A RESPONSE TO PROFESSOR ROSE'S 'SHAREHOLDER PROPOSALS IN THE MARKET FOR CORPORATE INFLUENCE'

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Professor Paul Rose's *Shareholder Proposals in the Market for Corporate Influence*[1] makes a significant contribution to the literature on shareholder proposals. The empirical data on shareholder voting trends from 2003 to 2013 was informative,[2] and the insights Professor Rose derives there from are plausible conclusions.[3] In this short response, I provide a few additional observations. My observations stem from a different rearrangement of the categories of shareholder proposals. Once the labels for the different shareholder proposals are rearranged, additional plausible insights follow. My thoughts on the underlying reasons for the shareholder voting patterns are, for the most part, fairly consistent with Professor Rose's thesis, and the exercise here reinforces in my mind the plausibility of his thesis given the data. I take a slightly different route toward roughly the same destination.

In compiling shareholder proposals and voting outcomes for the period 2003–2013, Professor Rose categorizes shareholder proposals into five broad subject matter categories: proxy access, audit, board, voting rights, and poison pill.[4] Within each category are subcategories. Based on the number of proposals, the proxy access and audit categories are fairly minor.[5] Let's focus instead on the categories related to board, voting rights, and poison pills.

Board-related proposals constitute by far the largest number of proposals: 20 subcategories of proposals, and 1,569 total proposals.[6] Of these twenty subcategories, there are only five major subcategories of proposals.[7] The following table presents the data, as found in Professor Rose's article, according to this simplification.

∗ John H. and Marylou Dasburg Professor of Law, University of Florida Levin College of Law. I thank the Florida Law Review for providing me this opportunity to comment on Professor Rose's fine article. I note one caveat to my comments here in this response. I am not an empirical legal scholar. Accordingly, I do not comment on the methodology of data collection or the validity of the underlying data in Professor Rose's article. I am not qualified to speak on these matters. In providing my own observations, I accept the data as given.

1. 66 FLA. L. REV. 2179 (2014).
2. *Id.* at 2197–216.
3. *Id.* at 2217–26.
4. *Id.* at 2203–07.
5. The two categories combined for 64 total shareholder proposals. *Id.* at 2203.
6. *Id.* at 2204–05.
7. *Id.*

Board-related proposals	No. proposals submitted (2003-2013)	Range of votes in favor as percentage of shares outstanding
Independent board chairman/separate chair-CEO	377	18% – 27%
Majority vote to elect directors	363	9% – 47%
Majority vote to elect directors (have implemented form of majority voting)	166	32% – 36%
Majority vote to elect directors (have not implemented form of majority voting)	130	43% – 59%
Repeal classified board	***410***	***45% – 64%***
All other 15 board-related proposals	123	varies from 2% to 31%

Note that the subcategory "Repeal classified board" (in ***bold italics***) is both a board-related matter and a takeover-related matter.[8]

Voting rights-related proposals are broken into only four subcategories, but saw 624 total proposals.

Voting rights-related proposals	No. proposals submitted (2003-2013)	Range of votes in favor as percentage of shares outstanding
Cumulative voting	201	18% – 28%
Eliminate or reduce supermajority provision	***159***	***46% – 57%***
Shareholder right to act by written consent	94	34% – 41%
Shareholder right to call special meeting	170	29% – 36%

Note that the subcategory "Eliminate or reduce supermajority

8. Classified boards are a common defensive measure against takeovers. *See* MODEL BUS. CORP. ACT § 8.06, official comment (2010) ("A staggered board of directors also can have the effect of making unwanted takeover attempts more difficult, particularly where the articles of incorporation provide that the shareholders may remove directors only with cause or by a supermajority vote, or both."). *See also* Michael E. Murphy, *Attacking the Classified Board of Directors: Shaky Foundations for Shareholder Zeal*, 65 BUS. LAW. 441, 441 (2010) (discussing the use of classified boards in takeover defense).

provision" (in ***bold italics***) is a takeover-related matter.[9]

Poison pill-related proposals are broken into five subcategories and saw 373 total proposals.[10] Clearly, this category is related to takeover defenses.

Poison pill-related proposals	**No. proposals submitted (2003-2013)**	**Range of votes in favor as percentage of shares outstanding**
Restrictions on or redemption of poison pills	189	18% – 28%
Poison pills (rescission)	155	42% – 44%
All other poison pill-related proposals	29	Varies from 7% to 37%

The above tables are Professor Rose's categorizations reprinted in simplified form to serve the point I wish to make in the following analysis (and also to make my analysis self-contained for the reader).

As implied in my commentary above, another potential category to use in segregating the data is shareholder proposals related to takeovers, rather than limiting the category related to takeovers to a specific form of takeover defense (poison pills). If one rearranges the major data categories on proposals related to takeovers generally, the following data is created:

Takeover-related proposals	**No. proposals submitted (2003-2013)**	**Range of votes in favor as percentage of shares outstanding**
Restrictions on or redemption of poison pills	189	18% – 28%
Poison pills (rescission)	155	42% – 44%
Repeal classified board	410	45% – 64%
Eliminate or reduce supermajority provision	159	46% – 57%

There were 913 takeover-related proposals. Professor Rose's data set does not allow a finer analysis of the average votes in favor of these proposals.[11] However, we can get a rough sense of the level of support for

9. Rose, *supra* note 1, at 2206 n.146.

10. *Id.* at 2207.

11. Arithmetic mean defined as either the average vote in favor of all proposals or the weighted average of all shareholders voting on proposals of the same category or subcategory. These two methods for calculating averages would produce different results. The former calculates the average vote of all proposals, and the latter calculates the average vote of all shareholders.

the category of takeover proposals. Assume the midpoint of the range of votes in favor as the average vote, and then take the weighted average of the subcategories of takeover-related proposals. Upon this gross analysis, the estimated weighted average vote in favor of takeover-related proposals is 46%.[12] (I emphasize that this figure and the figures that follow based on the same calculation method are gross estimates, i.e., quick-and-dirty calculations that hopefully provide some degree of insight at least.)

The shareholder proposals relating to voting on board members and shareholder voting rights can be rearranged and combined into a single category related to shareholder voting rights more generally (including voting on the board). The following data is created:

Voting rights-related proposals (including voting on the board)	**No. proposals submitted (2003-2013)**	**Range of votes in favor as percentage of shares outstanding**
Cumulative voting	201	18% – 28%
Shareholder right to act by written consent	94	34% – 41%
Shareholder right to call special meeting	170	29% – 36%
Majority vote to elect directors	363	9% – 47%
Majority vote to elect directors (have implemented form of majority voting)	166	32% – 36%
Majority vote to elect directors (have not implemented form of majority voting)	130	43% – 59%

There were 1,124 voting-related proposals. The estimated weighted average vote in favor of voting-related proposals is 32%.[13]

Professor Rose concludes that "the voting trends seem to suggest that shareholders have a slight preference for disciplining governance changes over empowering governance changes."[14] I agree with this conclusion to

12. Calculated as: Restrictions on or redemption of poison pills (21% weight x 23% midpoint) + Poison pills (rescission) (17% weight x 43% midpoint) + Repeal classified board (45% weight x 54.5% midpoint) + Eliminate or reduce supermajority provision (17% weight x 51.5% midpoint) = 45.5%. The weight is calculated as the number of proposals in each subcategory as a percentage of the total number of proposals in the entire category.

13. Calculated as: Cumulative voting (18% weight x 23% midpoint) + Shareholder right to act by written consent (8% weight x 37.5% midpoint) + Shareholder right to call special meeting (15% weight x 32.5% midpoint) + Majority vote to elect directors (32% weight x 28% midpoint) + Majority vote to elect directors (have implemented form of majority voting) (15% weight x 34% midpoint) + Majority vote to elect directors (have not implemented form of majority voting) (12% weight x 51% midpoint) = 32.1%.

14. Rose, *supra* note 1, at 2222. Professor Rose defines "disciplining" proposals as those "designed to reduce agency costs by constraining management or providing additional mechanisms to discipline management." *Id.* at 2221. He defines "empowering" proposals as those "designed to empower shareholders by giving them additional rights." *Id.*

the extent that, based on gross weighted average estimates, shareholders apparently had a stronger preference in Professor Rose's data set for takeover-related proposals (46%) to voting rights-related proposals (32%). I consider takeover-related proposals a "disciplining" device in that, in addition to legitimate functions, some antitakeover devices can be used for entrenchment and shielding managers from the market for corporate control.[15] The removal of anti-takeover devices can have a disciplining effect on managers. Furthermore, all else being the same, many shareholders may favor proposals that tend to diminish the power to the board to block takeovers[16] and thus to increase probability of their shares acquired for a premium in a takeover.

Shareholder proposals related to voting rights seem to garner substantial but relatively less support. A suggestive data point is the result for "cumulative voting" (18% to 28%); this range is generally lower than the support of other subcategories of shareholder voting rights. Cumulative voting is specifically designed to give a minority shareholder direct power in corporate governance. Furthermore, when "Cumulative voting", "Shareholder right to act by written consent", and "Shareholder right to call special meeting" are taken together as a category of shareholder proposals designed to give shareholders greater direct power in corporate governance, the gross weighted average estimate of the voting result for this group of subcategories is 29%.[17] Compare this figure to the takeover-related proposals of 46%. The difference seems significant, which validates the plausibility of Professor Rose's conclusion that shareholders are wary of minority shareholder opportunism.[18] With more direct powers, shareholders have the means to extract private gain through active influencing of corporate governance.

On the other hand, when shareholder-voting rights are tied to an expression of shareholder approval of company and board performance, Professor Rose's data suggests that the level of support is more significant. Aside from selling their shares and thereby exiting the investment, shareholders express their opinions on company and board performance principally through the election of the board. When "Majority vote to elect directors", "Majority vote to elect directors (have implemented form of majority voting)", and "Majority vote to elect directors (have not

15. *See generally* Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

16. *See* Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973, 975 (2002) (arguing against the power of the board to veto takeover bids).

17. The total number of proposals in these three subcategories is 465. The weight of each subcategory is calculated from this denominator. The weighted average is calculated as: Cumulative voting (43% weight x 23% midpoint) + Shareholder right to act by written consent (20% weight x 37.5% midpoint) + Shareholder right to call special meeting (37% weight x 32.5% midpoint) = 29.4%.

18. Rose, *supra* note 1, at 2219–20, 2224.

implemented form of majority voting)" are taken together as a category of shareholder proposals designed to give shareholders greater expressive voice in corporate governance, the gross weighted average estimate of the voting result for this group of subcategories is 34%.[19] I suspect that this figure is affected by an outlier: The range for "Majority vote to elect directors" is 9% to 47%, and the 9% is probably an outlier.[20] Suppose, for argument sake, the 9% is in fact an outlier and suppose further that a better representation of the range is 31% to 47%, a spread that is more consistent with other ranges. The gross weighted average estimate of the voting result for this group of subcategories would be 40%. Regardless of whether the gross weighted average estimate is 34% or 40% (or something closer to it), shareholders support proposals advancing the expression of their voice.

The major driver of the substance of shareholder voice (voting outcome) would be information cost. As Professor Rose notes, "shareholders will tend to display a preference for low-cost signals when evaluating shareholder proposals."[21] Monitoring share price and other readily available public information, such as SEC disclosures, impose low information costs.[22] Most shareholders monitor the performance of the company and the board at the level of publicly disclosed market information. Accordingly, shareholder proposals related to voting on the board are a means to express information contained in low cost monitoring by most shareholders. These shareholder proposals better align share price, public information, and voting outcomes. This effect, too, is a disciplining device.

In conclusion, Professor Rose's study tells a plausible story. It suggests that the voting outcomes of shareholder proposals over a sustained period of time (2003 to 2013) express a tension among information cost of monitoring corporate governance, desire for greater influence in corporate governance, and wariness of fellow shareholder opportunism. The tension is seen in the voting outcomes of various categories of shareholder proposals. Shareholders have expressed the greatest support for taking down anti-takeover devices (a gross estimate of 46% of votes in favor for this category of shareholder proposals). Next, shareholders have also

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19. The total number of proposals in these three subcategories is 659. The weight of each subcategory is calculated from this denominator. The weighted average is calculated as: Majority vote to elect directors (55% weight x 28% midpoint) + Majority vote to elect directors (have implemented form of majority voting) (25% weight x 34% midpoint) + Majority vote to elect directors (have not implemented form of majority voting) (20% weight x 51% midpoint) = 34%.

20. In most other subcategories, the range is much tighter than this spread of a difference of 28%.

21. Rose, *supra* note 1, at 2218.

22. *See, e.g.*, Randall S. Thomas et al., *Dodd-Frank's Say On Pay: Will It Lead to a Greater Role for Shareholders in Corporate Governance?*, 97 CORNELL L. REV. 1213, 1249 (2012) (suggesting that shareholder say-on-pay votes were highly correlated with share price returns and the amount of CEO pay).

strongly supported proposals designed to give shareholders greater expressive voice in corporate governance through majority voting of directors (a gross estimate of 40% of votes, or something like it after adjusting for an outlier, in favor). The lowest level of support has been for proposals that seek to increase the direct power of minority shareholders to actively participate in corporate governance (a gross estimate of 29%).

Professor Rose's article is not only a significant contribution to the literature on shareholder proposals, but it also provides one datum on the important and complex question of whether shareholders on the whole want or should have greater direct powers in corporate governance.[23]

23. *See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005) (questioning "the basic allocation of power between boards and shareholders under U.S. corporate law[]"); Lucian A. Bebchuk, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1784 (2006) (suggesting that reducing or eliminating entirely some limits on shareholder power would improve corporate governance of U.S. public companies).