DOES SHAREHOLDER VOTING MATTER? EVIDENCE FROM THE TAKEOVER MARKET

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Voting rights are a basic shareholder-protection mechanism. Outside of the core voting requirements state law imposes (election of directors and votes on fundamental changes), federal law grants shareholders additional voting rights. But these rights introduce concomitant costs into corporate governance. Each grant of a voting right thus invites the question: is the benefit achieved worth the cost the vote imposes?

The question is not merely a theoretical one. Recently, the SEC, concerned about NASDAQ's potential weakening of shareholder voting protections, has lamented that little evidence exists on the value of the shareholder vote. This Article provides that evidence. It examines the implementation of a NASDAQ shareholder voting rule to identify the associated costs and benefits of requiring the approval of acquisitions by the acquiring firm's shareholders. It find firms alter the structure of their acquisitions to avoid shareholder voting. On its own, this finding could suggest self-serving behavior—managers may be avoiding shareholder votes to effectuate suboptimal transactions at the shareholders' expense. Yet this Article find no difference between returns to acquisitions that require a shareholder vote and to those that do not. This lack of a difference suggests that, on average, for acquiring shareholders the costs outweigh the benefits associated with shareholder voting. Such results suggest that regulators and exchanges alike should be cautious when imposing shareholder voting requirements. The shareholder franchise, a relatively blunt and costly instrument, is best suited to fundamental corporate changes and director elections.

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I. INTRODUCTION

The issue of the value of the shareholder franchise is a perennial question in corporate law.[1] Shareholders generally play only a limited role in the governance of a corporation; they mostly rely on the directors they elect to serve as their representatives on the board and only vote on a few fundamental events in a corporation's life.[2]

1. *See* Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 602 (2006); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 676 (2007); K.A.D. Camara, *Shareholder Voting and the Bundling Problem in Corporate Law*, 2004 WIS. L. REV. 1425, 1428 (2004); Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1347 (2006); Paul H. Edelman et al., *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359, 1359 (2014); Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 948 (2014); Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 446 (2008); Joshua R. Mourning, *The Majority-Voting Movement: Curtailing Shareholder Disenfranchisement in Corporate Director Elections*, 85 WASH. U. L. REV. 1143, 1143 (2007); René Reich-Graefe, *Deconstructing Corporate Governance: Absolute Director Primacy*, 5 BROOK. J. CORP. FIN. & COM. L. 341, 341 (2011); Mark J. Roe, *The Corporate Shareholder's Vote and Its Political Economy, in Delaware and in Washington*, 2 HARV. BUS. L. REV. 1, 1 (2012).

2. Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 801 n.60 (2002) ("Formal shareholder control rights in fact are so weak that they scarcely qualify as part of corporate governance. Under the Delaware code, for example, shareholder voting rights are essentially limited to the election of directors and approval of charter or bylaw amendments, mergers, sales of substantially all of the corporation's assets, and voluntary dissolution.").

Acquisitions are a lopsided example of this norm; typically, shareholders of *target* corporations vote on any buyout offer, but *acquiring* shareholders—at least by statute—do not have a corresponding vote on acquisitions.[3]

However, exchange requirements have altered this statutory baseline. Beginning in 1989, NASDAQ required acquiring firms listed on its exchange to obtain shareholder approval in order to issue 25% or more of the acquirer's outstanding stock in connection with an acquisition.[4] But in 2015, NASDAQ announced it was considering revising these rules.[5] NASDAQ believed the existing rule, while potentially providing important shareholder protections, may have been overly restrictive in light of changes in capital markets and investor protections.[6] In the wake of NASDAQ's announcement, the Securities and Exchange Commission ("SEC") expressed concern about NASDAQ potentially weakening the existing shareholder voting rule and noted that little evidence exists on the consequences of this rule, making the potential implications of any changes unknown.[7]

This lack of evidence is all the more troubling because the vote in question falls outside the traditional core shareholder franchise. State statutes traditionally allow shareholders to vote in a limited number of settings—mainly to elect directors—but also in situations that amend the articles of incorporation or where the firm is being acquired or is dissolving.[8] Except for these areas, the board of directors retains the discretion to manage the corporation.[9]

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3. Mary Siegel, *An Appraisal of the Model Business Corporation Act's Appraisal Rights Provisions*, 74 L. & CONTEMP. PROBS. 231, 232 & n.8 (2011).

4. Order Approving Proposed Rule Change Relating to Eligibility Criteria for NASDAQ National Market System Securities, 54 Fed. Reg. 1463, 1464 & n.5 (Jan. 13, 1989). NASDAQ enacted a stricter 20% threshold in 1990. *See infra* Part II. Our main tests involve difference-in-difference tests examining the period before the enactment of the 25% rule and after the enactment of the 20% rule. We also perform additional analysis around both thresholds separately and find results consistent with our main analysis.

5. NASDAQ, SOLICITATION OF COMMENTS BY THE NASDAQ LISTING AND HEARING REVIEW COUNCIL ABOUT SHAREHOLDER APPROVAL RULES (2015), https://listingcenter.NASDAQ.com/assets/Shareholder%20Approval%20Comment%20Solicitation.pdf [hereinafter 2015 NASDAQ COMMENTS SOLICITATION]; Press Release, NASDAQ, NASDAQ Requests Comments for Shareholder Approval Rules (Nov. 18, 2015), http://ir.NASDAQ.com/releasedetail.cfm?releaseid=943415.

6. Press Release, NASDAQ, *supra* note 5.

7. Letter from Rick A. Fleming, Office of the Inv'r Advocate, SEC, to Stanley Higgins, Senior Director, Listing Qualifications, NASDAQ Stock Market LLC (Feb. 12, 2016), https://www.sec.gov/about/offices/investorad/comment-letter-investor-advocate-nasdaq-021216.pdf [hereinafter Office of the Inv'r Advocate Letter].

8. Edelman et al., *supra* note 1, at 1367.

9. DEL. CODE ANN. tit. 8, § 141(a) (2018); MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS'N 2016); Michael S. Kang, *Shareholder Voting as Veto*, 88 IND. L.J. 1299, 1306 (2013).

Over time, federal law in the form of securities regulation and SEC-approved rules imposed by self-regulatory organizations ("SROs")—notably NASDAQ and the New York Stock Exchange ("NYSE")—have increased the scope of the shareholder franchise.[10] Shareholders today vote on executive pay,[11] for example, and a host of proxy proposals.[12] Critics argue that these votes impose real costs on corporations and thus on shareholders.[13]

Time Inc.'s purchase of Warner Communications exemplifies the costs a shareholder vote can impose—and the lengths that managers will go to avoid one. In September 1988, Time initiated a stock-swap merger with Warner that eventually fell through.[14] The following March, the boards of both firms approved a merger, with the planned merger structured as a $9 billion stock swap.[15] The swap would have required the issuance of over 20% of Time's outstanding stock, thus requiring a shareholder vote.[16]

In June, Paramount Communications emerged as a hostile acquirer of Time.[17] To avoid being purchased, Time's management both increased the offer amount and changed the method of payment for Warner.[18] Rather than maintain the original stock-swap structure, Time made a cash offer—funded in part by debt—of $13.1 billion, thereby avoiding a vote by Time's shareholders.[19] For Time's managers, the cost associated with a stockholder vote was that of delay and its attendant uncertainty.[20] They neatly avoided that cost by taking on $7–$10 billion in debt rather than suffer the risk and

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10. *See, e.g.*, NASDAQ, STOCK MARKET RULES r. 5635 (2018), http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F3%5F8%5F24&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F; N.Y. STOCK EXCH., LISTED COMPANY MANUAL § 312.03 (2018), http://wallstreet.cch.com/LCMTools/PlatformViewer.asp?selectednode=chp_1_4_12_3&manual=%2Flcm%2Fsections%2Flcm-sections%2F.

11. Edelman et al., *supra* note 1, at 1379.

12. Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal*, 85 FORDHAM L. REV. 705, 708–11 (2016); Edelman et al., *supra* note 1, at 1359–60.

13. Camara, *supra* note 1, at 1472–80.

14. Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1143–49 (Del. 1989).

15. *Id.* at 1146; David B. Hilder & Randall Smith, *Proposed Stock Swap Could be Vulnerable*, WALL ST. J., Mar. 7, 1989, at C1.

16. *Paramount Commc'ns, Inc.*, 571 A.2d at 1146.

17. *Id.* at 1147–48.

18. *Id.* at 1148.

19. Paramount Commc'ns Inc. v. Time Inc., Nos. 10866, 10670, and 10935, 1989 WL 79880, at *12 (Del. Ch. July 14, 1989), *aff'd sub nom.*, Literary Partners, L.P. v. Time Inc., 565 A.2d 280 (Del. 1989), and *aff'd*, 565 A.2d 280 (Del. 1989), and *aff'd sub nom.*, *In re* Time Inc. S'holder Litig., 565 A.2d 281 (Del. 1989); Bill Saporito, *The Inside Story of Time Warner*, FORTUNE (Nov. 21, 2012), http://fortune.com/2012/11/21/the-inside-story-of-time-warner/.

20. *Paramount Commc'ns Inc.*, 1989 WL 79880, at *14–16.

delay of a shareholder vote.[21] While the outcome of Time's shareholder vote cannot be known because its management successfully avoided the vote altogether, it is clear that undertaking such a vote would have been costly, in terms of the probability of both completing a transaction with Warner and avoiding being purchased by Paramount.[22] As indicated by a negative market reaction—with the stock price declining from a peak of $180.00 on June 13, 1989, to $119.38 on January 10, 1990 (the day the merger closed)—Time's shareholders might well have preferred to receive $200 per share from Paramount rather than lose more than $60 per share in value and take on considerable debt to purchase Warner.[23]

The Paramount Time-Warner episode neatly illustrates several facets of the question regarding the costs and benefits of shareholder voting. First, in order to reduce both uncertainty and delay, acquiring managers may prefer to avoid a shareholder vote. Second, managers avoiding a shareholder vote may be structuring suboptimal deals. And third, in the United States (unlike in the United Kingdom, as will be discussed in Subpart II.B.1), it is relatively easy for an acquirer to avoid a shareholder vote despite regulators' efforts to impose one. However, there may be benefits of voting to the extent that shareholders can prevent value-destroying acquisitions that are subject to a vote. Current arguments about the value of the vote are dominated by anecdote rather than analysis.[24]

This Article explores the introduction of a necessary vote by acquiring-firm shareholders, as first implemented by NASDAQ in 1989, to investigate the costs and benefits of such a vote. First, to examine the costs of the voting requirement, this Article tests whether the introduction of the rule alters the way in which managers structure acquisitions. Prior to 1989, NYSE and the American Stock Exchange ("AMEX") already had rules in place analogous to the one

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21. *Id.* at *15.

22. *Id.* at *14–16.

23. *See* Paul Richter, *Time Warner Merger Still a Work in Progress: The Company is Making Headway on Some Fronts but Questions Remain about 'Synergies' and $10.8 Billion in Takeover-Related Debt*, L.A. TIMES, Jan. 6, 1991, at D1 (noting that the stock continued to fall a year after the merger, dropping to $87.25 by January 1991); Saporito, *supra* note 19. Another example of a firm adjusting its deal structure to avoid shareholder voting involves Kraft Foods's acquisition of Cadbury. Steven Davidoff Solomon, *Warren Buffett's Lost Vote*, N.Y. TIMES: DEALBOOK (Jan. 21, 2010, 9:05 AM), https://dealbook.nytimes.com/2010/01/21/warren-buffetts-lost-vote/. Warren Buffett, a significant investor in Kraft, openly opposed the merger. *Id.* In response, Kraft restructured the terms of its offer to avoid a shareholder vote, reducing the amount of its stock used to purchase Cadbury from greater than 20% to only 18%. *Id.*

24. *See generally* Camara, *supra* note 1; Edelman et al., *supra* note 1; Harry G. Hutchison & R. Sean Alley, *Against Shareholder Participation: A Treatment for McConvill's Psychonomicosis*, 2 BROOK. J. CORP. FIN. & COM. L. 41 (2007); Minor Myers, *The Perils of Shareholder Voting on Executive Compensation*, 36 DEL. J. CORP. L. 417 (2011).

NASDAQ adopted.[25] This regulatory change, whereby NASDAQ moved to synchronize its acquisition voting requirements with those of its peer exchanges, offers a unique setting to evaluate the effect of imposing a vote. Assuming that absent a shareholder voting rule, managers use the most appropriate deal structure, this Article examines whether the implementation of the shareholder voting rule is associated with deviations from the preferred deal structure—revealing an underexplored cost of granting acquiring shareholders voting rights in acquisitions. To examine any such effect, this Article compares the pre- and post-rule-change periods, testing whether NASDAQ acquirers are less likely to issue an amount of stock in an acquisition that, after the enactment of the shareholder voting rule, would require shareholder approval. This comparison across the pre- and post-rule-change periods helps isolate and examine the effect of an acquirer voting requirement on firms previously not subject to it, as compared to a sample of firms that were always subject to a voting requirement.

The second examination challenges the above-articulated assumption and considers whether managers may not act in shareholders' best interest. Managers may issue shares in acquisitions for reasons having more to do with self-interest (e.g., hubris or empire building) than with maximizing shareholder value.[26] If this self-interested motivation is present, then subjecting acquisitions to a vote would allow shareholders an opportunity to deny managers the ability to execute such value-destroying transactions. Accordingly, this Article investigates whether the presence of shareholder voting rules in acquisitions provides benefits to acquiring-firm shareholders by improving the quality of acquisitions as measured by short- and long-run returns.[27] Specifically, this Article compares the announcement and long-run returns surrounding acquisitions by NASDAQ, NYSE, and AMEX firms in the period before and after the implementation of the NASDAQ shareholder voting rules and tests for differences in returns of similarly structured acquisitions.

NASDAQ acquirers are less likely to issue a number of shares sufficient to trigger the shareholder voting requirement following the

25. AM. STOCK EXCH., COMPANY GUIDE §§ 712, 713 (1983); N.Y. STOCK. EXCH., LISTED COMPANY MANUAL § 312.00 (1983).

26. Jennifer Arlen & Eric Talley, *Unregulable Defenses and the Perils of Shareholder Choice*, 152 U. PA. L. REV. 577, 591 (2003); Stephen M. Bainbridge, *Exclusive Merger Agreements and Lock-Ups in Negotiated Corporate Acquisitions*, 75 MINN. L. REV. 239, 272–75 (1990). *See generally* John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1 (1986) (discussing the conflict of interest between shareholders and managers).

27. *See, e.g.*, Office of the Inv'r Advocate Letter, *supra* note 7 (arguing that shareholder voting rules in acquisitions protect investors from harmful actions of managers but noting that there is little evidence directly supporting this view.).

passage of the voting rule. The results suggest a 45% decline in the number of NASDAQ deals that would trigger shareholder voting following the NASDAQ rule change. This change is consistent with NASDAQ's suggestion that the existing rule imposes significant costs, causing acquirers to alter their deal structure to avoid a shareholder vote.[28] However, there is little evidence that imposing the voting rule financially benefits acquiring shareholders. Passage of the rule did not lead to significant increases in announcement returns for NASDAQ-listed acquirers subject to the rule. We also find no evidence of significant increases in post-acquisition long-run performance. These performance results are consistent with concerns that the costs associated with these rules outweigh the benefits.[29]

NASDAQ also suggested that the voting rule may disproportionately benefit firms not subject to strong outside monitoring, as would exist in firms with relatively low levels of institutional ownership.[30] Using levels of institutional ownership as a proxy for strong corporate governance, this Article finds in cross-sectional analyses that results are consistent across poor- and good-governance firms. This suggests that, contrary to regulators' views, the effect of the shareholder voting rule does not vary with corporate governance.[31] Overall, the results suggest there are significant costs but limited benefits to the shareholder voting rule as implemented by NASDAQ.

This Article's analysis thus provides crucial new data at a time when NASDAQ is currently considering revising its rules on shareholder voting. This data provides the first direct evidence on the value of the NASDAQ shareholder voting rule. Beyond this immediate impact, however, this Article's findings are important for a number of other reasons. First, while several studies examine factors that influence the method of payment in acquisitions,[32]

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28. *See* Press Release, NASDAQ, *supra* note 5.

29. *See, e.g.*, Douglas C. Michael, *Untenable Status of Corporate Governance Listing Standards Under the Securities Exchange Act*, 47 BUS. LAW. 1461, 1465–69 (1992).

30. NASDAQ, SOLICITATION OF COMMENTS BY THE NASDAQ LISTING AND HEARING REVIEW COUNCIL ABOUT THE DEFINITION OF MARKET VALUE FOR PURPOSES OF SHAREHOLDER APPROVAL RULES 3 (2017), https://listingcenter.NASDAQ.com/assets/Shareholder%20Approval%20Comment%20Solicitation%20June%2014%202017.pdf; 2015 NASDAQ COMMENTS SOLICITATION, *supra* note 5, at 5.

31. A strength of examining NASDAQ's implementation of a new shareholder voting rule is the ability to isolate the effect of the *shareholder voting rule itself*—holding all else constant—which cannot be done using more recent time periods. There seems to be no reason to believe that the results on *voting itself* are not generalizable. However, this Article acknowledges that it is limited in examining the *interaction* between voting and recent corporate governance developments due to the time period examined.

32. *See, e.g.*, Benjamin C. Ayers, Craig E. Lefanowicz & John R. Robinson, *Capital Gains Taxes and Acquisition Activity: Evidence of the Lock-in Effect*, 24 CONTEMP. ACCT. RES. 315 (2007); David T. Brown & Michael D. Ryngaert, *The*

comparatively little evidence exists on the role of shareholder voting in such decisions.[33] Second, the NASDAQ rule change provides a clean setting to examine how shareholder voting rules affect acquisitions by allowing an examination of a treatment group (NASDAQ acquirers) and a control group (acquirers listed on other exchanges that experienced no change in shareholder voting rules). Though most of the acquisition literature ties the performance of stock-financed transactions to overvaluation of the acquirer's stock,[34] this Article relates stock deals to shareholder voting. It tests whether shareholder voting results in better acquisition decisions relative to similar acquisitions not requiring shareholder approval, which is important to shareholders, managers, and regulators.[35]

In sum, our results provide two main contributions to the literature. First, we examine the effect of shareholder voting rules on the structure of acquisitions, finding evidence consistent with acquiring-firm managers using their discretion to avoid a shareholder vote. Thus, in terms of assessing the cost of imposing a vote, managers' avoidance behavior indicates that they, at least, believe it to be costly. Second, by using a unique identification strategy, we find no evidence that shareholder voting improves either short- or long-run acquirer performance.

These findings are important as NASDAQ considers revising its voting requirements. In general, our results are consistent with the shareholder voting rule adding additional costs, but no discernable benefits, to acquiring-firm shareholders. The larger implications of our findings are on the costliness of a shareholder vote outside of traditional core areas of the shareholder franchise. Our findings suggest federal regulators should be skeptical of imposing additional voting requirements on listed firms. Managers will go to great lengths to avoid a vote, and we find no evidence of any benefit in

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Mode of Acquisition in Takeovers: Taxes and Asymmetric Information, 46 J. FIN. 653 (1991); Julian R. Franks, Robert S. Harris & Colin Mayer, *Means of Payment in Takeovers: Results for the United Kingdom and the United States*, *in* CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 221 (Alan J. Auerbach ed., 1988); Robert G. Hansen, *A Theory for the Choice of Exchange Medium in Mergers and Acquisitions,* 60 J. BUS. 75 (1987); Kenneth J. Martin, *The Method of Payment in Corporate Acquisitions, Investment Opportunities, and Management Ownership*, 51 J. FIN. 1227 (1996); Andrei Shleifer & Robert W. Vishny, *Stock Market Driven Acquisitions*, 70 J. FIN. ECON. 295 (2003).

33. *See, e.g.*, Office of the Inv'r Advocate Letter, *supra* note 7.

34. *See, e.g.*, Brown & Ryngaert, *supra* note 32, at 666; Shleifer & Vishny, *supra* note 32, at 296–97.

35. Related but distinct prior literature examines the monitoring role of institutional investors around acquisitions, generally finding that higher levels of long-term institutional ownership increase acquirer announcement-window and long-run returns. *See, e.g.*, Xia Chen et al., *Monitoring: Which Institutions Matter?*, 86 J. FIN. ECON. 279, 281 (2007); José-Miguel Gaspar et al., *Shareholder Investment Horizons and the Market for Corporate Control*, 76 J. FIN. ECON. 135, 158, 162 (2005).

extending shareholder voting rights, at least in the acquiring-firm context. In many ways, we currently operate in the worst of all regulatory worlds in the acquisition setting: a voting requirement of unproven benefit that is easily avoided, albeit at the cost of restructuring what may be the optimal mechanics of a deal. In a world where votes are costly, they are best used sparingly on matters that count.

This Article proceeds as follows. Part II first contextualizes the shareholder vote, explaining how federal law has expanded the shareholder franchise beyond the traditional contexts required under state law to areas such as executive compensation. Next, it surveys the prior literature, which has examined the value of a shareholder vote on acquisitions. Notably, the United Kingdom imposes a voting requirement similar in substance to NASDAQ's rule yet much more difficult to avoid than NASDAQ's. Part II concludes by elucidating our hypotheses, and Part III moves to test them after describing our research methodology. Part IV describes the implications of our study, that our results suggest the costs of expanding the shareholder franchise to include acquirer votes on acquisitions outweigh any potential governance benefits.

II. BACKGROUND, PRIOR LITERATURE, AND HYPOTHESES

A. Background

Shareholders have limited rights in the corporation. Typically, they can vote, sell, and sue.[36] Taking the last power first, derivative suits are a problematic enforcement mechanism. Before suing to enforce her rights, the shareholder must first engage in a lawsuit about whether she can sue on behalf of the corporation.[37] Alternatively, a disgruntled shareholder may do the "Wall Street Walk" and sell her shares.[38] But if the market agrees with her unhappiness with management's performance, her right to sell her shares will likely provide cold comfort, because she will sell at a loss or at a price that she believes does not reflect the value of a well-managed firm.[39] Thus, the right to vote is an important shareholder right. State law, which supplies the bulk of corporate law, provides that shareholders elect directors and vote on major events in the

36. For an overview of shareholder rights, see Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 413, 416, 421 (2006).

37. *See* MODEL BUS. CORP. ACT § 7.44 (AM. BAR ASS'N 2016).

38. *See* Amanda M. Rose, *Better Bounty Hunting: How the SEC's New Whistleblower Program Changes the Securities Fraud Class Action Debate*, 108 NW. U. L. REV. 1235, 1256 (2014).

39. Anat R. Admati & Paul Pfleiderer, *The "Wall Street Walk" and Shareholder Activism: Exit as a Form of Voice*, 22 REV. FIN. STUD. 2645, 2646 (2009).

corporation's life.[40] Shareholders must approve before a corporation can amend its articles of incorporation, sell itself, dispose of all or substantially all of its assets, or dissolve completely.[41] Notably, in each case, the board of directors must propose the course of action and then submit it to a shareholder vote.[42] In other words, although the shareholder vote is necessary, it is not sufficient, nor is it something the shareholders can directly initiate on their own. In each case, first the board recommends, and then the shareholders have their say.

Federal law provides additional voting requirements. A recent example is the Dodd-Frank Wall Street Reform and Consumer Protection Act's advisory say-on-pay vote, which requires that firms subject their chief executive's pay to a nonbinding advisory vote at least every three years.[43] This say-on-pay vote has proved controversial, with critics arguing that it distracts management on a matter that is not of interest or importance to most shareholders.[44]

Votes on proxy proposals, which are shareholder proposals permitted under federal law,[45] are also controversial. SEC Rule 14a-8 allows shareholders to recommend a course of action for an advisory shareholder vote.[46] If the proposal is allowable, the firm must include it in its annual proxy materials.[47] Critics argue that these votes amount to an airing of grievances by little more than corporate gadflies, but these proposals can consume a significant amount of managerial time and attention.[48] While often failing to gain a majority vote, these proposals can nonetheless have an effect.[49] During the three years in which it operated, for example, the Shareholder Rights Project at Harvard Law School took aim at corporations with classified boards, those on which directors serve multiyear terms and thus are not all up for election every year.[50] Critics view classified boards as an example of poor governance

40. Velasco, *supra* note 36, at 416–18.

41. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 242, 251, 271, 275 (2018); MODEL BUS. CORP. ACT §§ 10.03, 11.02, 12.02, 14.02.

42. *See, e.g.*, MODEL BUS. CORP. ACT §§ 10.03, 11.02, 12.02, 14.02.

43. 15 U.S.C. § 78n-1 (2012).

44. *See* Matthew H. Nemeroff, Note, *Dodd-Frank: Frankly an Inefficient Form of Corporate Governance*, 23 U. FLA. J.L. & PUB. POL'Y 431, 439–40, 443 (2012); Stephen M. Bainbridge, *Remarks on Say on Pay: An Unjustified Incursion on Director Authority* 9–10 (UCLA Sch. of Law & Econ. Research Paper Series, Paper No. 08-06, 2008), https://ssrn.com/abstract=1101688.

45. 17 C.F.R. § 240.14a-8 (2018).

46. *See id.* § 240.14a-8(m)(1).

47. *See id.* § 240.14a-8(a).

48. *See, e.g.*, Bainbridge, *supra* note 12, at 709; Daniel E. Lazaroff, *Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals*, 50 RUTGERS L. REV. 33, 90 (1997).

49. *See* Edelman et al., *supra* note 1, at 1369; Andrew A. Schwartz, *Corporate Legacy*, 5 HARV. BUS. L. REV. 237, 243 (2015).

50. *See* Matthew D. Cain et al., *How Corporate Governance is Made: The Case of the Golden Leash*, 164 U. PA. L. REV. 649, 682 n.151 (2016); Schwartz, *supra* note 49.

because they insulate the board from shareholder displeasure, including by providing protection from the discipline of a hostile takeover.[51] The Shareholder Rights Project supported shareholder proposals that "consistently garnered over 80[%] shareholder support,"[52] leading to 121 Fortune 500 and S&P 500 companies "moving towards" annual elections.[53]

Shareholder voting disciplines directors, and consequently managers, but is costly. To take the example of shareholder proposals, according to the law firm Jones Day, "Shareholder proposals cost U.S. companies tens of millions of dollars each year, including the costs involved in negotiating with proponents, seeking SEC no-action relief to exclude proposals from proxy statements, and in preparing opposition statements."[54] Each vote imposes uncertainty and delay on corporate actions and transactions.[55] A collective action problem exists when each shareholder must separately bear the cost of informing themselves but can free ride on the efforts of others.[56] As Edelman et al. point out, intermediaries such as mutual funds and hedge funds now mitigate this collective action problem, but they also introduce costs of their own, most notably conflicts of interest.[57]

Starting in the 1920s, the exchanges began imposing their own voting requirements on listed companies, in addition to state and federal law. Beginning in 1926, NYSE began enforcing a form of shareholder voting rights by refusing to list the common stock of companies that did not have voting rights associated with their stock.[58] In 1955, NYSE revisited the shareholder voting

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51. *See* Alma Cohen & Charles C.Y. Wang, *How Do Staggered Boards Affect Shareholder Value? Evidence from a Natural Experiment*, 110 J. FIN. ECON. 627, 628 (2013).

52. *See* Edelman et al., *supra* note 1, at 1369.

53. Whether or not the Shareholder Rights Project benefited shareholders is currently subject to debate in the finance literature. *See* Lucian Bebchuk & Alma Cohen, Recent Board Declassifications: A Response to Cremers and Sepe 1 (May 18, 2017) (unpublished manuscript), https://ssrn.com/abstract=2970629; Martijn Cremers & Simone Sepe, Board Declassification Activism: The Financial Value of the Shareholder Rights Project 2–3 (June 21, 2017) (unpublished manuscript), https://ssrn.com/abstract=2962162.

54. LIZANNE THOMAS ET AL., JONES DAY, SHAREHOLDER PROPOSALS: RENEWED CALLS FOR REFORM 1 (2014), http://www.jonesday.com/files/Publication/3a9acf07-6e1c-44f6-ad58-45f3bdb99350/Presentation/PublicationAttachment/6550df92-062c-45a7-a00d-52bdcc828de7/Shareholder%20Proposals%20Renewed.pdf.

55. *See generally* Vineet Bhagwat et al., *The Real Effects of Uncertainty on Merger Activity*, 29 REV. FIN. STUD. 3000 (2016); Audra L. Boone et al., *Shareholder Decision Rights in Acquisitions: Evidence from Tender Offers* (Ind. Legal Stud. Res. Paper No. 331, 2017), https://ssrn.com/abstract=2629424.

56. Edelman et al., *supra* note 1, at 1379.

57. *Id.* at 1379, 1401–06.

58. GEORGE L. LEFFLER, THE STOCK MARKET 454 (2d ed. 1957). This policy was in response to the view that companies listed on the exchange could manipulate or take advantage of shareholders through the use of nonvoting shares. *Id.*

requirements and adopted the current rule for acquisitions, requiring shareholder approval if more than 20% of an acquirer's outstanding shares were issued in an acquisition.[59] Michael points out that in addition to the desire for shareholder oversight in corporate matters to mitigate agency conflict, shareholder voting policies established by NYSE in the 1920s and the 1950s were a response to competition for business (i.e., listings).[60] NYSE hoped that strengthening its listing standards would attract additional investors (and therefore listings) by providing investors with greater shareholder protections.[61] AMEX was slower to adopt standards related to shareholder voting. In 1946, AMEX adopted a general shareholder voting policy largely similar to that adopted by NYSE in 1926 but allowing for the listing of nonvoting shares on a case-by-case basis.[62] On November 16, 1982, AMEX adopted a 20% rule similar to NYSE's rule for issuances of stock used for the purposes of making an acquisition, thus providing uniformity with the NYSE rules.[63]

In contrast, NASDAQ was slower to move to protect acquiring shareholders with a vote. On August 5, 1988, NASDAQ proposed current Rule 5635,[64] covering shareholder voting on stock issuances in connection with an acquisition, which the SEC approved on January 9, 1989.[65] The rule required shareholder approval if newly issued shares in an acquisition amounted to 25% or more of the acquirer's stock;[66] there was previously no such rule at NASDAQ.[67] On September 18, 1989, NASDAQ proposed a stricter threshold of 20%, which the SEC approved on July 19, 1990.[68] Note, however, that

59. Michael, *supra* note 29, at 1469.

60. *Id.* at 1477 n.106.

61. *Id.* at 1470–72.

62. *Id.* at 1472. In fact, AMEX used this flexibility to compete with NYSE for business, consistent with the reasons suggested for many of the listing standards developed over time. For example, in 1976, Wang Laboratories, Inc., sought to be listed on NYSE. Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687, 704–05 (1986). Because Wang had dual-class stock with different voting rights, NYSE denied their request for listing. *Id.* Wang then went to AMEX, which listed the company. *Id.* This was one of the first visible instances of competition among the exchanges based on shareholder voting rights. *Id.*

63. Order Approving Proposed Rule Change, 47 Fed. Reg. 53,541 (Nov. 26, 1982).

64. Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Revisions and Restructuring of the NASDAQ Listing Rules, 74 Fed. Reg. 15,552, 15,558 (Apr. 6, 2009) (approving the revision of what was previously Rule 4350).

65. Order Approving Proposed Rule Change Relating to Eligibility Criteria for NASDAQ National Market System Securities, 54 Fed. Reg. 1463, 1463–65 (Jan. 13, 1989).

66. *Id.* at 1464 n.5.

67. *Id.* at 1464.

68. Order Approving Proposed Rule Change Relating to Shareholder Approval of Certain Transactions for NASDAQ National Market System Issuers, 55 Fed. Reg. 30,346 (July 25, 1990); Press Release, NASDAQ, *supra* note 5; Jeff

the voting rules are not as stringent as they might at first blush appear because of quorum and voting requirements. NASDAQ, like NYSE, requires a positive vote of 50% of the votes *cast* (provided a quorum exists[69]), not of the total outstanding shares.[70] Therefore, if the shareholder electorate is relatively apathetic and chooses not to vote, a relatively small proportion of shareholders could allow an acquirer to proceed with the issuance of a substantial number of shares.[71]

NASDAQ initially enacted the shareholder voting rule to provide shareholders with a greater level of both participation in corporate affairs and protection.[72] The change also made NASDAQ's rules substantially equivalent to the rules of the other major exchanges.[73] NASDAQ viewed the increase in listing requirements surrounding shareholder voting as a way to enhance its similarities with NYSE and AMEX exchanges and provide a stronger case for gaining "blue sky" law exemptions that NYSE and AMEX listings already enjoyed.[74] Now the question of whether an acquiring-shareholder vote is worth the cost is back on the table.

Zalesin, *NASDAQ Mulls Update to Shareholder Approval Rules*, LAW360 (Nov. 18, 2015, 7:49 PM), https://www.law360.com/articles/728909. In order to reduce noise during the interim period between the initial 25% threshold and the final 20% threshold, this Article specifies the main analysis to treat the pre-rule-change period as the thirty-six months before the 25% rule and the post-rule-change period as the thirty-six months after the 20% rule change. This Article also separately analyzes the 25% and 20% thresholds individually in Part III.F and finds results consistent with our main analysis.

69. NASDAQ, STOCK MARKET RULES r. 5620(c) (2018), http://nasdaq.cchwallstreet.com/NASDAQTools/bookmark.asp?id=nasdaq-rule_5620&manual=/nasdaq/main/nasdaq-equityrules/ ("Each Company that is not a limited partnership shall provide for a quorum as specified in its by-laws for any meeting of the holders of common stock; provided, however, that in no case shall such quorum be less than 33 1/3 % of the outstanding shares of the Company's common voting stock.").

70. *Id.* r. 5635(e)(4) (2018), http://nasdaq.cchwallstreet.com/NASDAQTools/bookmark.asp?id=nasdaq-rule_5635&manual=/nasdaq/main/nasdaq-equityrules/.

71. Kastiel and Nili investigated the total percentage of shares that were not voted in each of the matters standing for a vote at S&P 500 companies in 2008–2015 and found that the percentage of shares that did *not* vote increased from 15.2% in 2008 to 21.7% in 2015. Kobi Kastiel & Yaron Nili, *In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy*, 41 DEL. J. CORP. L. 55, 61 (2016).

72. Order Approving Proposed Rule Change Relating to Eligibility Criteria for NASDAQ National Market System Securities, 54 Fed. Reg. 1463, 1464 (Jan. 13, 1989) (explaining that NASDAQ proposed the rule to provide shareholders with "a greater level of participation in corporate affairs" and "provide further shareholder protection commensurate with the stature" of its issuers).

73. *Id.* at 1464.

74. Seligman, *supra* note 62, at 705–07. Blue sky laws refer to state-level regulations regarding securities issuances. *Blue-Sky Law*, BLACK'S LAW DICTIONARY (10th ed. 2014). Each state has their own agency that regulates security listings and offerings. However, to avoid duplication with federal

We study NASDAQ's 1989 shareholder voting rule change because it provides a clean setting for identification of the impact of shareholder voting requirements. Using the NASDAQ rule change allows us to isolate a change in shareholder voting requirements as compared to NYSE and AMEX, whose rules remained unchanged.[75]

B. Prior Literature and Hypothesis Development

1. Benefits of Shareholder Voting

As Subpart II.A described, shareholder voting rights were established to provide investor oversight over corporate managers to mitigate agency costs.[76] The literature has not examined the effect of shareholder voting rules enacted by stock exchanges; in fact, existing acquisitions research typically does not even consider whether stock issuances face shareholder approval. Taking into account shareholder voting could change the conclusions of a study given that, in many transactions typical in acquisition studies, acquiring-firm shareholders effectively have approval rights over the merger.[77] Of the few papers that look at the stock exchange rules for shareholder approval of equity issuances, the five most closely related to our study

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agencies, such as the SEC, securities listed on national exchanges (i.e., NYSE and AMEX, but not NASDAQ during our sample period) are exempt from such state laws. *See* DEL. CODE ANN. tit. 6, § 73-207 (2018).

75. Data limitations prevent studying the NYSE and AMEX changes themselves. The shareholder voting threshold at both NYSE and AMEX during our sample period was 20%. Michael, *supra* note 29, at 1497 n.223.

76. *See supra* Subpart II.A.

77. *See e.g.*, Clifford G. Holderness, Equity Issuances and Agency Costs: The Telling Story of Shareholder Approval around the World 2 n.3 (Sept. 2015) (unpublished manuscript), http://www.pitt.edu/~awkoch/C%20Holderness%20-%20Shareholder%20Voting%20and%20Internet%20Appendix%20September%202015.pdf ("Chang (1998) is one of many papers that do not appear to recognize the requirement of shareholder approval of equity issuances but where such approval is central to the question at hand. [He finds acquirers using stock] often experience a positive announcement return. [However, stock issuance] is usually conditional on shareholder approval. In these cases, by approving the stock issuance, the bidding firm's shareholders are effectively approving the merger. Chang does not consider this possibility. (I assume because he is unaware of it.) Thus, he does not divide his sample into those mergers that were approved by the bidding firms' shareholders and those that were not. This obviously could be relevant for explaining the positive overall announcement returns for bidders that he finds. . . . The same point can be made of virtually all studies of acquisitions by United States exchange-listed firms where the method of payment is relevant. . . . As we shall see, this insight recasts some of their conclusions.").

are Becht et al.,[78] Li et al.,[79] Kang and Park,[80] Chan and Brown,[81] and Holderness,[82] but none examine the NASDAQ rule change or its implications.

Two of these recent papers are closely related to this Article. First, the working paper by Li et al. investigates the effect of shareholder voting rules on acquirer returns at a time when all U.S. stock exchanges share the same voting rules.[83] However, this paper faces an empirical challenge; it assumes that firms cannot opt out of an all-stock deal that would necessitate a vote. Yet U.S. stock exchange rules largely provide managers with discretion in determining which deals are subject to a shareholder vote,[84] enabling managers to select only relatively better deals to undergo a vote.

Li et al. compare deals subject to a vote with those not subject to a vote using two methodologies.[85] First, they examine all-stock deals in which the acquirer issues a number of shares just below the voting threshold and just above the voting threshold.[86] Li et al. find higher announcement returns and post-acquisition performance for all-stock acquirers above the shareholder voting threshold.[87] They find this result holds only in the sample of acquiring firms with high institutional ownership.[88] As a second test, they compare all-stock deals subject to a vote to mixed-payment deals that are not subject to a vote and similarly find that voting deals earn higher returns.[89] These results would seem to suggest that imposing an acquirer vote benefits shareholders.

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78. Marco Becht et al., *Does Mandatory Shareholder Voting Prevent Bad Acquisitions?*, 29 REV. FIN. STUD. 3035 (2016).

79. Kai Li et al., *Vote Avoidance and Shareholder Voting in Mergers and Acquisitions* (Eur. Corp. Governance Inst., Fin. Working Paper No. 481/2016, 2018), https://ssrn.com/abstract=2801580.

80. Jun-Koo Kang & James Park, Equity Issuance, Distress, and Agency Problems: The 20% Rule for Privately Issued Equity (Dec. 14, 2017) (unpublished manuscript), https://ssrn.com/abstract=2139507.

81. Howard W. Chan & Rob Brown, *Rights Issues Versus Placements in Australia: Regulation or Choice?*, 22 COMPANY & SEC. L.J. 301, 304–10 (2004).

82. Holderness, *supra* note 77.

83. *See* Li et al., *supra* note 79, at 1.

84. Davidoff Solomon, *supra* note 23.

85. Li et al., *supra* note 79, at 1.

86. *Id.* at 2.

87. *Id.* at 3.

88. *Id.* In similar studies, Hsieh and Wang find that deals subject to a vote are less likely to be completed but find mixed evidence on performance, while Kamar finds no evidence that acquisitions subject to a vote experience better performance. *See* Jim Hsieh & Qinghai Wang, *Shareholder Voting Rights in Mergers and Acquisitions* 3 (Mar. 2008), http://www1.american.edu/academic.depts/ksb/finance_realestate/rhauswald/seminar/vote_American.pdf; *see also* Ehud Kamar, Does Shareholder Voting on Acquisitions Matter? 3 (Mar. 2011) (unpublished manuscript), http://www7.tau.ac.il/blogs/law/wp-content/uploads/2011/11/March-2011.pdf. Kamar also finds that the voting rules increase the amount of time required to complete an acquisition. *Id.*

89. Li et al., *supra* note 79, at 2.

However, Li et al. make a particularly strong assumption. They assume that an acquirer in an all-stock deal can *only* choose an all-stock deal.[90] If there is no choice between deal structures, then deals around the voting threshold should be relatively similar except that deals just surpassing the threshold are subject to a vote. Under this assumption, the number of shares issued in the deal is based on the value of the deal and not subject to managerial discretion (i.e., similar to the setting Becht et al.[91] examine, discussed below).[92] Crucially, however, Li et al.'s assumption does not hold in practice. Acquirers in the United States can choose whether or not to engage in an all-stock deal by electing to substitute cash for a portion of the stock.[93] This means that managers can self-select into all-stock deals above or below the voting threshold.[94] Given this ability to self-select, we would expect that only when managers are confident in the merits of a deal would they subject it to a shareholder vote and that these deals should generate relatively higher returns.

As expected, Li et al. find that deals subject to voting experience higher announcement returns than those that skirt the voting threshold.[95] As noted, a limitation of their test is that all of the firms in their sample are subject to the same voting requirements.[96] In contrast, our novel setting allows us to use an exogenous regulatory change as identification, taking advantage of periods of heterogeneous voting requirements, in order to provide additional insight on the effects of shareholder voting. Our study thus examines a situation where the baseline requires a vote, but the vote may be avoided, and asks whether the vote in such circumstances is beneficial.

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90. *Id.* at 3.

91. Becht et al., *supra* note 78, at 3037 (citing Jim Hsieh & Qinghai Wang, Shareholder Voting Rights in Mergers and Acquisitions (Mar. 2008) (unpublished manuscript), http://www1.american.edu/academic.depts/ksb/finance_realestate/rhauswald/seminar/vote_American.pdf).

92. *See infra* notes 97–106 and accompanying text.

93. N.Y. STOCK EXCH., LISTED COMPANY MANUAL §§ 312.03–.05 (2018), http://wallstreet.cch.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F12%5F3&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F; N.Y. STOCK EXCH., NYSE AMERICAN COMPANY GUIDE § 712 (2018), http://wallstreet.cch.com/AmericanTools/bookmark.asp?id=sx-policymanual-amex-acgSHAREHOLDERSAPPROVAL710713&manual=/American/CompanyGuide/american-company-guide/; NASDAQ, STOCK MARKET RULES r. 5635 (2018), http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F3%5F8%5F24&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F.

94. NASDAQ, STOCK MARKET RULES r. 5635, http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F3%5F8%5F24&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F (requiring shareholder approval only where common stock issuance exceeds a 20% voting threshold).

95. Li et al., *supra* note 79, at 3.

96. *Id.*

The other important recent study related to this Article, Becht et al., focuses on a very different regulatory regime, that of the United Kingdom.[97] In the U.K., shareholder voting is generally mandatory for acquisitions meeting certain thresholds.[98] The U.K. voting threshold is based on the *total deal size* rather than the percentage of shares issued.[99] Specifically, for U.K. acquirers there are several thresholds that relate either to the amount paid in the deal or to accounting values on prior periods' reports.[100] Triggering any of the thresholds imposes mandatory shareholder voting.[101] Because the thresholds are based on total acquisition size, rather than method of payment, managers have almost no discretion around meeting or missing the shareholder voting threshold.[102] Instead, it is the size of the target that determines whether a vote will occur.[103] These mandatory thresholds provide a strong setting for Becht et al. to identify the effects of shareholder voting requirements as it is difficult for a manager to alter deal size just to avoid a shareholder vote and impossible to change prior periods' accounting results. In other words, the U.K.'s rules cannot be easily avoided, in contrast to the NASDAQ regulations.

Becht et al. find that deals above the voting threshold have higher acquirer announcement returns.[104] They conclude that shareholder voting requirements impose a binding and credible constraint on acquirers so that only good deals are pursued if voting is required.[105] In contrast to the backdrop of their paper, the setting in this Article allows the examination of the influence of shareholder voting on payment method, in a context where managers have the ability to use discretion when selecting the payment method to avoid shareholder voting. Said differently, in the U.K., a vote is a binding and credible constraint.[106] The fact that NASDAQ introduced a rule that can be avoided with relative ease allows us to test the extent to which managers are willing to avoid the rule and the market's reaction to that avoidance.

Studies outside the acquisition context also examine managers' use of discretion regarding shareholder voting thresholds. Kang and

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97. Becht et al., *supra* note 78, at 3037.

98. FIN. CONDUCT AUTH., LISTING RULES r. 10.5.1, (2018), https://www.handbook.fca.org.uk/handbook/LR/10.pdf.

99. *Id.* § 10.2.1.

100. *Id.*

101. *Id.* § 10.5.1.

102. *Id.*

103. *Id.*

104. Becht et al., *supra* note 78, at 3038.

105. Burch, Morgan, and Wolf, among others, find that acquiring-shareholder voting is a credible threat against acquirers' ability to complete acquisitions. *See generally* Timothy R. Burch, Angela G. Morgan & Jack G. Wolf, *Is Acquiring-Firm Shareholder Approval in Stock-for-Stock Mergers Perfunctory?*, 33 FIN. MGMT. 45 (2004).

106. Becht et al., *supra* note 78, at 3037.

Park examine discounted private placements and find discontinuity around the 20% equity issuance threshold.[107] Firms avoiding the shareholder voting threshold issue at higher discounts and have both lower announcement returns and decreasing profitability in the following two years.[108] However, this study's subject matter provides a notable limitation on generalizing from its findings: discounted private placements involve issuing securities at below-market prices, usually by distressed firms in need of a quick financing solution.[109] While somewhat related, these transactions are substantially different than issuing securities for an acquisition.

Chan and Brown[110] likewise focus on private placements and examine a law change in Australia. That country increased the shareholder voting threshold on private placements from requiring a vote for placements exceeding 10% of existing shares to requiring a vote on placements exceeding 15% of existing shares.[111] Chan and Brown find that firms issue an amount of equity in private placements that falls just below the threshold (10% at first, and 15% following the rule change) requiring shareholder approval.[112]

Holderness[113] analyzes the benefits of shareholder voting using all equity issuances in a cross-country setting. Holderness compiles results of existing studies for a given equity issuance method and country (i.e., seasoned equity offerings, rights offerings, and private placements), similar to a meta-analysis.[114] He finds that equity issuances subject to shareholder approval have positive announcement returns on average, arguing that shareholder approval reduces agency costs.[115] We complement and extend the analysis of Holderness using a strong identification setting to study the effects of shareholder voting in U.S. acquisitions. Further, as suggested by Holderness,[116] we investigate whether shareholder voting requirements are an important, previously unexplored factor in determining the method of payment in acquisitions.

2. Costs of Shareholder Voting

While these studies generally focus on identifying the benefits associated with shareholder voting, in the form of better short- and long-run acquisition performance, the costs associated with shareholder voting are less well defined. Agency theory suggests that acquiring-firm managers may desire to avoid shareholder approval to

107. Kang & Park, *supra* note 80, at 9.
108. *Id.* at 4.
109. *Id.* at 10–11.
110. Chan & Brown, *supra* note 81.
111. *Id.* at 304.
112. *Id.* at 308.
113. *See generally* Holderness, *supra* note 77.
114. *Id.*
115. *Id.* at 22–23.
116. *Id.* at 8.

forgo shareholder oversight, especially if managers anticipate shareholder dissension.[117] In addition to costs associated with avoiding shareholder oversight, allowing a deal to go to a shareholder vote could also be administratively costly and time intensive, potentially increasing the likelihood of deal failure.[118] This Article assumes that, absent shareholder voting rules, managers will use the most appropriate deal structure to complete the deal (regardless of the appropriateness of the deal).

The introduction discussed how Time changed its deal structure to avoid a shareholder vote in its acquisition of Warner. Kraft Foods's acquisition of Cadbury is an even clearer example of structuring a transaction with the sole purpose of avoiding shareholder voting.[119] In September 2009, Kraft's management disclosed plans to launch an unsolicited tender offer for Cadbury.[120] The initial offer allowed for the use of up to 370 million shares (25%) of Kraft's stock and £4.3 ($7) billion in cash as a means to purchase Cadbury for a total purchase price of about $16.5 billion.[121] Warren Buffet, a significant investor in Kraft, openly opposed the merger.[122] His opposition, along with the opposition of the Cadbury board, led to a restructuring of the deal that both sweetened its total value (to $19.6 billion) and provided a means of avoiding a shareholder vote.[123] Kraft's management restructured the means of payment in the offer terms from 25% to 18% of Kraft's stock, which drastically increased the amount of cash—financed with debt—in the offer and pushed the deal just below the 20% shareholder voting threshold.[124] Thus, Kraft was able to avoid a shareholder vote

117. John Armor et al., *Agency Problems and Legal Strategies*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 29, 29–31 (3d ed. 2017).

118. STEPHEN M. BAINBRIDGE, MERGERS AND ACQUISITIONS (3d ed. 2012). We also note that managers may seek to avoid shareholder voting because they believe that their expertise and private information allows them to make superior decisions relative to shareholders. Li et al., *supra* note 79, at 14.

119. Davidoff Solomon, *supra* note 23.

120. *TIMELINE-Kraft Agrees Cadbury Deal After 4-month Fight*, REUTERS (Jan. 19, 2010, 8:27 AM), http://www.reuters.com/article/cadbury-kraft-idUSLDE60E0XI20100119.

121. Kraft Foods, Inc., Definitive Proxy Statement (Schedule 14A) (Dec. 18, 2009), https://www.sec.gov/Archives/edgar/data/1103982/000119312509255952/ddefm14a.htm; Jane Wardell & Robert Barr, *Kraft Foods, Cadbury Agree $19.5 Bln Deal*, BOSTON.COM (Jan. 5, 2010), http://archive.boston.com/business/articles/2010/01/19/kraft_foods_cadbury_near_to_agreed_deal/.

122. Colin Barr, *Buffett Votes against Kraft Bid for Cadbury*, FORTUNE, (Jan. 5, 2010, 10:27 AM), http://archive.fortune.com/2010/01/05/news/companies/kraft.cadbury.fortune/index.htm.

123. David Jones & Brad Dorfman, *Kraft Snares Cadbury for $ 19.6 Billion*, REUTERS (Jan. 19, 2010, 7:02 AM), http://www.reuters.com/article/us-cadbury-idUSTRE60H1N020100119.

124. *Id.*; Davidoff Solomon, *supra* note 23.

on acquiring Cadbury, at the cost of substantially increasing the firm's debt.[125]

Because of the anecdotal evidence showing that some managers incur costs to avoid shareholder voting, empirically analyzing the method of payment in acquisitions provides a first step in documenting how shareholder approval in acquisitions creates additional costs. We note that, despite these potential costs, potential benefits of shareholder voting arise when voting prevents managers from completing value-destroying acquisitions. Consistent with prior research, we measure the benefits using short- and long-run performance measures.

Thus, we extend the existing literature, evaluating both the costs and benefits of shareholder approval in acquisitions, by proposing and examining the following two hypotheses:

> **Hypothesis One ("H1"):** After NASDAQ enacts rules requiring shareholder approval of stock acquisitions that use more than a certain percentage of an acquirer's shares, NASDAQ acquirers are less likely to issue a number of shares that triggers shareholder voting.
>
> **Hypothesis Two ("H2"):** Acquirers subject to shareholder voting requirements make better acquisition decisions, resulting in better acquisition performance.

Despite some related evidence in prior literature, these predictions may not hold. First, as noted above, Hsieh and Wang,[126] Kamar,[127] and Li et al.[128] find mixed or conflicting evidence on whether voting rights lead to better acquisitions. In the prior literature on private placements, distressed firms issuing equity in discounted private placements likely have agency problems,[129] which do not necessarily mirror issues facing acquiring firms. In fact, several commentators suggest that shareholder voting requirements in acquisitions unnecessarily burden acquiring firms, without providing benefits.[130] Finally, some literature argues that shareholders sometimes favor low-quality acquisitions, suggesting that shareholder voting may not have a positive impact on acquisition performance outcomes.[131]

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125. Davidoff Solomon, *supra* note 23.
126. Hsieh & Wang, *supra* note 88.
127. Kamar, *supra* note 88.
128. Li et al., *supra* note 79.
129. Kooyul Jung et al., *Timing, Investment Opportunities, Managerial Discretion, and the Security Issue Decision*, 42 J. FIN. ECON. 159, 160 (1996).
130. *E.g.*, Michael, *supra* note 29, at 1490; Zalesin, *supra* note 68.
131. Gregor Matvos & Michael Ostrovsky, *Cross-Ownership, Returns, and Voting in Mergers*, 89 J. FIN. ECON. 391, 391 (2008); Eitan Goldman & Wenyu Wang, *Weak Governance by Informed Large Shareholders* 2 (Eur. Corp.

III. RESEARCH METHOD AND RESULTS

The analysis in this Article begins by obtaining all merger and acquisition data from January 10, 1986 (thirty-six months before the 25% rule was enacted), through July 18, 1993 (thirty-six months after the 20% rule became effective), from Thomson Reuters's SDC Platinum database ("SDC").[132] Acquisitions during the transition from the 25% rule to the 20% rule—i.e., from January 10, 1989, to July 18, 1990—have been excluded. Excluding this transition period helps clearly identify how the new shareholder voting requirements affect acquisitions without confounding effects of proposals and discussions of future rule changes that existed during this period. Therefore, the sample contains all acquisitions with an effective date between January 10, 1986, and January 10, 1989, and all acquisitions that were announced after July 18, 1990, but before July 18, 1993.

The sample of acquisitions has been restricted to include only those deals that have nonmissing announcement and effective (or withdrawn, for withdrawn deals) dates and where the acquirer has nonmissing price data available in the Center for Research in Security Prices. This Article further restricts the sample to include only deals with available deal value and method-of-payment information. To clearly identify the effect of shareholder voting on acquisitions, the sample has been restricted to include only those deals where the deal value exceeds 20% of the acquirer's *value* one day prior to the acquisition announcement date; deals not meeting this restriction could not involve 20% or more of the acquirer's stock.

To determine whether an acquirer would be subject to the shareholder voting requirements, this Article first determines the number of shares expected to be issued in an acquisition. Using SDC, the percentage of stock used in the acquisition is multiplied by the total consideration to determine the value of stock used in the acquisition. The stock value is then divided by the acquirer's share price the day before the announcement date to determine the number of shares expected to be issued upon completion of the acquisition. This provides the numerator for the shareholder voting threshold calculation. Next, the percentage of an acquirer's outstanding stock expected to be issued in connection with an acquisition is calculated by dividing the shares expected to be issued by the total number of

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Governance Inst., Fin. Working Paper No. 469/2016, 2017), https://ssrn.com/abstract=2768328.

132. One innovation of Li et al., *supra* note 79, is the hand collection of share issuance figures from SEC filings. Because the earliest filings in the SEC's EDGAR system date to 1993, with coverage largely complete only in 1995, it was impossible to access similar data during the sample period. As such, the share issuance data is noisy to the extent SDC data would not match hand-collected data. It would be expected that any noise increases standard errors and biases against us finding significant results.

shares outstanding the day before the acquisition is announced.[133] If the result exceeds the shareholder voting threshold (20%), the acquisition is classified as subject to shareholder voting requirements and identified as "20% equity issuance deals."

What follows is a brief explanation of the methodology used for testing this Article's hypotheses.

> **H1:** After the NASDAQ enacts rules requiring shareholder approval of stock acquisitions that use more than a certain percentage of an acquirer's shares, NASDAQ acquirers are less likely to issue a number of shares that triggers shareholder voting.

The difference-in-difference methodology allows the testing of whether acquiring firms are less likely to structure the transaction using enough stock such that they meet the shareholder voting requirement (our H1) following the rule change. This Article focuses on the difference in deals that require a shareholder vote for acquirers listed on NASDAQ versus other exchanges across the periods before and after the rule change.[134] Several additional variables are included, as in Ayers, Lefanowicz, and Robinson,[135] to control for factors that influence acquisition activity and deal structure. The dependent variable, *VOTE*, is one in acquisitions in which the acquirer would be subject to a shareholder vote as a result of issuing more than 20% of its outstanding shares (i.e., 20% equity issuance deals) and is zero otherwise. The following logistic model is estimated:

MODEL 1

$$VOTE_{i,t} = \beta_0 + \beta_1 POST*NASDAQ_{i,t} + \beta_2 NASDAQ_{i,t} + \beta_3 POST_{i,t} + \beta_4 CONTROLS_{i,t} + \varepsilon$$

POST is equal to one in the period after NASDAQ enacted its final 20% threshold rule and is zero otherwise. *NASDAQ* is equal to one for acquirers listed on NASDAQ and is zero otherwise. Controls include firm, deal, and economy characteristics associated with the method of payment.[136] These control variables are detailed in the Appendix. Based on H1, this Article predicts a negative coefficient on β_1.

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133. As noted in Li et al., *supra* note 79, the voting threshold is based on the number of shares the acquirer expects to issue, which the acquirer determines prior to the acquisition announcement date.

134. As a supplemental analysis, we also examine both of our hypotheses in the pre-rule-change period only. This allows us to perform simple comparisons of NASDAQ acquisitions, with no shareholder voting rules, to those of the other exchanges that imposed shareholder voting requirements. *See infra* Subpart III.A.

135. *See generally* Ayers, Lefanowicz & Robinson, *supra* note 32.

136. *Id.* at 320.

A. Descriptive Statistics and Results for the Period prior to the NASDAQ Rule Change

To understand the effects of shareholder voting on method of payment and subsequent performance, we first analyze deals prior to the NASDAQ rule change. This analysis allows for the comparison of deals on NASDAQ, which had no shareholder voting requirements, to deals on other exchanges, which had voting requirements. We use the period from November 16, 1982, the date AMEX implemented its shareholder voting rule, through NASDAQ's initial rule implementation on January 9, 1989.[137]

Table 1, Panel A presents descriptive statistics for deals before the NASDAQ rule change, split between acquisitions on NASDAQ and those on other exchanges.[138] The results show that, prior to the NASDAQ rule change, NASDAQ firms were significantly more likely to issue a number of shares that exceeded the voting threshold of other exchanges. The magnitude of the difference is economically significant, with the proportion of 20% equity issuance deals by NASDAQ acquirers being more than twice as large as the proportion of 20% equity issuance deals by acquirers on other exchanges (22.4% versus 9.0%). This evidence is consistent with shareholder voting rules enticing managers to change the structure of acquisitions to avoid a vote, which is consistent with H1. However, these results are univariate and descriptive only; this Article's main inferences are left to the difference-in-difference tests in Subpart III.C.

137. *See supra* notes 63–65 and accompanying text.
138. *See infra* Table 1.

TABLE 1: DESCRIPTIVE STATISTICS—PRE-NASDAQ RULE CHANGE[139]

Panel A: Full Sample								
	NASDAQ			**Other Exchanges**			**Difference**	
Variable	***N***	**Mean**	**SD**	***N***	**Mean**	**SD**	**Diff.**	***p*-value**
VOTE	303	0.224	0.418	669	0.090	0.286	0.135***	(0.000)
CAR	301	0.018	0.081	666	0.016	0.075	0.00198	(0.711)
MTB	271	1.183	1.076	628	1.069	2.708	0.114	(0.501)
INTRISK	303	0.021	0.003	669	0.022	0.003	–0.000344	(0.137)
AAA	303	0.106	0.014	669	0.107	0.015	–0.00123	(0.214)
GNP	303	5.520	0.377	669	5.449	0.362	0.0702***	(0.006)
INDSHK	303	0.216	0.298	669	0.283	1.744	–0.0677	(0.502)
CHG_CASH	303	7.924	60.683	669	5.179	50.023	2.745	(0.459)
STINT/LTINT	303	0.841	0.033	669	0.843	0.032	–0.00115	(0.608)
REL_SIZE	270	0.817	1.644	628	7.254	158.261	–6.437	(0.504)
SERIAL	303	0.059	0.237	669	0.045	0.207	0.0146	(0.332)
TIME	303	3.670	2.114	669	3.776	1.883	–0.106	(0.434)
PUBLIC	303	0.383	0.487	669	0.426	0.495	–0.0432	(0.206)
LN_MARKET	270	4.401	1.338	628	5.110	1.569	–0.709***	(0.000)
ROA	270	0.028	0.110	627	0.027	0.232	0.00158	(0.915)
Panel B: Only Deals Where the Acquirer Issues More than 20% of Its Outstanding Shares								
	NASDAQ			**Other Exchanges**			**Difference**	
Variable	***N***	**Mean**	**SD**	***N***	**Mean**	**SD**	**Diff.**	***p*-value**
CAR	67	0.013	0.084	59	(0.008)	0.062	0.0205	(0.128)
MTB	57	1.189	1.132	51	1.128	0.841	0.0603	(0.756)
INTRISK	68	0.022	0.003	60	0.023	0.003	–0.000444	(0.412)
AAA	68	0.098	0.008	60	0.100	0.010	–0.00227	(0.168)
GNP	68	5.706	0.236	60	5.598	0.230	0.108**	(0.010)
INDSHK	68	0.212	0.232	60	0.354	0.823	–0.142	(0.175)
CHG_CASH	68	34.873	124.897	60	38.881	132.570	–4.009	(0.861)
STINT/LTINT	68	0.834	0.028	60	0.825	0.028	0.00858*	(0.089)
REL_SIZE	57	0.397	0.305	51	0.518	0.607	–0.121	(0.185)
SERIAL	68	0.118	0.325	60	0.050	0.220	0.0676	(0.176)
TIME	68	4.419	1.591	60	4.332	1.413	0.0867	(0.746)
PUBLIC	68	0.662	0.477	60	0.833	0.376	–0.172**	(0.027)
LN_MARKET	57	5.165	1.435	51	5.952	1.426	–0.787***	(0.005)
ROA	57	0.005	0.160	51	0.043	0.066	–0.0374	(0.123)

139. This table presents summary statistics with univariate results comparing average firm, deal, and macroeconomic factors of NASDAQ versus other exchanges before the NASDAQ rule change. ***, **, * indicate significant differences in means of each variable across exchanges at the 1%, 5%, and 10%, respectively. For definitions of variables, *see infra* Appendix.

Table 1, Panel B presents statistics for only the subset of deals that would exceed the threshold for shareholder voting.[140] That is, Panel B examines only deals where the acquirer issues more than 20% of its outstanding shares in connection with the acquisition.[141] In this setting, there is no support for H2, as the announcement returns do not differ across exchanges. In other words, the shareholder vote required on the "other" exchanges does not appear to increase acquirer announcement returns. Also, there seems to be no statistically significant difference in the time required to complete deals between those requiring a vote and those not requiring a vote, which suggests that voting does not cost the acquiring firm by imposing additional delay. As in Panel A, these results are only univariate and should thus be interpreted with caution.

Table 2 confirms the results from the univariate statistics in Table 1 in a multivariate setting.[142] Table 2, Panel A presents the results from a logit regression of the likelihood that an acquirer issues more than 20% of its shares in an acquisition.[143] The regression is identical to Model 1, excluding the difference-in-difference (*POST*) variable. Consistent with Table 1, Panel A, NASDAQ acquirers are significantly more likely to issue more than 20% of their outstanding shares in an acquisition than are firms listed on NYSE or AMEX. Because, in this partition of the sample, NASDAQ firms are not subject to shareholder voting rules, the result is consistent with shareholder voting rules on other exchanges deterring the issuance of shares. Viewed differently, this result is consistent with acquiring firms choosing to list on NASDAQ due to their relatively unrestricted ability to use stock as an acquisition currency. Both explanations are consistent with firms taking advantage of NASDAQ's weak listing requirements. H1, formally tested in Subpart III.C, examines whether voting requirements constrain this behavior.

Table 1, Panel B presents the results from an announcement return regression comparing the difference in announcement returns between NASDAQ and NYSE or AMEX acquirers using greater than 20% of equity as consideration.[144] H2 (discussed and tested in more detail in Subpart III.C) suggests that, if shareholder voting in the context of acquisitions is value enhancing, then NASDAQ acquirers whose deals would be subject to a vote on other exchanges (*NASDAQ*VOTE*) should have a lower return than those on other exchanges due to the absence of the voting requirement. Consistent with Table 1, Panel B, there is no evidence that these NASDAQ firms have lower announcement returns. Untabulated tests find similar results for long-run performance measures. This result suggests

140. *See supra* Table 1.
141. *See supra* Table 1.
142. *See infra* Table 2.
143. *See infra* Table 2.
144. *See supra* Table 1.

shareholder voting does not improve acquisition performance. These results are also consistent with both (1) NASDAQ firms having an embedded valuation discount resulting from their selection to list on an exchange with reduced shareholder voting requirements, assuming the firm has an ability to choose the exchange on which they are listed, and (2) NASDAQ firms using the optimal deal structure when not constrained by voting rules.

TABLE 2: PRE-NASDAQ RULE CHANGE[145]

Panel A: Logistic Regression of the Likelihood of Acquirer Issuing > 20% of Its Stock		
$VOTE_{i,t} = \beta_0 + \beta_1 NASDAQ_{i,t} + \beta_2 CONTROLS_{i,t} + \varepsilon$		
Variable	**Pred.**	Coefficient ***(p-value)***
Intercept	?	1.964 ***(0.300)***
NASDAQ	+	1.434*** ***(0.000)***
MTB	?	0.00797 ***(0.714)***
LN_MARKET	?	0.283*** ***(0.008)***
INTRISK	?	–26.88 ***(0.476)***
AAA	?	–59.93*** ***(0.000)***
REL_SIZE	?	–0.548* ***(0.078)***
SERIAL	?	0.0704 ***(0.875)***
TIME	?	0.260*** ***(0.000)***
N		1,079
Panel B: OLS Regression of Announcement Window *CAR* of Acquirer		
$CAR_{i,t} = \beta_0 + \beta_1 NASDAQ{*}VOTEi,t + \beta_2 NASDAQi,t + \beta_3 VOTEi,t + \beta_4 CONTROLSi,t + \varepsilon$		
Variable	**Pred.**	Coefficient ***(p-value)***
Intercept	?	0.0472*** ***(0.000)***
*NASDAQ*VOTE*	–	0.0150 ***(0.353)***
NASDAQ	?	–0.00429 ***(0.535)***
VOTE	?	–0.0115 ***(0.258)***
PUBLIC	–	–0.0145** ***(0.0050)***
LN_MARKET	–	–0.00522*** ***(0.0030)***
ROA	?	–0.0201 ***(0.255)***
MTB	?	0.00391*** ***(0.000)***
REL_SIZE	?	–0.0000397*** ***(0.000)***
SERIAL	?	–0.0183 ***(0.105)***
N		1,076

B. Main Descriptive Statistics

Table 3, Panel A presents the acquisitions used in our analysis broken out by year and exchange.[146] Note that there are no acquisitions in 1989 because, as discussed above, the main sample excludes the transition period from January 10, 1989, to July 18,

145. ***, **, * indicate significance at the 1%, 5%, and 10% levels, respectively. Huber-White robust standard errors are clustered by firm and are used to control for heteroscedasticity and serial correlation. When predictions are made, *p*-values are one-tailed. For definitions of variables, *see infra* Appendix.

146. *See infra* Table 3.

1990, when the shareholder voting threshold was set at 25%. Specifically, the NASDAQ rule change occurred on January 9, 1989, and no deals meeting the sample requirements were completed in the first week of 1989. The years 1990 and 1993 have relatively fewer deals than surrounding years for similar reasons. Because of the date of the 1990 law change, only about half of the deals announced in 1990 and 1993 are included. Table 3, Panel B presents the same details for the subsample of transactions in which the acquirer issued more than 20% of its stock.[147] Consistent with H1, NASDAQ contains a relatively large proportion of acquirers that issue more than 20%. However, there is little change in the percentage of deals that exceed the voting threshold for NASDAQ acquirers from before to after the adoption of the shareholder voting rule.

TABLE 3: NUMBER OF ACQUISITIONS BY ANNOUNCEMENT YEAR AND EXCHANGE[148]

Panel A: Acquisitions					
Year	**Total**	**NASDAQ**	**NASDAQ (%)**	**Other**	**Other (%)**
1986	172	42	24.42%	130	75.58%
1987	144	49	34.03%	95	65.97%
1988	153	66	43.14%	87	56.86%
1989	0	0	n/a	0	n/a
1990	75	33	44.00%	42	56.00%
1991	177	90	50.85%	87	49.15%
1992	211	97	45.97%	114	54.03%
1993	110	65	59.09%	45	40.91%
Total	1,042	442	42.42%	600	57.58%
Panel B: Acquisitions Where Acquirer Issues More than 20% of Shares					
Year	**Total**	**NASDAQ**	**NASDAQ (%)**	**Other**	**Other (%)**
1986	34	16	47.06%	18	52.94%
1987	30	19	63.33%	11	36.67%
1988	22	15	68.18%	7	31.82%
1989	0	0	n/a	0	n/a
1990	15	7	46.67%	8	53.33%
1991	52	27	51.92%	25	48.08%
1992	59	37	62.71%	22	37.29%
1993	28	20	71.43%	8	28.57%
Total	240	141	58.75%	99	41.25%

147. *See infra* Table 3.

148. The authors' calculations are based on the sample obtained from SDC. The sample size in this table (1,042) differs slightly from the full regression sample of 1,079 because the full sample includes pre-rule-change period deals with *effective* dates from January 10, 1986, to January 9, 1989. A few such were announced prior to 1986 and thus are excluded from this table.

Table 4, Panel A provides a comparison of our main variables across the pre- and post-rule-change periods.[149] Table 4, Panel B presents similar statistics for only NASDAQ firms, providing a simple difference test of H1.[150] Importantly, Panel A (i.e., the full sample) shows an increase in the percentage of acquisitions in which acquirers issue more than 20% of their stock after the rule change (*VOTE*) as well as a higher announcement cumulative abnormal return (*CAR*).[151] Thus, comparing the period before the NASDAQ rule change with the period after shows an overall increase in acquisitions involving the issuance of over 20% of the acquirer's stock as well as higher announcement returns. Panel B (i.e., the NASDAQ sample) shows that, contrary to the overall increase in stock transactions that require a vote, NASDAQ acquirers saw no increase in the percentage of deals requiring a vote as compared to those pre-rule deals that would have required a vote had there been a voting rule. This is generally consistent with H1, suggesting that the implementation of the voting rule at NASDAQ deterred the issuance of stock in acquisitions compared to stock issuance activity on other exchanges, which had no change in shareholder voting rules.[152]

Finally, Table 4, Panel C presents a simple difference between NASDAQ firms issuing 20% or more of their shares before and after the implementation of the NASDAQ rule change to provide insight into H2.[153] Consistent with H2, we find weak evidence of more positive *CARs* after the rule change. Interestingly, Table 4, Panel C shows no significant difference between the time taken to complete deals before and after the enactment of the shareholder voting rule.[154] This finding is consistent with the results in Table 1, Panel B and contrasts with that of Kamar[155] and with regulators' beliefs that shareholder voting requirements delay deal completion time, thereby imposing an unnecessary cost on acquirers.

149. *See infra* Table 4.
150. *See infra* Table 4.
151. *See infra* Table 4.
152. Consistent with H2, which suggests that NASDAQ acquirers should see an *incremental* increase in returns compared to other exchanges in response to the newly enacted shareholder voting rule, NASDAQ acquirers saw an increase in announcement returns somewhat larger than those of the overall market. However, since these results do not control for firm and deal characteristics known to influence acquirer returns, we leave inferences to our full difference-in-difference results in Subpart III.C.
153. *See infra* Table 4.
154. *See infra* Table 4.
155. Kamar, *supra* note 88, at 40.

TABLE 4: DESCRIPTIVE STATISTICS—PRE- VS. POST-NASDAQ RULE CHANGE[156]

Panel A: Full Sample								
	Pre-Rule Change			**Post-Rule Change**			**Difference**	
Variable	***N***	**Mean**	**SD**	***N***	**Mean**	**SD**	**Diff.**	***p*-value**
VOTE	506	0.190	0.392	573	0.269	0.444	0.079***	(0.002)
CAR	503	0.021	0.085	573	0.055	0.168	0.0345***	(0.000)
MTB	506	0.332	0.471	573	0.497	0.500	0.165***	(0.000)
INTRISK	473	1.234	3.169	547	1.484	1.630	0.251	(0.106)
AAA	506	0.023	0.003	573	0.020	0.001	–0.00325***	(0.000)
GNP	506	0.094	0.003	573	0.082	0.007	–0.0122***	(0.000)
INDSHK	506	5.768	0.187	573	6.520	0.176	0.752***	(0.000)
CHG_CASH	506	0.244	0.375	573	0.126	0.150	–0.119***	(0.000)
STINT/LTINT	506	11.474	72.430	573	2.006	12.725	–9.468***	(0.002)
REL_SIZE	506	0.841	0.026	573	0.648	0.117	–0.193***	(0.000)
SERIAL	473	9.422	182.353	547	0.548	1.163	–8.874	(0.255)
TIME	506	0.095	0.293	573	0.166	0.372	0.0709***	(0.001)
PUBLIC	506	3.726	1.845	573	3.764	1.826	0.0374	(0.738)
LN_MARKET	506	0.468	0.499	573	0.234	0.424	–0.235***	(0.000)
ROA	473	4.988	1.573	547	4.171	1.830	–0.817***	(0.000)
Panel B: NASDAQ Acquirers Only								
	Pre-Rule Change			**Post-Rule Change**			**Difference**	
Variable	***N***	**Mean**	**SD**	***N***	**Mean**	**SD**	**Diff.**	***p*-value**
VOTE	168	0.327	0.471	285	0.319	0.467	–0.0081	(0.859)
CAR	166	0.022	0.093	285	0.066	0.182	0.0442***	(0.004)
MTB	156	1.265	1.171	275	1.777	2.113	0.513***	(0.005)
INTRISK	168	0.022	0.003	285	0.020	0.001	–0.00250***	(0.000)
AAA	168	0.094	0.003	285	0.081	0.007	–0.0134***	(0.000)
GNP	168	5.807	0.181	285	6.528	0.178	0.721***	(0.000)
INDSHK	168	0.230	0.271	285	0.113	0.146	–0.118***	(0.000)
CHG_CASH	168	14.344	81.031	285	2.941	15.100	–11.40**	(0.021)
STINT/LTINT	168	0.843	0.027	285	0.645	0.112	–0.198***	(0.000)
REL_SIZE	156	0.961	1.841	275	0.527	0.726	–0.435***	(0.001)
SERIAL	168	0.107	0.310	285	0.077	0.267	–0.0299	(0.279)
TIME	168	3.460	2.078	285	3.832	1.793	0.372**	(0.045)
PUBLIC	168	0.458	0.500	285	0.221	0.416	–0.237***	(0.000)
LN_MARKET	156	4.393	1.402	275	3.718	1.709	–0.675***	(0.000)
ROA	157	0.023	0.129	275	(0.111)	0.664	–0.134**	(0.013)

156. This table presents summary statistics with univariate results comparing average changes in firm, deal, and macroeconomic factors before and after the NASDAQ rule change. ***, **, * indicate significant differences in means between pre- and post-variables at the 1%, 5%, and 10% level, respectively. For definitions of variables, *see infra* Appendix.

Panel C: NASDAQ Acquirers Only Where Acquirer Issues More than 20% of Shares								
	Pre-Rule Change			Post-Rule Change			Difference	
Variable	*N*	Mean	SD	*N*	Mean	SD	Diff.	*p*-value
CAR	54	0.015	0.082	91	0.061	0.179	0.0463*	(0.075)
MTB	46	1.231	1.101	87	2.253	1.951	1.022***	(0.001)
INTRISK	55	0.023	0.003	91	0.020	0.001	–0.00272***	(0.000)
AAA	55	0.094	0.003	91	0.080	0.006	–0.0145***	(0.000)
GNP	55	5.785	0.188	91	6.555	0.165	0.770***	(0.000)
INDSHK	55	0.241	0.247	91	0.093	0.112	–0.148***	(0.000)
CHG_CASH	55	43.194	137.789	91	4.418	18.137	–38.78***	(0.009)
STINT/LTINT	55	0.843	0.023	91	0.618	0.084	–0.224***	(0.000)
REL_SIZE	46	0.395	0.313	87	0.519	0.581	0.123	(0.183)
SERIAL	55	0.145	0.356	91	0.066	0.250	–0.0795	(0.115)
TIME	55	4.370	1.661	91	4.280	1.598	–0.0907	(0.744)
PUBLIC	55	0.655	0.480	91	0.363	0.483	–0.292***	(0.001)
LN_MARKET	46	5.118	1.489	87	3.854	1.913	–1.264***	(0.000)
ROA	46	0.001	0.177	87	(0.126)	0.425	–0.127*	(0.055)

C. Main Results: Full Sample

We next present our results from estimating the logistic model testing whether the shareholder voting rule affected firms' method of payment (H1) in Table 5.[157] Our findings suggest that NASDAQ firms are less likely to issue enough shares to meet the shareholder voting threshold after the implementation of the shareholder voting rule. Economically, the rule change had a significant effect on the number of NASDAQ deals that issued an amount of stock that exceeded the shareholder voting threshold. The proportion of NASDAQ deals where share issuance exceeded the voting threshold decreased by 45% unconditionally following the rule change.[158] This suggests that shareholder voting rules entice acquirers to structure deals differently than they otherwise would in order to avoid the

157. *See infra* Table 5. In general, interaction terms, which are the variables of interest, are difficult to interpret in nonlinear models as the treatment effects can have a different sign than the coefficient. *See, e.g.*, Chunrong Ai & Edward C. Norton, *Interaction Terms in Logit and Probit Models*, 80 ECON. LETTERS 123, 123 (2003). However, Puhani shows that in difference-in-difference models, the treatment effect and the coefficient have the same sign. Patrick A. Puhani, *The Treatment Effect, the Cross Difference, and the Interaction Term in Nonlinear "Difference-in-Differences" Models*, 115 ECON. LETTERS 85, 85 (2012).

158. The unconditional marginal effect (45%) is derived by first calculating the conditional marginal effect at the population means from our main regression estimation (–0.1483, untabulated). The conditional marginal effect is then scaled by the unconditional mean for the proportion of deals by NASDAQ acquirers requiring a vote in the pre-rule-change period (Table 4, Panel B: 0.327). A 45% reduction of the proportion of voting deals before the rule change leads to a post-rule-change proportion of 0.179.

shareholder voting requirement. This result is consistent with regulators' concerns about the costs of shareholder voting rules. These results hold with (Column 2) and without (Column 1) control variables.[159]

TABLE 5: LOGISTIC DIFFERENCE-IN-DIFFERENCE REGRESSION OF THE LIKELIHOOD OF ACQUIRER ISSUING > 20% OF ITS STOCK[160]

$$VOTE_{i,t} = \beta_0 + \beta_1 POST*NASDAQ_{i,t} + \beta_2 NASDAQ_{i,t} + \beta_3 POST_{i,t} + \beta_4 CONTROLS_{i,t} + \varepsilon$$

Variable	**Pred.**	Coefficient ***(p-value)*** **(1)**	Coefficient ***(p-value)*** **(2)**
Intercept	?	–1.980*** ***(0.000)***	–7.508 ***(0.695)***
*POST*NASDAQ*	–	–0.744*** ***(0.0070)***	–0.990*** ***(0.0025)***
NASDAQ	?	1.260*** ***(0.000)***	1.600*** ***(0.000)***
POST	?	0.707*** ***(0.001)***	0.940** ***(0.046)***
MTB	?		0.0364 ***(0.182)***
LN_MARKET	?		0.0356 ***(0.533)***
INTRISK	?		107.1 ***(0.499)***
AAA	?		3.230 ***(0.958)***
GNP	?		0.307 ***(0.863)***
INDSHK	?		0.444 ***(0.103)***
CHG_CASH	?		–0.467*** ***(0.008)***
STINT/LTINT	?		0.00536*** ***(0.004)***
REL_SIZE	?		–0.593 ***(0.638)***
SERIAL	?		0.0189 ***(0.943)***
TIME	?		0.283*** ***(0.000)***
N		1,079	1,020

Having examined the effect of a new shareholder voting requirement on managers' deal structure choices, the second main question is addressed: whether a shareholder vote benefits shareholders?

159. This test includes all acquisitions. Results are virtually identical when examining only acquisitions that use at least some stock as consideration. Because firms can choose 0% as the amount of stock issued in an acquisition, we believe it is most appropriate to examine our hypothesis in the set of all acquisitions.

160. ***, **, * indicate significance at the 1%, 5%, and 10% levels, respectively. Huber-White robust standard errors are clustered by firm and are used to control for heteroscedasticity and serial correlation. When predictions are made, *p*-values are one-tailed. Column 2 includes control variables while Column 1 does not. For definitions of variables, *see infra* Appendix.

> **H2:** Acquirers subject to shareholder voting requirements make better acquisition decisions, resulting in better acquisition performance.

This Article examines whether shareholder voting requirements affect performance by examining several different performance measures. First, short-run returns are examined. Using a similar difference-in-difference methodology as before, we analyze the three-day *CARs* surrounding the announcement date of the acquisitions. Abnormal returns are measured using a Fama-French three-factor model with an estimation window from day –255 to day –42. Our short-term measure of an acquirer's performance is then the *CAR* from day –1 to day 1, where the event date (day 0) is the acquisition announcement date.[161]

Next, this Article examines long-run performance in a difference-in-difference design using three different long-run performance measures. Accounting-based measures of profitability are examined using the acquirer's change in industry-adjusted return on assets ("ROA") (*ΔROA*) and return on equity ("ROE") (*ΔROE*) from before to after the acquisition, following prior literature.[162] *ΔROA* equals average industry-adjusted ROA, where ROA equals net income scaled by the average assets over the prior two years, for the first three years following the completion of the acquisition as compared to the average industry-adjusted ROA measure for the three years ending prior to the completion of the acquisition. The Article measures *ΔROE* similarly, with the only difference being that ROE equals net income scaled by common equity instead of assets. Our industry adjustment to firm *i*'s year *t* ROA or ROE is performed by subtracting the median of the industry's average ROA or ROE, respectively, in year *t* measured at the 2-digit SIC code level. We also examine buy-and-hold returns (*BHAR*) for the holding period beginning with the first trading day after the acquisition effective date and continuing to 255 trading days after the acquisition effective date.

Empirically, testing the effect of the NASDAQ rule on the acquirer's performance requires a three-way interaction term, as we focus on the reaction for post-rule change NASDAQ acquirers that were subject to the shareholder voting requirements. Therefore, we use the following ordinary least squares ("OLS") model to test whether NASDAQ-listed acquirers make better acquisitions when required to obtain shareholder approval:

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161. Our results hold using longer cumulative abnormal measures such as (–3,+3) and (–5,+5) as well as a run-up *CAR* calculated from –42 days before announcement until completion as in Leonce L. Bargeron et al., *Why Do Private Acquirers Pay So Little Compared to Public Acquirers?*, 89 J. FIN. ECON. 375, 378 (2008).

162. Alexander Edwards et al., *Trapped Cash and the Profitability of Foreign Acquisitions*, 33 CONTEMP. ACCT. RES. 44, 74 (2016).

MODEL 2

$$PERF_{i,t} = \beta_0 + \beta_1 POST*NASDAQ*VOTE_{i,t} + \beta_2 POST*NASDAQ_{i,t} + \beta_3 POST_{i,t} + \beta_4 VOTE_{i,t} + \beta_5 NASDAQ_{i,t} + \beta_6 CONTROLS_{i,t} + \varepsilon$$

The dependent variable *PERF* represents *CAR*, *ΔROA*, *ΔROE*, or *BHAR*, as noted above. Other variables are as previously defined and detailed in the Appendix. Under H2, a positive coefficient on β_1 is expected if the NASDAQ shareholder voting requirement adds value for the acquiring firm and its shareholders.

The results from the OLS difference-in-difference regression testing H2, examining if NASDAQ acquirers experience better performance when shareholders vote on the acquisition, are presented in Tables 6 and 7.[163] This Article presents results for the *CAR*s at the announcement date of the acquisition in Table 6,[164] and Table 7 presents results for our long-run performance measures.[165]

Examining announcement *CAR*s, there is no evidence of a significant positive market reaction to NASDAQ deals that required a shareholder vote.[166] This result contrasts the findings of Becht et al., which focuses on the U.K., where there is no discretion to avoid a shareholder vote.[167] In the setting discussed in this Article, when managers *do* have the ability to use their discretion to structure an acquisition that avoids shareholder voting thresholds, shareholder voting does not improve acquisition performance. This finding also contrasts the finding by Li et al., who argue that managers only seek acquisitions with large synergistic gains when shareholder voting is required.[168] The results here suggest that, in the period after the initial implementation of the shareholder voting rule, managers use their discretion to alter the method of payment but do not subject only high-quality deals to a shareholder vote. Thus, the results indicate that the existence of the voting rule itself did not affect acquisition performance.

163. *See infra* Table 6
164. *See infra* Table 6.
165. *See infra* Table 7.
166. This test includes all acquisitions. Results are virtually identical in the subsample of acquisitions that use at least some stock as consideration.
167. Becht et al., *supra* note 78, at 3041.
168. Li et al., *supra* note 79, at 31–33.

TABLE 6: OLS REGRESSION OF ANNOUNCEMENT WINDOW *CAR* OF ACQUIRER[169]

$$CAR_{i,t} = \beta_0 + \beta_1 POST*NASDAQ*VOTE_{i,t} + \beta_2 POST*NASDAQ_{i,t} + \beta_3 POST_{i,t} + \beta_4 VOTE_{i,t} + \beta_5 NASDAQ_{i,t} + \beta_6 CONTROLS_{i,t} + \varepsilon$$

Variable	**Pred.**	Coefficient ***(p-value)*** **(1)**	Coefficient ***(p-value)*** **(2)**
Intercept	?	0.0223*** ***(0.003)***	0.0904*** ***(0.000)***
*POST*NASDAQ *VOTE*	+	0.0109 ***(0.3040)***	–0.0000231 ***(0.4995)***
*POST*NASDAQ*	?	0.0145 ***(0.439)***	0.0109 ***(0.575)***
POST	?	0.0261** ***(0.017)***	0.0144 ***(0.229)***
VOTE	?	–0.0184 ***(0.136)***	0.00313 ***(0.821)***
NASDAQ	?	0.00586 ***(0.655)***	–0.00946 ***(0.497)***
PUBLIC	–		–0.0298*** ***(0.0015)***
LN_MARKET	–		–0.0109*** ***(0.000)***
ROA	?		–0.0129 ***(0.311)***
MTB	?		0.00324* ***(0.086)***
REL_SIZE	?		–0.0000535 ***(0.128)***
SERIAL	?		–0.0169 ***(0.215)***
N		1,076	1,016

Finally, in Table 7, this Article examines if the acquirers subject to the NASDAQ voting rule experience better long-run performance despite no improvement in short-run performance (i.e., announcement *CAR*s).[170] Column 1 presents results for *ΔROA*, Column 2 presents results for *ΔROE*, and Column 3 presents results for *BHAR*.[171] For ease of presentation, only results including control variables are presented. There is no evidence of an improvement in long-run performance after the enactment of the shareholder voting rule, regardless of measure. Thus, the findings are consistent with shareholder voting affecting the managers' choice of structure for a deal but not the quality of deals subject to a vote.

169. ***, **, * indicate significance at the 1%, 5%, and 10% levels, respectively. Huber-White robust standard errors are clustered by firm and are used to control for heteroscedasticity and serial correlation. When predictions are made, *p*-values are one-tailed. Column 2 includes control variables while Column 1 does not. For definitions of variables, *see infra* Appendix.

170. *See infra* Table 7.

171. *See infra* Table 7.

TABLE 7: OLS REGRESSION OF LONG-RUN ACQUIRER PERFORMANCE[172]

$$PERF_{i,t} = \beta_0 + \beta_1 POST*NASDAQ*VOTE_{i,t} + \beta_2 POST*NASDAQ_{i,t} + \beta_3 POST_{i,t} + \beta_4 VOTE_{i,t} + \beta_5 NASDAQ_{i,t} + \beta_6 CONTROLS_{i,t} + \varepsilon$$

PERF =		*ΔROA*	*ΔROE*	*BHAR*
Variable	**Pred.**	Coefficient ***(p-value)*** **(1)**	Coefficient ***(p-value)*** **(2)**	Coefficient ***(p-value)*** **(3)**
Intercept	?	–0.0358 ***(0.185)***	2.238 ***(0.220)***	5.421** ***(0.022)***
*POST*NASDAQ *VOTE*	+	–0.0296 ***(0.355)***	0.452 ***(0.1620)***	0.909 ***(0.3570)***
*POST*NASDAQ*	?	0.0430 ***(0.185)***	0.608 ***(0.534)***	0.554 ***(0.720)***
POST	?	–0.0194 ***(0.293)***	–1.008 ***(0.380)***	0.805 ***(0.231)***
VOTE	?	0.0116 ***(0.509)***	–0.225 ***(0.514)***	0.0957 ***(0.763)***
NASDAQ	?	–0.0398** ***(0.038)***	–1.411 ***(0.155)***	–0.899* ***(0.059)***
PUBLIC	?	–0.0208 ***(0.153)***	–0.904* ***(0.090)***	–0.550 ***(0.221)***
LN_MARKET	?	0.00783 ***(0.164)***	–0.173 ***(0.378)***	–1.127** ***(0.030)***
ROA	?	0.0522 ***(0.455)***	0.0814 ***(0.821)***	0.514 ***(0.263)***
MTB	?	0.000345 ***(0.932)***	–0.0291 ***(0.258)***	–0.0504 ***(0.224)***
REL_SIZE	?	0.0000498*** ***(0.001)***	–0.00158** ***(0.013)***	–0.00193 ***(0.128)***
SERIAL	?	0.00663 ***(0.650)***	–0.885 ***(0.160)***	–0.156 ***(0.693)***
TIME	?	–0.00319 ***(0.440)***	0.0894 ***(0.288)***	0.233 ***(0.476)***
N		964	963	1,016

D. Cross-Sectional Results

This Article's empirical analyses have not yet considered the possibility that our results are driven by some unobserved characteristics of acquirers rather than the adoption of shareholder voting requirements. To address this concern, serial acquirers and firms with strong corporate governance are examined, using institutional ownership as a proxy for governance strength. First, a central insight of legal literature is that the repeat player enjoys considerable advantages over the "one-shotter."[173] In the acquisition

172. ***, **, * indicate significance at the 1%, 5%, and 10% levels, respectively. Huber-White robust standard errors are clustered by firm and are used to control for heteroscedasticity and serial correlation. When predictions are made, *p*-values are one-tailed. For definitions of variables, *see infra* Appendix.

173. *See, e.g.*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97 (1974) (defining "one-shotters" as "actors into those claimants who have only occasional recourse to the courts"); Maya Steinitz, *Whose Claim Is This Anyway: Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1300 (2011) (describing "one-shotters" as "claimants who have only occasional recourse to the courts"); Shauhin Talesh, *How the "Haves" Come out Ahead in the Twenty-First Century*, 62 DEPAUL L. REV.

field, prior literature isolates acquirer characteristics by performing cross-sectional tests based on whether an acquirer is a serial acquirer.[174] Using this distinction enables us to assess the change in the method of payment and performance due to the shareholder voting rules for acquirers that remain static through time.[175] Since serial acquirers are likely to have more familiarity with the structuring of acquisition deals, it is expected that serial acquirers exhibit a stronger response to the shareholder voting rule change compared to acquirers completing acquisitions less frequently. In contrast, less frequent acquirers may focus more on completing their deal and less on adjusting the method of payment to avoid shareholder voting rules.

Table 8, Panel A presents results for the likelihood of meeting the voting threshold, and Panel B for the announcement *CAR*, for the full sample of firms split between nonserial acquirers (Column 1) and serial acquirers (Column 2).[176] Results in Panel A show that both serial and nonserial acquirers alter their deal structure following the enactment of the shareholder voting rule.[177] However, the effect is significantly stronger for serial acquirers (p-value = 0.031, one-tailed, untabulated). This suggests that serial acquirers, which are more familiar with structuring deals, respond more strongly to acquisition-related rules. Consistent with the main results, Panel B presents no evidence of significantly positive market returns for NASDAQ acquirers subject to the voting requirements for either serial or nonserial acquirers.

519, 519 (2013) (noting the challenges faced by one-shotters to achieve "significant reform through the legal system").

174. This Article defines a serial acquirer as a firm that completes five or more acquisitions during our sample period. *See also* Kathleen Fuller, Jeffry Netter & Mike Stegemoller, *What Do Returns to Acquiring Firms Tell Us? Evidence from Firms that Make Many Acquisitions*, 57 J. FIN. 1763, 1763–64 (2002).

175. *Id.*

176. *See infra* Table 7.

177. *See infra* Table 7.

TABLE 8: SERIAL ACQUIRERS[178]

Panel A: Logistic Difference-in-Difference Regression of the Likelihood of Acquirer Issuing > 20% of Its Stock			
$VOTE_{i,t} = \beta_0 + \beta_1 POST*NASDAQ_{i,t} + \beta_2 NASDAQ_{i,t} + \beta_3 POST_{i,t} + \beta_4 CONTROLS_{i,t} + \varepsilon$			
Subsample:		**Exclude Serial Acquirers**	**Serial Acquirers Only**
Variable	**Pred.**	Coefficient ***(p-value)*** **(1)**	Coefficient ***(p-value)*** **(2)**
Intercept	?	–0.00748 ***(1.000)***	–584.4* ***(0.072)***
*POST*NASDAQ*	–	–0.867** ***(0.0130)***	–3.252*** ***(0.0035)***
NASDAQ	?	1.488*** ***(0.000)***	2.821*** ***(0.005)***
POST	?	1.123** ***(0.034)***	4.277* ***(0.067)***
MTB	?	0.0316 ***(0.304)***	0.611* ***(0.065)***
LN_MARKET	?	0.0231 ***(0.726)***	0.00511 ***(0.978)***
INTRISK	?	56.37 ***(0.733)***	7423.1* ***(0.080)***
AAA	?	–27.11 ***(0.666)***	1646.0* ***(0.063)***
GNP	?	–0.405 ***(0.829)***	44.85* ***(0.073)***
INDSHK	?	0.499** ***(0.032)***	–1.201 ***(0.411)***
CHG_CASH	?	0.00538*** ***(0.001)***	–0.113 ***(0.241)***
STINT/LTINT	?	0.219 ***(0.867)***	5.416 ***(0.410)***
REL_SIZE	?	–0.452** ***(0.014)***	–0.352 ***(0.384)***
TIME	?	0.278*** ***(0.000)***	0.524** ***(0.014)***
N		896	124

178. ***, **, * indicate significance at the 1%, 5%, and 10% levels, respectively. Huber-White robust standard errors are clustered by firm and are used to control for heteroscedasticity and serial correlation. When predictions are made, *p*-values are one-tailed. For definitions of variables, see *infra* Appendix.

Panel B: OLS Regression of Announcement Window *CAR* of Acquirer			
$CAR_{i,t} = \beta_0 + \beta_1 POST*NASDAQ*VOTE_{i,t} + \beta_2 POST*NASDAQ_{i,t} + \beta_3 POST_{i,t} + \beta_4 VOTE_{i,t} + \beta_5 NASDAQ_{i,t} + \beta_6 CONTROLS_{i,t} + \varepsilon$			
Subsample:		**Exclude Serial Acquirers**	**Serial Acquirers Only**
Variable	**Pred.**	Coefficient ***(p-value)*** **(1)**	Coefficient ***(p-value)*** **(2)**
Intercept	?	0.102*** ***(0.000)***	–0.00609 ***(0.834)***
*POST*NASDAQ *VOTE*	+	–0.00241 ***(0.937)***	–0.0139 ***(0.723)***
*POST*NASDAQ*	?	0.0182 ***(0.379)***	–0.0359 ***(0.410)***
POST	?	0.00894 ***(0.422)***	0.0393** ***(0.029)***
VOTE	?	0.00659 ***(0.761)***	–0.0215 ***(0.277)***
NASDAQ	?	–0.0149 ***(0.209)***	0.0357 ***(0.119)***
PUBLIC	–	–0.0295*** ***(0.0005)***	–0.0286** ***(0.0320)***
LN_MARKET	–	–0.0130*** ***(0.001)***	0.00381 ***(0.1700)***
ROA	?	–0.0114 ***(0.553)***	–0.0707 ***(0.288)***
MTB	?	0.00335*** ***(0.005)***	–0.00898 ***(0.256)***
REL_SIZE	?	–0.0000592*** **(0.000)**	–0.00235 **(0.838)**
N		894	122

In addition to an acquirer's familiarity with deal structuring, it may be that an acquirer's existing level of corporate governance affects the way in which managers or shareholders respond to shareholder voting rules. As suggested by NASDAQ's request for comment,[179] an acquiring firm that is already subject to strong outside monitoring by shareholders may care very little about the adoption of shareholder voting rules because shareholder discipline on the manager is already high. On the contrary, shareholders with little discipline over a manager would likely find the adoption of shareholder voting rules extremely beneficial. Finally, it could be the case that the effect of shareholder voting requirements on the method of payment and performance does not vary with the level of shareholder discipline on the manager. This Article examines the extent to which shareholder voting rules may be a complement to, rather than a substitute for, corporate governance.

To address regulators' expectations that the level of corporate governance affects the impact of shareholder voting requirements, an empirical analysis is formed by splitting our sample based on the level of corporate governance. Firms with higher institutional ownership (*IO*) are designated as having better governance.[180] Agency theory

179. Press Release, NASDAQ, *supra* note 5.

180. *See, e.g.*, Stuart L. Gillan & Laura T. Starks, *Corporate Governance Proposals and Shareholder Activism: The Role of Institutional Investors*, 57 J.

proposes that firms are subject to inherent agency costs due to the separation of ownership and control and the asymmetry of information between shareholders and managers.[181] To mitigate these agency costs, shareholders incur costs to monitor managers and induce decisions that are consistent with shareholder interest.[182] Because monitoring is a costly endeavor for shareholders, it gives rise to a free-rider problem.[183] In other words, no single shareholder is willing to shoulder the monitoring costs when he or she must share any resulting gains pro rata with his or her fellow shareholders.

However, large institutional owners have an incentive to incur such monitoring costs.[184] Therefore, institutional owners, acting as external monitors on firms' behavior,[185] reduce the agency problem between shareholders and managers, thereby improving governance. Specifically, institutional investors provide monitoring in several ways. Institutional owners monitor management's performance and can push for changes in management if performance lags.[186] Institutions are more involved in shareholder voting[187] and facilitate the market for corporate control.[188] In addition to monitoring financial performance, institutions can monitor operational performance and therefore are generally better able to monitor firms when they are closer to the firm or have easier access to the firm's location.[189]

Table 9, Panel A presents results where the dependent variable is the likelihood of issuing a number of shares that triggers the voting threshold, and Panel B presents results where the dependent variable

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FIN. ECON. 275, 277 (2000) (arguing that corporations with a large minority shareholder makeup are better governed). Due to the time period in the sample, only a limited number of governance measures are available.

181. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 328 (1976).

182. *Id.*

183. Andrei Shleifer & Robert W. Vishny, *Large Shareholders and Corporate Control*, 94 J. POL. ECON. 461, 461–62 (1986).

184. *See, e.g.*, Gillan & Starks, *supra* note 180, at 279.

185. Sanjeev Bhojraj & Partha Sengupta, *Effect of Corporate Governance on Bond Ratings and Yields: The Role of Institutional Investors and Outside Directors*, 76 J. BUS. 455, 456 (2003); Miguel A. Ferreira & Pedro Matos, *The Colors of Investors' Money: The Role of Institutional Investors around the World*, 88 J. FIN. ECON. 499, 514–15 (2008); Jay C. Hartzell & Laura T. Starks, *Institutional Investors and Executive Compensation*, 58 J. FIN. 2351, 2351 (2003).

186. Shleifer & Vishny, *supra* note 183, at 462.

187. James A. Brickley et al., *Ownership Structure and Voting on Antitakeover Amendments*, 20 J. FIN. ECON. 267, 268 (1988).

188. *See* Shleifer & Vishny, *supra* note 183, at 465.

189. Benjamin C. Ayers et al., *Hometown Advantage: The Effects of Monitoring Institution Location on Financial Reporting Discretion*, 52 J. ACCT. & ECON. 41, 59 (2011); Shai Bernstein et al., *The Impact of Venture Capital Monitoring*, 71 J. FIN. 1591, 1612 (2016).

is the announcement *CAR*.[190] Column 1 presents results for poor-governance firms; Column 2 presents results for good-governance firms.[191] In general, results in Panel A suggest that both good- and poor-governance firms alter their deal structures to avoid shareholder voting, consistent with our main results. This result contrasts the findings by Li et al., who conclude that firms with higher institutional ownership are less likely to alter their deal structure.[192] Results in Panel B show no evidence that the NASDAQ shareholder voting rule results in higher announcement returns regardless of the level of governance of the acquirer.[193]

As with the main results, results in Panel B are inconsistent with related results by Li et al., who find better performance for well-governed acquirers.[194] Again, this inconsistency is likely because Li et al. do not consider the strategic avoidance of the vote. This suggests that, contrary to the SEC's view, the effect of shareholder voting rules does not vary with corporate governance. However, this Article acknowledges that governance structures during the period of this study may differ substantially from more recent periods.

190. *See infra* Table 9.

191. *See infra* Table 9. In untabulated results, we confirm our findings using an alternative proxy for existing levels of corporate governance. Following Harford et al., we use the existing level of cash holdings to indicate governance levels because Harford et al.'s baseline findings show firms with higher cash balances have better governance on average. Harford et al. *Corporate Governance and Firm Cash Holdings in US*, 87 J. FIN. ECON. 535, 537 (2008). As such, we designate high-cash firms as good-governance firms, and our results hold.

192. *See* Li et al., *supra* note 79, at 34.

193. *See infra* Table 9. In untabulated tests on long-run performance, we find no consistent results suggesting that either poor- or good-governance firms experience better long-run performance.

194. *See* Li et al., *supra* note 79, at 33–34.

TABLE 9: SAMPLE SPLITS BASED ON GOVERNANCE

Panel A: Logistic Difference-in-Difference Regression of the Likelihood of Acquirer Issuing > 20% of Its Stock			
$VOTE_{i,t} = \beta_0 + \beta_1 POST*NASDAQ_{i,t} + \beta_2 NASDAQ_{i,t} + \beta_3 POST_{i,t} + \beta_4 CONTROLS_{i,t} + \varepsilon$			
Subsample:		**Poor Governance**	**Good Governance**
Governance variable for splitting sample:		**IO**	**IO**
Variable	**Pred.**	Coefficient ***(p-value)*** **(1)**	Coefficient ***(p-value)*** **(2)**
Intercept	?	–24.43 ***(0.489)***	–3.348 ***(0.877)***
*POST*NASDAQ*	–	–1.070* ***(0.0885)***	–1.047*** ***(0.0085)***
NASDAQ	?	1.785*** ***(0.008)***	1.553*** ***(0.000)***
POST	?	0.660 ***(0.487)***	1.031* ***(0.070)***
MTB	?	0.636*** ***(0.003)***	0.0199 ***(0.388)***
LN_MARKET	?	0.244 ***(0.171)***	–0.0677 ***(0.382)***
INTRISK	?	282.5 ***(0.335)***	73.40 ***(0.684)***
AAA	?	72.34 ***(0.511)***	–13.14 ***(0.851)***
GNP	?	1.461 ***(0.661)***	–0.0415 ***(0.983)***
INDSHK	?	0.599 ***(0.450)***	0.421* ***(0.073)***
CHG_CASH	?	0.00938*** ***(0.000)***	0.00435** ***(0.015)***
STINT/LTINT	?	–3.796 ***(0.162)***	0.153 ***(0.913)***
REL_SIZE	?	–0.162 ***(0.574)***	–0.517** ***(0.014)***
SERIAL	?	0.227 ***(0.620)***	–0.0770 ***(0.835)***
TIME	?	0.352** ***(0.026)***	0.296*** ***(0.000)***
N		301	719

Panel B: OLS Regression of Announcement Window *CAR* of Acquirer			
$CAR_{i,t} = \beta_0 + \beta_1 POST*NASDAQ*VOTE_{i,t} + \beta_2 POST*NASDAQ_{i,t} + \beta_3 POST_{i,t} + \beta_4 VOTE_{i,t} + \beta_5 NASDAQ_{i,t} + \beta_6 CONTROLS_{i,t} + \varepsilon$			
Subsample:		**Poor Governance**	**Good Governance**
Governance variable for splitting sample:		**IO**	**IO**
Variable	**Pred.**	Coefficient ***(p-value)*** **(1)**	Coefficient ***(p-value)*** **(2)**
Intercept	?	0.0570** ***(0.020)***	0.0873*** ***(0.001)***
*POST*NASDAQ *VOTE*	+	0.0257 ***(0.1495)***	–0.0107 ***(0.3885)***
*POST*NASDAQ*	?	–0.0341 ***(0.262)***	0.0216 ***(0.361)***
POST	?	0.0106 ***(0.225)***	0.0188 ***(0.194)***
VOTE	?	–0.0219 ***(0.121)***	0.0142 ***(0.600)***
NASDAQ	?	0.0199 ***(0.353)***	–0.0141 ***(0.277)***
PUBLIC	–	–0.0382*** ***(0.000)***	–0.0242** ***(0.0150)***
LN_MARKET	–	–0.00322 ***(0.2115)***	–0.0113** ***(0.0105)***
ROA	?	–0.0303 ***(0.526)***	–0.00910 ***(0.633)***
MTB	?	–0.00384 ***(0.452)***	0.00367*** ***(0.002)***
REL_SIZE	?	0.00326 ***(0.126)***	–0.0000547*** ***(0.000)***
SERIAL	?	0.00898 ***(0.411)***	–0.0340*** ***(0.003)***
N		301	715

E. Mechanism Used to Avoid Shareholder Voting Threshold

Up to this point, this Article finds evidence that firms alter deal structure to avoid shareholder voting but finds no associated benefit. Therefore, one potential mechanism firms use to avoid shareholder voting thresholds is investigated.

A mechanism that may allow acquirers to avoid the shareholder voting threshold is the use of proceeds from a seasoned equity offering ("SEO"). SEOs are equity issuances by already public firms that raise additional capital for the firm for expenditures such as capital investment or recapitalization.[195] SEOs are examined because they are one of the mechanisms most likely to be employed by acquirers to avoid shareholder voting.[196] Specifically, in the context of an acquisition, an SEO is a relatively low-cost source of financing to achieve the desired goal of reducing share issuance below the voting

195. Ivo Welch, *Seasoned Offerings, Imitation Costs, and the Underpricing of Initial Public Offerings*, 44 J. FIN. 421, 445 (1989). Conceptually, SEOs mirror initial public offerings ("IPOs"), except IPOs are a previously private firm's first public issuance of equity.

196. *See* Holderness, *supra* note 77, at 8.

threshold in the following way[197]: First, an SEO raises cash, reducing the need to issue stock in connection with an acquisition (i.e., reducing the numerator in the voting threshold calculation).[198] Second, an SEO increases the number of shares outstanding (i.e., increasing the denominator in the voting threshold calculation).[199] This results in an SEO generating a double benefit in reducing the percentage of shares issued in an acquisition. Third, the fact that a firm is considering issuing equity to complete an acquisition indicates that the firm believes its equity is correctly (or possibly over) valued and that the firm currently has a general preference for equity over debt financing—a positive signal to the market.[200] Importantly, although SEOs result in the issuance of stock, SEOs are generally not subject to shareholder voting requirements.[201] SEOs thus offer a way for firms to raise capital to complete an acquisition yet avoid issuing so much stock in the acquisition that a vote is required.

Given that SEOs are a mechanism likely to be employed by acquirers planning to avoid a vote, this Article examines the frequency of SEOs that likely cause an acquirer to fall below the shareholder voting threshold before and after the implementation of the NASDAQ rule. Data for the sample of acquirers is obtained from SDC, gathering all SEOs where funds are specified as being used for the financing of acquisitions, for future acquisitions, or for general

197. Bilinski et al., *Does Liquidity Risk Explain Low Firm Performance Following Seasoned Equity Offerings?*, 36 J. BANKING & FIN. 2770, 2770 (2012).

198. *See Seasoned Issue*, INVESTOPEDIA, https://www.investopedia.com/terms/s/seasonedissue.asp (last visited Apr. 15, 2018).

199. *See* Richard Loth, *Why do share prices fall after a company has a secondary offering?*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/07/secondary_offering.asp (last visited Apr. 15, 2018).

200. This Article provides examples of firms issuing debt to avoid the shareholder voting threshold (e.g., Kraft and Time). However, these examples occurred in cases where firms had to adjust their bids in very short time periods in response to external events. Completing an SEO is not likely feasible in such a short period of time.

201. *See, e.g.*, Whole Foods Market, Inc., Definitive Proxy Statement 31 (Schedule 14a) (2017), https://www.sec.gov/Archives/edgar/data/865436/000120677415002458/wholefoods_def14a.htm#Proposal4. This Article acknowledges that firms generally must obtain shareholder approval to increase the number of shares authorized by the corporate charter. If a firm was required to increase its authorized shares in order to perform an SEO, some SEOs could be considered "subject to a vote." In general, increases in authorized shares are done well in advance of any immediate need for shares and only loosely connected to any specific use of the shares. Thus, we view the likelihood of any SEO being considered subject to a vote to be low. See Peter Haslag, Tapping Untapped Equity: Financing Frictions and Firm Acquisition Behavior 10 (Feb. 15, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3052780, for an investigation of acquisition outcomes for firms that are constrained by the number of authorized shares outstanding. Haslag notes that, on average, firms authorize approximately three to five times the number of shares outstanding. *Id.* Our threshold of interest is 20% of shares outstanding, thus authorization is not likely to play a major role in our study.

corporate purposes. The acquirer's SEO issuance must occur within the 365 days preceding the announcement date of the acquisition.[202]

To assess whether acquirers use SEOs to mitigate the requirement for shareholder voting, we determine the proportion of deals requiring a shareholder vote as if the SEO did not occur. To make this determination, a new shareholder voting threshold is calculated for acquiring firms that issued new equity by increasing the amount of stock needed to complete the acquisitions by the value raised in the SEO (i.e., the numerator) and decreasing the shares outstanding by the number of shares raised in the offering (i.e., the denominator). This calculation provides a "new" hypothetical percentage of stock used in the acquisition as if the SEO did not occur. The number of "new" firms that would have met the shareholder voting requirements before and after the passage of the NASDAQ rule is compared taking into account the SEO.

The results from this analysis are presented in Table 10.[203] Column 1 presents the number of deals that met the voting threshold prior to the NASDAQ rule change.[204] Column 2 presents the number of additional deals that would have met the voting threshold had an SEO not occurred.[205] Column 3 sums Columns 1 and 2, and Column 4 presents the percentage of potential voting deals that avoided the voting threshold due to SEO.[206] Columns 5 through 8 present similar results for the post-rule-change period.[207] Columns 9 and 10 show and test for differences across time periods.[208] The number of NASDAQ deals falling below the voting threshold due to SEOs increased significantly following the implementation of the rule change (p-value = 0.046). Prior to the rule change, significantly fewer NASDAQ acquirers, versus acquirers listed on other exchanges, used SEOs that would have put them below the voting threshold (p-value = 0.020). Following the change, there is no significant difference in the proportion of voting deals affected by SEOs across exchanges (p-value = 0.719). Most importantly, the results show that, following the rule change, NASDAQ acquirers significantly increased their usage of this strategy (p-value = 0.077) compared to acquirers on the other exchanges. These findings suggest NASDAQ may want to consider amending the shareholder voting rule to account for these SEOs.[209]

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202. In some cases, an acquirer has multiple SEOs or multiple acquisitions within this 365-day period. In these cases, we assign to each acquisition deal a weighted average of the total equity raised during the 365-day period, weighted by the transaction value of each deal.

203. *See infra* Table 10.

204. *See infra* Table 10.

205. *See infra* Table 10.

206. *See infra* Table 10.

207. *See infra* Table 10.

208. *See infra* Table 10.

209. *See, e.g.*, *Listing Council Decision 2006-11*, NASDAQ LISTING CENTER (July 31, 2012), https://listingcenter.nasdaq.com/Material_Search.aspx

TABLE 10: SEO ISSUANCE TO AVOID SHAREHOLDER VOTING THRESHOLDS[210]

	Pre-Rule-Change Period				Post-Rule-Change Period					Difference	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)		(9)	(10)
Variable	**Actual Voting Deals**	**Additional Voting Deals if No SEO Occurred**	***Total***	**(2)/(3): Voting Deals Affected by SEO (%)**	**Actual Voting Deals**	**Additional Voting Deals if No SEO Occurred**	***Total***	**(6)/(7): Voting Deals Affected by SEO (%)**	**Pred.**	**(8)–(4): Post–Pre**	***p*-value**
NASDAQ Acquirers	55	1	56	1.8%	91	7	98	7.1%	+	5.4%	***(0.0464)*****
Other Acquirers	41	6	47	12.8%	63	6	69	8.7%	?	–4.1%	***(0.4986)***
Total	96	7	103		154	13	167				
Predicted Difference				–				?		+	
Difference (NASDAQ–Other)				–11.0%**				–1.6%		9.4%*	
***p*-value**				***(0.0202)***				***(0.7187)***		***(0.0774)***	

?materials=640&mcd=CD&criteria=2; *NASDAQ Staff Interpretation Letter 2014-1* (Aug. 4, 2014), https://listingcenter.nasdaq.com/Material_Search.aspx ?materials=1113&mcd=SI&criteria=2 (discussing transactions that would not require shareholder approval). Currently, NASDAQ can aggregate *private placement* transactions to determine if a series of transactions that, alone, do not trigger the shareholder voting requirements are in fact one transaction that should be subject to shareholder voting. However, public offerings such as SEOs are not currently aggregated.

210. This table presents the frequency of SEO issuance that causes an acquirer to avoid the shareholder voting threshold. ***, **, * indicate significant differences in means between the pre-rule-change and post-rule-change periods at the 1%, 5%, and 10% level, respectively. When predictions are made, *p*-values are one-tailed.

In further analysis (untabulated), this Article examines whether the market reaction varies for NASDAQ firms using SEOs to avoid the shareholder voting threshold compared to other NASDAQ acquirers. If the market views SEO issuance to avoid voting negatively, as an abuse of managerial power, we expect to see more negative returns to acquisitions which avoided the shareholder voting threshold by using an SEO. Using a regression analysis in the subset of post-rule-change NASDAQ acquirers, including all control variables from Model 2, NASDAQ acquirers using SEOs to avoid the voting threshold experience approximately 4.66% lower announcement returns than other NASDAQ acquirers. However, the lower return falls just short of significance (*p*-value = 0.114, untabulated, one-tailed), possibly due to the small sample size of only seven NASDAQ acquirers using this strategy, as shown in Table 10.[211]

F. Separate Tests around the 25% and 20% Threshold

A unique aspect of this setting is that two rule changes occurred over a short period of time. On January 9, 1989, NASDAQ went from no acquisition-related shareholder voting requirements to a requirement for shareholder voting if the acquirer issued 25% or more of its shares in connection with the acquisition.[212] About eighteen months later, on July 19, 1990, NASDAQ enacted stricter rules requiring shareholder voting if the acquirer issued 20% or more of its shares in connection with the acquisition.[213]

In the main test, this Article focuses on whether the existence of shareholder voting rules affects the method of payment and performance in acquisitions. Thus, the thirty-six months prior to the initial 25% rule (before January 9, 1989) are used as the pre-rule-change period and the thirty-six months after the final rule (after July 19, 1990) as the post-rule-change period. In this Subpart, each rule change is separately examined to verify that the results are robust to the design choice.

The eighteen months prior to and after the initial (25%) rule was enacted are initially examined. The results are limited to eighteen months in this test to avoid overlap with the final rule enacted in 1990, just over eighteen months after the initial rule. In this test, *VOTE* is set equal to one if the acquirer issued 25% or more of its shares in connection with the acquisition. In untabulated tests, the initial enactment of the shareholder voting rule reduced the

211. *See supra* Table 10.

212. Order Approving Proposed Rule Change Relating to Eligibility Criteria of NASDAQ National Market System Securities, 59 Fed. Reg. 1463, 1464 (Jan. 13, 1989).

213. Order Approving Proposed Rule Change Relating to Shareholder Approval of Certain Transactions for NASDAQ National Market System Issuers, 55 Fed. Reg. 30,345, 30,346 (July 25, 1990).

likelihood of an acquirer issuing a number of shares that triggered the voting threshold—consistent with the main results—and had no effect on announcement returns, also consistent with the main results.

Next, the eighteen months prior to and after the enactment of the revised (20%) rule are examined. Again, the results are limited to eighteen months to avoid allowing the pre-event period to spill over into the period before any shareholder voting rule existed (i.e., the pre-event period only includes the eighteen-month period covered by the 25% rule). In this test, *VOTE* is set equal to one if the acquisition involved the acquirer issuing 25% (20%) or more of its shares outstanding in the pre- (post-) rule-change period. In this setting, there is no evidence that the change to a stricter 20% threshold affected deal structure any more than the 25% threshold. In other words, acquirers avoid the 20% threshold to the same extent they avoid the 25% threshold. Again, there is no statistically significant effect on announcement returns. Thus, the results are robust to the original design choice to exclude the period between the implementation of the initial and revised rules.

IV. IMPLICATIONS

Shareholders have limited powers: they can vote, sell, and sue.[214] State law confines voting to limited areas, but federal securities law sometimes expands the shareholder franchise outside these core settings.[215] One such expansion of voting rights appears in the form of shareholder voting in acquisition transactions.[216] These voting rights may have benefits yet can be costly—not only because of the mechanics of soliciting and counting votes but also because subjecting any acquisition transaction to a vote introduces both increased uncertainty and potential delay.[217] Furthermore, if the structure of the voting rights provides managers with discretion to avoid a shareholder vote (e.g., to avoid uncertainty and delay), then this vote-avoidance behavior may lead to suboptimal transaction structuring, generating costs that ultimately are borne by shareholders.[218] In the case of Time, discussed earlier, these costs included additional financing costs in the form of increased debt levels and the corresponding debt service costs and the resulting decrease in stock price.[219]

The question this Article seeks to answer is whether it is important for shareholders to have a vote on an acquisition transaction if the acquisition requires the issuance of 20% or more of

214. Edelman et al., *supra* note 1, at 1375.
215. *See* Bainbridge, *supra* note 12, at 708.
216. *See* Michael, *supra* note 29, at 1469.
217. *See* Edelman et al., *supra* note 1, at 1382.
218. Davidoff Solomon, *supra* note 23.
219. *See supra* text accompanying notes 14–23.

the acquirer's outstanding shares. That is, this Article examines if the benefits of shareholder voting in acquisitions outweigh the costs. This question is not merely academic; given changes in corporate governance over time, such as increasing quality of boards of directors, increasing levels of institutional ownership, and increasing degrees of shareholder activism, NASDAQ is currently revisiting whether some of the additional protections of its shareholder voting rule remain necessary. NASDAQ requested public comments on the existing rule,[220] making it particularly important to study the effects of the initial implementation of the NASDAQ rule.

The SEC also has an interest in the outcome of the request for comments because it must review and approve any proposed rule changes. The SEC has significant power regarding listing rules under section 19(b) of the Securities and Exchange Act of 1934, which states that the SEC will take action "if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds."[221] Thus, the SEC may resist changes to shareholder voting rules not only to protect investors but also to provide fair competition among exchanges.[222] This is particularly relevant because, if NASDAQ determines a rule change is warranted, other exchanges are likely to follow suit, multiplying the importance of studying this rule.

This Article uses a unique setting to examine an important and increasingly studied question: what are the effects of shareholder voting in acquisitions? It specifically focuses on whether shareholder voting requirements affect the method of payment and short- and long-run acquirer performance in acquisitions. This Article uses NASDAQ's initial implementation of shareholder voting rules as the setting to examine our questions. This setting is particularly important now as NASDAQ revisits its existing shareholder approval requirements.

The first question in imposing any rule is whether it can be avoided. There is evidence that the existing shareholder voting rules can be avoided and impose costs in the form of altered deal structures to specifically avoid a vote, consistent with regulators' concerns. Additional analysis shows firms use SEOs as a mechanism for avoiding the shareholder voting threshold. However, results also suggest little increase in the time it takes to complete an acquisition after enactment of the shareholder voting rule. Thus, one clear implication is that, if regulators are serious about mandating acquiring shareholder votes, triggering the vote based on deal size, as done in the U.K., is preferable to the gameable U.S. method, which is based on the percentage of the acquirer's outstanding shares used in

220. Office of the Inv'r Advocate Letter, *supra* note 7; Zalesin, *supra* note 68.
221. 15 U.S.C. § 78s(b)(3)(B) (2012).
222. *See id.*

an acquisition. Shareholder voting rules based on deal size would alleviate costs associated with suboptimal deal structures, such as added financing costs, which managers may currently incur to avoid the gameable U.S. shareholder voting rule.

The second question focuses on the value of the vote itself. In contrast to some regulators' beliefs that shareholder voting rules improve managerial decisions,[223] there is no evidence of benefits from shareholder voting rules measured by either short- or long-run performance. Acquiring shareholders appear indifferent as to whether they have a vote on acquisitions.

However, managers display a marked bias *against* shareholder votes. The evidence shows NASDAQ acquirers, prior to the implementation of shareholder voting rules in acquisitions, issued greater than 20% of their equity in more than twice as many deals as acquirers using the same consideration structure from other exchanges, suggesting that acquirers subject to a vote seek to avoid shareholder approval in acquisitions. Our main results confirm this finding, showing that after the implementation of new shareholder voting rules by NASDAQ in early 1989, NASDAQ acquirers responded by reducing the number of deals subject to the new voting rules by over 45%. In contrast to existing literature and commentators' beliefs,[224] acquiring firms respond to shareholder voting requirements irrespective of existing levels of institutional ownership, a proxy for the level of corporate governance. Furthermore, there is evidence that serial acquirers, repeat players who are most familiar with deal structuring are more frequently able to structure acquisition transactions that avoid a shareholder vote as compared to those less familiar with deal structuring. Altogether, the results confirm this Article's H1 that acquirers prefer to avoid shareholder voting in acquisitions and are able to alter the deal structure to achieve this desire.

The narrow implication of the study is that deals that undergo a shareholder vote do not outperform those that avoid a vote. Said differently, an acquiring firm's shareholder vote does not appear to be a meaningful disciplining constraint on managers. The reason for these results may be that there are other, more effective ways to constrain empire-building managers. One is the market for managerial talent: firms will not hire executives that overpay for targets or make value-destroying acquisitions. The market for corporate control provides a second constraint on empire building.

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223. *See* Order Approving Proposed Rule Change Relating to Eligibility Criteria for NASDAQ National Market System Securities, 59 Fed. Reg. 1463, 1464 (July 25, 1990); Order Approving Proposed Rule Change Relating to Shareholder Approval of Certain Transactions for NASDAQ National Market System Issuers, 55 Fed. Reg. 30,345, 30,346 (Jan. 13, 1989).

224. *See, e.g.*, Bainbridge et al., *supra* note 1, at 628 (discussing how different types of investors have varied approaches to corporate governance).

Firms that overpay, manage acquired firms poorly, or finance acquisitions suboptimally will suffer decreases in stock price that make them vulnerable to activists and acquirers.[225] Shareholders can rely on this constraint rather than the discipline provided by shareholder voting rules. Put succinctly, bad bidders make good targets. Our results are more consistent with commentators' concerns that shareholder voting imposes costs without substantial benefits.[226]

More generally, the lesson may be that, while shareholder voting is an important constraint, it is a relatively blunt instrument ill-suited for micromanagement. Government-imposed regulations, even in the name of additional shareholder protection, risk creating additional unnecessary costs such as possible suboptimal deal structuring, which likely leads to additional administrative and financing costs and ill-timed SEOs. Therefore, the shareholder franchise may be best reserved for fundamental corporate changes and director elections.

V. CONCLUSION

This Article makes two main contributions. First, it explicitly examines the influence of shareholder voting rules on the structure of an acquisition and identifies one mechanism—SEOs—which acquirers use to avoid the shareholder voting threshold. Second, and contrary to recent literature, this Article finds no evidence that shareholder voting rules improve short- or long-run acquirer performance using a unique identification strategy surrounding a regulatory change in shareholder voting requirements. From a policy perspective, these findings are particularly important as NASDAQ is considering revising its voting requirements, with other exchanges likely to follow any change made by NASDAQ. The results discussed in this Article are consistent with shareholder voting rules adding additional costs, but no discernable benefits, to acquiring-firm shareholders. Additional analysis, comparing the pre- and post-implementation periods, confirms that shareholder voting rules significantly alter the method of payment in acquisitions and do not significantly increase announcement returns, suggesting no material benefits to the shareholder voting rules.

225. *See* Andrew C.W. Lund & Gregg D. Polsky, *The Diminishing Returns of Incentive Pay in Executive Compensation Contracts*, 87 NOTRE DAME L. REV. 677, 710–11 (2011).

226. *See, e.g.*, Michael, *supra* note 29, at 1485, 1490 (explaining how new voting requirements may prove fruitless and unworkable).

APPENDIX: VARIABLE DEFINITIONS

Variable	Definition
$VOTE_{i,t}$	Is an indicator variable that equals one if the acquirer issued 20% or more of its shares outstanding in an acquisition and equals zero otherwise.
$PERF_{i,t}$	Equals one of the following performance measures: *CAR*, *ΔROA*, *ΔROE*, or *BHAR*.
$CAR_{i,t}$	Equals Fama-French three-factor model abnormal returns with an estimation window from day –255 to day –42, accumulated from day –1 to day 1, where the event date is the acquisition's announcement date.
$\Delta ROA_{i,t}$	Equals average industry-adjusted net income, scaled by the average assets over the prior two years, for the first three years following the completion of the acquisition as compared to the average industry-adjusted ROA measure for the three years ending prior to the completion of the acquisition.[227] Our industry adjustment to firm *i*'s year *t* ROA measure is performed by subtracting the median of the industry's average ROA in year *t* measured at the 2-digit SIC code level.
$\Delta ROE_{i,t}$	Equals average industry-adjusted net income, scaled by common equity over the prior two years, for the first three years following the completion of the acquisition as compared to the average industry-adjusted ROE measure for the three years ending prior to the completion of the acquisition.[228] Our industry adjustment to firm *i*'s year *t* ROE measure is performed by subtracting the median of the industry's average ROE in year *t* measured at the 2-digit SIC code level.
$BHAR_{i,t}$	Equals the acquirer's one-year post-acquisition buy-and-hold return beginning with the first trading day after the acquisition is effective until 255 trading days after completion of the acquisition.
$POST_{i,t}$	Is an indicator variable that equals one in the period after the NASDAQ enacted its final 20% threshold rule and equals zero otherwise.
$NASDAQ_{i.t}$	Is an indicator variable that equals one if the acquirer is listed on the NASDAQ and equals zero otherwise.

227. *See generally* Alexander Edwards et al., *Trapped Cash and the Profitability of Foreign Acquisitions*, 33 CONTEMP. ACCT. RES. 44 (2016).

228. *See id.*

Control Variables for Method of Payment Logistic Regressions	
$MTB_{i,t}$	Equals firm *i*'s market value of equity in year *t*, as measured by the current share price times the number of shares outstanding, plus current liabilities, long-term liabilities, deferred taxes, investment tax credits, and the liquidation value of preferred stock all scaled by total assets in year *t*.
$LN\_MARKET_{i,t}$	The natural logarithm of firm *i*'s market value of equity.
$INTRISK_{i,t}$	The difference in the yields of Baa-rated bonds and ten-year treasury bonds for year *t*.
$AAA_{i,t}$	The yield on Aaa-rated bonds for year *t*.
$GNP_{i,t}$	GNP, in trillions, during the year preceding year *t*. Chained to 1992 dollars.
$INDSHCK_{i,t}$	The standard deviation in sales growth across industries for the two years preceding year *t*.
$CHG\_CASH_{i,t}$	The change in corporate net cash flows from the calendar year preceding quarter *t* to the calendar year including year *t*.
$STINT/LTINT_{i,t}$	The ratio of the one-year interest rate on treasury bonds to the ten-year interest rate on treasury bonds for year *t*.
$REL\_SIZE_{i,t}$	The value of the acquisition transaction scaled by firm *i*'s market value of equity at the time of the last annual report prior to the announcement date.
$SERIAL_{i,t}$	Is an indicator variable that equals one if the acquirer is a serial acquirer, defined as a firm making more than five acquisitions during our sample period and zero otherwise.
$TIME_{i,t}$	Equals the natural logarithm of the number of days between the merger announcement date and the effective date.
Control Variables for OLS *PERF* Regressions	
$PUBLIC_{i,t}$	Is an indicator variable set equal to one if the target is public and zero otherwise.
$ROA_{i,t}$	Equals firm *i*'s income scaled by assets.