar results), *with* Dimitrov & Jain, *supra* note 104, at 347 (finding significant positive abnormal returns of 23.11% over the four years following the announcement of adoptions of dual-class structures).

[183]*See, e.g.*, Vishaal Baulkaran, *Management Entrenchment and the Valuation Discount of Dual Class Firms*, 54 Q. REV. ECON. & FIN. 70, 70 (2014); Masulis, Wang & Xie, *supra* note 163, at 1722 (finding that CEOs at dual-class firms are paid more, outside

performance paint a rosier picture.[184] Moreover, at least one study suggests that dual-class firms are less likely to engage in myopic behavior.[185]

Other studies look at dual-class companies' experiences with the market for corporate control. As discussed in Part II, many corporate law scholars consider corporate takeovers an important mechanism for reducing agency costs. Although dual-class recapitalizations do not seem to be motivated by immediate takeover concerns,[186] one might expect that they would reduce the frequency of takeovers over the long term. Indeed, dual-class stock has been deemed the most effective anti-takeover device ever invented.[187] Surprisingly, studies have found little evidence that dual-class stock actually reduces the frequency of

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shareholders place less value on firm cash holdings, and dual-class firms are more likely to engage in acquisitions that reduce shareholder value); Smart, Thirumalai & Zutter, *supra* note 172, at 108-12 (finding that CEO turnover at dual-class firms is less sensitive to performance); Jennifer Francis, Katherine Schipper & Linda Vincent, *Earnings and Dividend Informativeness When Cash Flow Rights Are Separated from Voting Rights*, 39 J. ACCT. & ECON. 329 (2005) (finding that dual-class structures reduce the effect of firm earnings on valuation and may increase the effect of dividends on valuation).

[184]*See, e.g.*, Dimitrov & Jain, *supra* note 104, at 363-64 (providing evidence that accounting performance improves after dual-class recapitalizations); Bauguess, Slovin & Sushka, *supra* note 124, at 1249, 1251 (finding that the majority of firms that recapitalize to dual-class structures have superior industry-adjusted operating performance and fewer bankruptcy filings); David J. Denis & Diane K. Denis, *Majority Owner-Managers and Organizational Efficiency*, 1 J. CORP. FIN. 91, 114 (1994) (finding evidence that dual-class structures do not reduce firm value). *But see, e.g.*, ISS REPORT, *supra* note 100, at 3 (finding that dual-class firms underperform over three, five, and ten-year periods); Wayne H. Mikkelson & M. Megan Partch, *The Consequences of Unbundling Managers' Voting Rights and Equity Claims*, 1 J. CORP. FIN. 175, 177 (1994) (finding that dual-class recapitalizations are associated with negative subsequent operating performance).

[185]Van Thuan Nguyen & Li Xu, *The Impact of Dual Class Structure on Earnings Management Activities*, 37 J. BUS. FIN. & ACCT. 456, 457 (2010) (finding that dual-class firms are less likely to engage in earnings management, as evidenced by smaller absolute abnormal accruals and lower likelihood of meeting or exceeding analysts' earnings forecasts). *But see* Kai Li, Hernán Ortiz-Molina & Xinlei Zhao, *Do Voting Rights Affect Institutional Investment Decisions? Evidence from Dual-Class Firms*, 37 FIN. MGMT. 713, 728 (2008) (finding that dual-class structures reduce shareholdings by institutional investors, especially those associated with long-term investment horizons and shareholder activism); ISS REPORT, *supra* note 100, at 3 (finding that dual-class firms have weaker internal controls, which can facilitate earnings management).

[186]Lehn, Netter & Poulsen, *supra* note 107, at 561 (finding that rumors or a bid preceded dual-class recapitalizations in only three of ninety-seven firms); Partch, *supra* note 184, at 322-23; *see also* Dimitrov & Jain, *supra* note 104, at 352-53 (finding that insiders averaged 39.44% share ownership prior to recapitalizations, and thus could very likely defeat a takeover attempt).

[187]*See, e.g.*, Baulkaran, *supra* note 183, at 70; Jarrell & Poulsen, *supra* note 171, at 132.

takeovers.[188] There is some evidence that dual-class firms receive higher premiums in takeovers than comparable single-class firms,[189] but it is not clear how to interpret this result.[190] It is not even clear to what extent high- and low-vote shares garner the same payments in takeovers.[191]

The complicated picture that these studies present illustrates the difficulty of drawing conclusions about the effects of dual-class structures. Because firms do not randomly select whether they will adopt a dual-class structure, there is good reason to believe that dual-class firms differ from other firms in important ways. These underlying differences, and not the firms' respective voting structures, may be the cause of disparities observed between dual-class firms and a comparison group.[192] Studies have found several such potentially explanatory differences.[193] Scholars have attempted to control for these differences

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[188] *See* Bauguess, Slovin & Sushka, *supra* note 124, at 1249 (finding a slightly higher frequency of takeovers at dual-class firms than benchmark single-class firms, but that the difference was not statistically significant); Smart & Zutter, *supra* note 137, at 101-02 (finding that 21.3% of single-class IPO firms, versus only 15.4% of dual-class IPO firms, were acquired within five years, but that the difference was not statistically significant); *see also* Amoako-Adu, Baulkaran & Smith, *supra* note 120, at 1585 (looking at dual-class firms listed on the Toronto Stock Exchange and finding that two-thirds of dual-class firms in the sample changed control within ten years). *But see* Mikkelson & Partch, *supra* note 184, at 196 (finding that only 3% of dual-class firms experienced a change of control within five years of their dual-class recapitalization, versus 18% of comparison firms).

[189] *See* Bauguess, Slovin & Sushka, *supra* note 124, at 1249 (finding that dual-class firms garner larger premiums in takeovers, with a p-value of 0.1); Smart & Zutter, *supra* note 137, at 101-02 (similar; p-value varied by specification, at best 0.07).

[190] If takeover premiums are gains from removing inefficient management, larger premiums would imply poorer management at dual-class firms. Alternatively, larger premiums could arise because management has more leverage in negotiations, which they use to shareholders' advantage by extracting higher prices. *See* Bauguess, Slovin & Sushka, *supra* note 124, at 1249; *see also* Barry & Hatfield, *supra* note 87, at 636-37 (modeling a similar dynamic in a different context).

[191] *Compare* Bauguess, Slovin & Sushka, *supra* note 124, at 1249 (finding that both classes receive the same compensation), *with* DeAngelo & DeAngelo, *supra* note 107, at 57-60 (documenting several takeovers in which the high-vote shares received much more per share than the low-vote shares).

[192] *Cf. generally* Donna L. Street, *Controlling Extraneous Variables in Experimental Research: A Research Note*, 4 ACCT. EDUC. 169, 171 (1995) (discussing the need to control for extraneous variables in social sciences experimental research).

[193] *See, e.g.*, Gompers, Ishii & Metrick, *supra* note 19, at 1059 (finding that dual-class firms have a higher ratio of debt to assets than single-class firms); Lehn, Netter & Poulsen, *supra* note 107, at 559 (finding that firms that conducted dual-class recapitalizations were more likely to have high market-to-book ratios); Li, Ortiz-Molina & Zhao, *supra* note 185, at 714 (finding that dual-class firms have less institutional ownership, particularly by long-term, activist institutional shareholders); Bradford D. Jordan, Mark H. Liu & Qun Wu, *Corporate Payout Policy in Dual-Class Firms*, 26 J. CORP. FIN. 1, 2 (2014) (finding that dual-class firms pay out larger dividends than comparable single-class firms); *see also* Douglas C. Ashton, *Revisiting Dual-Class Stock*, 68 ST. JOHN'S L. REV. 853, 889 (1994) (suggesting that Lehn, Netter and Poulson's finding, *supra*, would make dual-class firms less likely to be takeover targets).

using a number of techniques,[194] but ultimately there is no guarantee that these approaches adequately address this issue.[195]

Moreover, for most dual-class firms, the high-vote shares are not publicly traded. This lack of a market makes determining the value of the high-vote shares, and therefore the overall value of the firm, challenging. Some studies assume that the high- and low-vote shares have the same value;[196] this assumption likely understates firm value (and therefore Tobin's q)[197] in most cases,[198] but may overstate it in others.[199] Studies sometimes avoid this issue by focusing solely on the value of low-vote shares, but that approach paints an incomplete picture of total firm value.[200] On the other hand, when composing a dataset of dual-class firms, it can be easier to identify those dual-class firms in which both the high- and low-vote shares are publicly traded.[201] This can result in a sample with a higher proportion of these firms than exist in the overall population of dual-class firms. These firms may differ from other

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[194] *See, e.g.*, Gompers, Ishii & Metrick, *supra* note 19, at 1071-72 (using an instrumental variables approach); Masulis, Wang & Xie, *supra* note 163, at 1721-22 (matching dual-class firms with single-class firms with similar characteristics).

[195] Controlling for these variables is particularly problematic if one thinks that the biggest difference between dual-class and other firms pertains to features of the controlling insiders that are difficult to observe.

[196] *See, e.g.*, Villalonga & Amit, *supra* note 134, at 3063 tbl. 1, 3082-83; *see also id.* at 3064 (stating that, in 70% of firm-years in their dual-class sample, at least one class of common stock is not publicly traded, primarily the high-vote class).

[197] Recall that a firm's market value is the numerator for Tobin's q. *See supra* note 181.

[198] *See, e.g.*, Ronald C. Lease, John J. McConnell & Wayne H. Mikkelson, *The Market Value of Control in Publicly Traded Corporations*, 11 J. FIN. ECON. 439, 452-59 (1983) (arguing that high-vote shares are more valuable in the United States); Zingales, *supra* note 138, at 1065 (positing that shares with greater voting rights will be more highly valued than shares with inferior voting rights); Cox & Roden, *supra* note 145, at 342 (finding that high-vote shares are priced 3.8% to 11.1% higher than inferior voting shares on average); *see also* Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross-Country Analysis*, 68 J. FIN. ECON. 325, 348-49 (2003) (considering how the value of control varies across countries); *cf.* Barry, Hatfield & Kominers, *supra* note 88, at 1112 (giving a reason why this premium might vary substantially depending on the time frame).

[199] For example, value can be overstated when low-vote shares have higher dividend rights than high-vote shares.

[200] *See* Adams & Ferreira, *supra* note 104, at 63 (discussing this issue).

[201] *See, e.g.*, Cox & Roden, *supra* note 145, at 340 (building a sample of firms with two classes of common stock publicly traded in the United States from 1984 to 1999); Lease, McConnell & Mikkelson, *supra* note 198, at 443-44 (similar, but with period 1940-1978); Zingales, *supra* note 138, at 1056-57 (similar, but with time period 1984-1990). *Compare* Bauguess, Slovin & Sushka, *supra* note 124, at 1250 (stating that 54% of dual-class firms in their takeover data had publicly traded high-vote stock), *with* Gompers, Ishii & Metrick, *supra* note 19, at 1056 (finding that 85% of dual-class firms had one class of stock which was not traded).

dual-class firms in important ways; if so, oversampling them could produce misleading results.[202]

It is also challenging to define the proper baseline capital structure against which to compare dual-class firms. Studies commonly look to publicly traded single-class firms,[203] but this comparison is problematic: Controlling shareholders who implement dual-class structures value their control over the firm, which dual-class structures preserve. If a dual-class structure were not available, controlling insiders might reject a single-class structure with publicly traded stock in favor of other ownership structures that better protect their control over the firm.[204]

For example, if public companies were prohibited from having dual-class stock, the controlling shareholders of a private company might choose to keep the company private in order to maintain their control over it—even if doing so meant passing up valuable corporate opportunities for lack of capital.[205] Thus, even if dual-class stock structures are inferior to single-class stock structures, dual-class stock structures may still be socially beneficial if they offer benefits compared to the transaction structures that firms would adopt if dual-class structures did not exist.[206] Several studies have found evidence that companies adopt dual-class structures because they face strong growth

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[202] The issues described in the text are not intended to be an exhaustive list. *See, e.g.*, Adams & Ferreira, *supra* note 104, at 84 (attributing studies' disparate results to differences in methodologies, sample periods, disparate voting arrangements, and countries studied).

[203] *See, e.g.*, Smart & Zutter, *supra* note 137, at 105-06.

[204] *See, e.g.*, Ronald J. Gilson, *Evaluating Dual-Class Common Stock: The Relevance of Substitutes*, 73 VA. L. REV. 807, 810-11 (1987) (arguing that leveraged buyouts (LBOs) and dual-class structures are substitutes for certain purposes); Lehn, Netter & Poulsen, *supra* note 107, at 564 (similar).

[205] *See* Lehn, Netter & Poulsen, *supra* note 107, at 571-72 (finding that, compared to firms that go private, firms that engage in dual-class recapitalizations have better growth prospects, as measured by growth in sales and the number of employees, the ratio of R&D to sales, advertisement-expenditure-to-sales ratios, and market-to-book ratios); James C. Brau & Stanley E. Fawcett, *Initial Public Offerings: An Analysis of Theory and Practice*, 61 J. FIN. 399, 406, 422 (2006) (surveying CFOs and finding that the need to raise capital is the primary driver for initial public offerings, and that the desire to maintain control of the company is the primary reason for remaining private); *see also* Anthony Saunders & Sascha Steffen, *The Costs of Being Private: Evidence from the Loan Market*, 24 REV. FIN. STUD. 4091, 4103 (2011) (finding that private UK firms face higher borrowing costs than public ones).

[206] *See* Lehn, Netter & Poulsen, *supra* note 107, at 559, 575-80 (stating that dual-class firms have a lower effective cost of capital than LBO firms, and that this may help explain why dual-class firms increased their capital expenditures more following their recapitalizations than LBO firms did following their buyouts); Adams & Ferreira, *supra* note 104, at 62 ("[D]ual-class structures are a cheaper alternative to private equity, in the sense of a lower cost of capital.").

opportunities[207] and want to access public equity markets to acquire the additional capital necessary to pursue those opportunities.[208]

Finally, we note another reason why orthodox corporate theory predicts that firms might improve their performance after adopting a dual-class structure. As discussed in Part II, a firm's controlling shareholders are generally much less diversified than its outside shareholders.[209] Accordingly, the controlling shareholders may cause the firm to pursue projects that reduce the firm's risk—even if they also reduce the firm's value—in order to reduce their risk level.[210] Dual-class structures may enable controlling shareholders to sell some of their

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[207] *See, e.g.*, Dimitrov & Jain, *supra* note 104, at 349-50, 358-59 (finding that, compared to competitors, dual-class-recapitalizing firms were high-growth firms in the year preceding the recapitalization, as measured by book-to-market value, and experienced higher median growth rates in sales, assets, and operating income over the five-year period beginning the year preceding the recapitalization). *But see* Villalonga & Amit, *supra* note 134, at 394 (finding that firms with more growth opportunities, less fixed assets, and higher Tobin's *q* are less likely to adopt dual-class structures).

[208] *See, e.g.*, Onur Arugaslan et al., *On the Decision to Go Public with Dual Class Stock*, 16 J. CORP. FIN. 170, 171 (2010); Bauguess, Slovin & Sushka, *supra* note 124, at 1250 (finding that dual-class firms' industry-adjusted capital expenditures were comparable to those of single-class firms prior to dual-class recapitalization, but were larger than those of single-class firms after dual-class recapitalization); Dimitrov & Jain, *supra* note 104, at 356-58 (finding that 40.45% of dual-class firms issued additional equity within four years after recapitalization, compared to 8.81% of matched single-class firms in the same period); *id.* at 351, 357-58 (finding that, at almost 90% of firms that issued equity after a dual-class recapitalization, the biggest shareholders maintained more than 50% voting control, but this would be true of only 49% of such firms had they remained single-class firms); Lehn, Netter & Poulsen, *supra* note 107, at 576-78 (finding that 41.2% of firms issued additional equity within three years of a dual-class recapitalization and that new-equity-issuing firms had increased industry-adjusted capital expenditures, operating income, and sales); Partch, *supra* note 171, at 323; *see also* Brau & Fawcett, *supra* note 205, at 400. *Cf.* Adams & Ferreira, *supra* note 104, at 61 (concluding, based primarily on non-U.S. studies, that dual-class unifications are done to reduce firms' cost of capital when they need public equity financing to undertake new investments, especially acquisitions); Anete Pajuste, *Determinants and Consequences of the Unification of Dual-Class Shares* 36 (Eur. Central Bank Working Paper Series No. 465, 2005) (similar); Li, Ortiz-Molina & Zhao, *supra* note 185, at 732 (suggesting similar). *But see* Arugaslan et al., *supra*, at 171 (finding that, post-IPO, dual-class firms "do not invest more in total or in R&D than [single-class] firms over either a one-year, or three-year horizon"); Wayne H. Mikkelson & Megan M. Partch, *Valuation Effects of Security Offerings and the Issuance Process*, 15 J. FIN. ECON. 31, 32 (1986) (arguing that equity offerings suggest managers believe the firm's stock is overvalued).

[209] *See* Bauguess, Slovin & Sushka, *supra* note 124, at 1247 (finding that, among the thirty-eight firms for which they had data, only one controlling insider had a "reportable shareholding in another public firm[,] amounting to 3% of the value of [that investor's] main shareholding"); Arugaslan et al., *supra* note 208, at 171 (finding that insiders of firms that go public with dual-class structures are less diversified than insiders of firms that go public with single-class structures).

[210] *See supra* Part II; *see also* Adams & Ferreira, *supra* note 104, at 58; DeAngelo & DeAngelo, *supra* note 107.

economic stake in the firm, and reinvest it elsewhere, without having to sacrifice their control over the firm. Doing so would make them more diversified and help align their interests with those of the firm's outside shareholders. A recent study found that, at a substantial fraction of companies that conducted dual-class recapitalizations, controlling shareholders significantly diversified their investment holdings after the recapitalization.[211] These companies were more likely to act in ways that furthered the interests of diversified shareholders.[212]

In short, the empirical evidence on dual-class firms is complicated and offers some support to both opponents and proponents of dual-class structures. As an international study on disparate control arrangements commissioned by a European Commission found, "the issue is complex and . . . simple conclusions may not be possible."[213] With this information in mind, we now turn to our analysis of TPV firms, where we would expect to see somewhat similar results.

IV. EMPIRICAL STUDY OF TPV COMPANIES

We searched for all the examples that we could find of U.S. firms with TPV at any point during their history. We took a multi-pronged approach that included contacting U.S. stock exchanges, reviewing prior academic studies, and running a variety of searches on Google, Westlaw, LexisNexis, Bloomberg Law, and Factiva. We also used the Riskmetrics Governance Database, which identifies companies with unequal voting

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[211] Bauguess, Slovin & Sushka, *supra* note 124, at 1250-51 (finding that at 36% of sample firms, controlling insiders reduced their economic ownership by selling 2% or more of outstanding firm shares ("Net-Sell firms"); the average percentage reduction in share ownership by controlling insiders at Net-Sell firms was 9% of outstanding shares; the average value of controlling insider shareholdings at Net-Sell firms fell by $33 million, from $173 million to $140 million); *see also* Arugaslan et al., *supra* note 208 (finding evidence consistent with similar dynamics at the public offering stage).

[212] Bauguess, Slovin & Sushka, *supra* note 124, at 1250-1252 & tbl.7 (finding that, after dual-class recapitalization, Net-Sell firms expanded core operations and divested non-core operations; benchmark firms expanded both core and non-core operations, "aggressively" divested core operations, and divested few non-core operations); *id.* at 1252 tbl.8 (finding that, compared to benchmark firms, Net-Sell firms had lower levels of risk prior to their dual-class recapitalizations, but the same levels of risk afterward). These behaviors translated to improved performance. *Id.* at 1249 (finding that Net-Sell firms had stronger industry-adjusted operating performance and increased capital expenditures after their recapitalizations).

[213] Adams & Ferreira, *supra* note 104, at 84.

rights, to find likely candidates.[214] We identified twelve U.S. companies that had or currently have TPV.[215]

We investigated a number of questions regarding these companies' experience with TPV. We begin by briefly describing the TPV companies in Subpart A. Subpart B details the terms of the companies' TPV plans. Subpart C reports on the reasons given by TPV companies for adopting and rescinding TPV. Subpart D discusses our findings on beneficial ownership and control of the TPV companies. It also discusses share ownership diversification by categories of shareholders and changes in outstanding stock for these companies over the years TPV was in effect. Subpart E examines how well TPV companies' stocks performed.

A. *Descriptive Information About TPV Companies*

The TPV companies share several significant commonalities. Ten of the twelve TPV companies are family-controlled companies that adopted TPV from 1985 to 1987 pursuant to a shareholder vote.[216] These

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[214]Riskmetrics Governance Database (currently Institutional Shareholder Service) is an advisory service that delivers S&P 500 companies board of directors' and shareholders' data for academic and non-commercial research purposes. *RiskMetrics*, U. TEX. LIBR., *archived at* https://perma.cc/4YJQ-7RZN (last visited Dec. 23, 2015).

[215]Those companies are Aflac Inc. (Aflac), Carlisle Companies Inc. (Carlisle), CenturyTel Inc. (Century), Milacron Inc. (Milacron), Church & Dwight Co., Inc. (Church & Dwight), J.M. Smucker Company (Smucker), Potlatch Corporation (Potlatch), Pioneer Hi-Bred International, Inc. (Pioneer), Quaker Chemical Corporation (Quaker), Roper Industries, Inc. (Roper), Shaw Group Inc. (Shaw) and Synovus Financial Corp. (Synovus). Many of these companies also had other names throughout their existence; for example, American Family Corporation; Century Telephone Enterprises, Inc.; CenturyLink, Inc.; Cincinnati Milacron Inc.; CB & T Bancshares Inc. (Synovus); etc. For clarity and convenience, we refer in this Article to each company, at all points during its existence, by the short name listed in this footnote.

[216]Aflac, Smucker, Pioneer, and Potlatch adopted TPV in 1985. *See* Am. Family Corp., Proxy Statement (Form DEF 14A) at 9-12 (Mar. 14, 1985) [hereinafter Aflac Proxy]; J.M. Smucker Co., Proxy Statement (Form DEF 14A), at 8-17 (July 25, 1985) [hereinafter Smucker Proxy]; Pioneer Hi-Bred Int'l, Inc., Proxy Statement (Form DEF 14A), at 2-6 (Oct. 3, 1985) [hereinafter Pioneer Proxy]; Potlatch Corp., Proxy Statement (Form DEF 14A), at 3-9 (Oct. 22, 1985) [hereinafter Potlatch Proxy]. Carlisle, Church & Dwight, Milacron, and Synovus followed in 1986. *See* Carlisle Cos. Inc., Registration Statement (Amendment 2 to Form S-4), at 11-12 (Apr. 23, 1986) [hereinafter Carlisle Proxy] (adopting TPV through a merger transaction); Church & Dwight Co., Proxy Statement (Form DEF 14A) at 4-12 (Jan. 15, 1986) [hereinafter Church & Dwight Proxy]; Cincinnati Milacron, Inc., Proxy Statement (Form DEF 14A), at 11-20 (Mar. 21, 1986) [hereinafter Milacron Proxy]; CB & T Bancshares, Inc., Proxy Statement (Form DEF 14A) at 2, 8-10 (Apr. 3, 1986) [hereinafter Synovus Proxy]. Finally, Century and Quaker adopted TPV in 1987. *See* Century Tel. Enter., Inc., Proxy Statement (Form DEF 14A), at 6-7 (Apr. 27, 1987) [hereinafter Century Proxy]; Quaker

companies' shares were already publicly traded when they adopted TPV.[217] The remaining two companies were not family-controlled at the time they adopted TPV.[218] These firms went public in the early 1990s, with TPV.[219]

A combination of economic and regulatory developments explains the common timing of TPV adoption. The 1980s saw a surge in hostile takeover attempts against controlling shareholders; prior to this time, controlling shareholders did not need to worry much about losing control of firms.[220] Incumbent managers experimented with a variety of defenses to deter takeovers, including dual-class recapitalizations. Competitive pressure from corporate managers pushed exchanges to permit alternative corporate voting structures. This culminated in June 1984, when the New York Stock Exchange ("NYSE"), the nation's most

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Chem. Corp., Proxy Statement (Form DEF 14A), at 10-13 (Mar. 31, 1987) [hereinafter Quaker Proxy].

[217]Aflac was listed on the NYSE in 1974. *Our History*, AFLAC, *archived at* https://perma.cc/C7US-XPQB (last visited Dec. 23, 2015). Carlisle was listed on the NYSE in 1960. *Carlisle's History,* CARLISLE, *archived at* https://perma.cc/83KD-M4PX (last visited Dec. 23, 2015). Century was listed on the NYSE in 1978. *Company History,* CENTURYLINK, *archived at* https://perma.cc/J7SN-75DE (last visited Dec. 23, 2015). Church & Dwight had its initial public offering in 1978. *Church & Dwight, Co.*, CRUNCHBASE, https://www.crunchbase.com/ (last visited Dec. 23, 2015). Smucker had an initial public offering in 1959. *Investor FAQ*, J.M. SMUCKER CO., *archived at* https://perma.cc/SN75-NH5W (last visited Dec. 23, 2015). Milacron held its initial public offering in 1946. *Milacron Inc. History*, FUNDINGUNIVERSE, *archived at* https://perma.cc/E2JD-UT9M (last visited Dec. 23, 2015). Pioneer went public in 1973. *Our Heritage,* PIONEER HI-BRED, *archived at* https://perma.cc/XKN6-LRY8 (last visited Dec. 23, 2015). Potlatch has been publicly traded since the 1950s. *Frequently Asked Questions,* POTLATCH CORP., *archived at* https://perma.cc/VG4K-H7FU (last visited Dec. 23, 2015). Quaker went public in 1972. *Our History,* QUAKER CHEM. CORP., *archived at* https://perma.cc/9T7Q-Y8CN (last visited Dec. 23, 2015). Finally, Synovus was listed on the NYSE by 1979. Synovus Financial Corporation, The New Georgia Encyclopedia, Sept. 17, 2013, *available at* http://www.georgiaencyclopedia.org/articles/business-economy/synovus/articles/business-economy/synovus-financial-corporation"*Looking Back. Moving Forward.*, TOTAL SYS. SERVS. INC., *archived at* https://perma.cc/G4JG-8SDY (last visited Dec. 23, 2015).

[218]*See History,* ROPER PUMPS CO., *archived at* https://perma.cc/LW3V-LP9Q (last visited Dec. 23, 2015) (stating that the Roper family line ended in 1942 with the death of the founder's son); *Looking Ahead: The Shaw Group* Explained, http://everything.explained.today/The_Shaw_Group/ ("The Shaw group was founded in 1987 by J.M. Bernard, Jr., the chariman and chief executive officer; Oscar LaFleur, and one other individual . . . .").

[219]Roper went public with TPV in 1992. *See* Roper Indus., Inc., Prospectus, at 6 (Feb. 12, 1992) [hereinafter Roper Prospectus]. Shaw did the same in 1993. *See* The Shaw Group, Registration Statement (Form S-1), at 6 (Oct. 1993) [hereinafter Shaw Prospectus].

[220]*See* Andrei Shleifer & Robert W. Vishny, *Takeovers in the '60s and the '80s: Evidence and Implications,* 12 STRATEGIC MGMT. J. 51, 53 (1991) (discussing the economic climate that influenced the wave of hostile takeovers in 1980s).

prestigious exchange, relaxed its longstanding requirement that listed companies have a one-share-one-vote structure.[221]

The SEC responded to this trend by issuing Rule 19c-4,[222] which prohibited exchanges from listing companies that engaged in transactions that disparately reduced the per-share voting rights of existing common stockholders.[223] Rule 19c-4 provided that adopting TPV was presumed to have this prohibited effect.[224]

Ten of the twelve TPV companies adopted TPV in the window between June 1984, when the NYSE relaxed its one-share-one-vote rules, and June 1987, when the SEC proposed Rule 19c-4.[225]

The United States Court of Appeals for the D.C. Circuit struck down Rule 19c-4 in 1990.[226] In 1994, under encouragement from the

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[221] *See* Roberta S. Karmel, *Qualitative Standards for "Qualified Securities": SEC Regulation of Voting Rights*, 36 CATH. U. L. REV. 809, 819 (1987).

[222] Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19c-4*, 69 WASH. U. L.Q. 565, 566-67 (1991). This Rule was proposed in June 1987 and adopted in July 1988. *Id.* at 566.

[223] *See id.*; 17 C.F.R. § 240.19c-4 (1990).

[224] *See* Bainbridge, *supra* note 222, at 579; 17 C.F.R. § 240.19c-4(a) (1990).

[225] The dynamic at play here is somewhat complex: All twelve of the TPV companies were listed on the NYSE at some point while they had TPV in place. However, only six of the ten firms that adopted TPV from 1985 through 1987 were listed on the NYSE at the time they adopted TPV. Aflac was listed on the NYSE in 1974 and adopted TPV in 1985. *See* Aflac Proxy, *supra* note 216, at 9-12 (providing the TPV adoption date); *Our History*, AFLAC, *supra* note 217 (stating the NYSE listing date). Carlisle was listed on the NYSE in 1960 and adopted TPV in 1986. *See* Carlisle Proxy, *supra* note 216, at 2 (providing the TPV adoption date); *Carlisle's History*, CARLISLE, *supra* note 217 (stating Carlisle's NYSE listing date). Century was listed on the NYSE in 1978 and adopted TPV in 1987. *See* Century Proxy, *supra* note 216, 7 (stating Century's TPV adoption date); *Company History,* CENTURYLINK, *supra* note 217 (stating Century's NYSE listing date). Potlatch was listed on the NYSE in 1969 and adopted TPV in 1985. *See* Potlatch Proxy, *supra* note 216, at 3 (providing the TPV adoption date); *Frequently Asked Questions,* POTLATCH CORP., *supra* note 217 (stating Potlatch's NYSE listing date). Smucker was listed on the NYSE in 1965 and adopted TPV in 1985. *See* Smucker Proxy, *supra* note 216, at 8 (providing Smucker's TPV adoption date); *Investor FAQ*, J.M. SMUCKER CO., *supra* note 217 (stating Smucker's NYSE listing year). We could not determine when Milacron was first listed on the NYSE, but it was listed on the NYSE at the time it adopted TPV. *See* Milacron Proxy, *supra* note 216, at 2. The other four firms became listed on the NYSE an average of approximately six years after adopting TPV: Church & Dwight, Pioneer, Quaker, and Synovus listed on the NYSE four, ten, nine, and three years after adopting TPV, respectively. *See* Church & Dwight Proxy, *supra* note 216, at 4; Pioneer Proxy, *supra* note 216, at 3; Quaker Proxy, *supra* note 216, at 10; Synovus Proxy, *supra* note 216, at 8; *Our Heritage*, DUPONT PIONEER, *archived at* https://perma.cc/4V3U-MF5G (last visited Dec. 23, 2015) [hereinafter *Pioneer Heritage*]; *FAQs*, QUAKER CHEM. CORP., *archived at* https://perma.cc/7G52-MT2N (last visited Dec. 28, 2015); Press Release, Synovus, Synovus Announces Record Date for TSYS Spin-off (Nov. 30, 2007), *archived at* https://perma.cc/G8YN-RFA5; *see generally Domestic Common Stock Listings 1990-1999*, N.Y. STOCK EXCHANGE, *archived at* https://perma.cc/R3FD-5TP7 (last visited Dec. 28, 2015).

[226] *See* Bus. Roundtable v. SEC, 905 F.2d 406, 417 (D.C. Cir. 1990).

SEC, the NYSE, the AMEX, and the NASDAQ all adopted rules that were similar to what Rule 19c-4 had imposed.[227] The remaining two TPV companies adopted TPV between these two events.[228]

Prior articles have charted how connections between firms have served as conduits for spreading legal innovations.[229] Our findings suggest that TPV may have spread in a similar way. Figure 1, below, shows connections between the directors of the TPV firms.[230] For example, when Synovus adopted TPV in 1987, one of its directors was also a director at Aflac, which adopted TPV in 1985.[231] Thicker lines denote more connections. We found director-level connections between nine of the twelve TPV firms. We also note that the corporate headquarters of the TPV companies were predominantly located in the southeastern United States during the periods they had TPV.[232] This

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[227] *See* NYSE Rule 313.00; NASDAQ Rule 5640; AMEX Rule Sec. 122; Robert Todd Lang et al., *Special Study on Market Structure, Listing Standards and Corporate Governance*, 57 BUS. LAW. 1487, 1506 (2002) (internal citation and quotation omitted):

> Prodded by investors and then SEC Chairman Arthur Levitt, the NYSE, Nasdaq and the Amex finally agreed to a uniform voting rights standard in 1994. The agreed-upon standard, which was essentially a modified (but more flexible) version of the vacated Rule 19c-4, reflected the recognition by the trading markets and the shareholder and business communities of the need to achieve a consensual and balanced resolution of issues relative to shareholder disenfranchisement.

[228] *See* Roper Prospectus, *supra* note 219; Shaw Prospectus, *supra* note 219. We note that these two companies went public with TPV, and thus would not seem to have been subject to Rule 19c-4. However, the exchanges may have been more comfortable listing TPV companies in this window.

[229] *See, e.g.*, Victor Fleischer & Nancy Staudt, *The Supercharged IPO*, 67 VAND. L. REV. 307, 339-40 (2014) (discussing how overlapping professional networks and the use of the same lawyers and accountants contributed to the increasing use of "supercharged IPOs").

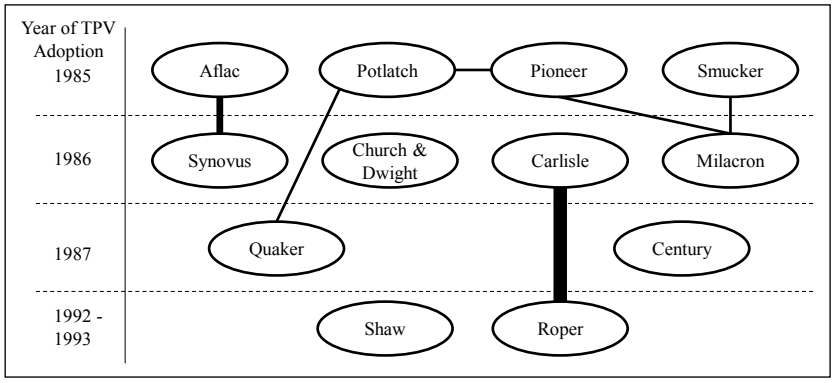
[230] More specifically, we checked to see if a director at a TPV company was a director or officer of another TPV company. We also checked to see if directors of two different TPV companies served together as directors or officers of a third company.

[231] Aflac directors were also on the boards of Synovus subsidiaries, and both companies' directors served together on the boards of other companies as well. *See* Aflac Proxy, *supra* note 216, at 2; Synovus Proxy, *supra* note 216, at 13-14.

[232] Company headquarters are in the following states: Aflac (Ga.), Carlisle (N.C.), CenturyLink (La.), Church & Dwight (N.J.); Smucker (Ohio), Milacron (Ohio), Pioneer (Iowa), Potlatch (Wash.), Quaker (Pa.), Roper (Fla.), Shaw (La.), Synovus (Ga.). *See Corporate Citizenship*, AFLAC, *archived at* https://perma.cc/46D9-T8MB (last visited Dec. 28, 2015); *Contact Us*, CARLISLE, *archived at* https://perma.cc/36KT-3F8W (last visited Dec. 28, 2015); *Corporate Headquarters*, CENTURYLINK, *archived at* https://perma.cc/H3R3-CBLK (last visited Dec. 28, 2015); *Who We Are: At a Glance*, CHURCH & DWIGHT CO., *archived at* https://perma.cc/9PTH-VXKC (last visited Dec. 28, 2015) [hereinafter Church & Dwight, *At a Glance*]; *Contact Us*, J.M. SMUCKER CO., *archived at* https://perma.cc/62KV-SDYF (last visited Dec. 28, 2015); *Locations*, MILACRON LLC, *archived at* https://perma.cc/TN8D-5FCD (last visited Dec. 28, 2015); *Contact Us*, DUPONT PIONEER, *archived at* https://perma.cc/5XQJ-8TJR (last visited Dec. 28, 2015); *Contact Us*, POTLATCH, *archived at* https://perma.cc/6N3S-XPV3 (last visited Dec. 28, 2015); *About Quaker*, QUAKER CHEM. CO., *archived at* https://perma.cc/SUY8-SLV7 (last visited Dec. 28, 2015) [hereinafter *About*

raises the likelihood that there are additional connections between the TPV firms, such as shared law firms, accounting firms, or underwriters.[233]

Figure 1: Connections Between TPV Company Directors



All of the TPV companies were longstanding businesses at the time they adopted TPV. Each company had operations dating back more than twenty years when it adopted TPV; half have been in existence in some form for over a century.[234]

Quaker]; *Investor Contact*, ROPER INDUS., *archived at* https://perma.cc/9RT3-N5Y8 (last visited Dec. 28, 2015); *The Shaw Group Inc.*, FORTUNE, *archived at* https://perma.cc/5KFX-RA39 (last visited Dec. 28, 2015); *Contact Us*, SYNOVUS, *archived at* https://perma.cc/PZ36-U3YK (last visited Dec. 28, 2015).

[233]For example, Shaw and Roper both used Smith Barney as an underwriter for their respective IPOs; Davis Polk was underwriter's counsel in both instances. *See* Roper Prospectus, *supra* note 219, at 1; Shaw Prospectus, *supra* note 219, at 1.

[234]Aflac originated in 1955. *Our History*, AFLAC, *supra* note 217. Carlisle originated in 1917. *Carlisle's History,* CARLISLE, *supra* note 217. CenturyLink was originally incorporated in 1968 as Central Telephone and Electronics. *Company History*, CENTURYLINK, *supra* note 217. Church & Dwight began in 1846. *Company Overview*, CHURCH & DWIGHT CO., *archived at* https://perma.cc/MG2N-9CV2 (last visited Dec. 28, 2015). Smucker's operations began in 1897. *Smucker's History*, J.M. SMUCKER CO., *archived at* https://perma.cc/3BU2-RG6J. Milacron was incorporated in 1884. *Milacron Timeline*, MILACRON, *archived at* https://perma.cc/AZF9-D8TW (last visited Dec. 28, 2015). Pioneer was founded in 1926. *Our Heritage*, DUPONT PIONEER, *supra* note 217. Potlatch originated in 1903. *About Us*, POTLATCH, *archived at* https://perma.cc/F6N2-ZUTY (last visited Dec. 28, 2015). Quaker originated in 1918. *See About Quaker*, *supra* note 232. Roper originated in 1919 as Geo. D. Roper Corporation. *Roper Industries, Inc. History,* FUNDING UNIVERSE, *archived at* https://perma.cc/4EYH-W67D (last visited Dec. 28, 2015). Shaw was founded in 1987 on purchasing the assets of Benjamin Shaw Company, a century-old pipe fabricator. *Shaw Group, Inc. History,* FUNDING UNIVERSE, *archived at* https://perma.cc/W9GC-YQAE (last visited Dec. 28, 2015) [hereinafter *Shaw Group, Inc.*]. Finally, Synovus originated in

Beyond the items described above, there are no obvious similarities among the TPV firms relative to other publicly listed firms. Approximately one half of the TPV companies were incorporated in Delaware during the period they had TPV, which mirrors the proportion of U.S. public firms as a whole.[235] The TPV companies represent a wide variety of industries, from finance to agriculture;[236] there does not seem to be any connection between industry and TPV status.[237] Some TPV companies are consumer-facing, with brands that are household

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1888. *Our History*, SYNOVUS, https://www.synovus.com/?id=1268 (last visited Dec. 28, 2015). Some of the companies have made changes in their company names over the years and their states of incorporation; all have made some changes to their business.

[235] *See* Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES (June 30, 2012), http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html?_r=1 ("Nearly half of all public corporations in the United States are incorporated in Delaware."); Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 565-68 (2002) (observing that slightly less than 60% of publicly traded corporations are incorporated in Delaware). Carlisle, Church & Dwight, Milacron, Potlatch, and Roper are incorporated in Delaware. *See* Carlisle Cos. Inc., Annual Report (Form 10-K) (Feb. 12, 2013), *archived at* https://perma.cc/VN4K-Y9CH; Church & Dwight Co., Inc., Annual Report (Form 10-K) (Feb. 22, 2014), *archived at* https://perma.cc/B9Z2-83AV; Milacron Inc., Annual Report (Form 10-K) (Mar. 24, 2008), *archived at* https://perma.cc/3J9Y-UVM4; *Frequently Asked Questions*, POTLATCH, *supra* note 217; Roper, Annual Report (Form 10-K) (Feb. 25, 2013), *archived at* https://perma.cc/G63U-4NMP. The remaining seven studied TPV firms are incorporated outside Delaware. *See* Aflac Inc., Annual Report (Form 10-K) (Feb. 26, 2013), *archived at* https://perma.cc/24VT-GV7G (Georgia); CenturyLink, Inc., Annual Report (Form 10-K) (Mar. 1, 2013), *archived at* https://perma.cc/K7DF-UFBU (Louisiana); J.M. Smucker Co., Annual Report (Form 10-K) (Jun. 21, 2013), *archived at* https://perma.cc/3RCT-ZX2J (Ohio); Pioneer Hi-Bred Int'l Inc., Annual Report (Form 10-K) (Nov. 23, 1998), *archived at* https://perma.cc/AMN6-7FYH (Iowa); Quaker Chem. Corp., Annual Report (Form 10-K) (Mar. 6 2013), *archived at* https://perma.cc/J5F8-KU3Q (Pennsylvania); Shaw Group Inc., Annual Report (Form 10-K) (Oct. 19, 2012), *archived at* https://perma.cc/VE2Q-KL52 (Louisiana); Synovus Fin. Inc., Annual Report (Form 10-K) (Feb. 28, 2014), *archived at* https://perma.cc/N4FB-74EX (Georgia).

[236] For example, TPV companies' industries include insurance (Aflac, Primary SIC Code 6411), telecommunications (Century, Primary SIC Code 4813), manufacturing consumer products under brands such as Arm & Hammer, Trojan, and Oxi Clean (Church & Dwight, SIC Code 2841), banking services (Synovus, SIC Code 6712), and agriculture (Pioneer, SIC Code 0119). *See About Aflac, Our Company*, AFLAC, *archived at* https://perma.cc/YEU2-7P9K (last visited Dec. 28, 2015); *About Us*, CENTURYLINK, *archived at* https://perma.cc/M2TU-RWE5 (last visited Dec. 28, 2015); Church & Dwight, *At a Glance*, *supra* note 232; *Investors*, DUPONT PIONEER, *archived at* https://perma.cc/8HRF-4F9N (last visited Dec. 28, 2015). The primary SIC codes for the other TPV companies are distributed across a spectrum of industries. They are: Carlisle (3069), Milacron (3559), Potlatch (6798), Quaker (2899), Roper (3823), Shaw (8711), Smucker (2033), and Synovus (6712).

[237] *Cf.* note 137, *supra*, and accompanying text, noting that dual-class stock is particularly common in certain industries. We also note that the small number of TPV companies cautions against drawing strong conclusions on this point.

names.[238] Others have an industrial client base.[239] Some are regional;[240] others have a global presence.[241]

No company delisted its securities from the NYSE during the period they had TPV.[242] However, six companies rescinded their TPV plans from 2003 to 2009,[243] and one was acquired by a company that did not have TPV.[244]

B. *The Terms of TPV Plans*

While all TPV plans provide long-term shares with more votes per share than short-term shares, the particulars of each TPV plan vary. Plans vary both in the number of votes that each long-term share receives

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[238] *See, e.g.*, *Our Brands*, J.M. SMUCKER CO., *archived at* https://perma.cc/W44V-D98G (last visited Dec. 28, 2015) (listing Smucker, Folgers, Dunkin' Donuts, and Pillsbury, among others).

[239] For example, Quaker produces chemical specialty products for various heavy industrial and manufacturing applications; Roper's business is engineered products and solutions for global niche markets; Shaw provides power plant engineering contractor and environmental services. *See*, *e.g Company FAQS*, QUAKER CHEM. CO., *archived at* https://perma.cc/7LUV-WMAF (last visited Dec. 28, 2015); *About Roper*, ROPER INDUS., *archived at* https://perma.cc/7S2J-98TX (last visited Dec. 28, 2015); *Shaw Group Inc.*, *supra* note 234.

[240] For example, Synovus primarily provides financial services to customers in the southeastern United States. *See Company Information*, SYNOVUS, https://www.synovus.com/?id=5 (last visited Dec. 28, 2015).

[241] For example, Quaker has facilities in nineteen countries, with regional headquarters in the Netherlands, Brazil, and China. *Locations & Phone Numbers*, QUAKER CHEM. CORP., *archived at* https://perma.cc/AW4H-R95W (last visited Dec. 28, 2015).

[242] Stock price data for the studied companies reflects no break in listing for the relevant periods. *See* Spreadsheet (on file with authors).

[243] The six companies rescinded TPV in the following years, explaining the rationale for doing so in their proxy statements: Century (1991), Church & Dwight (2003), Milacron (2003), Potlatch (2005), Roper (2006), Shaw (2007). *See* CenturyLink, Inc., Proxy Statement (Form DEF 14A), at 12-19 (May 1, 1991) [hereinafter Century Rescission]; Church & Dwight Co., Proxy Statement (Form DEF 14A), at 26-27 (Apr. 3, 2003) [hereinafter Church & Dwight Rescission]; Milacron, Inc., Proxy Statement (Form DEF 14A), at 26-31 (Apr. 23, 2003) [hereinafter Milacron Rescission]; Potlatch Corp., Proxy Statement (Form DEF 14A), at 31-33 (Mar. 30, 2005) [hereinafter Potlatch Rescission]; Roper Indus., Inc., Proxy Statement (Form DEF 14A), at 26 (May 1, 2006) [hereinafter Roper Rescission]; Shaw Group Inc., Proxy Statement (Form DEF 14A), at 35-36 (Dec. 22, 2006) [hereinafter Shaw Rescission]. Century's situation was somewhat unusual. It effectively rescinded TPV in 1991, when it eliminated prospectively the ability of stockholders to qualify for ten votes per share by providing that only shares owned continuously by the same person since May 30, 1987 (when TPV was adopted) would be entitled to ten votes per share. Century Rescission, *supra*. Century continued to refer to its essentially dual-class structure as time-phased voting. This structure was rescinded in connection with a merger transaction in 2008. CenturyTel Inc. Prospectus at 25, Dec. 22, 2008.

[244] Pioneer was acquired by DuPont in 1999 and ceased to exist thereafter as a separate entity. DuPont did not have TPV. *Pioneer Heritage*, *supra* note 225.

and in the number of years that shares must be held to qualify as long-term shares. Each of these factors affects the voting power both of long-term shareholders as a group and of individual long-term shareholders. As Table 1 illustrates, the most common choices are ten votes per long-term share (half of TPV companies) and a four-year holding period (three-quarters of TPV companies).

Table 1: Basic Terms of TPV Plans[245]

		Votes Per Long-Term Share		
		4	5	10
Holding Period, In Years	3		Pioneer	Milacron, Quaker
	4	Church & Dwight, Potlatch	Carlisle, Roper, Shaw	Aflac, Century, Smucker, Synovus

However, not all shares must be owned for the requisite holding period in order to qualify as long-term shares. First, among the companies that were publicly traded before they adopted TPV, essentially all treated shares outstanding at the time they adopted TPV as long-term shares.[246] Companies who went public with TPV in place

[245] *See* Aflac Proxy, *supra* note 216, at 9; Carlisle Proxy, *supra* note 216, at 15, 17; Century Proxy, *supra* note 216, 6-9; Church & Dwight Proxy, *supra* note 216, at 6; Milacron Proxy, *supra* note 216, at 12; Pioneer Proxy, *supra* note 216, at 3; Potlatch Proxy, *supra* note 216, at 3-4; Quaker Proxy, *supra* note 216, at 10-11; Roper Prospectus, *supra* note 219, at 6; Smucker Proxy, *supra* note 216, at 8-10; Shaw Rescission, *supra* note 243, at 35-36; Synovus Proxy, *supra* note 216, at 6.

[246] Aflac Proxy, *supra* note 216, at App. B; Carlisle Proxy, *supra* note 216, at 42; Church & Dwight Proxy, *supra* note 216, at 4; Smucker Proxy, *supra* note 216, at Exh. A at 1; Milacron Proxy, *supra* note 216, at App. A at 8; Pioneer Proxy, *supra* note 216, at 2; Potlatch Proxy, *supra* note 216, at 3; Quaker Proxy, *supra* note 216, at 10; Synovus Proxy, *supra* note 216, at Exh. B at 1. Century provided that all shares owned as of the record date for voting on TPV (Mar. 31, 1987) were long-term shares; the Proxy was dated April 27, 1987, and the vote was on May 28, 1987. *See* Century Proxy, *supra* note 216, 6; *see also* Smucker Proxy, *supra* note 216, at Exh. A at 2 (treating shares transferred pursuant to contracts entered into prior to the adoption of TPV as long-term shares upon receipt). Potlatch provided that all shares would have one vote for certain matters. *See* Potlatch Proxy, *supra* note 216, at App. A. Synovus, meanwhile, treats all small shareholders as long-term shareholders. *See* Synovus Proxy, *supra* note 216, at Exh. B at 1 (providing that shareholders with fewer than 100,000 shares qualify for long-term status). The number of shares a shareholder can own and still fall under this rule has been modified from time to time. *See, e.g.*, Synovus Fin. Corp., Proxy Statement (Form DEF 14A), at 2 (Apr. 6, 1990) (changing this number to 225,000).

treated all or substantially all of their pre-IPO shares (but not the shares sold in the IPO) as long-term shares.[247]

In addition, at many TPV companies, the board of directors has significant discretion over the number and ownership of the company's long-term shares. Smucker reset its holding period at least twice, each time in connection with a major transaction, rendering all outstanding shares owned as of those dates long-term shares.[248] Similarly, half the companies give the board of directors discretion to issue new shares or treasury shares as long-term shares, even though the transferee has not held these shares for the holding period.[249] Companies with this kind of provision usually explain in their proxy statements that this authority may deter a person from taking over the company.[250]

Companies also gave special treatment to shares issued to certain classes of investors, with managers and employees in particular getting positive treatment. Most companies provide that shares acquired via stock options issued under the company's employee benefit plan are deemed beneficially owned from the date of grant or earlier.[251] Some

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[247] *See* Roper Prospectus, *supra* note 216, at 3 (treating all pre-IPO shares as long-term shares); Shaw Prospectus, *supra* note 219, at 3-6 (indicating that, upon IPO, Shaw would have 8.102 million shares outstanding, with pre-IPO shareholders—all of whom were officers and directors—owning 4.977 million shares and possessing 87.7% of votes, corresponding to 87% of pre-IPO shareholders' shares being long-term shares).

[248] Smucker reset its holding period in 2002 and 2008. The former corresponded to Smucker's acquisition of Jif and Crisco from Procter & Gamble, and the latter corresponded to Smucker's acquisition of Folgers from Procter & Gamble. *See* J.M. Smucker Co., Proxy Statement (Form DEF 14A), at 1 (Jul. 9, 2002); J.M. Smucker Co., Proxy Statement (Form DEF 14A), at 3 (Jul. 9, 2009).

[249] *See* Carlisle Proxy, *supra* note 216, at 19; Roper Indus. Inc., Proxy Statement (Form DEF 14A), at A-2 (June 28, 2006); Smucker Proxy, *supra* note 216, at Exh. A at A-3 (July 25, 1985); Synovus Proxy, *supra* note 216, at Exh. B. at B-1; *see also* Church & Dwight Proxy, *supra* note 216, at Exh. A (allowing the board to do so when shares are issued or transferred from the Company's treasury pursuant to a public offering or as consideration for an acquisition); Pioneer Proxy, *supra* note 216, at 5 (making newly issued shares and shares transferred from treasury long-term shares unless the board provides otherwise); *see also infra* note 398 (describing a transaction between Church & Dwight and Occidental Petroleum in which Occidental (1) received Church & Dwight shares which were treated as long-term shares upon receipt and (2) agreed to vote those shares in accordance with Church & Dwight's wishes).

[250] *E.g.*, Smucker Proxy, *supra* note 216, at 12 (disclosing that "[t]he existence of this authority could deter any person seeking to acquire voting control" of Smucker); Pioneer Proxy, *supra* note 216, at 5 (providing that this provision "could also be used to discourage a takeover attempt or further increase voting control among the holders of Long-Term Shares at any given time").

[251] Church & Dwight Proxy, *supra* note 216, at Exh. A at 2-3 (providing that shares held by management are "deemed to be beneficially owned from the date such option is granted"); Milacron Proxy, *supra* note 216, at App. A at 9 (setting forth a similar provision); Synovus Proxy, *supra* note 216, at Exh. B at 2. Some start the holding period from the date

companies treat all shares issued pursuant to tax-qualified employee benefit plans as long-term shares.[252] We note that this also benefitted managers because, during the years in which companies were adopting TPV plans, managers often controlled how shares held in employee benefit plans were voted.[253] Two companies extend the same special treatment to shares acquired pursuant to dividend reinvestment plans.[254] One company explains this special treatment: "[E]mployees participating in such plans and stockholders who continue to reinvest . . . are demonstrating a long-term commitment to the Company."[255]

Some TPV terms disadvantage other classes of investors. For example, all TPV companies presume that shares held in "street" or nominee name are short-term shares.[256] This presumption can adversely affect shareholders who hold their shares through brokerage firms and banks. A shareholder can rebut this presumption by providing evidence that the shares have not changed beneficial ownership during the relevant period.[257]

In addition, one third of the companies have a special provision for large investors: If a shareholder fails to notify the company that she has acquired 5% of outstanding shares, her shares are deemed to have changed beneficial ownership.[258] Thus, on the failure to make such

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the option is exercised, however. Carlisle Proxy, *supra* note 216, at Attach. II at 40-41; Potlatch Proxy, *supra* note 216, at App. A.

[252]Church & Dwight Proxy, *supra* note 216, at Exh. A at 3; Potlatch Proxy, *supra* note 216, at App. A; Synovus Proxy, *supra* note 216, at Exh. B at 1; *see also* Milacron Proxy, *supra* note 216, at App. A at 9 (treating employees who receive shares through a company plan as beneficially owning those shares on the date they are allocated).

[253]*See* Brett McDonnell, *ESOPs' Failures: Fiduciary Duties When Managers of Employee-Owned Companies Vote to Entrench Themselves*, 2000 COLUM. BUS. L. REV. 199, 204-05.

[254] Potlatch Proxy, *supra* note 216, at App. A; Synovus Proxy, *supra* note 216, Exh. B at 1.

[255]Potlatch Proxy, *supra* note 216, at 6.

[256]*See, e.g.*, J.M. Smucker Co., Proxy Statement (Form DEF 14A), at 3 (July 2, 2013) (explaining that shares held in "street name" do not obtain the long-term share voting benefit unless written certification is complete, even if the shares have been held for the four-year long-term share threshold).

[257]*See* Aflac Proxy, *supra* note 216, at App. B; Carlisle Proxy, *supra* note 216, at 40 (referring to shares held by brokers or banks or in nominee name); Church & Dwight Proxy, *supra* note 216, at Exh. A at 3; Milacron Proxy, *supra* note 216, at App. A at 9; Pioneer Proxy, *supra* note 216, at 2; Potlatch Proxy, *supra* note 216, at App. A (specifying that shares held in street or nominee name include shares held by a broker, clearing agency, voting trustee, bank, or trust company); Quaker Proxy, *supra* note 216, at 16 (similar); Synovus Proxy, *supra* note 216, at Exh. B at 2.

[258]Carlisle Proxy, *supra* note 216, at Attach. II at 40 (requiring notice within ten days); Roper Indus., Proxy Statement (Form DEF 14A), at 32-33 (Feb. 12, 1992) [hereinafter Roper Proxy] (same); Shaw Rescission, *supra* note 243, at Annex A at 45-46 (same); *see also* Smucker Proxy, *supra* note 216, at Exh. A at 2 (deeming a change of beneficial ownership of

notification, her shares become short-term shares, even if she has held them for many years.[259]

At each TPV company, the holding period for a share restarts upon a change in beneficial ownership. The baseline definition of beneficial ownership is substantially the same across companies and tracks the definition that the SEC applies to proxy statements.[260]

Companies both expand and limit this baseline definition. For example, companies commonly deem a change in the person who has the right to receive dividends from a share of stock as constituting a change in beneficial ownership for TPV purposes.[261]

Other transactions are specifically listed as not constituting changes in beneficial ownership for TPV purposes. Transfers made without valuable consideration, such as gifts, bequests, and inheritances, are exempted.[262] Changes related to share-owning trusts, such as a change in trustee, guardian, custodian, or beneficiary, or a distribution of shares to a beneficiary, are also exempted.[263] These exemptions are presumably intended to facilitate tax-planning activities and the

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all of a 5% shareholder's shares each day until notice is given). Smucker also provided that a shareholder with one-fifth of voting power or more would have one vote per share unless other shareholders approve it. *Id.* at A-1.

[259]Synovus also had a roughly converse rule, automatically treating shareholders with fewer than 100,000 shares as holding long-term shares. Synovus Proxy, *supra* note 216, Exh. B at 1. This amount was adjusted in subsequent years. *E.g.*, Synovus Fin. Corp., Proxy Statement (Form DEF 14A), Ex. A at 3, (Apr. 6, 1990).

[260]Under this definition, either a transfer in voting or investment power can constitute a change of beneficial ownership. *See* Rule 13d-3 (17 C.F.R. 240.13d-4); Securities and Exchange Act Schedule 14A (17 C.F.R. 240.14a-101); Item 403 of Regulation S-K (17 C.F.R. 229.403); Milacron Proxy, *supra* note 216, at App. A at 9; Potlatch Proxy, *supra* note 216, at App. A.

[261]*See e.g.,* Church & Dwight Proxy, *supra* note 216, at Exh. A at 3; Roper Proxy, *supra* note 258, at 32; Shaw Rescission, *supra* note 243, at Annex A at 45-46; Smucker Proxy, *supra* note 216, at 11-12. These provisions generally do not apply if the designation of a new dividend recipient is revocable.

[262]This exemption applies as long as the transfer is made in good faith and not for the purpose of circumventing the TPV rules. Aflac Proxy, *supra* note 216, at 9; Carlisle Proxy, *supra* note 216, at Attach II, at 2; Church & Dwight Proxy, *supra* note 216, at Exh. A at 2; Smucker Proxy, *supra* note 216, at 11-12; Milacron Proxy, *supra* note 216, at 13; Pioneer Proxy, *supra* note 216, at 4; Quaker Proxy, *supra* note 216, at 16; Roper Proxy, *supra* note 258, at 33; Shaw Rescission, *supra* note 243, at 46; Synovus Proxy, *supra* note 216, at Exh. B at 1.

[263]Church & Dwight Proxy, *supra* note 216, at Exh. A at 2; Pioneer Proxy, *supra* note 216, at 4; Potlatch Proxy, *supra* note 216, at App. A; Quaker Proxy, *supra* note 216, at 16. Some are quite complex. Carlisle Proxy, *supra* note 216, at 14; Roper Rescission, *supra* note 243, at Annex A at 2; Shaw Rescission, *supra* note 243, at 46; Synovus Proxy, *supra* note 216, at Exh. B at 1.

maintenance of family control; several companies acknowledge this motivation explicitly.[264]

Some companies also have a catch-all provision, stating that transfers of beneficial interests do not constitute a change in beneficial ownership "where the circumstances surrounding [the] transfer clearly demonstrate that no material change in beneficial ownership has occurred."[265] Somewhat analogously, all of the TPV companies provide that shares acquired via a stock split or stock dividend have the same holding period as the original shares with respect to which the new shares are issued.[266]

Finally, one company provided for the termination of TPV if long-term shares fell below a threshold percentage of outstanding shares. That is, if long-term shares constituted less than 15% of outstanding shares at two consecutive annual meetings, all shares would have only one vote per share thereafter.[267]

C. *Companies' Stated Reasons for TPV Implementations and Rescissions*

We now discuss the reasons given by TPV companies for adopting and rescinding TPV, respectively.

1. Implementations

We begin with the reasons companies gave for proposing TPV to their shareholders, before turning to the possible adverse consequences of TPV they disclosed.[268]

a. *Arguments Raised in Favor*

Most TPV companies, in proposing TPV to their shareholders, expressed concern over the influence of short-term, speculative

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[264]Carlisle Proxy, *supra* note 216, at 41; Roper Rescission, *supra* note 243, at Annex A at 2; Shaw Rescission, *supra* note 243, at 46.

[265]Church & Dwight Proxy, *supra* note 216, at Exh. A at 2; Potlatch Proxy, *supra* note 216, at App. A; Quaker Proxy, *supra* note 216, at 16.

[266]Aflac Proxy, *supra* note 216, at 9; Carlisle Proxy, *supra* note 216, at 42; Church & Dwight Proxy, *supra* note 216, at Exh. A at 2; Smucker Proxy, *supra* note 216, at 12; Milacron Proxy, *supra* note 216, at 13; Pioneer Proxy, *supra* note 216, at 4-5; Potlatch Proxy, *supra* note 216, at App. A; Quaker Proxy, *supra* note 216, at 17; Shaw Rescission, *supra* note 243, at 47; Synovus Proxy, *supra* note 216, at Exh. B at 2.

[267] Milacron Proxy, *supra* note 216, at App. A at 10.

[268]The information in Subpart 1 comes from proxy statements of the companies when they adopted TPV and registration statements in 1986, 1992, and 1993 for Carlisle, Roper and Shaw, respectively. *See supra* notes 216 & 219.

investors.[269] One company, for example, expressed its belief about the growing influence of "investment managers interested in short-term portfolio performance rather than long-term growth and hence their support for highly leveraged takeovers or management strategies which emphasize only short-term return."[270] Many companies expressed the belief that short-term investors either "caused some companies to be overly concerned with short-term performance at the expense of the long-term best interests of such companies"[271] or "impair[ed] the ability of management and the [board] to focus on long-term goals."[272] The companies framed TPV as protecting the board and management from the adverse "influence of speculative investors with short-term objectives."[273] The companies said that TPV would give long-term shareholders, who "share the [c]ompany's commitment to long-term performance, as evidenced by their continuing stock ownership," the "greatest influence" over the company's affairs.[274]

TPV companies expressed the view that TPV would thus "enable" the company to focus on long-term performance and growth.[275] A

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[269] *See* Aflac Proxy, *supra* note 216, at 9-10; Carlisle Proxy, *supra* note 216, at 11; Century Proxy, *supra* note 216, at 7-8; Church & Dwight Proxy, *supra* note 216, at 4; Smucker Proxy, *supra* note 216, at 8-9; Milacron Proxy, *supra* note 216, at 14; Pioneer Proxy, *supra* note 216, at 2; Potlatch Proxy, *supra* note 216, at 3; Quaker Proxy, *supra* note 216, at 10.

[270] Milacron Proxy, *supra* note 216, at 14.

[271] Aflac Proxy, *supra* note 216, at 9. *See* Church & Dwight Proxy, *supra* note 216, at 4; Potlatch Proxy, *supra* note 216, at 3; *see also* Milacron Proxy, *supra* note 216, at 14 (expressing this concept in different language).

[272] Century Proxy, *supra* note 216, at 8; *see also* Pioneer Proxy, *supra* note 216, at 2 (stating this concern in similar terms); Quaker Proxy, *supra* note 216, at 10 (same); Smucker Proxy, *supra* note 216, at 8-9 (similar).

[273] Carlisle Proxy, *supra* note 216, at 17; *see also* Century Proxy, *supra* note 216, at 8 ("The purpose of the Amendment is to protect the Company and its current shareholders . . . ."); Pioneer Proxy, *supra* note 216, at 2 (same); Smucker Proxy, *supra* note 216, at 8-9 (same).

[274] Century Proxy, *supra* note 216, at 8; *see also* Aflac Proxy, *supra* note 216, at 9-10 (granting long-term shareholders a "greater vote"); Carlisle Proxy, *supra* note 216, at 29 (stating that "investors who share [the company's] commitment to long-term performance and growth will exert the greatest influence"); Letter from Dwight C. Minton, Chairman & CEO, to Stockholders, *in* Church & Dwight Proxy, *supra* note 216 ("This amendment is intended to give long-term investors a greater voice in the Company's affairs than short-term investors."); Milacron Proxy, *supra* note 216, at 14 (giving long-term shareholders a "greater voice"); Pioneer Proxy, *supra* note 216, at 2 ("The Amendment is designed to achieve this objective by ensuring that investors who share the Company's commitment to long-term performance, as evidenced by their continuing stock ownership, will exert the greatest influence over the Company's affairs."); Smucker Proxy, *supra* note 216, at 9 (giving long-term shareholders "who share the Company's commitment to long-term performance and growth . . . the greatest influence").

[275] Carlisle Proxy, *supra* note 216, at 12 (stating that TPV "will enable the management . . . to focus on long-term business goals and strategies rather than on short-term results"); Potlatch Proxy, *supra* note 216, at 6 ("The Amendment has been proposed at this time to

number of companies sought to "foster an atmosphere in which the executive officers and Board of Directors can make decisions which will be in the long-term best interests of the [c]ompany and its stockholders."[276] A few companies referred to the history of their company and its philosophy of "emphasiz[ing] long-range planning and . . . dedicat[ing] the [c]ompany's resources to long-term goals."[277] Certain companies stated that their "[d]irectors believe[d] that this philosophy [was] important to many stockholders and ha[d] been responsible for increasing the value of the business despite short-term variations in industry and national economic conditions."[278]

The companies also said that TPV would encourage persons interested in taking over the company to negotiate with the company's board of directors.[279] Thus, the objective was in essence to discourage hostile takeovers, which often involve contested shareholder votes to elect new board members.[280] TPV companies expressed their belief that negotiations with the board encouraged by TPV were advantageous

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enable the Directors and officers to concentrate on the long-term best interests of the Company."); Quaker Proxy, *supra* note 216, at 12 (stating that TPV would "advance the best interests of the Company and all of its shareholders by enabling the Company to seek long-term performance rather than emphasizing quarter-by-quarter results"; Roper Prospectus, *supra* note 219, at 35 (explaining that TPV "will enable management and the Board of Directors to focus on long-term performance and growth").

[276]Aflac Proxy, *supra* note 216, at 9; Century Proxy, *supra* note 216, at 7; Church & Dwight Proxy, *supra* note 216, at 5; Smucker Proxy, *supra* note 216, at 9; Milacron Proxy, *supra* note 216, at 14. *See* Quaker Proxy, *supra* note 216, at 10 (noting that TPV reflects "the Company's desire to create an atmosphere in which the Board . . . will be free to pursue the Company's primary business objectives").

[277]Church & Dwight Proxy, *supra* note 216, at 4.

[278]*Id.*; Potlatch Proxy, *supra* note 216, at 3; Milacron Proxy, *supra* note 216, at 14 (expressing the same sentiment except for a nod to the "relatively cyclical nature of its business"). Some companies referred to company-specific reasons for TPV. For example, Century referred to a specific "long-term growth strategy" it was pursuing with its "cellular and paging investments" that would likely "retard short-term performance for the next decade." Century Proxy, *supra* note 216, at 7. Milacron noted that the "relative vulnerability of the Company's business and the market prices of its shares to fluctuations in the business cycles and conditions of international trade and investment" madea long-term perspective important in evaluating its performance. Milacron Proxy, *supra* note 216, at 14.

[279]Aflac Proxy, *supra* note 216, at 10; Church & Dwight Proxy, *supra* note 216, at 5; Potlatch Proxy, *supra* note 216, at 4; Smucker Proxy, *supra* note 216, at 9. Some companies stated that TPV, in combination with previously adopted defensive measures, would encourage negotiations. Century Proxy, *supra* note 216, at 8; Quaker Proxy, *supra* note 216, at 10; Synovus Proxy, *supra* note 216, at 5.

[280]A potential acquirer of a TPV company would acquire short-term shares because her purchase of company shares would constitute a change in beneficial ownership. Thus, the relative voting power of the acquirer in acquiring company shares would be less in a TPV company than in a one-share-one-vote company. Moreover, long-term company shareholders, often including insiders, would have enhanced control of a TPV company, which would hinder the transfer of control of the company without their consent. *See, e.g.*, Aflac Proxy, *supra* note 216, at 10; Smucker Proxy, *supra* note 216, at 9.

because the company's board of directors would be in a position to determine whether a change of control was in the best interest of the company and all its shareholders.[281] Some companies offered reasons for this conclusion, such as the board's knowledge of the company's value and prospects, the board's ability to evaluate whether the financing of the takeover would impair the company's ability to finance long-term growth, the difficulties shareholders have in evaluating the fairness of such offers, and acquirers' advantages in negotiating takeover terms when stock prices are depressed due to cyclical industry downturns or general economic conditions.[282] Some companies focused on their belief that maintaining the company's independence was in the long-term interests of the company and its shareholders.[283]

Most companies also gave as a reason for adopting TPV its impact on discouraging "greenmail."[284] Greenmail refers to the situation where

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[281] *See* Aflac Proxy, *supra* note 216, at 10; Century Proxy, *supra* note 216, at 8; Church & Dwight Proxy, *supra* note 216, at 5; Smucker Proxy, *supra* note 216, at 9; Milacron Proxy, *supra* note 216, at 15; Potlatch Proxy, *supra* note 216, at 2; Quaker Proxy, *supra* note 216, at 10.

[282] *See* Church & Dwight Proxy, *supra* note 216, at 5, 8 (noting also that negotiations would enable shareholders to get the best possible terms for their shares rather than having bidders address "stockholders piecemeal on a take-it-or-leave it basis"); Milacron Proxy, *supra* note 216, at 15 (discussing the advantage of "careful consideration by the [b]oard of the proposed terms and conditions [of a takeover offer], including price, form of consideration, tax effects and whether the proposal is soundly financed or a highly leveraged proposal which will lead to a breakup of the [c]ompany or impair its ability to finance long-term growth"); *id.* (pointing to the difficulty of shareholders in evaluating the "changing nature of the [c]ompany's business and the value . . . of 'hidden' assets such as the results of its research and development program, new products in various stages of development and introduction, its name and reputation among customers worldwide and its highly skilled employees"); Pioneer Proxy, *supra* note 216, at 2 (encouraging negotiations with the board in a "position to consider and react to any such potential change in control in the manner they believe to be in the best interests of all the [c]ompany's shareholders and its non-shareholder constituencies"); Potlatch Proxy, *supra* note 216, at 4 (encouraging potential acquirer to "initiate arms-length negotiations with the [b]oard of [d]irectors, who will then be in a position to follow a course of action which it believes to be in the best interests of all the [c]ompany's stockholders").

[283] Pioneer Proxy, *supra* note 216, at 2 (proposing TPV, in the context of an offer for the Company, to further the Company's "policy of independence," which it stated was important for preserving relationships with non-shareholder constituencies on which the company's performance depends); Synovus Proxy, *supra* note 216, at 4 (introducing several antitakeover amendments to its articles of incorporation in addition to TPV to "remain an independent entity"). Church & Dwight and Potlatch referred to the interests of a majority of their shareholders in preserving the "unique character" of their companies; Smucker expressed a similar sentiment. Letter from Dwight C. Minton, Chairman & CEO, to Stockholders, *in* Church & Dwight Proxy, *supra* note 216; Letter from Richard B. Madden, Chairman & CEO, to Shareholders, *in* Potlatch Proxy, *supra* note 216; Smucker Proxy, *supra* note 216, at 8.

[284] *See, e.g.*, Aflac Proxy, *supra* note 216, at 10; Carlisle Proxy, *supra* note 216, at 11; Century Proxy, *supra* note 216, at 8; Church & Dwight Proxy, *supra* note 216, at 5; Milacron

a company threatened with a takeover bid removes that threat by acquiring the shares of the bidder at a substantial premium (over market price). This is less likely to occur if a firm has TPV. TPV shares newly acquired by the bidder are not considered long-term shares. This diminishes the seriousness of the bidder's takeover threat, and thus reduces the likelihood that the company will pay greenmail to eliminate that threat.

Finally, one company gave as an express reason for TPV the "greater flexibility" it would give the company "to issue equity capital to finance expansion or to take advantage of attractive acquisition or joint venture opportunities" with only minimal dilution of long-term shareholders' voting rights.[285] While other companies did not expressly state this reason, they increased the number of shares authorized in their articles of incorporation at the time they adopted TPV, which would facilitate the issuance of additional equity capital.[286]

b. *Possible Adverse Consequences*

Companies gave as a possible adverse consequence of TPV that long-term shareholders, who may not own a majority of the company's shares and whose interests may differ from short-term shareholders',

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Proxy, *supra* note 216, at 15; Potlatch Proxy, *supra* note 216, at 4; Synovus Proxy, *supra* note 216, at 5.

[285] Milacron Proxy, *supra* note 216, at 14.

[286] *See* Aflac Proxy, *supra* note 216, at 8 (increasing authorized shares from 25 to 75 million); Roper Prospectus, *supra* note 219, at 6 (noting that "a substantial number of shares of [c]ommon [s]tock will become available for sale in the public market at various times following the completion of the [o]ffering"); Synovus Proxy, *supra* note 216, at 3-4 (increasing authorized shares from 40 to 100 million). *See also* Milacron Proxy, *supra* note 216, at 20 (increasing authorized shares from 30 to 50 million). Smucker stated, however, that it "has no present intention . . . of issuing or transferring new shares in the foreseeable future." Smucker Proxy, *supra* note 216, at 12. *Accord* Pioneer Proxy, *supra* note 216, at 5; Quaker Proxy, *supra* note 216, at 12. Some companies sought to assure shareholders at the time of adopting TPV that insiders were not planning to change their shareholdings. *See* Milacron Proxy, *supra* note 216, at 16-17 (disclosing that "descendants of the [c]ompany's founder, their in-laws, and trusts established by them" intend, at least over the near term, to retain their shares in the company); Pioneer Proxy, *supra* note 216, at 3 (stating that "[t]he percentage of shares . . . owned by directors and officers has remained relatively constant in recent years[,]" thereby implying that this situation will probably continue); Potlatch Proxy, *supra* note 216, at 3 ("Many [d]irectors, officers and other employees of the [c]ompany have held their shares for many years and it can be expected that such individuals will continue to hold their shares for the long term."); Quaker Proxy, *supra* note 216, at 11 ("The percentage ownership of the [c]ommon [s]tock held by the [c]ompany's directors and officers has been fairly constant throughout recent years. The [c]ompany is not aware, moreover, of any other significant changes in beneficial ownership that have occurred in the past or are likely in the future."); Smucker Proxy, *supra* note 216, at 10 (declaring that share holdings of insiders have been constant throughout the years and are not expected to change in the near future).

would control the company.[287] Moreover, they disclosed the possible or likely concentration of control in an insider group as public shareholders sell their shares.[288] The companies variously defined the insider group as including founders and their families, directors, officers, and/or employees.[289] All shareholders at the time of the TPV recapitalization received long-term shares; thus, calculations of the likely concentration of control in an insider group due to TPV required the company to make assumptions about the percentage of public shareholders and insiders who would sell their shares in the future. Many companies calculated the likely concentration of shares in the group, making differing assumptions in the process.[290]

Because potential acquirers would initially acquire short-term shares, and TPV may result in insiders having disproportionate control, all companies recognized that TPV might have an antitakeover effect.[291]

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[287]Often, companies specifically noted that this could mean lost premiums from unconsummated change-of-control transactions. Aflac Proxy, *supra* note 216, at 11; Carlisle Proxy, *supra* note 216, at 19-20, 32; Century Proxy, *supra* note 216, at 11; Church & Dwight Proxy, *supra* note 216, at 8-9; Milacron Proxy, *supra* note 216, at 15-16; Potlatch Proxy, *supra* note 216, at 5-6; Smucker Proxy, *supra* note 216, at 13-14.

[288]*See* Aflac Proxy, *supra* note 216, at 11; Century Proxy, *supra* note 216, at 11; Church & Dwight Proxy, *supra* note 216, at 8-9; Milacron Proxy, *supra* note 216, at 15-17; Smucker Proxy, *supra* note 216, at 14; Pioneer Proxy, *supra* note 216, at 5 (stating that "it is likely that the [a]mendment will increase the voting power of current management"); Quaker Proxy, *supra* note 216, at 12 ("Depending on the extent shares are traded after the [e]ffective [d]ate, the [a]mendment could result in the concentration of effective or even absolute voting control in the hands of management . . . .").

[289]*See, e.g.*, Century Proxy, *supra* note 216, at 9 (describing the voting power of directors, officers, and employee benefit plans); Smucker Proxy, *supra* note 216, at 14 (noting that "management members of the Smucker family" would control the company after implementation of TPV).

[290]*See* Aflac Proxy, *supra* note 216, at 10 (hypothesizing the number of shares that might be sold post-TPV and prior to the annual shareholders meeting and assuming that all management shareholders excercise stock options but do not sell); Century Proxy, *supra* note 216, at 9 (making assumptions about the number of shares that would be transferred); Pioneer Proxy, *supra* note 216, at 5 (suggesting the result if 50% of shares were traded but management shareholders did not sell any shares); Smucker Proxy, *supra* note 216, at 9-10 (making similar assumptions); *see also* Quaker Proxy, *supra* note 216, at 12 (stating that the result of any illustrative calculation would depend on the number of shares traded post-TPV adoption).

[291]Most companies said TPV "may" or "could" be considered or deemed to have an antitakeover effect. Aflac Proxy, *supra* note 216, at 11 (acknowledging that, at least to some degree, TPV "makes it less likely that a takeover attempt opposed by the holders of long-term shares will succeed"), Carlisle Proxy, *supra* note 216, at 16 (explaining that the "effect of [TPV] may be to deter a future takeover attempt which is not approved by the [b]oard"); Quaker Proxy, *supra* note 216, at 11 (stating that TPV "may be considered to be an anti-takeover proposal"); Roper Prospectus, *supra* note 219, at 35 (disclosing that TPV "may be deemed to have anti-takeover effects"); Smucker Proxy, *supra* note 216, at 10 (explaining that TPV "may be considered an anti-takeover proposal"); Synovus Proxy, *supra* note 216, at 4

Almost every TPV company had other provisions with an antitakeover effect at the time it adopted TPV.[292] Every company disclosed that TPV,

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(referring to TPV as one of the antitakeover amendments). Other companies explained that TPV would discourage hostile takeover attempts opposed by long-term shareholders. Aflac Proxy, *supra* note 216, at 11 (noting that TPV would make it "difficult, if not impossible, for a third party to acquire control of the [c]ompany on terms opposed by the holders of long-term shares, including the [d]irectors, executive officers and employees"); Century Proxy, *supra* note 216, at 11 (stating that TPV "could hinder a person attempting to acquire control of the [c]ompany on terms opposed by the [l]ong-[t]erm [s]hareholders"); Church & Dwight Proxy, *supra* note 216, at 5 (disclosing that the TPV amendment would make it more "difficult, although not impossible, for a third party to acquire control of the company on terms opposed by the long-term stockholders"); Pioneer Proxy, *supra* note 216, at 5 (noting that a takeover attempt opposed by long-term shareholders "might also be less likely to succeed"); Potlatch Proxy, *supra* note 216, at 4 (stating that TPV will make "it difficult, if not impossible, for a third party to acquire control of the [c]ompany on terms opposed by the long-term stockholders"); Quaker Proxy, *supra* note 216, at 12 (noting that "a takeover attempt . . . opposed by long-term shareholders might be less likely to succeed"); *see also* Milacron Proxy, *supra* note 216, at 15 ("The [b]oard anticipates that the [TPV] recapitalization will discourage hostile takeover attempts . . . ."); Synovus Proxy, *supra* note 216, at 2 (disclosing that "[t]he proposed amendments [including TPV] . . . are of a general antitakeover nature, meaning, specifically, that they are capable of use to deter, or are, in fact, addressed and designed specifically to deter, an unsolicited attempt to takeover or effect a change in control" of the company). After Potlatch proposed TPV at a special meeting of shareholders, it received and rejected a takeover offer. Potlatch ultimately purchased all of the potential acquirer's Potlatch shares. Letter from Robert A.G. Monks at 2 (Dec. 4, 1985) (received Dec. 19, 1986 as proxy soliciting material). Most companies stated that they were not aware of an existing or threatened effort to take over the company at the time they proposed TPV. *See* Aflac Proxy, *supra* note 216, at 11; Century Proxy, *supra* note 216, at 8; Church & Dwight, *supra* note 216, at 5-6; Potlatch Proxy, *supra* note 216, at 4; Smucker Proxy, *supra* note 216, at 9; Synovus Proxy, *supra* note 216, at 5.

[292]Century Proxy, *supra* note 216, at 13-15 (listing other previously adopted antitakeover measures, including a staggered board, super-majority voting approval of certain business combinations, blank check preferred stock, a preferred stock purchase rights plan, and certain executive compensation agreements); Church & Dwight Proxy, *supra* note 216, at 10-12 (listing a staggered board, super-majority voting, and series preferred stock); Milacron Proxy, *supra* note 216, at 19 (listing a staggered board, serial preferred stock, and a unanimous written consent procedure, among other provisions); Pioneer Proxy, *supra* note 216, at 6 (describing the company's staggered board and serial preferred stock and noting that directors "may be removed only for cause (determined by a judicial finding of misconduct), by a two-thirds vote of the shares"); Potlatch Proxy, *supra* note 216, at 7-9 (describing the company's staggered board, preferred stock, prohibition of shareholder action by written consent, business combination provision, supermajority voting, and other provisions); Quaker Proxy, *supra* note 216, at 13 (noting that the company had previously adopted preferred stock, a staggered board, and a business combination provision, as well as other provisions limiting shareholders' ability to call special shareholder meetings and remove directors); Roper Prospectus, *supra* note 219, at 35-35 (noting Delaware business combination provision set forth in Section 203 of the *Delaware General Corporation Law* ("*DGCL*")); Shaw Prospectus, *supra* note 219, at 29-30 (noting the company's prior adoption of blank check preferred stock, a staggered board, an advance notice provision for board nominations and other matters, and shareholder supermajority voting for changing certain articles and bylaw provisions and certain business combinations); Smucker Proxy, *supra* note 216, at 15-17 (describing the company's staggered board, 1977 adoption of a "Fair Price Amendment" with a supermajority voting provision, and serial preferred shares); Synovus Proxy, *supra* note 216, at 5-6 (noting the company's

either alone or together with these provisions, would render more difficult or discourage a merger proposal, tender offer, proxy contest, or removal of incumbent directors or managers that were opposed by the holders of long-term shares.[293]

One company pointed out that long-term shareholders would have enhanced voting power on "every corporate decision that is submitted to shareholders, regardless of the long-term or short-term implications of such decision."[294] It also noted that there was no assurance that long-term shareholders would not vote in 611avour of their short-term personal interests or that short-term shareholders would not support the company's long-term interests.[295]

In summary, the TPV companies' main stated reason for adopting TPV was to decrease the influence of short-term investors on the company and to increase the relative influence of long-term investors. They stated that TPV would insulate managers from short-term market pressures, enabling them to focus on long-term performance and generally fostering a corporate culture geared toward long-term performance. Companies also said that TPV would encourage potential acquirers to negotiate with the company's board of directors. However, companies also disclosed the possible or likely concentration of control in insiders as a possible adverse consequence of TPV.[296]

2. Rescissions

Six companies rescinded TPV, and one company merged into another company that did not have TPV.[297] The principal reason companies gave for rescinding TPV was that it was a departure from the "prevailing voting structure" in U.S. companies; it was not in accord with "a basic tenet of corporate democracy," the "one-share, one-vote

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staggered board, super-majority voting, and other provisions). *But see* Aflac Proxy, *supra* note 216, at 11 (stating that Aflac's articles of incorporation had no other antitakeover provisions).

[293]Aflac Proxy, *supra* note 216, at 11; Carlisle Proxy, *supra* note 216, at 3; Century Proxy, *supra* note 216, at 11; Church & Dwight Proxy, *supra* note 216, at 9; Smucker Proxy, *supra* note 216, at 13-14; Pioneer Proxy, *supra* note 216, at 5; Quaker Proxy, *supra* note 216, at 12; Potlatch Proxy, *supra* note 216, at 6; Roper Prospectus, *supra* note 219, at 35; Synovus Proxy, *supra* note 216, at 8.

[294]Century Proxy, *supra* note 216, at 8.

[295]*Id*.

[296]A couple of companies summarized the "overall effect" of TPV as rendering the removal of incumbent management more difficult, even if such removal would be beneficial. *See* Carlisle Proxy, *supra* note 216, at 32, Quaker Proxy, *supra* note 216, at 13; Smucker Proxy, *supra* note 216, at 14.

[297]This information is drawn from proxy statements proposing rescission. *See supra* notes 243 and 244.

principle," which is considered among best corporate governance practices.[298] As such, TPV was subject to criticism by institutional investors and their associations.[299] One company explained that its TPV resulted in a downgrading of its corporate governance ratings by independent monitoring agencies such as Institutional Shareholder Services, which provides corporate governance advice to institutional investors.[300] Additionally, some companies gave as a reason for rescinding TPV that the NYSE Listed Companies Manual discourages TPV.[301] Thus, the TPV rescissions were influenced by prevailing beliefs, particularly among institutional investors, concerning the advisability of such voting arrangements. At one company, a particular institutional shareholder appears to have successfully pressured the company into proposing rescinding TPV.[302]

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[298]Roper Rescission, *supra* note 243, at 26 (stating that TPV is "discouraged by the New York Stock Exchange under Rule 313.00 and represents a departure from a basic tenet of corporate democracy, the one share/one vote principle"); Shaw Rescission, *supra* note 243, at 36 (stating that TPV "is discouraged by the New York Stock Exchange under Rule 313.00 and represents a departure from a basic tenet of corporate democracy, the one share/one vote principle. Approval of this proposal would make our voting structure consistent with the prevailing voting structure for public companies."); *see also* Church & Dwight Rescission, *supra* note 243, at 2, 26 (noting that "the major stock exchanges in the United States now prohibit the adoption of time-phased voting" and that other provisions "are more consistent with the modern corporate governance principles of one vote per share"); Milacron Rescission, *supra* note 243, at 2 (seeking to "conform [Milacron's] voting structure to current best practices in corporate governance"); Potlatch Rescission, *supra* note 243, at 31.

[299]*See, e.g.*, Potlatch Rescission, *supra* note 243, at 31 ("[T]he time-phased voting structure has been subject to criticism by institutional stockholders and others as undemocratic.").

[300]*See* Milacron Rescission, *supra* note 243, at 4 (stating that "[a] higher [ISS governance rating] indicates better corporate governance in ISS's view" and rescinding TPV would increase Milacron's governance rating, which, according to ISS, is "designed to assist institutional investors in evaluating the quality of corporate boards and the impact their governance practices may have on performance") (internal quotation and alteration in original omitted).

[301]*See* Roper Rescission, *supra* note 243, at 26; Shaw Rescission, *supra* note 243, at 36. Section 313.00 of the NYSE Listed Companies Manual provides that the "[v]oting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Exchange Act cannot be disparately reduced or restricted through any corporate action or issuance. Examples of such corporate action or issuance include . . . time phased voting plans . . . ." N.Y STOCK EXCH., LISTED COMPANY MANUAL § 313.00, *archived at* https://perma.cc/MSK4-W68P.

[302]Potlatch proposed that its shareholders rescind TPV at its 2005 annual meeting after opposing a similar shareholder proposal at its 2004 annual meeting. Potlatch Rescission, *supra* note 243, at 31; Potlatch Corp., Proxy Statement (Form DEF 14A) at 30, (May 3, 2004). In 2004, the company expressed its concern over the short-term interest of speculative investors, stating:

> [W]e believe that the special nature of Potlatch's most valuable asset—1.5 million acres of productive timberlands, each of which requires 30 to 60 years of care and investment per growth cycle—must be treated in a sustainable manner in order to provide the best future returns to stockholders. A short-

In their proxy statements proposing the rescission of TPV, some companies reiterated their commitment to long-term value and long-term business strategies, which was their main stated purpose for adopting TPV.[303] However, companies explained that other mechanisms, more generally accepted than TPV, which they now had in place or were contemplating adopting, would enable management to serve the long-term interests of their companies.[304] These mechanisms included shareholder rights plans and staggered-board provisions.[305] The mechanisms they discussed did not enhance the voting power of long-term shareholders like TPV did and some, such as limitations on calling special shareholder meetings and advance notice requirements, diminished the power of shareholders overall.[306] However, these mechanisms did have the effect of increasing managers' discretion to serve the long-term interests of long-term shareholders if they chose to do so. Rescinding TPV would also enhance the relative voting power of

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> term view with respect to our timberlands will result in the full value of the assets not being recognized and will jeopardize future returns and sustainability.

Id. 32% of the voting power of the Potlatch voted in favor of the 2004 shareholder proposal to rescind TPV, and 61% voted against it. Potlatch Rescission, *supra* note 243, at 31.

[303] *See* Church & Dwight Rescission, *supra* note 243, at 27; Milacron Rescission, *supra* note 243, at 29; Potlatch Rescission, *supra* note 243, at 31.

[304] *See* Church & Dwight Rescission, *supra* note 243, at 2, 26 (discussing its shareholder rights plan); Milacron Rescission, *supra* note 243, at 29 (identifying other provisions of the company's certificate and by-laws and its shareholder rights plan); Potlatch Rescission, *supra* note 243, at 31 (suggesting a shareholder rights plan could be implemented for this purpose); Shaw Rescission, *supra* note 243, at 36 (discussing the company's shareholder rights plan). Companies gave additional reasons for rescinding TPV. Some companies indicated that TPV was no longer necessary because the coercive takeover tactics that were being used when TPV was adopted were no longer prevalent; others referred to the protection afforded by Delaware's business combination statute. *See* Church & Dwight Rescission, *supra* note 243, at 3, 20 (both); Milacron Rescission, *supra* note 243, at 29-30 (both); Potlatch Rescission, *supra* note 243, at 33 (latter). See *supra* note 292 for provisions with antitakeover effect that many TPV companies had at the time of adopting TPV.

[305] *See* Church & Dwight Rescission, *supra* note 243, at 19-20 (referring to shareholder rights plan adopted in 1989 and renewed in 1999 and its staggered board provision); Milacron Rescission, *supra* note 243, at 6, 29-30 (discussing its classified board structure and suggesting it has other means to combat hostile takeovers); Shaw Rescission, *supra* note 243, at 36 (mentioning its shareholder rights plan); Potlatch Rescission, *supra* note 243, at 32-33 (indicating its intent to adopt a shareholder rights plan in the future and defensive measures, including a staggered board provision).

[306] *See* Church & Dwight Rescission, *supra* note 243, at 1 (proposing limiting the ability of shareholders to call shareholder meetings and suggesting an advanced notice provision); Milacron Rescission, *supra* note 243, at 29-30 (mentioning its limitations on shareholders' ability to call special meetings, among other provisions, such as limitations on shareholders' written consents).

institutional investors if they are not long-term shareholders in these companies.

One company gave, as an express reason for rescinding TPV, that TPV was likely to increase managerial entrenchment.[307] In contrast, the context of TPV rescissions at two companies indicated that these companies were concerned with TPV enhancing the power of long-term shareholders. Milacron proposed to rescind TPV when minority, long-term shareholders, including founding-family descendants, proposed a nominee to the Milacron board. The shareholders were concerned with the direction of the company, claiming that Milacron's acquisitions had rendered it highly leveraged, resulting in a contraction of the company as business units were sold to service the company's debt. Moreover, Century's rescission of TPV was proposed at a time when its management was losing voting control of shares in the company's employee benefit plans, and because it feared that institutional investors held shares that were likely to become long-term shares in the near future.[308] While Century continued to express its belief that TPV had enabled it to pursue a long-term growth strategy successfully, it also expressed concern that once the institutional investors reached the four-year threshold entitling them to long-term share voting rights, they would no longer have an incentive to support the corporation's long-term objectives.[309]

Finally, some companies criticized TPV for the administrative burden it imposed. Companies need to keep track of the beneficial ownership of shares and were concerned that TPV created confusion as to the distribution of voting power in the company.[310] One company quantified administrative costs, which did not seem substantial: It stated that elimination of TPV would save the company approximately $12,500

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[307] Roper Rescission, *supra* note 243, at 26.

[308] Century Rescission, *supra* note 243, at 12-16, 18-20.

[309] This concern is also expressed in Colin Mayer's recent book. COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT (2013) (proposing time-dependent shares which provide greater voting power to shareholders who commit in advance to hold their shares for a period of time).

[310] *See* Century Rescission, *supra* note 243, at 8; Church & Dwight Rescission, *supra* note 243, at 26 (stating that rescinding TPV would eliminate "confusion as to the distribution of voting power" and a system that is "burdensome" and "has substantially complicated the [c]ompany's stockholder records and proxy voting procedures"); Milacron Rescission, *supra* note 243, at 4 (stating that eliminating TPV would "reduce confusion over the distribution of voting power . . . , particularly among shareholders holding through banks and brokers"); Roper Rescission, *supra* note 243, at 26 (referring to the impracticality of policing TPV because of difficulties in determining whether there has been a change of beneficial ownership).

a year and eliminate approximately fifty hours per year of employee time.[311]

In summary, the companies rescinded TPV to conform to what was viewed by institutional investors and others as best corporate governance practices. They believed that other measures designed to assure their independence from short-term market pressures were sufficient to achieve their long-term objectives. One company expressed concern with the insider entrenchment effects of TPV companies whereas two companies were concerned about the empowerment of long-term shareholders through TPV. One of the latter companies was concerned that once institutional investors held their shares for the holding period they would impose short-term pressure on the company. Some companies also mentioned the administrative inconvenience of keeping track of the beneficial ownership of shares and confusion as to voting control due to TPV.

D. *Beneficial Ownership and Voting Control of TPV Firms*

We now consider how ownership and control of TPV companies has been distributed over time. In Subpart 1, we explore beneficial ownership of TPV company shares by insiders overall, founding family members in particular, and principal outside shareholders. We also consider the beneficial ownership of institutional investors overall, as well as by different types of institutional investors. Subpart 2 examines long-term shareholding at TPV companies, including long-term shareholding by insiders and principal outside shareholders. Subpart 3 considers voting power at TPV companies, as well as the "wedge" between voting rights and cash-flow rights that TPV creates with respect to long-term shareholders overall and insiders in particular. Finally, in Subpart 4, we consider whether TPV's insider-control-enhancing properties facilitate insider diversification or new equity issuances.

1. Beneficial Ownership

We obtained share ownership information for all of the TPV companies for selected years by examining the beneficial ownership

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[311]Milacron Rescission, *supra* note 243, at 28-29; *see also* Church & Dwight Rescission, *supra* note 243, at 27 ("[T]he current system is burdensome for the [c]ompany and has substantially complicated the [c]ompany's stockholder records and proxy voting procedures. As a result, the [c]ompany has incurred additional expenses for administrative record keeping.").

sections of proxy statements.[312] By SEC regulation, these statements contain considerable information on the beneficial share ownership of a company's (1) directors and officers and (2) principal outside shareholders—shareholders that own more than 5% of the company's stock.[313]

Proxy statements are considered a reliable source of information about share ownership of corporate directors and officers.[314] However, proxy statements generally do not purport to disclose family ownership. The founding family status of directors, officers, and principal shareholders typically does not need to be (and usually is not) disclosed. Nor does the share ownership of founding family members who are not principal outside shareholders, directors, or officers need to be disclosed, and it usually is not. Scholars have lamented the difficulty in getting data about founding family stock holdings. As a result, many studies ignore family ownership and focus instead on ownership by directors and officers. Even studies of family-owned companies are often forced to use proxies for family ownership; simply identifying family-owned companies can be quite challenging.[315] This issue has hampered the study of family-owned public companies.

As noted previously, ten of our twelve TPV companies were family-owned companies at the time they adopted TPV.[316] To get data on family ownership at these companies over time, we combed through companies' proxy statements for any statements that shed light on

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[312]The selected years are the year the company adopted TPV, years one, three, five, ten, fifteen, twenty and twenty-five in which TPV was in effect, and, for companies that rescinded TPV, the year of rescission.

[313]SEC rules attribute shares owned by parties related to a shareholder—for example, shares owned by a trust, of which a shareholder was trustee—as beneficially owned by that shareholder. Similarly, SEC rules treat shares that an insider has an option to purchase within sixty days as beneficially owned by that insider. *See* 17 C.F.R. § 240.13d-3 (SEC Rule 13d-3). We include all shares held by entities related to a shareholder as held by that shareholder. We also include shares beneficially owned by family members (including in-laws), family-affiliated foundations, and holding companies, regardless of whether the insider disclaims ownership of such shares, but we were careful to avoid double counting. In a few cases, companies also disclosed information about a large outside shareholder that owned less than 5% of outstanding shares. These shareholders are included in our principal outside shareholder data as well.

[314]Many studies have drawn their officer and director share ownership data from proxy statements *See, e.g.*, Bauguess, Slovin & Sushka, *supra* note 124, at 1246; Gompers, Ishii & Metrick, *supra* note 19, at 1055-56; Villalonga & Amit, *supra* note 134, at 3057; Villalonga & Amit, *supra* note 161, at 388-89.

[315]*See, e.g.*, Gompers, Ishii & Metrick, *supra* note 19, at 1063 (using whether a company has a person's name—any name—in the company name as a noisy proxy for family ownership because researching each company's history individually was so time-intensive).

[316]These companies are Aflac, Carlisle, Century, Church & Dwight, Smucker, Milacron, Pioneer, Potlatch, Quaker, and Synovus. *See supra* note 216 and accompanying text.

founding family members' identity and ownership. For example, the share ownership of founding family members is sometimes disclosed in footnotes when such information relates to the share ownership of directors, officers, or principal shareholders. We and our research assistants also conducted Internet searches on directors, officers, and principal shareholders when we had some reason to believe that they might be members of that company's founding family.

Our approach enabled us to extract information on founding family share ownership. This data enabled us to both consider trends in family ownership and to expand our measure of total combined insider ownership. However, our founding family data has two chief limitations.

First, it substantially understates family ownership in many instances. For example, when Milacron proposed TPV to its shareholders, it included a statement in its proxy statement that descendants of the company founders, their in-laws, and related trusts controlled 35% of Milacron common stock.[317] In contrast, examining the other family-ownership-related disclosures in Milacron's proxy statement only enabled us to identify family ownership of 12%.[318]

Second, observed family ownership becomes "spiky" or "lumpy"; observed ownership can fluctuate significantly, even when actual family ownership does not change. For example, when a member of a founding family becomes a director, her share ownership becomes disclosed and can be counted toward total family ownership. This disclosure makes it look as if family ownership has increased, even if the family's share ownership has not changed. The opposite problem can arise when that family member leaves the board of directors.

Finally, we note that because we treat founding family members as insiders, both of these problems apply to our total insider ownership figures as well.

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[317] Milacron Proxy, *supra* note 216, at 16-17.

[318] Elsewhere in its 1986 proxy statement, Milacron stated that "[c]urrent and former employees," directors, employee benefit plans, and founding family members owned over 50% of its shares. *Id.* at 2. Our number for insiders (including family) and shares influenced by insiders (including employee benefit plans) is twenty-six. Our figure does not include shares owned by current and former employees, which is not information that is generally available in company proxy statements. Potlatch's proxy statement for 1985, the year it adopted TPV, provides another example of the limitations of proxy statement information. It included a statement that "descendants of the early founding families and long-term shareholders of predecessor companies" owned over 40% of the company. Potlatch Proxy, *supra* note 216. Our number for total insider beneficial ownership was 14% for that year. Proxy statements do not usually disclose share ownership by "long-term shareholders of predecessor companies" or whether these shareholders are insiders or outsiders.

For much of our analysis, we place similar companies into four groups and look at average ownership in each group. This grouping helps mitigate the spikiness issue.[319] We cannot correct for the understatement problem. Nonetheless, we believe that observed family ownership is useful for demonstrating trends in actual family ownership—that is, whether it is increasing or decreasing—even if it does not enable an accurate and precise measure of actual family ownership at any given time.[320]

The "Family Companies 1" and "Family Companies 2" groups both consist of family-owned companies.[321] All of the companies in these groups adopted TPV from 1985 to 1987, pursuant to a shareholder vote.[322] None of the companies in Family Companies 1 has rescinded TPV; all still have it as of this writing. The companies in "Family Companies 2" maintained a TPV structure for a significant period of time (ranging from seventeen to nineteen years), but ultimately rescinded their TPV plans.

Pioneer is a family-owned company that is presented separately on our charts. Like Family Companies 1 and 2, it adopted TPV in the mid-1980s through a shareholder vote. Pioneer was acquired by DuPont, which did not have TPV, thirteen years later.[323] We group it separately because of its shorter history with TPV and the different mechanism through which its experience with TPV ended.

Finally, the "Non-Family Companies" group consists of two non-family-owned companies.[324] These companies adopted TPV later than the family companies, in the early 1990s. Also, unlike the family

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[319]On another level, this lumpiness may not be a major problem. To the extent that we are attempting to measure changes in family control of the company over time, a family member becoming (or ceasing to be) an officer, director, or principal outside shareholder corresponds with such a change.

[320]On the other hand, if the degree of understatement became worse (or better) over time, the observed trend might be misleading.

[321]More specifically, Family Companies 1 includes Aflac, Carlisle, Quaker and Synovus, and Family Companies 2 includes Church & Dwight, Milacron, and Potlatch. Our statistics regarding Milacron ignore its preferred stock. This is immaterial; Milacron's proxy statements through 1999 (but not 2000) state that more than 50% of common shares are long term. Thus, throughout those years, the preferred stock commanded, at most, 1.1% of outstanding votes, and probably less. Moreover, in many years, insiders' ownership of common and preferred stock are fairly close. We exclude Century from this Subpart's discussion because Century terminated its TPV plan before its first holding period had a chance to run. We exclude Smucker because the double counting of shares held by family members (for example, by co-trustees of trusts) made it impossible to determine family ownership and to separate out the ownership of non-family directors and officers. Smucker also adopted a dual-class stock structure for some years it had TPV.

[322]*See supra* note 216 and accompanying text.

[323]*See Pioneer Heritage*, *supra* note 225.

[324]Specifically, it includes Roper and Shaw.

companies, the Non-Family Companies went public with TPV. The companies in this group rescinded their TPV plans thirteen to fourteen years after adopting TPV.

We begin by looking at ownership by insiders. We discuss total insider ownership in TPV firms in Subpart 1.a, before singling out family ownership in Subpart 1.b. We then turn to shares owned by outsiders. Subpart 1.c looks at principal outside shareholders' ownership in TPV companies. Subpart 1.d considers the association between TPV and share ownership by institutional investors as a group. Subpart 1.e digs further, examining ownership by specific types of institutional investors with longer- and shorter-term investment strategies.

a. *Insider Beneficial Ownership*

We explore in this Subpart the degree of insider ownership in both family-owned and non-family-owned companies. For family-owned companies, insider ownership combines founding-family-member ownership and the ownership of non-family directors and officers. Figure 2, below, shows the average combined inside ownership for each group of TPV companies over time;[325] the dotted lines show share ownership in the year in which companies rescinded TPV or, in the case of Pioneer, the year it was acquired by DuPont.[326]

[325]Options held by insiders are generally included in their beneficial ownership, but not in their voting power.

[326]We use this convention in some of our other charts as well. *See infra* Figures 3 and 4. We note that individual companies have different rescission years, both in an absolute sense and measured relative to the year in which they adopted TPV, though the range within each group is rather narrow. There is no dotted line for Family Companies 1 because companies in that group never rescinded TPV.

Figure 2: Average Combined Insider Beneficial Ownership

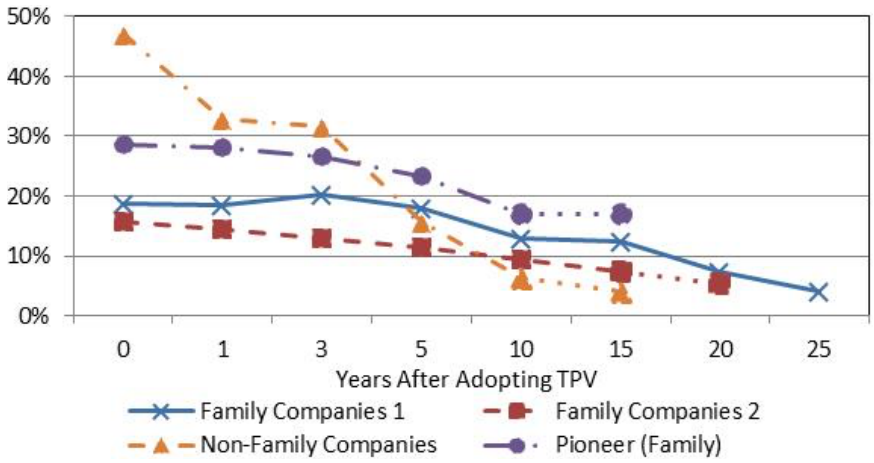


Figure 2 demonstrates that, overall, there was considerable concentration of ownership in insiders at the time of TPV adoptions.[327] But, by ten years after the adoption of TPV, insider ownership had declined in all companies, and every group average declined substantially.[328] The chart above also indicates that this general trend continues in later years as well. We note that many TPV companies date to the early 1900s or earlier, making the time period in question a relatively small fraction of their lifespan up to that point. Thus, we think it significant that this decrease in insider control follows the adoption of TPV—though we cannot say whether TPV caused insiders to reduce their ownership, or whether insiders' plans to reduce their ownership motivated them to implement TPV.[329]

At the time that companies rescinded TPV, insider beneficial ownership was lower, and generally had declined more, than in non-rescinding companies after the same length of time. At the time of rescission, average insider ownership for Family Companies 2 and Non-Family Companies was 5% and 4%, respectively. This pattern is consistent with insiders not having sufficient ownership to insist on the

[327]We note also that there was considerable variation across individual firms at the time of TPV adoption: among family-owned companies, figures ranged from 9% (Aflac) to 31% (Quaker); among non-family-owned companies the range was 32% (Roper) to 61% (Shaw).

[328]Non-Family Companies saw the biggest decline, 86%. Family Companies 1 and 2 declined by 32% and 40%, respectively.

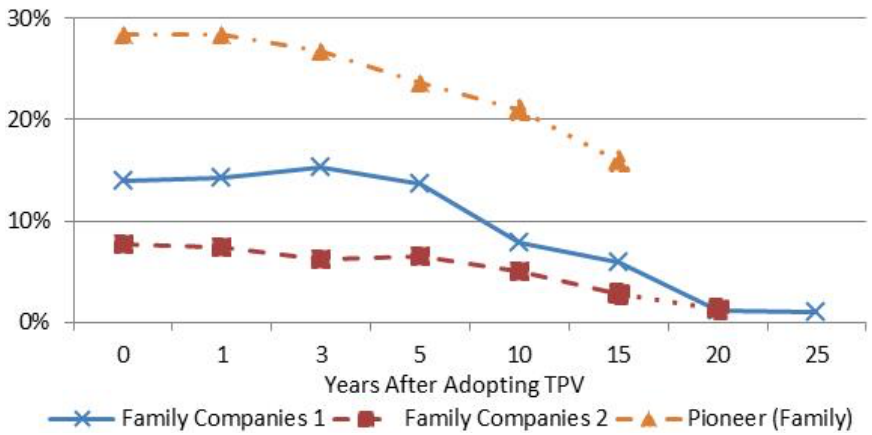
[329]We note that these explanations are not mutually exclusive.

continuance of TPV. However, we note that average ownership at Family Companies 1 ultimately reached this same level, yet these companies have not yet rescinded TPV. Thus, insider concentration does not in itself explain why some companies rescinded TPV and others did not.

b. *Founding Family Beneficial Ownership*

As Figure 3 demonstrates, focusing on family beneficial ownership in family-owned TPV companies paints a similar picture as focusing on total insider ownership.[330]

Figure 3: Founding Family Beneficial Ownership



As before, there was a substantial decline in average family ownership in the ten years after the adoption of TPV.[331] This trend continues in subsequent years, with observed family ownership in both Family Companies 1 and 2 falling to 1% within twenty years.[332] As before, we find this decrease significant, particularly in light of the long existence of

[330]As before, there is substantial variation in family ownership among family-owned companies. Considering all eight family-owned companies included in the chart, family ownership ranged from 4% to 28% and averaged 13% at the time of adoption of TPV.

[331]Average family ownership declined by 44% for Family Companies 1, 34% for Family Companies 2, and 26% for Pioneer.

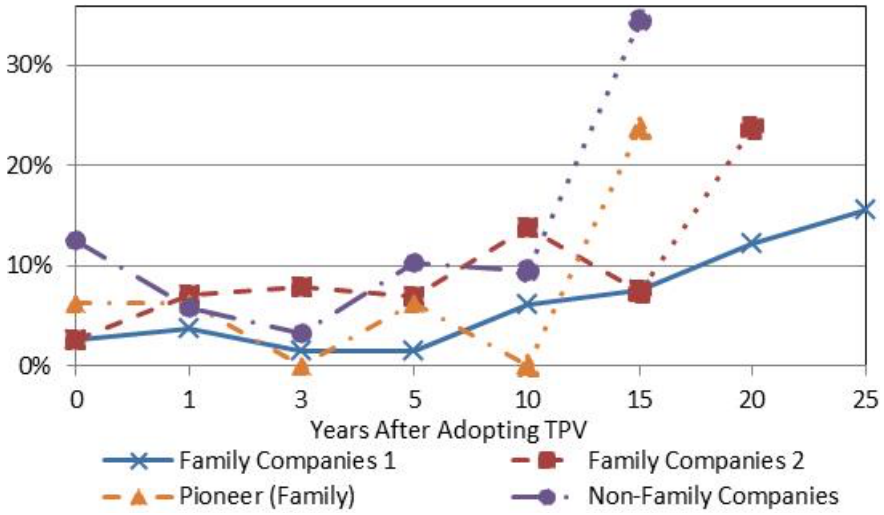
[332]Family ownership in Pioneer was 16% when it was acquired, thirteen years after it adopted TPV.

most TPV companies. Again, however, we cannot say whether TPV caused the reduction in family ownership.

c. *Principal Outside Shareholder Beneficial Ownership*

This Subpart discusses the combined average beneficial ownership of principal outside shareholders, displayed below in Figure 4.

Figure 4: Combined Average Beneficial Ownership of Principal Outside Shareholders



In contrast to insider ownership, there was relatively little ownership of shares by principal outside shareholders at the time companies adopted TPV. Only one firm had more than one principal outside shareholder, or an outside shareholder that owned more than 8% of its stock, in the year it adopted TPV.[333]

As discussed above, Figure 4 is spiky. Because in general our data only captures outside shareholders owning more than 5% of the company's stock, shareholders whose holdings hover around 5% may

[333]The exception to this rule was Roper, which was 21% owned by principal outside shareholders when it adopted TPV, including a commingled pension fund and a member of the selling group for its IPO. These shareholders do not appear as principal outside shareholders of Roper in any other year. Principal outside shareholders owned 19% or more of Roper's shares five and ten years after it adopted TPV and in its rescission year.

appear in some years but not in others.[334] Nonetheless, there is a trend toward increased principal outside shareholder ownership over time. Similarly, this increase in principal outside shareholders is particularly pronounced with respect to the years in which companies rescinded TPV.[335] This combination of increased principal outside shareholder ownership and reduced insider ownership may explain why the companies in the Family Companies 2 and Non-Family Companies groups rescinded TPV and the companies in the Family Companies 1 group did not.[336] This is consistent with principal outside shareholders disfavoring TPV and pressuring companies to abandon it, as was the case at Potlatch.[337] It is also consistent with insiders being concerned that TPV would provide principal outside shareholders with too much voting power; this was a concern at Century and Milacron.[338]

d. *Institutional Investor Beneficial Ownership*

To further explore the connection between TPV and share ownership, we turned to 13F filings. Institutional investment managers, such as banks, investment companies, insurance companies, and pension funds, must file Form 13F each quarter, detailing their equity holdings.[339] Using Thomson-Reuters' 13F Database (the "13F Database"), we downloaded data on every 13F filing from 1980 through 2013 in which an institutional investor reported owning shares in a TPV company. This data incorporated over 200,000 data points.[340] We then processed and tabulated this data to get information about overall institutional ownership of each TPV company in each quarter.[341] The average

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[334]We supplemented our data by reviewing Statements of Beneficial Ownership filed by the companies, but these Statements provided very little data that we did not already have from the proxy statements.

[335]In these years, principal outside ownership for Family Companies 2 and Non-Family Companies averaged 24% and 35%, respectively. This is significantly more than average principal outside ownership for Family Companies 1 in any year. Pioneer had high principal outside ownership at the time it was acquired (24%), but roughly 20% was attributed to DuPont, the acquiring company. *See* Pioneer Hi-Bred Int'l Inc., Annual Report (Form 10-K), at 1 (Nov. 23, 1997).

[336]*See supra* Part IV.C.2.

[337] *See supra* note 302.

[338] *See supra* notes 307-309 and accompanying text.

[339]*See* 17 C.F.R. § 240.13f-1 (2011) (setting forth SEC Rule 13f-1).

[340]A data point in this context represents an investor owning shares in a particular company in a particular quarter.

[341]This data provides a wealth of information. However, like any large dataset, there are some issues with the data. We describe these issues, and the actions we took in response, more fully in the Appendix online. *See* Lynne. L. Dallas & Jordan M. Barry, Technical

adjusted institutional ownership throughout our sample was approximately 37%, with a median of 38%.[342]

We ran a regression that estimated institutional share ownership in each period, controlling for the company, the date, whether the company had TPV at the time, the company's market capitalization and its log, and institutional ownership in the prior period.[343] The results of that regression appear in Table 2, below.

Table 2: Institutional Shareholding Regression Results

N = 1297	*Coefficient*	*Standard Error*	*t Stat*	*P-value*
Intercept	-0.01166	0.010079	-1.16659	0.247657
Period Date	0.000375***	6.03E-05	6.21683	6.85E-10
Carlisle	0.01167**	0.005838	1.998968	0.045823
Century[344]	0.016515***	0.005729	2.88269	0.004009
Church & Dwight	0.005754	0.005745	1.001644	0.316705
Milacron	0.018189***	0.006376	2.852882	0.004402
Pioneer	0.00892	0.006203	1.438002	0.150678
Potlatch	0.005494	0.005741	0.957014	0.338741
Quaker	0.015047**	0.006749	2.229428	0.025958
Roper	0.017875***	0.006448	2.77223	0.005648
Shaw	0.025033***	0.007149	3.501652	0.000478
Synovus	-0.02585***	0.005741	-4.50246	7.33E-06
TPV?	0.000997	0.002565	0.388631	0.697614
Market Cap[345]	-1.5E-06***	3.89E-07	-3.80397	0.000149
Log Market Cap	0.01301***	0.003775	3.446364	0.000587
Prior Period Ownership	0.853877***	0.014562	58.63777	≈ 0[346]

*, **, and *** denote significance at the 10%, 5%, and 1% levels, respectively.

Appendix to Long-Term Shareholders and Time-Phased Voting, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746638.

[342] *See* Spreadsheet (on file with authors).

[343] Note that we dropped the first data point for each company, since we did not know the prior period's institutional ownership.

[344] Century's repeal of TPV essentially instituted a dual-class stock system. See note 243, *supra*. Excluding Century from the regression, or excluding Century after it rescinded TPV, does not materially change the estimated coefficients or p-values. This is also true with respect to the regressions described in Table 3, *infra*. *See* Spreadsheet (on file with authors).

[345] Here and throughout these regressions, company market cap is measured in millions of dollars.

[346] Excel reports this number as zero, but that cannot be literally correct.

As Table 2 demonstrates, the TPV variable was not economically or statistically significant. This result was robust to several other model specifications. We note that the R^2 for this regression is 0.949; that is, our model is able to explain 95% of the observed variation in institutional ownership over this time period. Moreover, all coefficients have the expected signs.[347] Both of these facts add credence to our results.[348]

Finally, we note that our regression cannot say for certain that TPV did not affect institutional ownership. For example, there may be omitted variable bias—that is, there may be other variables that are correlated with the presence or absence of TPV and that affect institutional ownership, but that are omitted from our model.[349]

e. *Beneficial Ownership by Different Types of Institutional Investors*

Even if TPV does not affect the overall percentage of institutional ownership at companies, one might predict that it would affect the relative proportions of different types of institutional owners. In particular, shareholders with longer-term investment horizons might be attracted by the extra voting rights that they receive, while investors with shorter-term horizons might be repelled. These effects might cancel each other out in terms of overall institutional ownership, but would affect the overall mix of shareholders at TPV companies.

To investigate this question, we use a classification system developed by Professor Brian Bushee that classifies institutional investors into one of three categories—dedicated investors, quasi-indexers, and transient investors—based on the stability and the size of

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[347]In particular, the Period Date coefficient is positive, consistent with the well-documented trend toward increased ownership of publicly traded stocks by institutional investors over the last few decades.

[348]Some caution is necessary when interpreting the coefficients reported in Table 2. Because our regression includes the prior period's institutional ownership as an explanatory variable, there is an amplification effect of each other variable. For example, predicted institutional ownership at Quaker in period t_n, is 1.5% (on account of the Quaker dummy variable) plus, among other things, 85% of institutional ownership in period t_{n-1}. The predicted institutional ownership in t_{n-1} was also augmented by 1.5% because of the Quaker dummy variable, and so on back to t_0. Thus, in a sense, the effect of each explanatory variable (other than prior period institutional ownership) could be as large as 6.67 times the reported coefficient. This does not affect the sign of the estimated coefficients. Even accounting for this, TPV's predicted effect on ownership is well below 1%.

[349]Similarly, this regression is only able to discern whether TPV is associated with changed institutional ownership. This regression design does not support strong causative inferences.

the investments that they make in portfolio companies.[350] Stake size was measured by "the average percentage ownership in portfolio companies, the percentage of the portfolio stock in large block holdings (greater than a 5% stake), and the average dollar investment in portfolio firms."[351] Ownership stability was measured by quarterly portfolio turnover and the percentage of portfolio stocks held continuously within the portfolio over the past two years.[352] We note that, at TPV companies, an investor must hold her shares for three or four years to be treated as a long-term shareholder, whereas Bushee's classification system looks at only the past two years of share ownership.

Transient shareholders are categorized by high portfolio turnover (often with 70% of their portfolios turning over each quarter) and a small percentage of their portfolio stocks held for two years (often, only 25%).[353] They have relatively small stakes in portfolio firms. Bushee associates these characteristics with attempts to profit from short-term price movements in stocks and concludes that these investors have the least incentive to "understand drivers of long-run value."[354]

Dedicated investors are characterized by a low quarterly stock turnover (often less than 1%) and a high percentage of their shares held for at least two years (often over 75%).[355] They are stable shareholders who, on average, have substantial investments in a relatively small number of portfolio firms.[356] Because of their investment strategy, these investors have the greatest incentive to think about the long term and to take an active role in corporate governance and monitoring of portfolio companies.[357] Bushee provides Berkshire Hathaway, Warren Buffett's company, as an archetypical example of a dedicated investor.[358]

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[350] *See* Bushee, *supra* note 74, at 30. *See also* Bushee, *supra* note 59, at 310-11; Bushee, *supra* note 68, at 213-14. We applied Bushee's classification system by integrating our data with Bushee's data. Bushee provides both annual and permanent classifications for investors. Brian Bushee, *Institutional Investor Classification Data (1981-2013)*, WHARTON SCH., *archived at* https://perma.cc/3U78-WEK5 (last updated June 10, 2014). We use the permanent classifications; they are broadly consistent with the annual classifications. When we had ownership information for an institutional investor for a year in which Bushee did not classify that investor, we used the Bushee permanent classification for the closest year in which the investor was included in Bushee's data, so long as it was within three years of the date in question. We were able to classify nearly all institutional shareholders in our data; the average (median) percentage of shares we were unable to classify per company period was 0.8% (0.0%).

[351] Bushee, *supra* note 74, at 30.

[352] *Id.*

[353] *Id.* at 30-31.

[354] *Id.* at 30-32.

[355] Bushee, *supra* note 74, at 30-31.

[356] *Id.*

[357] *See id.* at 30-31; Bushee, *supra* note 59, at 309-10.

[358] *See* Bushee, *supra* note 74, at 31.

Quasi-indexers fall between the other two categories. They maintain index-like portfolios; they tend to hold small, stable investments in many companies for long periods of time.[359] These investors have good incentives to think about the company's long-term value, but do not have good incentives to be involved in corporate governance and oversight.[360] Bushee provides CalPERS as a good example of a quasi-indexer investor.[361]

Bushee found that, among institutional investors, approximately 8% are dedicated investors; 61% are quasi-indexers, and 31% are transient.[362] Overall, our population of institutional investors seems largely similar.[363]

If TPV attracts investors with a long-term focus and repels investors with a short-term focus, we would expect to see TPV associated with higher levels of ownership by dedicated investors and lower levels of ownership by transient investors. To explore this hypothesis, we calculated the percentage of total institutional shareholdings in each period that were held by each type of institutional investor. We then ran regressions analogous to the regression depicted in Table 2, above.[364] Table 3 below shows the main results;[365] we found no

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[359] *Id.*

[360] *See* Bushee, *supra* note 59, at 311.

[361] Bushee, *supra* note 74, at 31.

[362] *Id.* at 30-31. Bushee arrived at these numbers based on counts of institutional investors that were active at any point between 1983 and 2002. *Id.* at 29-31.

[363] By simple headcount, the breakdown is 3% dedicated, 54% quasi-indexer, 31% transient, and 12% unclassified by Bushee's system. The mean (median) percentage of institutional shareholdings by each type of investor was 11% (8%) dedicated, 71% (73%) quasi-indexer, 18% (17%) transient, and 1% (0%) unclassified. Over the entire length of the sample, the total percentage of shares owned by each type of investor was 9% dedicated, 68% quasi-indexer, 21% transient, and 2% unclassified.

However, direct comparisons between our data and Bushee's can be misleading. First, we examine a different time period (1980-2013). Second, we only consider shareholdings in a small group of firms. Accordingly, transient investors, which make many small, short-term investments, should be more likely to appear at least once in our data, and dedicated firms, which make relatively few, long-term investments, should be less likely to appear. To the extent that our headcount numbers differ from Bushee's, these differences may explain why.

Looking at mean and median shareholdings by different institutional investors does not reflect this latter problem. However, Bushee did not report comparable data for us to compare.

[364] Instead of using prior period institutional investor ownership, we used the prior period ownership for that particular institutional investor type.

[365] As with Table 2, some caution is necessary when interpreting the coefficients reported in Table 3.

evidence that TPV was associated with increased ownership by dedicated shareholders or decreased ownership by transient shareholders.[366]

Table 3: Shareholding Regression Results for Different Types of Institutional Investors

	Institutional Investor Type			
	Dedicated	Transient	Quasi-Indexer	Unclassified
Coefficient	-0.32%	-0.19%	0.83%*	-0.25%***
Standard Error	0.37%	0.30%	0.44%	.08%
T-Statistic	-0.870	-0.628	1.88	-3.24
P-Value	0.385	0.536	0.060	0.001

*, **, and *** denote significance at the 10%, 5%, and 1% levels, respectively.

2. Long-Term Shareholding

We now shift from total beneficial ownership to long-term share ownership. For this purpose, long-term share ownership is defined under the terms of the companies' TPV plans, which specify holding periods of three or four years. We begin by examining overall long-term shareholding in Subpart 2.a. Subpart 2.b analyzes long-term shareholding by insiders. Subpart 2.c poses similar questions with respect to principal outside shareholders.

a. *Long-Term Share Ownership at Reporting TPV Companies*

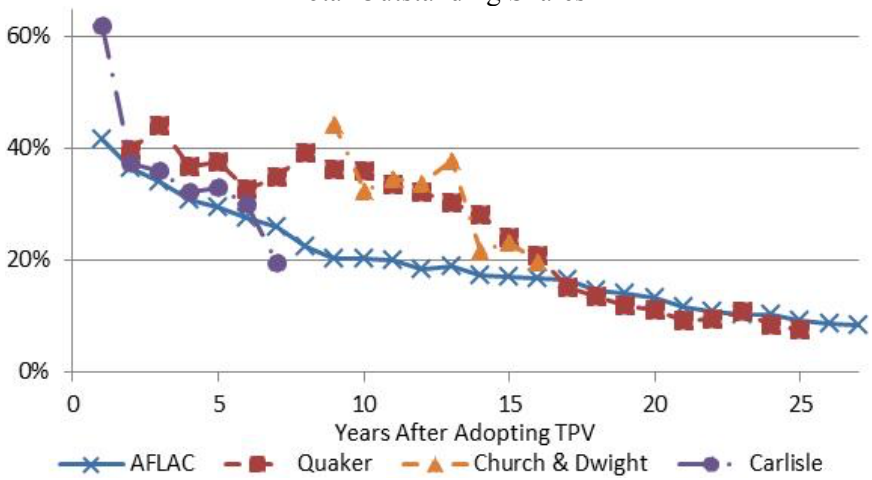
We now investigate long-term share ownership at TPV companies. Unfortunately, only a few TPV companies' proxy statements systematically included information about the number and identity of their long-term shareholders.[367] Figure 5, below, provides information

[366]The full results of these regressions appear in the technical appendix, available on SSRN. *See* Dallas & Barry, *supra* note 341. We find a marginal association with increased ownership by quasi-indexers, but this result seems to be related to a reduction in the unclassified investors. *See id.* at Table B1.

[367]Shaw disclosed enough information to enable us to estimate maximum and minimum possible long-term shareholdings for some years. After year seven, this range becomes too large to tell us much. However, for years four through seven, this band was roughly ten percentage points wide. It was centered at 19.3% in year four, and steadily declined to 10% by year seven; this pattern resembles that of the other firms in Figure 5. Shaw's ownership amounts are lower than the other companies exhibited in this time period,

on long-term share ownership at the four companies that provided this information.[368]

Figure 5: Long-Term Shares as a Percentage of Total Outstanding Shares



All shares outstanding at the time these companies adopted TPV were initially considered long-term shares. Accordingly, a decline in long-term share ownership was basically guaranteed in the early years after adopting TPV.[369]

Yet the decline in long-term share ownership goes beyond the immediate aftermath of TPV adoption. Figure 5 shows a general and consistent decline in long-term share ownership over the years TPV was in effect at these companies.[370] Long-term share ownership generally

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but this may partially be explained by the fact that Shaw adopted TPV at its IPO instead of via a recapitalization: Recapitalizing firms initially treat all shares outstanding as long-term shares. When Shaw went public with TPV, all shares purchased in the IPO were initially short-term shares. Thus, the little data we have suggests that Shaw's experience is consistent with that of the companies shown in Figure 5.

[368] Aflac and Quaker provided information on long-term share ownership for all the years we have data. Carlisle provided information for 1987-1993, and Church & Dwight for 1995-2002.

[369] Initially, every sale would lower the percentage of long-term shareholders, and it would take new purchasers several years to become long-term shareholders.

[370] In the twenty-five years after adopting TPV, the percentage of Aflac and Quaker shares that were long-term shares declined from 42% to 9% and 40% to 8%, respectively. The percentage of shares that were long-term shares declined from 44% to 20% at Church & Dwight from nine to sixteen years after adopting TPV and from 63% to 20% at Carlisle from one to seven years after adopting TPV.

trends downward at all four companies over all the years for which we have data.

If TPV effectively encourages long-term shareholding or attracts long-term shareholders, one might expect the overall percentage of long-term shares outstanding to begin climbing, or at least to stabilize, at some point. Figure 5 does not demonstrate this. The continued drop in ownership could potentially be explained by a secular decline in long-term shareholding marketwide. But this would not fully explain the trends shown in Figure 5: If receiving additional voting rights were a strong incentive to be a long-term shareholder, one would expect to see more long-term shareholding at Aflac and Quaker, which accord shareholders ten votes per long-term share, than at Carlisle and Church & Dwight, which accord five and four votes per long-term share, respectively.[371] This is not the case. Accordingly, Figure 5 does not seem to support the argument that TPV encourages long-term share ownership.

There are several possible explanations for this apparent investor apathy. One possibility is that additional voting rights are simply too small of an inducement for investors to change their behavior. Alternatively, since TPV is so uncommon in the United States, it is possible that many investors simply did not realize that these companies had TPV.[372] In the future, TPV could attract long-term investors or encourage long-term investing—but none of the evidence that we have uncovered, either in this Subpart or Subpart IV.D.1, above, suggests that this was the case for the companies we studied in the time periods we examined.

That said, a couple of caveats are in order. First, we note that Figure 5 only contains data on four companies, which makes a very small sample size. Second, we do not know what long-term share ownership in these companies would have been if they had not implemented TPV; without TPV, it is possible that long-term share ownership at these companies would have been even lower. Finally, companies only reported the long-term shareholders of which they were aware. It is possible that some investors held shares for a sufficiently

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[371] As noted below, insiders are more likely to be long-term shareholders, which could be a cross-cutting factor that explains this discrepancy. However, insider ownership at the time of TPV adoption was generally higher at Quaker than at Church & Dwight, and at Carlisle than at Aflac, casting doubt on this explanation. *See infra* Figure 6 (graphing percentage of outstanding long-term shares owned by insiders).

[372] *Cf. A Different Class, supra* note 23 (stating that no firms in America have TPV); Zweig, *supra* note 23, at B1 (stating that no American company has TPV).

long period of time to receive additional votes per share,[373] but did not provide the company with documentation establishing this.[374] Thus, it is possible that true long-term share ownership at these companies may be higher than Figure 5 reflects.

We close with one additional, illustrative piece of evidence. In 2003, eighteen years after it adopted TPV, it appears that Aflac mistakenly reported having twice as many long-term shares outstanding as it actually did.[375] To the best of our knowledge, Aflac never disclosed its error in any of its public filings, and simply corrected its reporting methodology the following year.[376] Although we are hesitant to ascribe too much significance to this one incident, the fact that Aflac did not feel the need to amend its filings or otherwise acknowledge its error suggests that Aflac did not believe that investors attached great weight to the additional voting power that TPV accorded them at that time. We also found no indication that investors noticed or inquired about this.[377]

b. *Insider Long-Term Share Ownership at Reporting TPV Companies*

We now consider the extent to which insiders hold long-term shares at TPV companies. Figure 6, below, shows the percentage of a company's outstanding long-term shares owned by insiders over time at the three companies that reported this data. The average percentage of

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[373]For example, a review of Aflac's proxy statements from 1991 to 2000 revealed that Aflac had a principal shareholder, Oppenheimer Group, Inc., who held shares for ten years, owning 6% to 13% of the company's shares with corresponding voting power of only 2% to 5%. Depending on the amount of short-term trading that shareholder did, some or all of its shares might be long-term shares.

[374]Under the terms of TPV plans, shareholders owning shares in street or nominee name are required to provide proof that their shares have not changed hands prior to the shareholders' meeting. *See supra* Part IV.B.

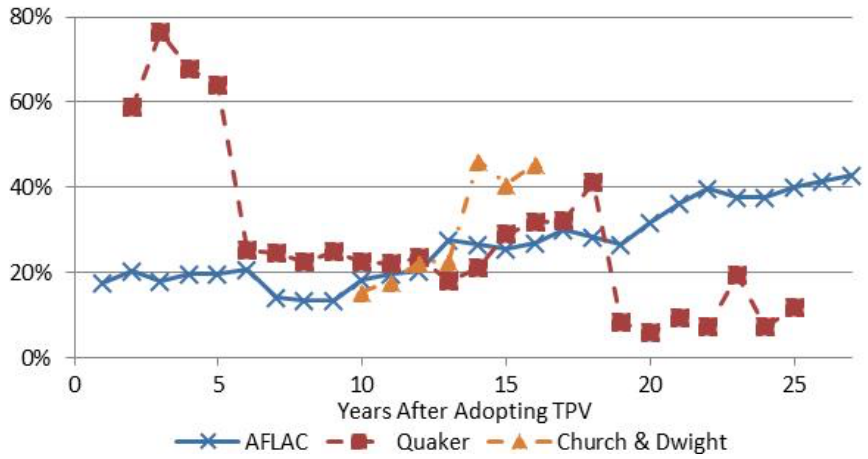
[375]Aflac's reported long-term shares outstanding for 2003 is a clear outlier. Aflac had a 2:1 stock split that was correctly reflected in its 2002 proxy statement. *Compare* Aflac Inc., Proxy Statement (Form DEF 14A), at 3 (Mar. 13, 2001) (stating 44,662,033 long-term shares outstanding), *with* Aflac Inc., Proxy Statement (Form DEF 14A), at 2 (Mar. 12, 2002) (stating 85,035,989 long-term shares outstanding). It seems that Aflac erroneously included this split again when calculating its long-term shares outstanding in 2003. *See* Aflac Inc., Proxy Statement (Form DEF 14A), at 2 (Mar. 12, 2003) (stating 150,336,665 long-term shares outstanding). After significant investigation, we could find no other explanation for this result. Figure 5, above, uses the correct figure for Year 18, not the mistakenly doubled figure that was reported.

[376]*See* Aflac Inc., Proxy Statement (Form DEF 14A), at 2 (Mar. 15, 2004) (stating 71,984,236 long-term shares outstanding).

[377]So far as we can tell, no one, with the possible exception of the individuals preparing Aflac's 2004 proxy statement, seems to have noticed; we were unable to find anything in the financial press or anywhere else that addressed this issue.

long-term shares owned by insiders across all company years (all data points) was 28%; the median was 24%.[378]

Figure 6: Percentage of All Long-Term Shares Owned by Insiders



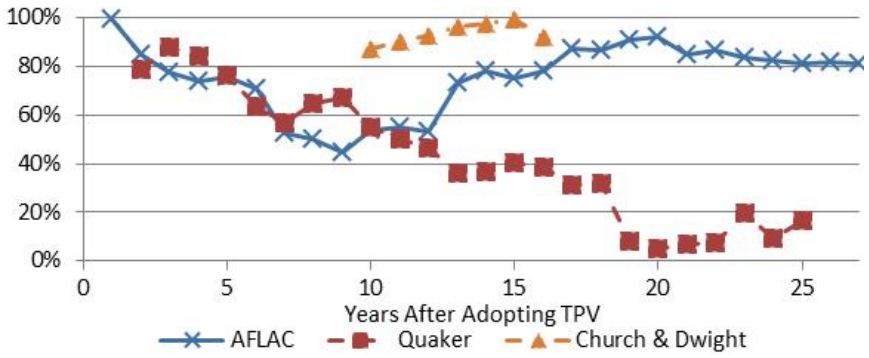
We note that different companies exhibit different trends. At Aflac, insiders only reduced their shareholdings by a few percentage points and consistently held a high percentage of their shares as long-term shares. This resulted in insiders holding a growing percentage of all long-term shares over time. At Quaker, in contrast, total insider ownership fell more over time and insiders were less likely to hold their shares as long-term shares. Thus, it exhibits a somewhat opposite pattern.[379]

Figure 7, below, provides a different perspective on insiders' long-term share ownership. It illustrates the percentage of insiders' shareholdings that were long-term shares over time for the three companies that reported this information.

[378]The average percentages of long-term shares owned by insiders at Aflac, Church & Dwight, and Quaker were 26%, 30%, and 28%, respectively.

[379]In the twenty-five years after TPV adoption, insider ownership at Aflac dropped from 8.9% to 4.6%, a decline of almost 50%. Insider ownership at Quaker decreased from 31.4% to 5.4% over the analogous period, a decline of 83%. Both companies exhibited similar trends in their percentage of long-term shares outstanding. *See supra* Figure 5.

Figure 7: Percentage of Insider Shares That Are Long-Term Shares



Across all company years (all data points), an average of 64% of insiders' shares were long-term shares; the median is 75%.[380] Thus, insiders on average across all companies mostly owned long-term shares.[381] Moreover, these percentages are much higher than the percentage of these companies' shares that were long-term shares, reinforcing the conventional wisdom that insiders are disproportionately likely to be long-term shareholders.[382] This confirms that TPV gave insiders additional voting power.

c. *Long-Term Share Ownership by Principal Outside Shareholders*

Proxy statement disclosures suggest that principal outside shareholders (who were mostly institutional investors) are not significant owners of long-term shares. Across the three companies that disclosed this information,[383] principal outside shareholders' share ownership percentages exceeded their voting percentages every year except one.

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[380]The average percentages of insider shares that are long-term shares at Aflac, Church & Dwight, and Quaker were 71%, 94%, and 43%, respectively. *See supra* Figure 7.

[381]However, there was considerable variation in the trend of insider ownership of long-term shares at the companies. The percentages of insider shares that were long-term shares declined for both Aflac and Quaker for the first twelve years after the adoption of TPV. Thereafter, the percentages increased for Aflac and decreased for Quaker. However, there was an overall decline in the percentages of insider shares that were long-term shares at Aflac and Quaker, from 100% to 81% at Aflac and from 79% to 17% at Quaker for years one and twenty-five after the adoption of TPV. At Church & Dwight, the percentages of insider shares that were long-term shares are 87% in year ten and 92% in year sixteen. *See supra* Figure 7.

[382]*See supra* Figure 5.

[383]That is, Aflac, Church & Dwight, and Quaker.

It is possible that some principal outside shareholders were long-term shareholders who held their shares in street name, but did not provide the TPV company with documentation to establish their long-term ownership. These shareholders may not have wished to incur the costs, or did not have procedures in place, to provide proof of long-term share ownership. Alternatively, the ability to qualify their shares may have been enough to give them their desired influence over management.[384] There are some investors reported as shareholders on proxy statements over multi-year periods, yet their shares generally were not treated as long-term shares.[385] We do not know whether these investors were turning over their holdings between proxy statements, however.

3. Voting Power and the Wedge Between Ownership and Control

This Subpart explores two issues: Voting power and the "wedge" between ownership and control—that is, the extent to which a group's voting power exceeds its share ownership.[386] These issues are closely related; the wedge for a given shareholder depends on both the percentage of shares that she owns and the percentage of votes that she controls.

As noted above in Subpart 1, TPV companies' proxy statements generally disclose their insiders' beneficial share ownership. Unfortunately, knowing a shareholder's beneficial share ownership alone is not sufficient to determine her voting power, which depends on both (1) the extent to which she is a long-term shareholder and (2) how many of the company's other outstanding shares are long-term shares and thus have enhanced voting rights. SEC rules do not require companies to disclose this information. Accordingly, we are able to examine voting power, and the wedge between ownership and control, only at those TPV companies that voluntarily disclosed this information. For these companies, we consider long-term shareholders as a group in Subpart 3.a and insiders in Subpart 3.b.

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[384] *Cf.* John C. Coates IV, *Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence*, 79 TEX. L. REV. 271, 316-17 (2000) (discussing a similar dynamic with respect to the adoption of poison pills).

[385] *See supra* note 373.

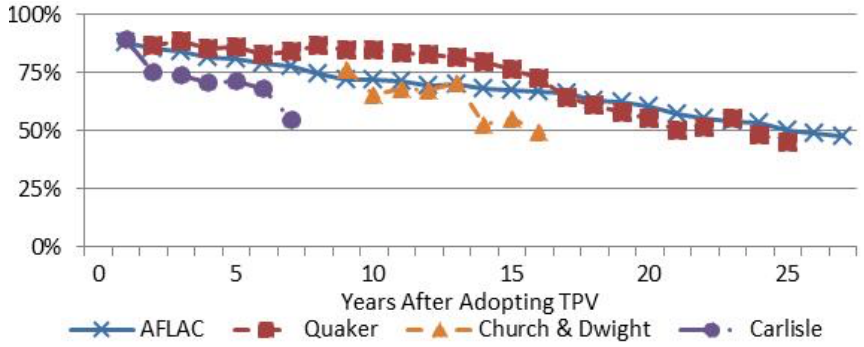
[386] *See supra* Part III.0 (discussing the wedge between ownership and control in dual-class companies).

a. *Voting Power and Wedge for Long-Term Shareholders at Reporting TPV Companies*

i. Voting Power of Long-Term Shareholders

As the percentage of shares that were long-term shares declined, so did the voting power attributed to all long-term shares. But even in years when long-term shareholdings are lowest, long-term shareholders as a whole wield considerable voting power. Figure 8, below, shows the total voting power of all long-term shares for the four TPV companies for which we have relevant data. In all years, long-term shareholders, voting as a bloc, could guarantee the outcome of any shareholder vote. The average voting power of long-term shares across all company years (all data points) was 69%; the median was 70%.[387] The decline is slower at Aflac and Quaker in part because they give long-term shares more votes per share than do Church & Dwight and Carlisle.[388]

Figure 8: Total Voting Power of Long-Term Shares



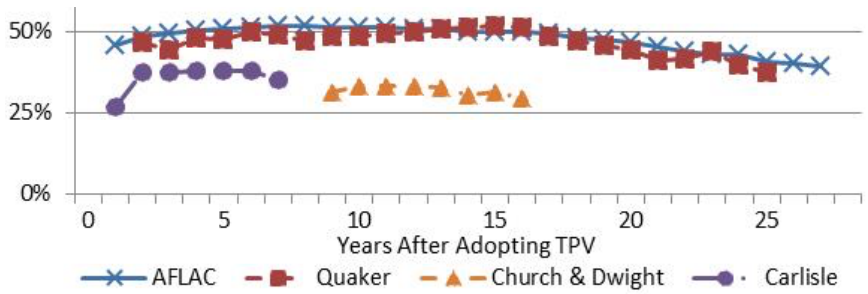
ii. The Wedge for Long-Term Shareholders

Figure 9 shows the difference between long-term share voting power and long-term share ownership—that is, the percentage of votes the long-term shareholders controlled minus the percentage of shares outstanding that were long-term shares.

[387]The average (median) voting power of long-term shares in Aflac, Carlisle, Church & Dwight and Quaker was 68% (68%), 72% (71%), 63% (67%) and 72% (81%), respectively.

[388]Aflac and Quaker both give long-term shares ten votes, while Carlisle gives them five and Church & Dwight gives them four.

Figure 9: Difference Between Voting Rights and Cash-Flow Rights of Long-Term Shares



The mean difference across all company years (all data points) is 45%; the median is 47%.[389] As expected, this chart shows that the voting power of long-term shares is strongly enhanced by TPV. The wedges for Aflac and Quaker are larger in part because they give long-term shares more votes per share than do Church & Dwight and Carlisle.

Looking at the ratio of long-term shareholders' voting rights to their cash-flow rights paints a similar picture. The average ratio of long-term votes to long-term shares across all company years (all data points) is 3.35, and the median is 2.85.[390] The proportionate increase in votes to shares is high and grows over time, as long-term shares become a smaller percentage of total shares outstanding.[391]

b. *Voting Power and Wedge for Insiders at Reporting TPV Companies*

i. Voting Power of Insiders

Figure 10, below, illustrates insiders' voting percentages at the four TPV companies for which we have data. TPV, combined with insiders'

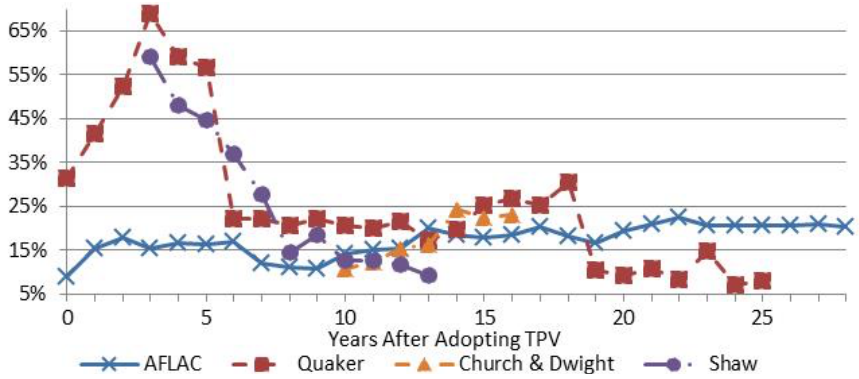
[389]The average (median) difference between long-term voting power and long-term share ownership for Aflac, Carlisle, Church & Dwight, and Quaker are 48% (50%), 36% (38%), 32% (32%), and 47% (48%), respectively.

[390]The average (median) ratios of long-term votes to long-term shares for Aflac, Carlisle, Church & Dwight, and Quaker are 3.91 (3.89), 2.13 (2.16), 2.11 (2.00), and 3.49 (2.75), respectively.

[391]For the first five years after adopting TPV, long-term shareholders' voting rights tend to be between two and three times their cash-flow rights. But for firms that keep TPV for twenty years or more, this ratio increases to between five and six to one. This may counsel in favor of a provision stating that the plan terminates automatically if long-term share ownership falls below a given threshold. *Cf.* Milacron Proxy, *supra* note 216, App. at 10 (automatically terminating TPV if fewer than 15% of shares are long-term shares for two consecutive annual meetings).

propensity to hold long-term shares, gives insiders significant voting power. Insiders' average voting percentage across all company years (all data points) was 22%; the median was 19%.[392] Though sizable, we note that this is less than the 60% of votes that insiders typically have at dual-class firms.[393]

Figure 10: Insiders' Voting Percentages



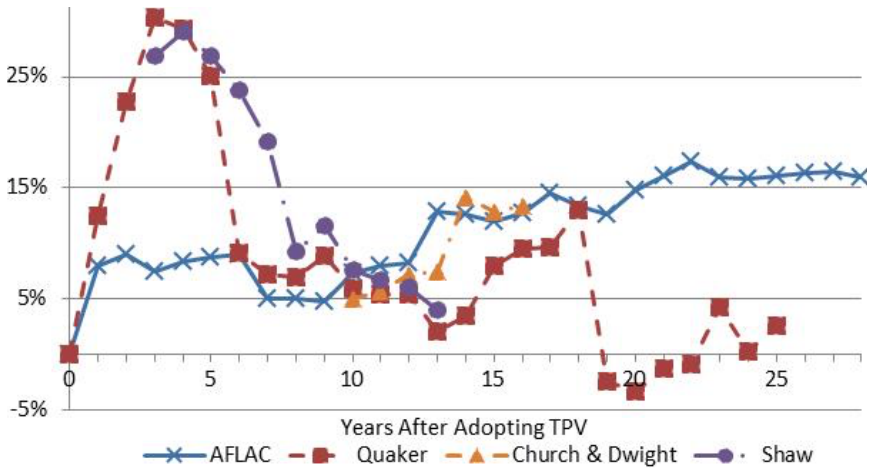
ii. The Wedge for Insiders

We next examine the wedge between insiders' voting control of TPV companies and their beneficial share ownership. Figure 11 shows the difference between the insiders' voting percentages and their share ownership percentages over time.

[392]The average (median) insiders' voting percentage at Aflac, Church & Dwight, Quaker, and Shaw was 18% (18%), 18% (16%), 27% (22%), and 27% (19%), respectively.

[393]*See supra* Part III.C.

Figure 11: Difference Between Insiders' Voting and Cash-Flow Rights



These results demonstrate that, in general, TPV created a significant wedge between insiders' voting power and their share ownership. Insiders' mean voting percentage across all company years (all data points) is 22%, double their 11% mean share ownership.[394] Similarly, across all company years (all data points), the average ratio of insiders' voting percentage to their beneficial ownership is 2.33, and the median is 2.02.[395] We also note that the size of the wedge between insiders' voting power and ownership rights is approximately one-half the size of the wedge between insiders' voting power and ownership rights at dual-class firms.[396]

Finally, we note that TPV is not the only arrangement that created a wedge between insiders' voting and cash-flow rights. Three TPV companies' proxy statements disclosed arrangements that gave insiders influence over votes associated with shares that others beneficially owned.[397] For example, for several years, one large Church & Dwight

[394]The median insiders' voting percentage is 19%; the median insiders' ownership percentage is 8%; the ratio of these figures is 2.39. The median difference between insiders' voting control and ownership is 8.95%. As to particular companies, the average (median) difference measures for Aflac, Church & Dwight, Quaker, and Shaw are 12% (13%), 9% (7%), 9% (7%), and 16% (12%), respectively.

[395]The average (median) ratio of insiders' votes to shares owned in Aflac, Church & Dwight, Quaker, and Shaw are 3.14 (3.10), 2.07 (1.87), 1.41 (1.46), and 2.43 (2.51), respectively.

[396] *See supra* note 165.

[397]*Cf.* Villalonga & Amit, *supra* note 134 (empirically examining different mechanisms for increasing family control). We note that there may be additional shares whose votes are controlled by insiders, but which were not included in the TPV companies' proxy

shareholder was contractually obligated to vote its shares—which were treated as long-term shares upon receipt—in accordance with the recommendations of Church & Dwight's board of directors.[398]

In some years, these "insider-influenced" shares were substantial compared to the percentage of shares that insiders beneficially owned outright in these three companies.[399] Thus, these other control-enhancing mechanisms significantly increased the size of the wedge between insiders' voting and cash-flow rights. However, we note that, after the adoption of TPV, the percentage of insider-controlled shares at TPV companies generally trends downward over time.[400]

4. Diversification and New Equity Issuances

Because TPV increases insiders' control above their beneficial ownership, it enables them to maintain a given amount of voting control over the company while owning a smaller percentage of outstanding shares. This can facilitate insider diversification and new equity issuance. We consider each in turn.

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statements. We were unable to account for such shares, if any. We note also that beneficial ownership, as defined previously, includes shares not actually owned by insiders (such as shares owned by a spouse), but over which the insiders presumably have substantial control.

[398]A few months after it adopted TPV, Church & Dwight entered into a partnership with Occidental Petroleum Company ("Occidental"), which involved a Standstill Agreement, effective October 1, 1986. This agreement gave Occidental approximately 5% of outstanding Church & Dwight shares. If Occidental wished to sell its shares, Church & Dwight had the option to buy them at market price, which it did in 1991. *Church & Dwight Co. Inc. Agrees to Repurchase Certain Common from Occidental Petroleum Corp.*, STANDARD & POOR'S DAILY NEWS, Jan. 30, 1991. Figure 11 also includes shares held by Synovus' subsidiaries in a fiduciary or agency capacity. These shares amounted to between 6% and 27% of Synovus' shares outstanding over the selected years. Finally, Figure 11 includes shares held by trustees of Milacron's employee benefit plans, which accounted for 10% to 13% of Milacron's shares for selected years zero, one, three and five. We note also that Smucker, which is not included in Figure 11, put in place a dual-class structure for several of the years in which it also maintained TPV.

[399]For example, the average percentage of shares beneficially owned (beneficially owned plus influenced) by insiders at the time of adopting TPV was 19% (26%) for Family Companies 1 and 16% (20%) for Family Companies 2. Similarly, the average percentage of shares beneficially owned (beneficially owned plus influenced) by Family Companies 1 insiders ten and fifteen years after the adoption of TPV was 13% (16%).

[400]The trend, counting both shares owned and influenced by insiders, is consistent with the trend for shares owned by insiders, as shown in Part IV.D.1.a; in fact, the trend is slightly stronger here. In other words, insiders do not seem to be increasing their use of other control-enhancing mechanisms over time as their beneficial ownership falls.

a. *Insider Diversification*

As discussed in Subart II.B, insiders' share ownership in the company[401] often represents a large percentage of their total wealth. Accordingly, they are likely to favor less risky corporate strategies than diversified public shareholders would prefer. Diversification may encourage insiders to make business decisions that are more in line with diversified public shareholders' preferences. On the other hand, as insiders reduce their ownership stake in the company, they may be less inclined to monitor its performance,[402] which can increase agency costs. However, we note that, while companies had TPV, insiders generally retained ownership interests that exceeded those of insiders in typical public firms.

Figure 12 shows how total insider share ownership in TPV companies changed after they adopted TPV.[403] This chart shows substantial diversification with respect to total insider ownership. Ten years after the adoption of TPV, average observed insider ownership at TPV companies declined by 36%, with a median decline of 42%.[404] Looking at family ownership, instead of total insider ownership, paints a similar picture.[405]

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[401]Insiders' exposure to the company's fortunes also includes the value of the salary the insiders receive from the company, if they are also officers, directors, or other employees of the company.

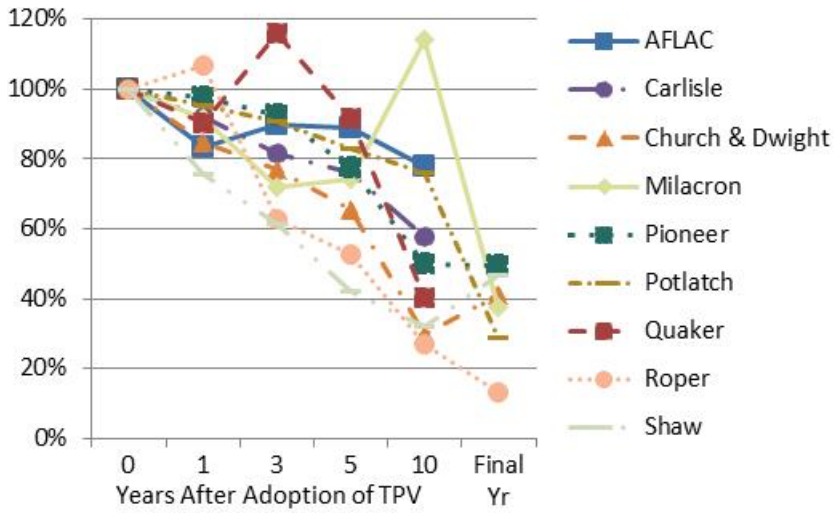
[402]Or, in the case of corporate employees, to work as hard.

[403]These charts exclude Century and Smucker. *See supra* note 321. Synovus is similarly excluded due to data issues, though we note that it appears to exhibit increased family and insider ownership.

[404]These numbers are for companies that were already public when they adopted TPV. When companies that went public with TPV are included, the average decline in ownership is 44%, and the median is 50%. *See* Spreadsheet (on file with authors).

[405]Over a ten-year period, average (median) family ownership at TPV firms declined by 35% (48%).

Figure 12: Total Insider Ownership as a Percentage of Total Insider Ownership Before Adopting TPV



We are unaware of any studies that examine insider diversification at dual-class firms over a ten-year period. However, over the three-year period following a dual-class recapitalization, insider diversification averages 5.1%.[406] Observed diversification at TPV firms over a comparable period is substantially larger, averaging 11%.[407]

It is somewhat surprising that TPV firms appear to have experienced greater insider diversification than dual-class firms: Dual-class stock gives insiders greater security in their control over the firm. Thus, to the extent that insider diversification is attributable to insiders' security in their control over the firm, one would expect dual-class stock to result in more diversification than TPV. One possible explanation is that firms self-select into TPV and dual-class stock. Firms that selected dual-class stock may have had insiders who were more concerned with

[406] *See* Bauguess, Slovin & Sushka, *supra* note 124, at 1247 (reporting average reduction in ownership of 5.1% after three years).

[407] The median was 10%. In order to facilitate a better comparison to the dual-class recapitalizing firms (discussed below), the average and median figures reported here are for firms that were already public when they adopted TPV. *See* Bauguess, Slovin & Sushka, *supra* note 124, at 1246 (describing the sample as consisting of public firms that switched from one-share-one-vote structures to dual-class structures).

maintaining control than those at firms who chose TPV.[408] In any event, our sample size is small.

b. *Issuance of Shares*

Controlling shareholders may be reluctant to allow controlled firms to issue new equity, out of concern that doing so will dilute their control over the firm. TPV, by lowering the voting control "cost" of issuing new shares, may encourage firms to issue additional equity. Similarly, a controlled firm anticipating a need to issue new equity may choose to implement TPV to help preserve the controlling shareholder's control.

Table 4 shows the proportion of TPV firms that had issued varying amounts of additional equity one, three, and five years after adopting TPV. For each firm and year, the figure is calculated by comparing the number of common shares outstanding, adjusted for stock splits and stock dividends, to the number of common shares outstanding at the time the firm adopted TPV. Table 4 shows that approximately one-third of TPV firms substantially increased their outstanding equity within five years of adopting TPV. Five years after adopting TPV, the mean (median) change in shares outstanding was +7.6% (+1%).[409]

Table 4: New Equity Issuances at TPV Firms

Years After Adopting TPV	Firms Issuing at Least [X]% Additional Equity		
	10%	25%	50%
1	0%	0%	0%
3	25%	0%	0%
5	33%	25%	0%

Moreover, the observed rate of additional equity issuance among TPV firms seems to be almost exactly between that of single-class firms

[408] We also note that the time period in which firms adopted disparate voting structures differed somewhat. This temporal difference affects the business environment these firms faced and may also indicate underlying differences in the firms themselves. *Compare* Bauguess, Slovin & Sushka, *supra* note 124, at 1247 tbl.1 (stating that the dual-class sample ranges from 1978 to 1998), *with* Part IV.A, *supra* (stating that the firms in our sample that adopted TPV after they were publicly traded did so between 1985 and 1987, which corresponded to a particular window of regulatory treatment).

[409] Five years after adopting TPV, the outstanding shares at each company had changed, on a stock-split- and stock-dividend-adjusted basis: Shaw (+46%), Synovus (+32%), Century (+25%), Milacron (+16%), Roper (+9%), Aflac (+2%), Smucker (+0%), Pioneer (-2%), Church & Dwight (-5%), Potlatch (-6%), Quaker (-9%), and Carlisle (-17%). *See* Spreadsheet (on file with authors).

and that of dual-class firms.[410] Dual-class firms that issue equity also seem to issue somewhat more of it than TPV firms.[411]

5. TPV and Firm Performance

The stock price performance of TPV firms paints a mixed picture.[412] Overall, TPV firms significantly outperformed the market as a whole. As Figure 13 shows, an investor who invested $100 in our TPV firm index at the beginning of 1980 would have had $10,672 at the end of 2013, compared to only $1,748 if she had invested in the S&P 500.[413] This performance is not due to firms taking on a higher level of systemic risk; the beta of the TPV index is slightly below one.[414]

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[410]Approximately 40% of firms issue new equity within three years of a dual-class recapitalization, compared to 9% of comparable single-class firms. *See supra* note 208. The 25% issuance rate for TPV companies after three years of TPV is almost the exact midpoint of this range.

[411]The median equity issuance at dual-class firms is approximately 25%. Dimitrov & Jain, *supra* note 104, at 356 tbl.6. For TPV firms that significantly increased their shares outstanding within three years of adopting TPV, the average and median increases were 18%. *See* Spreadsheet (on file with authors).

[412]Smucker is excluded from the analysis in this Subpart because it also had dual-class stock during much of the time it had TPV.

[413]Our TPV index is structured in much the same way as the S&P 500. It assumes that, at the beginning of 1980, an investor bought shares of each TPV company (though none had adopted TPV yet) proportional to that company's market capitalization. The investor then rebalances her portfolio at the end of each trading day based on each company's market capitalization. When a company is acquired or delisted, the investor cashes out and reinvests in the remaining TPV firms in proportion to their market capitalizations. Dividends are assumed to be reinvested. *See* Performance Data 2 Spreadsheet (on file with authors); Worksheet Price Chart 4 (on file with authors).

[414]The beta of the TPV index is 0.93 over the entire period measured, using the returns of the S&P 500 as the measurement of market returns. *See* Spreadsheet (on file with authors).

Figure 13: Value of $100 Invested in TPV Index and S&P 500

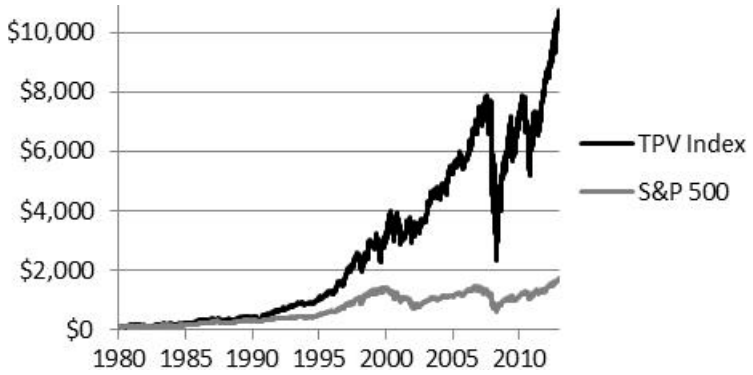
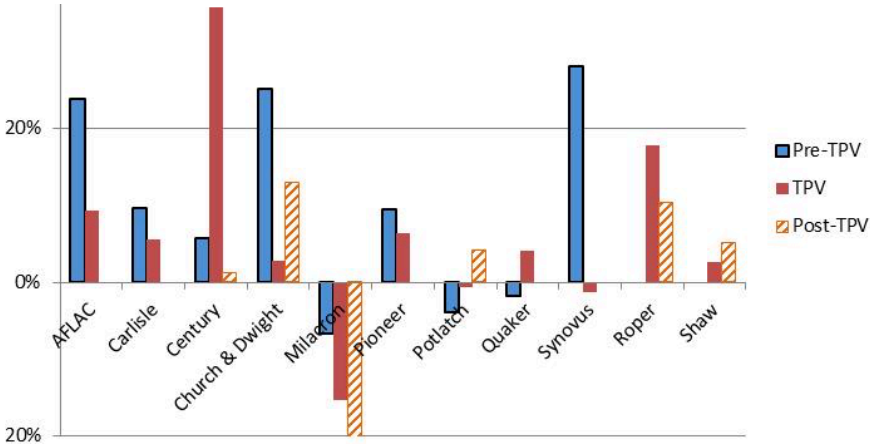


Figure 14 shows the performance of each TPV firm relative to the S&P for three periods: Before the firm implemented TPV; while the firm had TPV; and after the firm rescinded TPV.[415] It shows that 72% of TPV firms outperformed the S&P 500 during the time they had TPV.[416]

Figure 14: Annualized Returns of TPV Companies Relative to the S&P 500



At the same time, however, it is not clear that TPV contributed to this strong performance; measured relative to the S&P 500, most TPV companies performed better before they adopted TPV than afterward.

[415]Of course, for those firms that went public with TPV or that never rescinded TPV, Figure 14 does not report data for the pre-TPV or post-TPV period, respectively.

[416]Note that Milacron's poor performance post-TPV extends off of the chart.

Similarly, among those companies that repealed TPV, as many saw their performance improve afterwards as saw it decline. All we can comfortably conclude from this evidence is that TPV did not prevent many TPV companies from performing well relative to the market as a whole.

V. CONCLUSION

Our results support arguments made by both advocates and critics of TPV. We demonstrate that TPV does empower long-term shareholders. However, we find little evidence that TPV increases "long-term" shareholding within the meaning of the TPV plans. Moreover, we find that TPV empowers insiders in the short term, increasing their voting power and creating a wedge between their ownership of the firm and their voting control over it.

Our findings suggest that TPV represents an intermediate step between one-share-one-vote and dual-class stock. We find that, compared to dual-class firms, TPV companies exhibit lower levels of insider ownership and control. Moreover, the wedge between insider control and ownership at TPV firms is approximately one-half as large as the wedge between insider ownership and control at dual-class firms.

While we caution against drawing strong conclusions from our limited data, TPV appears to be linked with mature, family-owned companies' transition toward a more dispersed public ownership structure. We find that TPV is associated with diversification by controlling shareholders, which better aligns their incentives with those of outside shareholders. Moreover, although TPV structures increase insider control in the short term, over the long term, the TPV companies in our sample ultimately exhibited a reduced level of insider control. This result is driven by the companies who rescinded TPV following insider divestment and diversification that seems to have been facilitated by TPV. This suggests that TPV could play a useful role in facilitating such ownership transitions over time.

We conclude that firms should be able to experiment with TPV plans. Companies and observers should pay particular attention to the key terms of TPV plans: The length of the required share holding period; the number of votes that long-term shares receive; the board's discretion to issue new shares as long-term shares; whether the plan terminates when long-term shareholding drops below a certain level; and whether the plan treats certain groups of shareholders—such as large shareholders, shareholders who hold their shares in street name, and employees—differently. The Securities and Exchange Commission

should promulgate rules requiring TPV companies to disclose the voting power of directors, officers and principal shareholders. Until then, companies that adopt TPV should voluntarily disclose this information.