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SHAREHOLDER ACTIVISM: THE 21ST CENTURY POISON PILL REPLACEMENT

I. INTRODUCTION

Has the twenty-some year dominance of the poison pill come to an end? The 1980s saw the advent of the shareholders rights plan—more commonly referred to as the poison pill—due to the prevalence of corporate raiders wishing to make hostile bids for companies they wished to ultimately sell for parts. Initially praised as an effective tool for defending against hostile takeovers and protecting a company's directors and officers, adoption of a poison pill often resulted in a temporary stock price increase to the adopting company because the pill sent a message to investors that the company might be a takeover target. Since the 1980s, the poison pill has evolved into a defensive tactic that runs the gamut of severity.

Recently, however, shareholder activists have brought the poison pill into a new light by demanding that companies drop their shareholders rights plans, or by affecting change without owning a percentage of stock that would normally trigger a poison pill, calling into question the necessity of this hostile takeover defense. With the topics of corporate governance and shareholders' rights on the upswing, shareholder activists and activist hedge funds are making a strong case for the shift from poison pills to actual shareholders' rights and a seat at the governance table without the use of the offensive and dramatic takeover defense that is the poison pill. This Article argues that poison pills are becoming irrelevant because shareholder activists are able to drive essential business decisions as a hostile bidder would in a more peaceable, value-driven manner.

Since the 1980s, public companies have been using poison pills to combat corporate raiders, hostile bidders, and now shareholder activists. While boards of directors initially praised the poison pill as an effective tool for leveling the playing field between a hostile bidder and a company's board of directors, it has now evolved into a mechanism that facilitates board entrenchment and subjective, board-centric decision-making.

However, with a new trend in corporate governance and shareholders' rights on the rise, the poison pill might meet its demise. Recently, shareholder activists have thrust the poison pill into the limelight to hold it accountable for what it really is, and not what it purports to be. All of the actions shareholder activists take with regards to public companies are those which a hostile bidder might wish to take if the bidder was successful in a bid for a company and not impeded by a poison pill, demonstrating how shareholder activists are contributing to the declining use

and irrelevancy of the poison pill. In fact, poison pills are becoming irrelevant in this day and age because shareholder activists are able to drive essential business decisions as a hostile bidder would in a more peaceable, value-driven manner.

In order to show how poison pills are becoming irrelevant due to shareholder activists, Part II of this Article begins by examining the poison pill and its development over time, comparing the historical purpose of the poison pill to its current use in public companies, including a discussion regarding shareholders' current opposition to the poison pill because of its effect on shareholders' rights, and its questionable lawfulness and ethical nature. Part III of this Article then turns to shareholder activists, focusing on activist hedge funds, and discusses their roles in public companies, including their roles in increasing shareholder value and roles in key decision-making of a company, and shareholder activists' efficacy, including their long-term positive effects on target companies and the increasing frequency with which companies are faced with shareholder activists, further demonstrating their efficacy. Part IV concludes with a discussion of the irrelevance of the poison pill due to shareholder activism and its effects.

II. THE POISON PILL AND ITS DEVELOPMENT OVER TIME

Justifications for the creation of the poison pill differ greatly from justifications for its continued use today, and the tactic is now a much less prevalent defensive takeover measure in public companies, demonstrated by examining the poison pill and its development over time. In this section, Subsection II(a) discusses the purpose behind the poison pill's invention and the issues the defensive measure was designed to protect against. Subsection II(b) discusses the current use of the poison pill, including shareholders' increasing opposition to the defensive measure and the questionable lawfulness of the measure in light of the Williams Act.

a. The Historic Purpose of the Poison Pill

Martin Lipton, of Wachtell, Lipton, Rosen & Katz, invented the poison pill in the early 1980s to protect against corporate raiders, and in order to prevent the break-up of a company.¹ The poison pill had the effect of eliminating, or at least severely hindering, a hostile bidder's involvement in important business decisions commonly reserved for the company's officers and board of directors. Lipton described the poison pill as giving a "board of directors the opportunity to level the playing field" at a time when corporate raiders and hostile takeovers were on the

1. See The Deal, *Why Martin Lipton invented the poison pill*, VIMEO (Dec. 23, 2010, 12:49 PM), <https://vimeo.com/18125037>.

rise, and targeted companies were routinely bought and sold for their parts.²

Delaware courts quickly reviewed the legality of the poison pill and deemed the defensive measure an acceptable defense to a hostile takeover bid, so long as the board of directors' decisions and actions satisfy enhanced judicial scrutiny. Since the 1980s, the use of poison pills has become commonplace in public companies,³ although the reason behind a company's adoption of a poison pill seems to have changed.

b. Current Use of the Poison Pill

More than thirty years after its invention, the poison pill is most often used today for entrenchment of a company's board of directors and officers, and is on the decline because of its severity and questionable ethical nature. In fact, many companies that adopt poison pills do so because of a recent decrease in their stock price,⁴ suggesting that these companies do not wish to invite any acquisition activity so that boards of directors are not threatened, even if the company's stock price reflects that the company might be underperforming and in need of a new direction that might be provided by a hostile bidder.

Further demonstrating the use of a poison pill for board entrenchment is the decreasing share percentage that triggers a company's poison pill. In the 1980s, a twenty percent trigger was the rule; today, companies are setting triggers as low as fifteen or ten percent.⁵ Moreover, Delaware courts recently upheld a poison pill with two different triggers that allow more stock ownership for passive investors, while maintaining a lower threshold for activist shareholders.⁶

Not only has use of the poison pill declined because of its severity, but its use is also abandoned because of its questionable ethical nature. At its inception, the poison pill was a tool for the board of directors to

2. *See id.*

3. *See* Kris Frieswick, *Poison Pill Popping*, CFO (Oct. 15, 2001), available at <http://ww2.cfo.com/banking-capital-markets/2001/10/poison-pill-popping/>. (“John P. Biestman, vice president of finance at Commerce One . . . [explains] ‘at this point, poison pills are really just an established practice.’”)

4. *See id.*

5. *See id.* (“When companies first started adopting pills in the early 1980s, a 20 percent trigger was the rule, says McGurn. Today, triggers are more often set at 15 percent, and 10 percent is increasingly common.”); *See* Lucian A. Bebchuk, *Don't Make Poison Pills More Deadly*, N.Y. TIMES: DEALBOOK (Feb. 7, 2013) [hereinafter *Bebchuk, Don't Make Poison Pills More Deadly*], available at <http://dealbook.nytimes.com/2013/02/07/dont-make-poison-pills-more-deadly/>. (“Indeed, among the 637 companies with poison pills in the FactSet Systems database, 80 percent have plans with a threshold of 15 percent or less. No other developed economy grants corporate insiders the freedom to cap the ownership of blockholders they disfavor as such low levels.”)

6. *See* Steven Davidoff Solomon, *Poison Pill's Relevance in the Age of Shareholder Activism*, N.Y. TIMES: DEALBOOK (Apr. 18, 2014) [hereinafter *Solomon, Poison Pill's Relevance*], available at http://dealbook.nytimes.com/2014/04/18/poison-pills-relevance-in-the-age-of-shareholder-activism/?_r=0NYT. (“The pill sets two limits for ownership—a 20 percent limit for passive investors like mutual funds and a 10 percent threshold for activist shareholders.”)

level the playing field, but now the balance of power has tipped dramatically in management's favor.⁷ Before poison pills, if management did not adequately maximize shareholder value, the price of the company's stock declined; this then allowed a hostile bidder to buy into the company at a low price and replace management, which created an incentive for management to maximize shareholder value to avoid being replaced. The poison pill eliminates this incentive because it allows management to refuse any hostile bidder, even if management is shirking its fiduciary duty to the shareholders. The threat of a hostile takeover means nothing in the face of a poison pill, and the once effective check on a company's management no longer exists.⁸ This practice is clearly entrenchment of the board of directors, which would not survive enhanced judicial scrutiny in court,⁹ but public companies are aware that many hostile bidders do not wish to spend time and money arguing over a poison pill in court, so they are not incentivized to challenge this practice. Not only does it eliminate an incentive to maximize shareholder wealth, but the poison pill also operates to disenfranchise shareholders by refusing them the option to participate in a hostile tender offer, evaluate the bidder for themselves, and vote in the hostile bidder's proxy contest, all of which are consequences which violate enhanced judicial scrutiny as it relates to hostile takeover defenses.¹⁰

So what is a hostile bidder to do when faced with a poison pill? There are seemingly only three ways around a poison pill: negotiate a friendly transaction with the target company, prove the pill fails enhanced judicial scrutiny in court, or start a proxy contest to remove the target company's board of directors.¹¹ While negotiating a friendly transaction with the target company seems like the best option, a target company that is open to friendly negotiation is most likely open to a merger or acquisition, is willing to talk to any acquirer outside of using defensive tactics, and will redeem the rights in a poison pill before a hostile

7. See Julian Velasco, *The Enduring Illegitimacy of the Poison Pill*, 27 J. CORP. L. 381, 382–84 (2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=825046. (“And, while in place, [the poison pill] is an absolute barrier to the consummation of a hostile takeover. The only way to counter a poison pill is to have it removed, which is easier said than done. From management's perspective, the poison pill is almost too good to be true. . . . [T]he poison pill is extremely potent, capable of preventing all hostile takeovers, regardless of their underlying merit.”)

8. See Bebchuk, *Don't Make Poison Pills More Deadly*, *supra* (“Over time, however—and without sufficient attention by investors and public officials—companies have started to use poison pills to prevent acquisitions of stakes that fall substantially short of a controlling block.”)

9. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (“A Delaware corporation may deal selectively with its stockholders, provided the directors have not acted out of a sole or primary purpose to entrench themselves in office.”)

10. See *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660 (Del. Ch. 1988) (“Action designed principally to interfere with the effectiveness of a vote inevitably involves a conflict between the board and a shareholder majority. Judicial review of such action involves determination of the legal and equitable obligations of an agent towards his principal. This is not, in my opinion, a question that a court may leave to the agent finally to decide so long as he does so honestly and competently; that is, it may not be left to the agent's business judgment.”)

11. See Velasco, *supra* at 383.

bidder triggers the defensive tactic if they want the deal to go forward. The other two options—legal battles or a proxy contest—are quite costly to a hostile bidder, who could easily find another target company without such a defensive tactic in place. Target companies know that the monetary cost and uphill battle of combating a poison pill are huge deterrents to any attempts to defeat the tactic, and use this fact to their advantage to keep themselves in power, prevent hostile bids, and disenfranchise shareholders.¹² It seems highly unethical that a public company can hide behind its wealth relative to a hostile bidder, and its perceived better judgment, in order to keep its management in power and thwart any potential merger or acquisition by using a defensive tactic whose purpose has changed so much since its invention.

These trends in poison pill use demonstrate a motivation that stems from a board of directors unwilling to relinquish their seats of power, and the Delaware courts approval of such practice further demonstrates how use of a poison pill has shifted from allowing for a level playing field to allowing a board of directors to protect themselves from any and all hostile bids that threaten their power. Boards of directors are no longer in need of a level playing field, rather those wishing to acquire or merge with a company are now at a disadvantage.

All of these trends in poison pill use are contributing to its own demise, and this can be seen through shareholders' increasing interest in corporate governance and recent questions regarding the poison pill's lawfulness in light of the Williams Act.

i. Shareholders' Increasing Interest in Corporate Governance

Shareholders increasingly oppose use of a poison pill because of its effect on shareholder choice and because it limits shareholders' decision-making ability. As certain poison pills have become more toxic or contentious, shareholders have begun to take note of the effects of the poison pill and have begun to demand change from corporations using this defensive tactic. This opposition has manifested itself in shareholders' increasing interest in corporate governance in recent years,¹³ which has invariably led shareholders to become more interested in what sorts of

12. See Velasco, *supra* at 383. ("A second way around the poison pill is to persuade the courts that the target company's board of directors is breaching its fiduciary duties by refusing to redeem the poison pill Rights. . . . However, courts are not easily persuaded. . . . Despite the obvious benefits to shareholders, who would prefer to sell their shares at an often substantial premium to market price, courts are hesitant to second-guess the business judgment of directors. . . . The third way around the poison pill is to launch a proxy contest . . . A proxy contest, however, is expensive and time-consuming. Thus, only the most determined bidders can proceed with this option, and yet, this is the only real option available to most hostile bidders.")

13. See James R. Copland, *2015 Proxy Season Wrap-Up*, Proxy Monitor (2015), available at <http://www.proxymonitor.org/forms/2015Finding4.aspx> (finding that corporate governance—which includes separate chairman and CEO, proxy access, special meetings/written consent, and voting rules—was the subject of 42% of shareholder proposals in 2015, a close second only to social policy shareholder proposals at 43%.)

decision-making power they are allowed in a company, and more specifically, which decisions they are barred from making for themselves.

A poison pill prevents shareholders from reaping the benefits of a tender offer, usually offered at a premium over market value, without allowing shareholders the ability to make the decision to accept or deny the offer themselves. Also, a poison pill prohibits shareholders from approving a change in control—in the form of a hostile bidder—that would lead to different, sometimes more profitable, business decisions than those currently undertaken by the board of directors. As such, shareholders are increasingly weary of this defensive tactic and its adoption in a company.

In 2001, more than 2,200 corporations had poison pills in effect; just ten years later, corporations with poison pills in effect totaled less than half of the 2001 amount,¹⁴ representing the first time in two decades that this number has fallen below 1,000.¹⁵ Moreover, do not expect this number to increase anytime soon. While corporations have been allowing their poison pills to expire or are eliminating them because of pressure from informed shareholders, Institutional Shareholder Services has released proxy guidelines that, if followed, point towards a further decrease in poison pill use.¹⁶ These guidelines urge shareholders to vote against or withhold a vote for any directors who previously adopted a poison pill of duration of more than twelve months, renewed a poison pill without shareholder approval, or made a material adverse change to an existing poison pill without shareholder approval.¹⁷

14. See Andrew L. Bab & Sean P. Neenan, *Poison Pills in 2011*, CONFERENCE BOARD: DIRECTOR NOTES (Mar. 2011), available at <https://www.conference-board.org/retrievefile.cfm?filename=TCB%20DN-V3NS-11.pdf&type=subsite> (“A January 4, 2011 search through CapitalIQ found that fewer than 900 corporations had poison pills in effect. . . . Moreover, fewer pills are being adopted in the absence of a specific threat. . . .”)

15. See John Laide, *A New Era in Poison Pills – Specific Purpose Poison Pills*, SHARKREPELLENT.NET: RESEARCH SPOTLIGHT (Apr. 1, 2010), available at https://www.sharkrepellent.net/request?an=dt.getPage&st=1&pg=/pub/rs_20100401.html&Specific_Purpose_Poison_Pills&rnd=42401 (“On 3/30/2010, Callon Petroleum Corp’s poison pill expired without renewal. As a result, the number of U.S. companies with a poison pill in force fell to 999, the first time the total was less than 1,000 since about 1990. There were no regulatory or legal changes leading to the decline in companies adopting and maintaining routine poison pills but can largely be attributed to the increased efforts of shareholder activists along with an enhanced awareness of corporate governance issues by U.S. corporations”)

16. See Bab et al., *supra* (“In addition, Institutional Shareholder Services (ISS) revised its guidance for the 2010 proxy season in a manner likely to continue the downward trend in the number of poison pills. In the past ISS has recommended that shareholders vote against or withhold their votes for directors who voted to adopt or renew a poison pill of any duration without shareholder approval (or without commitment to put the pill up for shareholder approval within 12 months of adoption or renewal).”)

17. *Id.* (“Prior to this revision, ISS would have made a voting recommendation only in the year that the pill was implemented or renewed. Under the revised guidelines, a director’s voting record on the company’s poison pill may factor into ISS’s recommendation concerning that director every time he or she is up for election.”)

While the use of poison pills is declining, the types of poison pills that are adopted are increasingly shareholder-friendly. Corporations are weary of the fact that shareholders now understand how poison pills diminish their decision-making ability, causing corporations to adopt poison pills that require shareholder approval or are of duration of five years or less.¹⁸ All of these trends in poison pill construction and adoption stem from shareholder opposition to the defensive tactic and subsequent interest in corporate governance, and demonstrate the tactic's declining prevalence in public companies.

ii. Lawfulness of the Poison Pill in Light of the Williams Act

Not only has the poison pill declined due to shareholder opposition and increased shareholder interest in corporate governance, but also the lawfulness of the poison pill is questionable given its draconian nature and possible preemption by the Williams Act. However, even though the practice is questioned, no one wants to be the first to overturn the overwhelming case law in favor of poison pills. Also, the legal nightmare that a hostile bidder would have to endure to challenge the legality of a poison pill is a strong deterrent, causing opponents of the poison pill to find ways around the tactic (for example, shareholder activism) that lead to its irrelevance and declining use.

Professors Lucian Bebchuk and Robert Jackson Jr. argue that although federal courts have largely ignored the possibility of preemption of state antitakeover laws authorizing the use of poison pills, the Williams Act preempts these state laws.¹⁹ The Williams Act creates a federal standard for regulating unsolicited tender offers, and when it was enacted, states responded by developing state laws that created more barriers to unsolicited tender offers. During the 1970s and 1980s, federal courts, including the Supreme Court, held that the Williams Act preempted some of these state laws. Since that time, federal courts have largely ignored other state laws that have implications for unsolicited tender offers. In particular, Professors Bebchuk and Jackson argue that the Williams Act likely preempts state laws authorizing the use of poison pills because such laws are the “most powerful impediment to outside buyers of shares”, and are more powerful impediments than those created by the laws that courts held preempted in the 1970s and 1980s.²⁰ Professors

18. See Laide, *supra* (finding that “routine poison pill adoptions are declining, while ‘in play’ adoptions and poison pills adopted to protect [net operating loss carryforwards] are on the rise.”)

19. See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Toward a Constitutional Review of the Poison Pill*, 144 COLUM. L. REV. 1549 (Oct. 2014) [hereinafter Bebchuk et al., *Towards a Constitutional Review*], available at <http://columbialawreview.org/wp-content/uploads/2014/10/Bebchuk-Jackson.pdf> (“We argue that the state-law rules governing poison pills are vulnerable to challenges based on preemption by the Williams Act. Such challenges, we show, could well have a major impact on the corporate-law landscape.”)

20. See Bebchuk et al., *Towards a Constitutional Review*, *supra* at 1575–78 (“Given that the state-law rules on the poison pill have transformed the tender-offer landscape imagined by the drafters of the Williams Act, have provided incumbents with stronger antitakeover protections than those

Bebchuk and Jackson argue that many of the state laws on which companies rely to support their use of this defensive tactic would be invalidated if challenged,²¹ and as such, the poison pills created under these laws would be illegal.

When early versions of Professors Bebchuk and Jackson's study began circulating, Martin Lipton—creator of the poison pill, himself—came to the poison pill's defense. Calling Bebchuk and Jackson's position "tendentious and misleading",²² the vehement debate among these individuals highlights the polarizing effect the poison pill has on different constituencies.

Furthermore, corporations' poison pills are challenged in courts quite frequently nowadays and although some judges rule in a way that skirts the issue at hand or find the defensive tactics troubling, the overwhelming body of law in favor of poison pill use prevails, and no one wants to be the first person to rule otherwise.

In a recent challenge to a corporation's poison pill, Third Point LLC and Daniel S. Loeb challenged Sotheby's poison pill, which set two limits for ownership based on the type of investor.²³ Delaware's Chancery Court upheld the poison pill without actually ruling on the validity of the poison pill, because even without the court's intervention, there was a high probability that Third Point would win its proxy contest to replace three of Sotheby's directors.²⁴ The court's ruling implied that even without striking down the poison pill—a holding that would dramatically change Delaware law as it relates to poison pills—Third Point would achieve the same result as if the court had struck down Sotheby's poison

imposed by the statutes considered by the Supreme Court in *MITE* and *CTS*, and are not meaningfully different from the laws considered in those cases, an examination of the constitutional validity of these rules is necessary. Courts, commentators, and practitioners should not take for granted that state-law poison-pill rules would survive a preemption challenge.")

21. See Bebchuk et al., *Towards a Constitutional Review*, *supra* at 1549.

22. See Martin Lipton, *A Response to Bebchuk and Jackson's Toward a Constitutional Review of the Poison Pill*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Mar. 13, 2014), available at <http://corpgov.law.harvard.edu/2014/03/13/a-response-to-bebchuk-and-jacksons-toward-a-constitutional-review-of-the-poison-pill/> ("Bebchuk and Jackson's paper is tendentious and misleading . . . [and] thus conveys a fanciful vision of Williams Act preemption standards . . .")

23. See Solomon, *Poison Pill's Relevance*, *supra* ("Sotheby's has become a hedge fund hotel as a number of funds, including Eton Park and Marcato Capital Management, have taken stakes in the company. Leading the charge is Third Point, which has taken a 9.62 percent stake in the auction house and is running a proxy contest to replace three of Sotheby's directors, comparing Sotheby's to 'an old master painting in desperate need of restoration.' Sotheby's has based its defense on an increasingly common tactic: a low-threshold poison pill.")

24. See Michael J. De la Merced & Alexandra Stevenson, *Sotheby's Poison Pill Is Upheld by Delaware Court*, N.Y. TIMES: DEALBOOK (May 2, 2014), available at http://dealbook.nytimes.com/2014/05/02/sothebys-poison-pill-is-upheld-by-court/?_r=0 ("Vice Chancellor Parsons noted that the hedge fund manager had roughly 10 times the number of shares that Sotheby's board now owns, and, even now, Third Point has a roughly 50-50 chance of winning the proxy contest . . . 'There is a substantial possibility,' the vice chancellor wrote, 'that Third Point will win the proxy contest, which would make any preliminary intervention by this court unnecessary.'")

pill, so the judge did not need to rule in a way that would make him responsible for a substantive change in Delaware corporate law. Similarly, in a 2011 suit between a hostile bidder Air Products and Chemicals and target Airgas, the Delaware Chancery Court upheld Airgas poison pill, stating that the proper solution for the shareholders' problem with the poison pill was a new board of directors.²⁵ Even in light of the Chancellor's personal reservations regarding the law of hostile takeover defensive measures, Chancellor Chandler was forced to release an opinion consistent with binding Delaware precedent, although Chancellor Chandler personally took issue with the defensive tactic as it was used in this case.²⁶ However, even with the support of Professors Bebchuk and Jackson's research and cases in which it is obvious that judges are beginning to realize the poison pill's time has come and gone, challenges to the constitutionality of state laws authorizing the use of poison pills have not been made, even though such a challenge would seemingly put poison pills to bed for good. Since no one wants to be the first mover, opponents of the poison pill have had to find new ways to successfully affect change in corporations, and in doing so, have become so effective that poison pills are becoming irrelevant.

It is plain to see that the historic need for the poison pill and its invention no longer exist in the market today. Poison pills have gone from leveling the playing field for a company's board of directors and management to allowing boards of directors to entrench themselves in office to the detriment of shareholders. This defensive tactic continues to create a hostile environment for all those affected by it, and the increased shareholder opposition to such a tactic and the debated lawfulness of the poison pill have led to its declining use.

However, another phenomenon has played a large role in the poison pill's declining use because it has made the defensive tactic somewhat irrelevant—shareholder activism. Because shareholder activists are able to accomplish the same goals that hostile bidders wish to achieve, in a

25. See Steven Davidoff Solomon, *Air Products Bid Dies as Airgas Poison Pill Lives On*, N.Y. TIMES: DEALBOOK (Feb. 15, 2011) [hereinafter Solomon, *Air Products Bid*], available at <http://dealbook.nytimes.com/2011/02/15/air-products-withdraws-airgas-bid-after-ruling/> ("Chancellor Chandler also held that while it was not 'realistically attainable' for Air Products to call a special meeting to remove directors, the prospect of another election meeting in September was so attainable. The poison pill was not preventing the Air Products bid from ultimately succeeding since Air Products could attempt to elect more directors then.")

26. *Id.* ("Although I have a hard time believing that inadequate price alone (according to the target's board) in the context of a non-discriminatory, all-cash, all-shares, fully financed offer poses any 'threat'—particularly given the wealth of information available to Airgas's stockholders at this point in time—under existing Delaware law, it apparently does' Chancellor Chandler was also quick to note that '[in] my personal view, Airgas's poison pill has served its legitimate purpose [and] has given Airgas more time than any litigated poison pill in Delaware history' However, again, he could not substitute his judgment for binding Delaware precedent For takeover law generally, Chancellor Chandler's opinion goes on a tour de force detailing 30 years of Delaware case law on the poison pill. In the end, the chancellor does assert that 'this case does not endorse 'just say never''—raising the prospect that in the case of a conflicted board, a pill could be ordered redeemed.")

more peaceable, value-driven manner, poison pills are declining even further in use.

III. SHAREHOLDER ACTIVISTS

Shareholder activists are outsiders who affect major business decisions that increase shareholder value, without threatening a total break-up of a company or creating a hostile environment. Through their actions, shareholder activists, and more specifically hedge fund activists, have had the same effect on corporations that hostile bidders or corporate raiders of the past wished to achieve. Accordingly, shareholder activists are eliminating the need for the poison pill, because they are able to affect change without triggering a pill's harsh consequences.

Section III(a) discusses shareholder activists' role in public companies, including their ability to increase shareholder value and play an active role in key decision-making. Section III(b) discusses the studies performed to date showing shareholder activists' efficacy and evidence showing that shareholder activism is on the rise in the United States.

a. Shareholder Activists' Role in Public Companies

Shareholder activists function as outsiders who affect major business decisions and bring objectivity to directors and officers. In the past, it was generally accepted that individual shareholders owned too few shares in order to effectively monitor management or a board of directors' performance, and these individual shareholders did not possess the financial wherewithal to undertake effective monitoring processes.²⁷ As such, shareholders were relegated to the position of a 1950s child at a dinner table: seen but not heard.

This is no longer the case with the advent of shareholder activists, who make it their business to inform themselves and monitor a company's officers, directors, and operating performance. In particular, hedge fund activists have drastically changed the relationship between a company's officers and directors and its shareholders. Hedge fund activists are investment firms that identify corporations that can make operational changes, improvements, or undertake strategic business plans that create increased value for the company, and consequently, the company's

27. See Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 864–85 (2013), available at http://www.jstor.org/stable/23491833?seq=1#page_scan_tab_contents (“The canonical account of U.S. corporate governance, which stresses the tension between dispersed shareholders and company managers in large public firms, has become factually obsolete and now provides a misleading framework for contemporary corporate governance theorizing. In this account, framed eighty years ago by Adolf Berle and Gardiner Means, shareholders individually own too few shares to monitor management’s performance and confront coordination costs that make collective monitoring difficult . . . the Berle-Means premise of dispersed share ownership is now wrong. In 2011, for example, institutional investors owned over 70% of the outstanding stock of the thousand largest U.S. public corporations.”)

shareholders.²⁸ By attracting investors and capital, these hedge funds are able to function as intermediaries who “monitor company performance and present to companies and institutional shareholders concrete proposals for business strategy through mechanisms less drastic than takeovers.”²⁹ Activist hedge funds have the financial wherewithal to effectively and objectively monitor a variety of corporations, and to engage in the necessary research and planning to craft business strategies to be presented to a company’s board of directors, and do so through the use of proprietary programs.³⁰ Activist hedge funds often partner with a group of current and former chief executive officers of large, Fortune 500 companies, and use this vast array of experience and expertise to enter a corporation’s boardroom in a peaceful, mutually agreeable manner.³¹

The discussions and environment created by activist hedge funds are entirely different from those which are created by hostile bidders (or were created by corporate raiders in the past); activist hedge funds focus on demonstrating ways in which both a corporation and its shareholders can improve—a pareto improvement—while hostile bidders often put a board of directors on defense, and create an us versus them environment.

Through their cooperative discussions with corporations, activist hedge funds accomplish a variety of different business transactions. These business transactions include, but are not limited to, divesting assets, changing investment or payout levels, altering capital structure, replacing the CEO, cost reductions, reorganizations, corporate spin-offs, revamped financing structures, and more shareholder-oriented uses of cash and liquidity.³² Furthermore, while both hostile bidders and hedge fund activists are interested in steering the future direction of a company,

28. See Hudson Executive Capital, *About Us*, HUDSON EXECUTIVE CAPITAL (2015), available at <http://www.hudsonexecutive.com/about> (“Our historical relationships and deep insight allow our team to work effectively with corporate boards, management teams and shareholders. Accordingly, we are well positioned to employ our principle of Constructive Engagement: Discussions with the board, management and shareholders of our portfolio companies will be anchored in fundamental and strategic analysis, collaborative dialogue and mutual respect.”)

29. See Gilson et al., *supra* at 867.

30. See PricewaterhouseCoopers LLP, *Shareholder Activism: Who, what, when, & how?* (PricewaterhouseCoopers LLP 2015), available at <https://www.pwc.com/us/en/corporate-governance/publications/assets/pwc-shareholder-activism-full-report.pdf>. (“Although each hedge fund activist’s process for identifying targets is proprietary, most share certain broad similarities.”)

31. See Hudson Executive Capital, *supra* (“The Firm’s 14 CEO Partners . . . and an additional CEO Network of 20+ LPs invested in the Fund, bring a wealth of managerial, operational and regulatory expertise to the Firm. The CEO Partners have served with distinction on 66 public company management teams and boards across the Firm’s key industry verticals. The Firm’s Founders draw on 50 plus combined years of executive, valuation and transactional experience, and the insights of the Firm’s CEO Partners, who bring approximately 200 years of CEO experience in industry verticals representing more than 80% of the S&P500.”)

32. See Lucian Bebchuk, Alan Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1093 (2015) [hereinafter Bebchuk et al., *Long-Term Effects of Hedge Fund Activism*], available at <http://columbialawreview.org/the-long-term-effects-of-hedge-fund-activism/>; see also Global Markets Intelligence, *Sector Disruptors: Investor Activism*, S&P Capital IQ, at 2 (Jul. 2, 2015), available at <http://www.spcapitaliq.com/documents/our-thinking/research/sector-disruptor-investor-activism.pdf>.

hedge fund activists differ in that they do not wish to eliminate shareholders or the company itself; “the company’s future independence or survival is not the primary question,”³³ the company’s future business decisions are hedge fund activists’ main focus.

Further evidence of shareholder activists’ beneficial role in public companies is demonstrated by the following discussion of shareholder activists’ role in creating shareholder value and their role in major decision-making in public companies.

i. Role in Shareholder Value

Shareholder activism aims to create shareholder value by affecting major business decisions of a company that boards of directors may be opposed to, without creating a hostile bidder versus directors environment. Preliminarily, hedge fund activists are required to publically disclose the purchase of a significant stake of a corporation’s stock through a Schedule 13D filing.³⁴ This not only puts a corporation on notice that a shareholder activist is likely to engage with management, but also sends a positive message to the public: “public disclosures of the purchase of a significant stake by an activist are accompanied by significant positive stock-price reactions as well as followed by subsequent improvements in operating performance” which are not reversed in the long run, according to a recent study regarding the long-term effects of hedge fund activism.³⁵ Furthermore, this initial rise in stock price is not followed by a corresponding decline down the line; in fact, the stock price of such companies generally continues to rise.³⁶ Simply by announcing their involvement with a corporation, hedge fund activists create shareholder value through increases in the corporation’s stock price. This increase does not even account for the increased value to shareholders that hedge fund activists create through their role in decision-making, which will be discussed in greater detail in Section III(b).

33. See Solomon, *Poison Pill’s Relevance*, *supra* (“There is one clear difference—activism is about enhancing shareholder value, while in a hostile takeover the claim was that shareholders were being taken advantage of.”)

34. U.S. Securities and Exchange Commission, *Schedule 13D*, U.S. SECURITIES AND EXCHANGE COMMISSION: FAST ANSWERS (Dec. 5, 2012), available at <http://www.sec.gov/answers/sched13.htm>.

35. Bebchuk et al., *Long-Term Effects of Hedge Fund Activism*, *supra* at 1089 (testing “the claim that interventions by activist hedge funds have a detrimental effect on the long-term interests of companies and their shareholders” and finding “that the claim is not supported by the data.”)

36. See George W. Dent, Jr., *The Essential Unity of Shareholders and the Myth of Investor Short-Termism*, 35 DEL. J. CORP. L. 97, 118 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557356 (“But even the basic claim that hedge funds are quick in-and-out investors has been disproved. Moreover, studies of corporate performance show that investors are right about large blockholders. Companies with large outside shareholders tend to perform better and have less waste than other companies. And when one or more investors acquire a large block of a company’s stock, the company’s stock price does not decline after its initial rise but tends to keep growing.”)

This is not to say that hostile bidders are unable to contribute to increased shareholder value; however, the value created by hedge fund activists is much different from that created by a hostile bidder. Hostile bidders offer shareholder value in a tender offer in the form of a premium over market value, however, the negative effects of a poison pill often offset this value. Companies facing a hostile bidder automatically go into defensive mode, and if a company's poison pill is triggered, the hostile bidder is placed in isolation and unable to act. Also, hostile bidders are often accused of targeting companies solely for their own benefit; yes, shareholders benefit in the short-term from an accepted tender offer, but then they no longer form part of the company and the resulting positive results achieved are only beneficial to the hostile bidder.

This is not the case with activist hedge funds, which create shareholder value for themselves as shareholders, but also the rest of the shareholders involved in a corporation. A variety of studies have been performed to calculate the shareholder value created by hedge fund activists; Brav et al. find a 21% average annualized market adjusted return,³⁷ while Klein and Zur report a 22% average shareholder market-adjusted return over the year after the shareholder activist initiates action.³⁸ Furthermore, these returns do not disappear once the hedge fund activists divest their shares in a corporation. On average, three years after a hedge fund activist's exit from a company, shareholder returns are positive.³⁹

Not only do activist hedge funds propagate the common saying "there's no 'I' in 'team'" through their creation of shareholder value, they also do so in a peaceable manner, unlike hostile bidders. The average activist block of shares in any one corporation is 8%, a number smaller than would trigger a common poison pill.⁴⁰ Furthermore, while activist hedge funds keep their ownership of the company at a non-threatening level, they also tend to divest their shares of a corporation if

37. See Alon Brav, Wei Jiang, Frank Partnoy, & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1729 (2008), available at <http://www.columbia.edu/~wj2006/HFAActivism.pdf> (finding that "activist hedge funds in the United States propose strategic, operational, and financial remedies and attain success or partial success in two-thirds of cases Target firms experience increases in payout, operating performance, and higher CEO turnover after activism" through a study of data collected from 11,602 Schedule 13D filings from 2001 to 2006.")

38. See April Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors*, 64 J. FIN. 187, 188, 226 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913362 (studying a sample of 151 hedge fund activist campaigns conducted between 2003 and 2005).

39. See Bebchuk et al., *Long-Term Effects of Hedge Fund Activism*, *supra* at 1134 ("Using each of the three standard methods for detecting abnormal returns . . . we have found no evidence for the pump-and-dump view. Following the month of partial cashing out by the activists, there is no evidence for negative abnormal returns in the subsequent three years. Indeed, returns in this period are positive, though not always statistically significant, in many specifications.")

40. Gilson et al., *supra* at 899.

discussions and negotiations with management are unsuccessful, rather than turning towards a proxy contest as hostile bidders often do.⁴¹

In fact, activist hedge funds approach the process of engaging with companies much differently than hostile bidders generally do. There exist four stages of hedge fund activist action: public filing of a Schedule 13D, demand and negotiation, proxy threat, and finally, proxy contest.⁴² Of note is the fact that hedge fund activists move to each subsequent stage of activist action with declining frequency.⁴³ This is further evidence of the fact that hedge fund activists are concerned with achieving their goals in the least-hostile manner possible, and avoid entering into a proxy contest—or even threatening a proxy contest—as much as possible. As such, hedge fund activists are able to focus their time and resources on creating value in corporations most willing to accept their expertise, and in ways that create a positive relationship and environment between the hedge fund and the corporation, all in order to create concrete, measureable shareholder value.

ii. Role in Major Decision-Making

Shareholder activists not only create shareholder value in a peaceable manner, but are also causing companies to become more objective in their business decisions, to consider all business opportunities fully and fairly, and shifting focus from officer and director entrenchment towards shareholders. By objectively evaluating companies through their proprietary programs and providing business strategies that could unleash unrealized company value, hedge fund activists are contributing towards creating more objective, fair companies.

With hedge fund activism on the rise in the United States, many different firms and multiple publications are creating guidelines to aid companies in becoming less vulnerable to shareholder activists. Interestingly enough, these guidelines do not emphasize the adoption of defensive tactics, or the refusal to communicate with shareholder activists—in fact, most of these guidelines advise against these tactics. Rather, a strong emphasis is placed on simply doing the business of the company well.

For example, PricewaterhouseCoopers released a publication describing shareholder activism and how corporations can respond to this

41. Gilson et al., *supra* at 900–01 (“After public posting of a bond (the toehold investment) to establish its credibility and secure the chance of its return, the activist undertakes a nonpublic campaign to elicit a favorable institutional response. Subsequent actions reveal the outcomes of such efforts. With approbation, the activist proceeds; without, it withdraws, realizing that the chances for success are low.”)

42. *Id.*

43. *Id.* (“Of particular interest is the declining frequency of each stage and the increasing success rate at the later stages . . . Presumably this is because the activist evaluates the likelihood of success at each stage in deciding whether to continue, and the target makes the same assessment at each stage as it seeks out information about institutional sympathy for the activist’s proposals.”)

growing trend. Among its suggestions for corporations wishing to prepare for shareholder activists, PricewaterhouseCoopers recommended, “critically evaluat[ing] all business lines and market regions . . . evaluat[ing] the [company’s] risk factors . . . develop[ing] an engagement plan that is tailored to the company’s shareholders and the issues that the company faces.”⁴⁴ Similarly, a report released by JPMorgan Chase & Co. advocates for focusing on stock performance, preparing to engage investors and knowing one’s investors, evaluating potential business challenges and risk factors, and avoiding hostile defensive tactics.⁴⁵ Other steps companies are advised to consider include demonstrating a commitment to best practices in corporate governance, engaging with the company’s investor base, and being the first to prepare a “white paper” on the company.⁴⁶ Put simply, public companies are advised to beat shareholder activists to the punch—consider business decisions and opportunities fully and objectively to maximize company value, and pay attention to shareholders before shareholder activists do.

Not only are companies being advised to simply be better in order to deal with shareholder activism, but companies that are performing poorly or are stuck in a subjective frame of mind are being singled-out as shareholder activist targets. Barry Genkin and Keith Gottfried, partners specializing in mergers and acquisitions and defending against shareholder activism at the law firm of Blank Rome LLP, outline the most common ways companies are left vulnerable to shareholder activists with a focus on the board of directors’ actions and composition.⁴⁷ Among the ten ways outlined by Genkin and Gottfried, “insufficient level of industry experience, absence of core or necessary competencies among board members, insufficient level of board independence, excessive board compensation, no separation of the chairman and CEO roles, low turnover among board members, failure to heed the will of shareholders, record of supporting or facilitating its own entrenchment, and failure to hold management accountable”⁴⁸ all point towards solutions that lead to more objective, shareholder-centric companies. Genkin and Gottfried are high-

44. See PricewaterhouseCoopers LLP, *supra* at 8–9.

45. See Corporate Finance Advisory, *The Activist Revolution: Understanding and navigating a new world of heightened investor scrutiny*, J.P. MORGAN CHASE AND CO. (2015), available at https://www.jpmorgan.com/cm/BlobServer/JPMorgan_CorporateFinanceAdvisory_MA_TheActivistRevolution.pdf?blobkey=id&blobwhere=1320687517719&blobheader=application/pdf&blobheadername1=Cache-Control&blobheadervalue1=private&blobcol=urldata&blobtable=MungoBlobs.

46. See Barry H. Genkin & Keith E. Gottfried, *Ten Steps to Prepare a Company for the New Age of Shareholder Activism & Prevent it From Being a Sitting Duck This Proxy Season*, WALL STREET LAWYER (Apr. 2008), available at <https://www.blankrome.com/index.cfm?contentID=37&itemID=1529>.

47. See Keith E. Gottfried & Barry H. Genkin, *10 Ways That a Company is Made Unduly Vulnerable to an Activist Shareholder Due to its Board’s Composition, Governance, Leadership and Compensation*, WALL STREET LAWYER (Jan. 2010) [hereinafter Gottfried et al., *10 Ways*], available at <https://www.blankrome.com/siteFiles/Publications/862E055AB64F47156478F6DFDA9B1AAF.pdf>.

48. See *id.*

lighting characteristics common to boards of directors of many public companies that, if ameliorated, would help protect against shareholder activism, but would also have the effect of creating more independent, objective management teams that respond to their shareholders. In essence, the advice given to protect against shareholder activism accomplishes the same goals that shareholder activists wish to achieve when they enter into a company—create independent management and boards of directors that are responsive and accountable to their shareholders.

Shareholder activists, and hedge fund activists in particular, are not only increasing shareholder value for the companies in which they invest, but they are also contributing towards creating a market full of more objective, shareholder-focused corporations.

b. Shareholder Activists' Efficacy

While shareholder activists are creating shareholder value and fostering a market full of more objective, shareholder-centric companies, it is also important to note that shareholder activists have long-term positive effects on the companies with which they interact, as discussed in further detail below. Similarly, shareholder activism is on the rise, pointing to the practice's efficacy, also discussed further below.

i. Positive Effects on Targeted Companies

The most common argument against shareholder activists is that they advocate for “actions that are profitable in the short term but are detrimental to the long-term interest of companies and their long-term shareholders.”⁴⁹ The creator of the poison pill himself, Martin Lipton, comments, “[the poison pill] is particularly critical in the face of increased activism in which some hedge funds use aggressive tactics to expropriate short-term benefits at the expense of long-term value-maximizing investments made by corporations on behalf of all shareholders.”⁵⁰ However, these comments are not supported by studies exam-

49. See Bebchuk et al., *Long-Term Effects of Hedge Fund Activism*, *supra* at 1087 (“We focus on the ‘myopic-activists’ claim that has been playing a central role in debates over shareholder activism and the legal rules and policies shaping it. According to this claim . . . activist shareholders with short investment horizons, especially activist hedge funds, push for actions that are profitable in the short term but are detrimental to the long-term interests of companies and their long-term shareholders. The problem, it is claimed, results from the failure of short-term performance figures and short-term stock prices to reflect the long-term costs of actions sought by activists. As a result, activists with a short investment horizon have an incentive to seek actions that would increase short-term prices at the expense of long-term performance, such as excessively reducing long-term investments or the funds available for such investments.”)

50. See Liz Hoffman, *Martin Lipton: Poison Pills are Critical in the Face of Increased Activism*, WALL ST. J.: MONEYBEAT (Jan. 29, 2014), available at <http://blogs.wsj.com/moneybeat/2014/01/29/martin-lipton-poison-pills-are-critical-in-the-face-of-increased-activism/> (“Mr. Lipton has been one of the most vocal critics of shareholder activism, which he has said focuses on short-term profit at the expense of long-term investment and can leave companies on shaky footing. Wachtell Lipton often advises companies seeking to keep these investors at bay.”)

ining the long-term effects of hedge fund activism. In fact, studies show shareholder activists play a positive role in a company's history and are good for business.

The Long-Term Effects of Hedge Fund Activism studies 2,000 actions by activist hedge funds from 1994 to 2007, through the use of Schedule 13D filings.⁵¹ First, it is established that hedge fund activists generally target underperforming companies, whether such underperformance is relative to its peers or a company's own historic levels.⁵² Second, through the use of various statistical significance tests, it is found that there is no evidence supporting opponents of shareholder activists' concerns that activist action leads to short-term gains that ignore the long-term negative effects to a company's operating performance. In fact, "in each of the years three, four, and five following the [activist action], we find improvements that are statistically significant."⁵³ This study goes to show that not only are hedge fund activists saying they will increase shareholder value and company value, they are actually following through on their word, and the market is taking note: "large blockholders do not reduce, but increase, firm investment,"⁵⁴ meaning that even investors are convinced of shareholder activists' positive effect. In addition, companies with activist hedge fund investors tend to exhibit better performance and are less wasteful than other companies.⁵⁵

So who is to say that these increases in company value and stock price are due to hedge fund activists and not some other cause? First, it would seem a quite interesting coincidence that all of these statistically significant trends in increased stock price and better operating perfor-

51. See Bebchuk et al., *Long-Term Effects of Hedge Fund Activism*, *supra* at 1090.

52. See Bebchuk et al., *Long-Term Effects of Hedge Fund Activism*, *supra* at 1117 ("To begin, activists do not generally target well-performing companies. Targets of activism tended to be companies whose operating performance was below industry peers and also their own historical levels at the time of intervention. Moreover, at the time of the intervention, the targets seemed to be in a negative trend with operating performance declining during the three years preceding the intervention. Furthermore, during the five years following the intervention, we find no evidence supporting concerns that activist interventions are followed by short-term gains that come at the expense of subsequent long-term declines in operating performance.")

53. *Id.* ("Examining both Q and ROA, and conducting comparisons both to the end of the year following the intervention and the end of the year preceding it, the feared adverse effect on long-term performance is not found in the data. Indeed, in each of the years three, four, and five following the intervention, we find improvements that are statistically significant. Thus, overall, the evidence on firm performance does not support the myopic-activists claim.")

54. See Dent, *supra* at 117 ("The most striking evidence is the many studies finding that the existence or acquisition of large block stock holdings in a company by institutional investors does not cause the company's stock price to fall but rather to rise, and the increase is greater if the shareholder is expected to be aggressive. One study finds that performance-based CEO pay works best when a large blockholder monitors CEO performance. Another finds that large blockholders do not reduce, but increase, firm investment.")

55. See Dent, *supra* at 118 ("Moreover, studies of corporate performance show that investors are right about large blockholders. Companies with large outside shareholders tend to perform better and have less waste than other companies. And when one or more investors acquire a large block of a company's stock, the company's stock price does not decline after its initial rise but tends to keep growing.")

mance that begin at the time of the activist action are due to something other than the initial activist action. Second, activist action amounts to significant costs: research, development of business strategies, engagement of experts, overhead costs of maintaining the firm, etc. In fact, it has been estimated that, on average, a campaign that results in a proxy contest costs nearly \$11 million.⁵⁶ No one is interested in undertaking significant costs if they believe that the improvements they are aiming to achieve would result in any event without intervention.⁵⁷ This goes two-fold for a hedge fund, whose business is wise investment. As such, it seems quite likely that the expertise and money hedge fund activists put into activist action contribute towards these long-term increases in stock price and operating performance.

ii. Shareholder Activism on the Rise

Shareholder activism is on the rise in the United States. First of all, one need only look at the trend in Schedule 13D filings to see how dramatically shareholder activism and activist hedge funds are growing; in 1994, only ten 13D filings were filed with the Securities and Exchange Commission, while in 2007, that number increased to 272.⁵⁸ Moreover, from 2005 to 2009, eighty-nine activist actions occurred; from 2010 to 2014, 341 activist actions occurred, and this trend is only continuing in a stronger manner in 2015.⁵⁹ Within the activist hedge fund world, total

56. Gilson et al., *supra* at 898 (“Gantchev’s recent work sheds light on the costs of hedge fund activism and its returns. A campaign that culminates in a proxy contest costs nearly \$11 million on average, he estimates. When costs are taken into account, nominal hedge fund returns are on average cut by approximately two-thirds. These benefit-cost considerations become important when considering the regulatory framework within which activism operates.”)

57. See Bebchuk et al., *Long-Term Effects of Hedge Fund Activism*, *supra* at 1119–20 (“Finally, critics of hedge fund activism might argue that the identified association between activist interventions and subsequent improvements in operating performance does not by itself demonstrate a causal link. It could merely reflect the activists’ tendency to choose targets whose operating performance is expected to increase in any event. Under such a scenario, the improvement in long-term performance experienced by targets reflects activists’ ‘stock picking’ ability rather than the activists’ impact on the company’s operating performance However, there are at least three reasons to believe that the identified improvements in operating performance are at least partly due to the activist interventions. First, activist engagements involve significant costs, and activist investors would have strong incentives to avoid bearing them if they believed that the improvements in performance would ensue in any event, even without engaging with target companies Second, improvements in operating performance follow activist interventions not just in our dataset as a whole but also in the subset of activist interventions that employ adversarial tactics [Third], the view that the interventions contribute to subsequent improvements is consistent with the finding in earlier work co-authored by two of us (together with Hyunseob Kim) that such improvements do not take place after outside blockholders pursuing a passive strategy announce the purchase of a block of shares, but do occur when blockholders switch from passive to activist stance.”)

58. See Bebchuk et al., *Long-Term Effects of Hedge Fund Activism*, *supra* at 1100.

59. See Global Markets Intelligence, *supra* at 1–2 (“We have reached the golden age of investor activism. In the past five full years, activist engagements increased fourfold. Furthermore 64 activist cases have been announced thus far in 2015 (through June 19, 2015) compared with only 18 total transactions in all of 2005 and 102 for 2014, according to S&P Capital IQ data Applying S&P Capital IQ’s data and analytics, we identified just fewer than 500 examples of investor activism involving companies with individual market capitalizations of \$1 billion or more from the beginning of 2005 to mid-2015: From 2005 to 2009, 89 activist actions occurred. In the past five years, from

assets under management now exceed \$100 billion,⁶⁰ reaching \$112.1 billion in the third quarter of 2014,⁶¹ and \$115.5 billion in November of 2014.⁶² In 2014 alone, assets under management by hedge fund activists increased by 24% from the beginning of the year until November.⁶³

Not only have activist actions and assets under management increased dramatically in recent years, but the number of activist hedge funds themselves have increased. From 2003 through May 2014, 275 new activist hedge funds were launched.⁶⁴ Furthermore, larger companies used to be somewhat immune to shareholder activists and their campaigns, but this is no longer true. From 2013 to 2014, the number of activist actions in companies with a market capitalization greater than \$25 billion increased from only six to seventeen.⁶⁵ 41% of current activist hedge funds focus on North America,⁶⁶ and 29% of directors surveyed in PricewaterhouseCoopers 2014 Annual Corporate Directors Survey say their board had interactions with activist shareholders and engaged in extensive discussions about activism in the last twelve months. Another 14% respond that they have discussed shareholder activism in the boardroom, even though they have not yet had any interaction with an activist.⁶⁷

If these numbers are not convincing enough proof that shareholder activism is on the rise and such an increase is due to its efficacy, then one need only examine the careers of those starting activist hedge funds for more proof of this fact. High-level management executives, partners at high-ranking law firms, and many more high-ranking officers and directors in corporate America are leaving these positions in order to start activist hedge funds. Not only are these individuals leaving their high-paying, well-regarded positions to start these investment firms, but former CEOs and chairmen of boards of directors of major U.S. companies are partnering with these hedge funds to influence their investment strategy.⁶⁸ If not because of the efficacy of hedge fund activism and its proven track record of increasing shareholder value and creating better performing companies, why leave a familiar, comfortable position in corpo-

2010 to 2014, 341 actions took place. We have seen volume increases for every year since 2010, and this trend has continued strongly in 2015.”)

60. See PricewaterhouseCoopers LLP, *supra* at 2.

61. See Corporate Finance Advisory, *supra*.

62. See PricewaterhouseCoopers LLP, *supra* at 6.

63. *Id.*

64. See PricewaterhouseCoopers LLP, *supra* at 2.

65. See Corporate Finance Advisory, *supra* (“While shareholder activist themes have remained largely the same, the companies targeted by shareholder activists have changed. In particular, the relative immunity that size and scale have historically offered from shareholder activism no longer exists . . . the number of large- and mega-cap companies (greater than \$25 billion market cap) targeted by shareholder activists has almost tripled in 2014 relative to recent years.”)

66. See PricewaterhouseCoopers LLP, *supra* at 3.

67. See PricewaterhouseCoopers LLP, *supra* at 5.

68. See Hudson Executive Capital, Our Team, HUDSON EXECUTIVE CAPITAL (2015), available at <http://www.hudsonexecutive.com/our-team>.

rate America for these sorts of investment firms? Surely, these individuals have not all fallen victim to the same ruse, they must also agree that shareholder activism is on the rise because of its efficacy and proven success.

All of the foregoing suggests shareholder activism as an alternative to a hostile bidder and defensive takeover measures. The stated benefits of this form of activism are not purely speculative, but in fact, these activists have been demonstrated to increase long-term shareholder value, long-term operating performance, and are becoming popular modes of investment due to their efficacy.

IV. CONCLUSION

The past necessity for the poison pill has significantly diminished, and companies who employ poison pills often do so for entrenchment purposes. Furthermore, shareholder activism has led to a decrease in the use of poison pills, and while hostile bidders aim to affect major business decisions of a company, and shareholder activists aim to do the same, the resulting effects of these two groups' actions have differing consequences that both lead to the declining use of the poison pill. Hostile bidders have increasingly brought the poison pill to light through lawsuits, rousing shareholder opposition to such a defensive tactic and questioning the ethical nature and legality of such a defensive tactic. On the other hand, shareholder activists are able to effectively accomplish the goals of hostile bidders without creating a hostile, defensive environment within a company, and without triggering a poison pill. Moreover, shareholder activists create long-term value that can be distributed to the company and all shareholders alike. All of this taken together, poison pills are becoming increasingly irrelevant and declining in use in this day and age because shareholder activists are able to drive essential business decisions as a hostile bidder would in a more peaceable, value-driven manner.

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