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PROTECTING SHAREHOLDERS FROM THEMSELVES: HOW THE UNITED KINGDOM'S 2011 TAKEOVER CODE AMENDMENTS HIT THEIR MARK

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INTRODUCTION

American food conglomerate Kraft Foods' four-month-long, hostile-turned-friendly takeover of British icon Cadbury,[1] met with outcries from unions, politicians, and the general public.[2] The uproar led to major changes in the United Kingdom's City Code on

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1 *See TIMELINE-Kraft Agrees to Cadbury Deal After 4-month Fight*, REUTERS, Jan. 19, 2010, *http://www.reuters.com/article/2010/01/19/cadbury-kraft-idUSLDE60E0XI20100119* [hereinafter *TIMELINE*].

2 *See* David Jones & Brad Dorfman, *Kraft Snares Cadbury for $19.6 Billion*, REUTERS, Jan. 19, 2010, http://www.reuters.com/article/2010/01/19/us-cadbury-idUSTRE60H1N020100119. Much of the concern among the public was over two things: losing Cadbury, a uniquely British company, to a faceless giant of a company; and over the potential loss of jobs, which occurs after almost any merger when the two newly merged companies start consolidating operations and work forces.

Takeovers and Mergers ("Takeover Code").[3] Within eighteen months of the takeover, The Code Committee ("The Code Committee" or "The Committee") of The Panel on Takeovers and Mergers ("the Takeover Panel" or "The Panel") amended the Takeover Code. The Committee's change corrected the perceived imbalance of power in favor of bidders in a takeover attempt.[4] It is unclear, however, whether this inequity was as threatening as the public outcry made it seem.[5] Rather, The Code Committee may have succumbed to political pressures by creating amendments that protect target companies at the expense of target company shareholders.[6] Moreover, some large law firms hypothesized that the new Code amendments would deter some potential bidders from ever pursuing a target company, thereby chilling the mergers and acquisitions ("M&A") market and reducing potential sale proceeds to target shareholders.[7] On the other hand, "short-term" investors can unduly influence hostile bids.[8] Therefore, in practice, the

[3] *See generally* THE PANEL ON TAKEOVERS AND MERGERS, THE CITY CODE ON TAKEOVERS AND MERGERS (10th ed. 2011), http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf [hereinafter *Takeover Code*].

[4] THE PANEL ON TAKEOVERS AND MERGERS, REVIEW OF CERTAIN ASPECTS OF THE REGULATION OF TAKEOVER BIDS, 2010, Consultation Paper Issued by The Code Committee of The Panel PCP 2010/2, 4, http://www.thetakeoverpanel.org.uk/wpcontent/uploads/2008/11/PCP201002.pdf [hereinafter *Consultation Paper*].

[5] See *generally* Michael R. Patrone, *Sour Chocolate? Cadbury/Kraft and the 2011 Proposed Amendments to the U.K. Takeover Code – A Call for Further Research*, 8 BYU INT'L L. MGMT. R. 63, 66 (2011), http://www.law2.byu.edu/ilmr/articles/winter_2011/BYU_ILMR_winter_2011_4_Chocolate.pdf. *See also* note 99.

[6] *See* Patrone, *supra* note 5, at 65-66; *Takeover Code*, *Introduction*, ¶ 2(a) at A1 (stating that the shareholders are the primary constituents whom The Code seeks to protect).

[7] *See, e.g.,* Corporate Legal Alert, Mayer Brown, *Takeover Code Changes Published – Is This a New Era for UK Takeovers?* (July 2011) http://www.mayerbrown.com/publications/Takeover-Code-changes-published—-is-this-a-new-era-for-UK-takeovers-07-21-2011/; Client Briefing, Clifford Chance, *Impact of UK Takeover Code Reform*, 10 (Sept. 15, 2011) http://www.cliffordchance.com/publicationviews/publications/2011/09/impact_of_uk_takeovercodereform.html.

[8] *See* infra Part III.A. *See also Consultation Paper*, *supra* note 4, at 4 (describing "short-term" investors as those shareholders who become interested in

shareholders of the target company may not be protected to the extent The Code originally envisioned. This "short-term" investor problem was the primary problem the amendments intended to fix.[9] Either way the amendments will likely substantially impact how a takeover bid will operate in the United Kingdom going forward.

This comment argues that The Code amendments will protect target company shareholders beyond the pre-amendment regime, without over-regulating and potentially harming other aspects of takeover practice. Had The Code Committee gone further by fully implementing[10] the proposed idea of exempting "short-term" investors from voting on transactions,[11] the M&A market generally, and target shareholders specifically, would have been harmed in contravention of the principles[12] of the Takeover Code. Although the Takeover Panel appeared to react due to the public dismay, the amendments will serve the established shareholders of publically traded United Kingdom companies, and therefore strengthen the protections envisioned under the original spirit of The Code.[13]

Part I of this comment will briefly explore the history of the Kraft-Cadbury takeover and the resulting fervor surrounding the deal.[14] Part II will discuss the traditional functions of the Takeover Panel and the Takeover Code.[15] Part III will explain the four major

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the shares of the target company only after a public announcement of a possible offer); *see also* Jean Eaglesham & Lina Saigol, *Mandelson Urges Radical Takeover Reform*, FIN. TIMES, Mar. 1, 2010, http://www.ft.com/cms/s/0/5491ca8a-2587-11df-9bd3-00144feab49a.html#ixzz1Y8uy6kxO.

9 *See* Steven M. Davidoff, *British Takeover Rules May Mean Quicker Pace but Fewer Bids*, N.Y. TIMES, Sep. 19, 2011, http://dealbook.nytimes.com/2011/09/19/new-british-rules-will-speed-up-the-pace-of-takeovers/.

10 This comment will suggest, *infra* Part IV, that a measured, limited application of this proposed amendment may increase shareholder protection in the future.

11 *Consultation Paper*, *supra* note 4, at 20.

12 *Takeover Code*, supra note 3, Introduction, Gen. Principles 1-6, at B1; The Panel on Takeovers and Mergers, Explanatory Paper: *Implementation of the European Directive on Takeover Bids*, 2005/10, apps. 1-2 at 24-26.

13 *Takeover Code*, *supra* note 3, *Introduction*, Gen. Principles 1-6, at B1.

14 *See infra* Part I.A.

15 *See infra* Part I.B.

changes to the Takeover Code and will explore the concerns with, and the reasoning behind, each amendment by examining the consulting and explanatory papers about The Code amendments issued by the Takeover Panel.[16] Part IV will first look to economic studies of shareholder value in takeovers[17] and then explore the effects of "short-term" investors[18] on takeover attempts.[19] Finally, this comment will conclude that the new amendments will mitigate those "short-term" investor detrimental effects and actually protect shareholders as the Takeover Code had always intended.

I. HISTORY & BACKGROUND

A. The Kraft-Cadbury Deal, the Resulting Fervor, and Swift Action by the Takeover Panel

It took Kraft Foods four hard-fought months to reach a deal with the shareholders of Cadbury.[20] After a series of offers and rejections, and then over two months of Cadbury posting increasing financial projections and share prices, Kraft increased its bid to £11.9 billion ($19.55 billion U.S.), which the Cadbury board accepted on January 19, 2010.[21] The Cadbury shareholders accepted Kraft's tender offer[22] on February 2, 2010, with over seventy percent of the

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16 *See infra* Parts II.A-D.

17 *See infra* Part III.A.

18 Merger arbitrageurs, discussed *infra* Part III.B, are the most prevalent type of "short-term" investors in M&A practices and the type with which this comment will concern itself.

19 *See infra* Part III.B.

20 *See TIMELINE*, *supra* note 1.

21 *See* Graeme Wearden, *Timeline: Cadbury's Fight Against Kraft*, THE GUARDIAN, Jan. 19, 2010, http://www.guardian.co.uk/business/2010/jan/19/cadbury-kraft-takeover-timeline. Kraft made a public indicative offer on September 7, 2009, for £10.2 billion (approximately $16.3 billion U.S.), Kraft submitted its firm hostile bid directly to the Cadbury shareholders on November 9, 2009, on the same terms it originally proposed to the Cadbury board. This offer was quickly rejected by the shareholders. *See id.*

22 For an explanation of a tender offer *see Tender Offer*, U.S. SEC. & EXCH. COMM', http://www.sec.gov/answers/tender.htm (last visited Jan. 28, 2012) ("A tender offer is a broad solicitation by a company or a third party to purchase a substantial percentage of a company's . . . registered equity shares or units for a

shareholders tendering their shares.[23] During this four-month process, the composition of the Cadbury shareholders changed drastically.[24] By the time the shareholders tendered their shares, "short-term" investors such as hedge funds had increased their share in Cadbury from five percent to about thirty-one percent of the company.[25]

Throughout the takeover battle unions and politicians in the United Kingdom voiced strong opposition to Kraft swallowing Cadbury.[26] United Kingdom Business Secretary Lord Peter Mandelson, for example, was against the takeover as early as September 25, 2009.[27] After the transaction was consummated, Mandelson urged substantial reform of the United Kingdom takeover regime.[28] Unions in the United Kingdom also argued against the Cadbury takeover due to the fear of large-scale job cuts.[29] Compounding the fears and flaring political tempers, the Royal Bank of Scotland, at the time an eighty-four percent taxpayer-owned bank, agreed to loan Kraft £630 million (approximately $1.03 billion U.S.) to finance the takeover after the bank had been bailed out by the

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limited period of time. The offer is at a fixed price, usually at a premium over the current market price, and is customarily contingent on shareholders tendering a fixed number of their shares or units").

23 David Jones & Brad Dorfman, *Cadbury Shareholders Approve Kraft Takeover*, REUTERS, Feb. 2, 2010, http://www.reuters.com/article/2010/02/02/us-cadbury-kraft-idUSTRE61124D20100202.

24 *See Foreign Takeovers in Britain: Small Island for Sale*, ECONOMIST, May 25, 2010, http://www.economist.com/node/15769586.

25 *Id.*

26 *See infra* text accompanying notes 27-30.

27 David Teather, *Mandelson Admits Foreign Ownership of Firms Disadvantages UK*, THE GUARDIAN, Sept. 25, 2009, http://www.guardian.co.uk/business/2009/sep/25/mandelson-british-industry-unions.

28 *See* Eaglesham & Saigol, *supra* note 8.

29 *See Debt-Heavy Kraft Could Put 30,000 Cadbury Jobs at Risk, Warns Unite*, UNITE THE UNION, Jan. 13, 2010, http://archive.unitetheunion.org/news_events/archived_news_releases/2010_archived_press_releases/debt-heavy_kraft_could_put_3-1.aspx.

government.[30] Surely the Takeover Panel was acutely aware of the mounting political pressure throughout the United Kingdom.

In contrast to the dragged out takeover battle that ensued between Kraft and Cadbury, it took less than a year and a half for The Code Committee of the Takeover Panel to consider, propose, and adopt amendments to the United Kingdom's Takeover Code.[31] In fact, a mere five weeks after the Kraft and Cadbury deal was completed, The Code Committee announced its intention to solicit input from the United Kingdom business community to review specific aspects of the Takeover Code.[32] The Committee cited the Kraft takeover of Cadbury and the public reaction to the deal as the impetus for its action.[33] After this consultation period expired,[34] The Code Committee reviewed responses from numerous respondents. The Committee then roughly outlined amendments it felt compelled to undertake in an October 21, 2010, report.[35] By March 2011, The Committee had proposed amendments to the Takeover Code,[36] which it adopted with little change in late July 2011.[37] These amendments took effect September 19, 2011.[38]

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[30] *Clegg Attacks Brown Over RBS Funding for Cadbury Bid*, BBC, Jan. 20, 2010, http://news.bbc.co.uk/2/hi/uk_news/politics/8470776.stm.

[31] The Code Committee officially announced and adopted the amendments in July 2011, but it was another two months before the amendments came into effect on Sept. 19, 2011.

[32] *Consultation Paper*, *supra* note 4, at 1.

[33] *Id.*

[34] The consultation period ran from June 1, 2010 to July 27, 2010.

[35] THE PANEL ON TAKEOVERS AND MERGERS CODE COMMITTEE, REVIEW OF CERTAIN ASPECTS OF THE REGULATION OF TAKEOVER BIDS, PCP 2010/2, 1–2, http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/2010-22.pdf [hereinafter *Panel Report*].

[36] THE PANEL ON TAKEOVERS AND MERGERS CODE COMMITTEE, REVIEW OF CERTAIN ASPECTS OF THE REGULATION OF TAKEOVER BIDS: PROPOSED AMENDMENTS TO THE TAKEOVER CODE, PCP 2011/1, http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201101.pdf [hereinafter *Proposed Amendments*].

[37] *See* THE CODE COMMITTEE OF THE PANEL ON TAKEOVERS AND MERGERS, 2011, AMENDMENTS FOLLOWING THE CODE COMMITTEE'S REVIEW OF THE REGULATION OF TAKEOVER BIDS, Instrument 2011/2, 1,

B. The Operation of the Takeover Code and the Takeover Panel

The Takeover Panel was originally created in 1968 to oversee takeover regulation in the United Kingdom.[39] The Takeover Panel is charged with issuing and administering the Takeover Code.[40] The United Kingdom Companies Act of 2006 codified and broadened the rule-making powers of the Takeover Panel.[41] Interestingly, when The Code Committee first started soliciting input for the recent amendments to The Code, the introduction paragraph of the Takeover Code stated that its purpose was to ensure the fair treatment of shareholders generally.[42] However, when The Code Committee published its Consultation Paper that began the initial solicitations of input, the introduction had changed. The Committee specifically wrote that The Code is designed principally to ensure that shareholders in an offeree[43] company . . . are treated fairly."[44] As such, the Consultation Paper may have been the first indication that political pressures were forcing The Panel to consider strengthening target company shareholder protection.[45]

The Takeover Panel and the Takeover Code are not concerned with the financial and commercial merits of takeovers.[46]

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http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/Instrument-2011-2.pdf [hereinafter *Amendment Instrument*].

38 *Id.*

39 *Consultation Paper*, *supra* note 4, at 1-2. The Takeover Panel governs publically listed companies on the U.K. stock exchanges that have their registered offices in the U.K. *See Takeover Code*, *supra* note 3, *Introduction*, ¶ 3(a) at A3.

40 *Takeover Code*, *supra* note 3, Introduction, ¶ 1 at A1.

41 Companies Act 2006, (c. 46), pt. 28 ch. 1.

42 *See Amendment Instrument*, *supra* note 37, at app. 1. (amending *Introduction* ¶ 2(a) from "The Code is designed principally to ensure that shareholders are treated fairly . . ." to ". . . to ensure that shareholders *in an offeree company* are treated fairly . . .").

43 The Takeover Panel uses the terms "Offeree" and "Offeror" to designate targets and acquirers. This comment will typically use the American designations of "target" and "acquirer" or "bidder," but will also use the formal British terms of The Panel at times, especially when quoting or directly referring to the Takeover Code or papers from The Panel.

44 *Consultation Paper*, *supra* note 4, at 2.

45 *See generally* Davidoff, *supra* note 9.

46 *Takeover Code*, *supra* note 3, *Introduction* ¶ 2(a) at A1; *Consultation Paper* at 2, 5.

The Panel has never taken a view on the advantages or disadvantages of takeovers to the companies participating in them.[47] Instead, The Panel and The Code exist to establish a framework to regulate the conduct of companies involved in a particular transaction.[48] The final decision on the merits of an offer, however, is left to the shareholders.[49]

In light of these principles, a central pillar of the Takeover Code, and an excellent example of its purpose of ensuring fair treatment of shareholders, is the Board Neutrality Rule.[50] The Board Neutrality Rule prevents the board of directors of a target company from taking any action that may frustrate or deny the shareholders the opportunity to decide on the merits of an offer themselves.[51] This is in stark contrast to the defensive tactics, such as poison pills,[52] that Delaware courts have long endorsed.[53] As seen in the Cadbury takeover, the best defense a target board can legally employ is to ask the shareholders to vote against the bid.[54] Cadbury's board, for example, could only show improved financial data in an attempt to convince its shareholders that their long-term prospects of remaining shareholders of Cadbury were better than their short-term prospects (i.e. selling their shares to "short-term" investors or Kraft).[55] Alternatively, Cadbury's board could attempt to increase the fair

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47 *Consultation Paper*, *supra* note 4, at 5.

48 *Takeover Code, supra* note 3, *Introduction* ¶ 2(a) at A1.

49 *See Takeover Code*, *supra* note 3, *Introduction* ¶ 2(a) at A1-A2.

50 *Takeover Code*, *supra* note 3, Rule 21.1(a) at I13 (applying during the course of an offer or when an offer is reasonably believed to be imminent).

51 *Id.*

52 SAMUEL S. THOMPSON, JR., BUSINESS PLANNING FOR MERGERS AND ACQUISITIONS: CORPORATE, SECURITIES, TAX, ANTITRUST, INTERNATIONAL, AND RELATED ASPECTS 155-56 (3d ed. 2008) ("The basic objectives of the [poison pill] are to deter abusive takeover tactics by making them unacceptably expensive to the raider [i.e. a hostile bidder] and to encourage prospective acquirers to negotiate with the board of directors of the target rather than to attempt a hostile takeover.").

53 *See e.g.,* Moran v. Household Int'l, Inc., 500 A.2d 1346, 1356 (Del. 1985).

54 *See* Wearden, *supra* note 21.

55 *See Id.*

value of Cadbury's shares—by making the company more profitable—beyond what Kraft would be willing to pay.[56]

The Takeover Code presumes it is protecting shareholders from board entrenchment[57] by requiring neutrality of the board of directors of target companies.[58] Nevertheless, after receiving numerous responses to its Consultation Paper, The Code Committee concluded that hostile bidders had gained a tactical advantage over targets because of "short-term" investors.[59] The irony of dissuading board defensive maneuvers, only to have "short-term" investors provide the shareholder support that a bidder may need to complete their hostile takeover, seems to have been a tipping point for The Panel. In response, The Panel enacted several major amendments, discussed below, to help tilt the balance of power back to a more reasonable level for the target company shareholders.[60]

II. THE 2011 AMENDMENTS TO THE TAKEOVER CODE

To restore the level of protection originally afforded to target company shareholders, The Code Committee sought to correct some perceived disadvantages to those shareholders that had developed in the system.[61] The first problem that The Committee addressed was the problem of the "virtual bid."[62] The "virtual bid" is a term of art given to the time period after an announcement of a potential bid has been made, but before a firm offer is made.[63] This time period has many effects. Significantly, it can lead to a change in the composition of the shareholders when some shareholders sell to merger arbitrageurs[64] (i.e. "short-term" investors).[65] Other problems The

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[56] *See Id.*
[57] For an explanation of board entrenchment see *infra* Part III.A.
[58] *See Takeover Code*, *supra* note 3, Note 5 on Rule 21.1 at I15.
[59] *Panel Report*, *supra* note 35, at 3; *see also supra* note 8.
[60] *See infra* Part I.
[61] *See generally Consultation Paper*, *supra* note 4.
[62] *Panel Report*, *supra* note 35, at 4.
[63] *See id.* (explaining that the offer period is the period after there is public knowledge of the potential bid. This can arise from an official announcement or if information is accidently leaked).
[64] *Id.*
[65] *See supra* text accompanying notes 8, 24-25.

Code Committee identified include: the acquiring company effectively having the ability to negotiate directly with the target shareholders and bypass the board without ever having to make a firm offer;[66] the bidding company obtaining the protections of the Board Neutrality Rule against the target board simply by announcing their intent to make an offer;[67] a target's board of directors being reluctant to ask The Panel for a "Put Up or Shut Up"[68] deadline for the fear of appearing self-serving;[69] and, the inclusion of inducement fees (i.e. break fees[70]) becoming standard practice in many recent deals possibly precluding competing offers.[71] The Code Committee attempts to address all of these problems through the amendments, which will account for the following four major changes to the operation of the United Kingdom's Takeover Code.

A. The Announcing All Bidders Requirement

The 2011 Amendments to the Takeover Code will affect how bidding companies approach target companies.[72] The new Announcing All Bidders requirement, operating in concert with the mandatory "Put Up or Shut Up" deadline,[73] will likely have the greatest impact on the approach. Rule 2.4(a) of the Takeover Code has been completely rewritten to require a target company to identify any potential bidder with which the target has been in negotiations[74] as soon as an offer period commences.[75] Furthermore, Rule 2.2 now

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66 *Panel Report*, *supra* note 35, at 4.

67 *Id.*

68 *See generally Put Up or Shut Up*, FIN. TIMES LEXICON, (Feb. 02, 2012, 3:09 PM) http://lexicon.ft.com/Term?term=put-up-or-shut-up ("The 'put up or shut up' Takeover Panel rule is designed to stop predators besieging companies for an indefinite period of time. It requires a potential bidder either to make an offer to shareholders or walk away for a period of six months").

69 *Panel Report*, *supra* note 35, at 4-5.

70 *See Break Fee infra* note 111.

71 *Panel Report*, *supra* note 35, at 5.

72 *See* Client Briefing, Clifford Chance, *supra* note 7, at 16.

73 *Infra* Part II.B.

74 *Takeover Code*, *supra* note 3, Rule 2.4(a) at D5; *Amendment Instrument*, *supra* note 37, at app. 8.

75 *See Amendment Instrument*, *supra* note 37, at app. 8; *see also id.* at app. 3 ("An offer period will commence when the first announcement is made of an offer or possible offer for a company").

requires that the target company make an announcement in any of three situations: first, when the board of the target company receives notification of a firm intention to make an offer;[76] second, when following an approach from, or on behalf of, a bidding company the target company becomes the subject of rumors, speculation or if there is an untoward movement in the target company's share price;[77] or third, when a potential bidder has considered an offer but has not approached the board of the target company yet, and the target becomes the subject of rumor or speculation, or there is an untoward movement in the target company's share price and there are reasonable grounds to conclude that the bidder's potential actions have led to the situation.[78] In other words, when it is known or rumored that a potential bid may affect securities' prices, the target company is required to make a public announcement of all known potential bidders. This amendment will likely heighten the secrecy with which bidding companies will plan their approach because the mandatory "Put Up or Shut Up" deadline amendments, discussed below, will tie in with this mandatory identification of the All Potential Bidders Amendment.[79]

B. The Mandatory Twenty-Eight Day "Put Up or Shut Up" Deadline

Amended rules to the Takeover Code 2.6, 2.7 and 2.8 together govern the function of the colloquially dubbed "Put Up or Shut Up" deadline.[80] Rule 2.6(a) expressly grants only a limited twenty-eight day window from when a potential bidder is first

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[76] *Takeover Code*, *supra* note 3, Rule 2.2 at D2-D5; *Amendment Instrument*, *supra* note 37, at app. 5-6.

[77] *Takeover Code*, *supra* note3, Rule 2.2 at D2-D5; *Amendment Instrument*, *supra* note 37, at app. 5-6.

[78] *Takeover Code*, *supra* note 3, Rule 2.2 at D2-D5; *Amendment Instrument*, *supra* note 37, at app. 5-6.

[79] *See* Client Briefing, Clifford Chance, *supra* note 7, at 16; Orrick, Herrington & Sutcliffe, *Private Equity Global Insights, Proposed Changes to the UK Takeover Code* (April, 2011) http://www.orrick.com/Events-and-Publications/Documents/3569.htm.

[80] *See Takeover Code*, *supra* note 3, Rule 2.6 at D9-D10; *Amendment Instrument*, *supra* note 37, at app. 12-14; *Takeover Code*, *supra* note 3, Rule 2.8 at D12-D14; *Amendment Instrument, supra* note 37, at app. 16-18.

publically identified and announced until that potential acquirer must: 1) announce a firm intention to make an offer in accordance with Rule 2.7;[81] or 2) announce that it does not intend to make an offer. The latter situation then triggers Rule 2.8.[82] Rule 2.8 bars, for six months, any company that has announced that it will not make an offer to a target from a number of activities, including: announcing an offer or possible offer for the same target;[83] acquiring any interest in shares of the previous target or any irrevocable commitment for those shares amounting to an aggregate of thirty-percent of the voting rights of the target company;[84] making any statement that may raise or confirm the possibility that the bidder may make an offer to the target company;[85] or take any steps in connection with a possible offer for the target.[86] In other words, Rule 2.6 starts the twenty-eight day countdown, at which point the potential bidder must comply with Rule 2.7 and make a firm offer (the "Put Up" part), or walk away for six months under Rule 2.8 (the "Shut Up" part).[87]

Rule 2.6 and its automatic invocation of Rule 2.8 will put time constraints on bidders that were rarely seen before the amendments.[88] This change reflects The Panel's attempt to remedy the aforementioned problems resulting from the "virtual bid."[89] Now that the twenty-eight day deadline begins automatically upon an

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[81] *Takeover Code*, *supra* note 3, Rule 2.7(a) at D11-D12 (requiring an offeror company to follow through on its firm intention to make an offer unless another company makes a higher offer or some other limited exceptions occur).

[82] *Takeover Code*, *supra* note 3, Rule 2.6(a) at D9.

[83] *Takeover Code*, *supra* note 3, Rule 2.8(a) at D12-13.

[84] *Takeover Code*, *supra* note 3, Rule 2.8(b)-(c) at D12-D13.

[85] *Takeover Code*, *supra* note 3, Rule 2.8(d) at D12-D13.

[86] *Takeover Code*, *supra* note 3, Rule 2.8(e) at D12-D13.

[87] *See Takeover Code*, *supra* note 3, Rules 2.6-2.8 at D9-D13.

[88] *See Put Up or Shut Up*, *supra* note 68 (explaining that before the amendments a 28 day Put Up or Shut Up deadline was imposed by The Panel only after the target board asked for, and was granted one by The Panel, when they were besieged without a firm offer having been made).

[89] THE PANEL ON TAKEOVERS AND MERGERS CODE COMMITTEE, REVIEW OF CERTAIN ASPECTS OF THE REGULATION OF TAKEOVER BIDS: RESPONSE STATEMENT BY THE CODE COMMITTEE OF THE PANEL FOLLOWING THE CONSULTATION ON PCP 2011/1, RS 2011/1 at 7, 12 http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/RS201101.pdf [hereinafter *Response Statement*].

announcement that starts an offer period, bidding companies will want to keep their investigations into, or preparations for, an offer secret for as long as possible.[90] Bidding companies will likely shroud their actions in secrecy to avoid having only twenty-eight days to "Put Up or Shut Up" when they are not advanced enough in their preparations to make an offer within that period.[91]

About two-thirds of respondents to the Consultation Paper were actually opposed to the coupling of the all bidders identification requirement and the mandatory "Put Up or Shut Up" deadline for various reasons.[92] The primary reason is because the mandatory "Put Up or Shut Up" deadline may reduce competition for the acquisition of target companies and thus possibly deny target shareholders the benefit of other competing offers.[93] Also, it may cause more advanced potential bidders to "flush out" less advanced potential bidders by leaking information that will require an announcement and an identification of all potential bidders.[94] The amendments may otherwise create an "uneven playing field" where bidders that are more advanced in their preparations will have a large advantage over those not as advanced in their preparations.[95] The Panel decided to enact the amendments with little change despite having more opposition than support.[96]

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[90] This is now due to the requirement that all bidders be named in an announcement that opens an offer period from amended Rules 2.2 and 2.4(a).

[91] *See* Client Briefing, Clifford Chance, *supra* note 7, at 11, 16; Orrick, Herrington & Sutcliffe, *supra* note 79.

[92] *Response Statement*, *supra* note 89, at 8.

[93] *Id.*

[94] *Id.*

[95] *Id.* (showing that although listed as separate concerns, those respondents who were opposed to the mandatory identification of all potential bidders requirement were generally concerned about the "uneven playing field" that could arise after an announcement that starts an offer period regardless of whether it begins in the natural course of offer negotiations or because a well-advanced bidding company is attempting to "flush out" the less well-advanced potential bidders).

[96] *See id.* at 9-11. Furthermore The Committee deemed that it would be inappropriate to allow the Offeree company's board to decide when they wanted to keep a potential bidder's identity secret because that would lead to potential bidders requiring, as a pre-condition, a confidentiality agreement to keep their identity concealed in almost every deal. *Id.*

The Panel decided that it would review how the amendments affected the M&A market one year after their implementation.[97] The one-year review was published in November of 2012.[98] Although the findings were generally positive, the report also stated that much of the effects of the amendments remain to be seen.[99] Multiple large law firms predicted, just after The Panel announced that the amendments would be adopted, that the identification of all potential bidders requirement, and the mandatory twenty-eight day "Put Up or Shut Up" deadline, would require bidders to use the utmost secrecy when preparing a bid.[100] Bidders would need to be much more advanced in their preparations before making an approach to a target company board of directors than a bidding company would be under the pre-amendments Code.[101] The Committee kept the narrow exception that a target board could request an extension of the "Put Up or Shut Up" deadline for some or all potential bidders in a takeover.[102] This exception will provide some relief for potential bidders negotiating a friendly acquisition with the target company's board of directors.[103] Hostile bidders, on the other hand, will need to be wary of how they protect information regarding a potential approach to a target.[104] It is this heightened wariness that led some commentators to conclude that the amendments will deter potential bidders from ever making an offer in the first place and thereby harm

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97 *Response Statement*, *supra* note 89, at 5.

98 Discussed *infra* Part III.

99 *See generally* THE PANEL ON TAKEOVERS AND MERGERS CODE COMMITTEE, REVIEW OF THE 2011 AMENDMENTS TO THE TAKEOVER CODE, 2012/8, http://www.thetakeoverpanel.org.uk/wp-content/uploads/2012/01/2012-8.pdf [hereinafter *One Year Review*].

100 Iain Wright, Publications, *The UK Takeover Code: Significant Changes Come Into Effect*, MORGAN, LEWIS & BOCKIUS (Sept. 22, 2011), https://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/1f22a35e-c340-4de3-9703-2954b8020a98. *See* Client Briefing, Clifford Chance, *supra* note 7, at 16; Orrick, Herrington & Sutcliffe, *supra* note 79.

101 *See* Wright, *supra* note 100; Client Briefing, Clifford Chance, *supra* note 7, at 11, 16; Orrick, Herrington & Sutcliffe, *supra* note 79.

102 *Takeover Code*, *supra* note 3, Rule 2.6(c) at D9.

103 Wright, *supra* note 100, at 3.

104 *See* Wright, *supra* note 100, at 2.

target shareholders by suppressing bid competition.[105] The divisive response of commentators, both before and after The Panel adopted the amendments, shows that these two major amendments aimed at correcting the "virtual bid" period remain the most controversial of the amendments.[106]

C. The Prohibition of Deal Protection Measures

The Panel's sweeping decision to prohibit deal protection measures, except in limited circumstances,[107] puts the United Kingdom at odds with most other developed M&A markets.[108] As part of the amendments, The Code Committee entirely rewrote Rule 21.2.[109] New Rule 21.2(a) prohibits the target company, or any person acting in concert with the target company, from entering into any offer related arrangements with a bidder.[110] Furthermore, Rule 21.2(b) makes it clear that this prohibition includes inducement fees[111] of any amount.[112] This is a significant change to U.K. M&A practice where inducement fees of one-percent had become standard

105 *See Response Statement*, *supra* note 89, at 8; Patrone, *supra* note 5, at 77-78.

106 *See* Wright, *supra* note 100, at 2.

107 The exceptions where the amendments still allow inducement fees are: with a friendly or more preferred competing bid to a hostile bid (a "white knight") up to one-percent of the first "white knight" offer only payable if the hostile competing bid is successful; if the target is in financial distress; or with a preferred bidder up to one-percent of the bid in the event that the target has commenced a formal auction sale. *See* Client Briefing, Clifford Chance, *supra* note 7, at 8, 12 (stating that most markets allow deal protection measures).

108 *Id.* (stating that most markets allow deal protection measures).

109 *Response Statement*, *supra* note 89, at 37.

110 *Takeover Code*, *supra* note 3, Rule 21.2(a) at I16; *Amendment Instrument*, *supra* note 37, at app. 32.

111 *See generally* Megan Murphy, *Takeover Panel Set to Ban Break Fees*, FIN. TIMES, Mar. 21, 2011, at 18; *Break Fee*, THE FREE DICTIONARY http://financial-dictionary.thefreedictionary.com/Break+Fee ("In mergers and acquisitions, a fee the target pays to the acquirer in case a deal fails before completion. Theoretically, this is done to reimburse the acquirer for due diligence expenses, but, in practice, it is often used to attempt to restore good relations between the two companies").

112 *Takeover Code*, *supra* note 3, Rule 21.2(b) at I16; *Amendment Instrument*, *supra* note 37, at app. 32.

in almost all acquisitions.[113] By comparison, the Delaware Chancery Courts have allowed inducement fees of three or three-and-a-half percent.[114] Although commentators agree that this sweeping ban will alter what had become common practice, this modification was not contested as much as the "virtual bid" correction amendments.[115]

The Panel's Response Statement to their Consultation Paper notes that only around one-third of respondents were opposed to the amendments' prohibition of inducement fees.[116] Concerned respondents suggested that prohibiting inducement fees would deter potential bidders from making offers[117] because the cost of preparing and negotiating an offer may be prohibitive without some assurance that the target will not leave a bidder at the altar.[118] Similar to the major concern with the "virtual bid" corrective amendments, the major concern with the ban on inducement fees is that shareholders may be harmed by not having the chance to decide on the merits of *all* potential offers.[119] In other words, some commentators are concerned that the inducement fee ban will deter potential bidders, reduce bid competition, and implicitly devalue the best offers that could have been made to a target company.[120]

The Code Committee, however, concluded that this argument cuts both ways, and that inducement fees possibly deter competing bidders from making a topping offer.[121] Competing bidders would be deterred because they would have to offer at an extra high premium

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113 *See* Orrick, Herrington & Sutcliffe, *supra* note 79.

114 *See e.g.*, McMillan v. Intercargo Corp., 768 A.2d 492, 505 (Del. Ch. 2000) (3.5% break fee are not unreasonable); In re Pennaco Energy, Inc., 787 A.2d 691 (Del. Ch. 2001) (3% break fee and matching rights are not unreasonable).

115 *See Response Statement*, *supra* note 89, at 38 ("Around two-thirds of the respondents who commented on the proposed general prohibition of offer-related arrangements supported it or took a neutral stance").

116 *Response Statement*, *supra* note 89, at 38.

117 *Id.*

118 *See* Orrick, Herrington & Sutcliffe, *supra* note 79 (stating that costs incurred in pre-offer activities such as due diligence and financing fees could be too much of a burden for some potential offerors if there is no compensation for those wasted costs if their bid is trumped).

119 *Response Statement*, *supra* note 89, at 38 (emphasis added).

120 *Id.*

121 *Id.* at 39.

to make the deal worthwhile for the target company's shareholders to pay the inducement fee and accept the competing bid.[122] With the support of a majority of respondents, The Code Committee implemented the amendment banning inducement fees because The Panel believed that inducement fees had become so standard in M&A transactions in the United Kingdom that targets were typically not afforded a chance to negotiate over these fees.[123] Consequently, law firms predict that the inducement fee ban will have the biggest impact on private equity firms, because private equity firms will typically be in a more constrained financial position and will not want to risk losing the money put into preparing a bid if their offer is trumped by a competing offer.[124] Strategic bidders[125] will also be concerned about the up-front costs of an offer after these amendments, but the effects of the ban on inducement fees will likely not be as drastic as with private equity firms.[126]

D. The Enhanced Disclosure Requirements

The final major change to the Takeover Code, the imposition of enhanced disclosure requirements, consists of a series of small changes aimed at increasing transparency during an acquisition.[127] The most important new disclosures required by the Takeover Code amendments are the revelation of advisor's fees,[128] bid financing[129] and company financial information,[130] and of the bidding company's intention with regard to the target company and the target company

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122 *Id.*

123 *See* Wright, *supra* note 100, at 4.

124 *See* Orrick, Herrington & Sutcliffe, *supra* note 79.

125 A Strategic Bidder is a company that is attempting to takeover another company for the strategic purpose of enhancing its own value. For example, Kraft taking over Cadbury to improve its market share in the confections market.

126 *See* Orrick, Herrington & Sutcliffe, *supra* note 79.

127 *See generally Takeover Code*, *supra* note 3, Rules 23.2, 23.3, & 24 at J1-J16.

128 *Takeover Code*, *supra* note 3, Rule 24.16 at J15-J16; *Amendment Instrument*, *supra* note 37, at 45-46.

129 *Takeover Code*, *supra* note 3, Rule 24.3(f) at J7; *Amendment Instrument*, *supra* note 37, at 41.

130 *Takeover Code*, *supra* note 3, Rule 24.3(a), (c) at J4, J5; *Amendment Instrument*, *supra* note 37, at 37-39.

employees.[131] This section will briefly look at each of these major disclosure requirements.

1. *Disclosure of Advisor's Fees*

The idea behind disclosing advisory fees is that although the fees may only make up a small percentage of the total transaction, an advisory fee is still usually a significant amount of money, sometimes rising as high as nine digits.[132] With advisory fees being such a significant amount of money, The Panel concluded that these fee arrangements are material contracts to an offer.[133] As such, the shareholders deserve to know how the directors are spending company money in relation to that offer, and disclosure of those fees might reveal incentives for advisors attempting to persuade their clients to a particular course of action.[134]

2. *Disclosure of Financial Information and Financing Information*

Before the amendments were implemented, disclosure of financial information and information relating to the financing of an offer was only required in securities exchange offers.[135] The amendments now require disclosure of this information in all offers, including cash-out mergers.[136] A vast majority of respondents supported this disclosure requirement, even though there would be some small additional cost to bidders and targets in assembling this information for dissemination, because it benefits shareholders far beyond that added cost.[137]

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131 *Takeover Code*, *supra* note 3, Rule 24.2 at J3; *Amendment Instrument*, *supra* note 37, at 37.

132 Liam Vaughan, *M&A: Costs Overlooked in the Heat of the Moment*, FIN. NEWS, Jan. 3, 2011, http://www.efinancialnews.com/story/2011-01-03/m-and-a-costs (explaining that investment banks can earn about one to one and one half percent on deals over $1 Billion, commercial banks can earn considerably more for financing an M&A deal, and legal fees can be as high as $10 Million).

133 *Proposed Amendments*, *supra* note 37, at 58.

134 *Id.*

135 *Response Statement*, *supra* note 89, at 67.

136 *Takeover Code*, *supra* note 3, Rule 24.3(a)-(e) at J4-J7; *Amendment Instrument*, *supra* note 37, at 37-40.

137 *Response Statement*, *supra* note 89, at 68.

3. *Disclosure of Future Intentions*

The major new disclosure requirement that appears to be the most reactionary to the Kraft-Cadbury takeover is the requirement to disclose intentions[138] regarding the target company and its employees.[139] Many British citizens were upset that Kraft announced that it would close Cadbury's Bristol factory, signaling the loss of 400 jobs, shortly after it promised to keep it open and spare all Cadbury jobs in the United Kingdom.[140] The amended Rule 24.2 requires that successful bidding companies make known, among other things, their intentions with regards to future employment of personnel and management, and their strategic plans for the acquired company.[141] If the successful bidder has no intention to make any changes, the companies must disclose that as well.[142] The respondents to the Consultation Paper agreed wholeheartedly with this change.[143] The Code Committee conceded, though, that some hostile bidders might not have undertaken enough due diligence to really know the exact future plans of the company.[144] In such cases, The Committee still expects that the bidding company should disclose, to the full extent possible, its business rationale for acquiring the target.[145]

The 2011 amendments to the United Kingdom's City Code on Mergers and Takeovers will certainly have an impact on the M&A market and on M&A practice.[146] The question now becomes whether these amendments effectively protect target company

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[138] For example, The Code Committee now wants an acquiring company to state if after the merger or takeover it will make any job cuts or close any offices or factories. *See* Sarah Gadd, *The Revised UK Takeover Code: Employment Considerations*, 13 THE WORKING WORLD (Lantham & Watkins), Nov. 2011, http://www.lw.com/thoughtLeadership/working-world-november-2011.

[139] *See id.*

[140] *See e.g.*, *Cadbury's Bristol Plant to Close by 2011*, BBC NEWS, Feb. 9, 2010, http://news.bbc.co.uk/2/hi/8507066.stm.

[141] *Takeover Code*, *supra* note 3, Rule 24.2 at J3; *Amendment Instrument*, *supra* note 37, at 36-37.

[142] *Takeover Code*, *supra* note 3, Rule 24.2 at J3; *Amendment Instrument*, *supra* note 37, at 36-37. (*Id.*)

[143] *Response Statement*, *supra* note 89, at 80.

[144] *Id.*

[145] *Id.*

[146] *See* Davidoff, *supra* note 9.

shareholders from the recent perceived tactical advantage achieved by bidding companies? And furthermore, do the amendments reach too far or might they not reach far enough?

III. IMPLICATIONS OF THE 2011 TAKEOVER AMENDMENTS

As the collective owners of a corporation shareholders stand to gain or lose on their investment as the result of a merger or acquisition.[147] In public corporations, a large majority of shareholders individually have only a miniscule vote and cannot affect the policies of the corporation by voting their shares without the cooperation of many other shareholders.[148] In Delaware a corporate board of directors is able to utilize a poison pill to block their shareholders from selling their shares in a tender offer.[149] The United Kingdom, however, has developed a vastly different approach than the Delaware courts to protect shareholder interests in these potential multi-billion pound (or dollar) transactions.[150] The United Kingdom takeover regulations have always upheld board neutrality in a takeover situation, and The Code Committee did not compromise that tenet with the 2011 amendments.[151] However, some have argued that abandoning the Board Neutrality Rule for more Delaware-like defensive maneuvers would have better protected shareholders.[152]

[147] *See generally* 18 AM. JUR. 2D *Corporations* § 630 (2011).

[148] For example, as of the end of September 2011, ExxonMobil's largest shareholder was an institutional investor, The Vanguard Group, Inc. with 4.16% of the vote, contrasting with their largest direct shareholder Rex Tillerson, who has about 0.03% of the total vote. *Exxon Mobil Corporation (XOM): Major Holders*, YAHOO! FIN. (Jan. 5, 2011 3:55 PM) http://finance.yahoo.com/q/mh?s=xom+Major+Holders.

[149] A poison pill, or shareholder's rights plan, makes the shares so unattractive to the potential acquirer that an offer will never actually be made to shareholders, even if they desire the offer, without the board of directors first redeeming the poison pill. *See e.g.,* Moran v. Household Int'l, Inc., 500 A.2d 1346, 1348-49 (Del. 1985).

[150] *See e.g.*, Han-Wei Liu, *The Non-Frustration Rule of The U.K. City Code on Takeovers and Mergers and Related Agency Problems: What are the Implications for the E.C. Takeover Directive?*, 17 COLUM. J. EUR. L. ONLINE 5, 8-9 (2011), http://www.cjel.net/online/17_2-liu/ (illustrating briefly the difference in possible board of director action under U.S. and U.K. takeover regulation regimes).

[151] *See Takeover Code*, *supra* note 3, Rule 21.1(a) at I13.

[152] *See* Patrone, *supra* note 5, at 85.

This dichotomy between United Kingdom and United States takeover regulation begs the question: do these takeover regulation regimes protect shareholders equally and adequately? This part will look at economic studies of defensive devices and how they affect shareholder value, and will also explore how "short-term" investors affect established long-term shareholders.

A. Economic Studies of the Impact of Defensive Maneuvers

Studying the economic effect of defensive maneuvers on shareholders in takeover situations requires using data with numerous variables.[153] Different studies, focusing on different variables, have thus led to opposing conclusions.[154] The reality of the depth and breadth of data and variables results in no one study that definitively declares that shareholders benefit or suffer a loss when defensive measures are utilized by a target company's board of directors.[155] Yet prominent Harvard M&A economist Lucian Bebchuk and some of his understudies have exposed a trend that the entrenchment of a board of directors[156] negatively affects shareholder value.[157] This is particularly relevant to the 2011 United Kingdom Takeover Code amendments because The Code Committee never questioned the importance of the Board Neutrality Rule,[158] which should continue to prevent the possibility of board entrenchment.

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153 *See* Michael D. Frakes, *Classified Boards and Firm Value*, 32 DEL. J. CORP. L. 113, 115 (2007).

154 John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 97 GEO. L. J. 1727, 1732 (2007).

155 *See* Frakes, *supra* note 153, at 114-15.

156 Board entrenchment refers to the phenomenon of a corporation's board of directors taking possibly self-serving action to maintain their positions as directors of the company. In the United States, when a board appears to be entrenching itself against shareholders' wishes, a breach of fiduciary duty question will likely arise. *See generally* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988).

157 *See generally* Frakes, *supra* note 153, at 114-15; Lucian A. Bebchuk, et al., *The Powerful Anti-Takeover Force of Staggered Boards*, 54 STAN. L. REV. 887 (2002).

158 *See generally Consultation Paper*, *supra* note 4 (declaring The Committee's intention to make changes to The Code but never entertaining an amendment to the Board Neutrality Rule). *But see* Patrone, *supra* note 5 (arguing that repealing the

The Board Neutrality Rule in the United Kingdom prevents much data about board entrenchment in the United Kingdom's companies from being accumulated.[159] However, exploring the effects of board entrenchment in United States companies resonates with The Code Committee's support of the Board Neutrality Rule because the negative correlation of board entrenchment to shareholder value supports The Committee's decision to continually maintain board neutrality.[160] In 2002, Professor Bebchuk and colleagues conducted an in-depth study of Delaware companies with both poison pills and staggered boards[161] that showed that the combination of these defensive measures makes it almost impossible for a bidding company to acquire a target company without consent from the board of the target company.[162]

The empirical evidence from Professor Bebchuk's study suggests that staggered boards, combined with a poison pill, provide the most robust takeover defense in Delaware corporate law.[163] Furthermore, the research and statistical analysis shows that this robust takeover defense[164] does, in fact, lead to board

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Board Neutrality Rule would better protect target shareholders instead of protecting target companies).

159 *See* Nicholas F. Carline & Pradeep K. Yadav, *Decoupling the Motives for Takeover Resistance, and the Implications for Stockholders, Managers and Bidders* 3-4 (August 2008) (unpublished manuscript) (on file with The University of Oklahoma), http://www.ou.edu/content/dam/price/Finance/CFS/paper/pdf/SeminarPaper_Carline.pdf.

160 *See* Bebchuk, *supra* note 157, at 937.

161 A staggered board of directors is a board that is split up into classes, and only one class is up for election at each annual shareholders meeting. For example, a company with a nine-director staggered board, in three classes, would have only three directors up for election every year, with the winners of that election serving three-year terms before they would be up for another election. The staggered board thus prevents a change in control of a company's shares from changing control of the board of directors until at least two annual shareholder meetings have passed, or in other words, at a minimum when just over one year has elapsed. *See Staggered Board*, INVESTOPEDIA (Jan. 5, 2011, 12:35 PM), http://www.investopedia.com/terms/s/staggered-board.asp#axzz1iYTZNDa8.

162 *See* Bebchuk, *supra* note 157, at 890.

163 *Id.* at 950.

164 In Delaware Corporate law the board of directors can unilaterally impose a poison pill if they can meet the *Unocal* enhanced business judgment test *ex post* in the Delaware courts. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d

entrenchment.[165] It also shows that board entrenchment negatively affects shareholder value by an average of about 11.6% on their final return on investment.[166] This loss of wealth to the shareholders is most likely due to the high odds that the target company will remain independent.[167] Shareholders will often be unable to dismantle a staggered board or force the board to redeem a poison pill.[168] The shareholders are financially harmed by the resulting board entrenchment and their inability to cash in on an acquisition premium offered by the acquiring company for their shares.[169] This is the exact type of effect that the Takeover Panel sought to avoid in the United Kingdom with the Board Neutrality Rule.

Michael D. Frakes, a disciple of Bebchuk's, further explored how staggered boards affect firm value using three different statistical analyses designed to correct for estimated co-variables.[170] He also found a negative correlation between staggered boards and

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946, 955 (Del. 1985); Moran v. Household Int'l, Inc., 500 A.2d 1346, 1356 (Del. 1985).

165 Bebchuk, *supra* note 157, at 913-14, 937 (providing an example of U.S. Surgical's hostile bid for Circon in 1996, where Circon was able to thwart U.S. Surgical's hostile takeover attempt with a poison pill and an effective staggered board, only to end up selling itself two years later for 17% less than the original bid).

166 *Id.* ("As a starting point we examine total shareholder returns, irrespective of bid outcome, for [Effective Staggered Board (ESB)] and non-ESB targets. Shareholders in the ESB targets in our sample achieved 31.8% returns in the nine months after a hostile bid was announced, compared to 43.4% returns for the shareholders in non-ESB targets, representing an 11.6% difference.").

167 *Id.* at 950 ("We find that the increased odds of remaining independent are quite costly for target shareholders, without providing sufficient countervailing benefits in terms of higher acquisition premium. We estimate than an ESB reduces the expected return of target shareholders in the nine months after a hostile bid is launched on the order of 8-10%. The negative wealth effect associated with ESBs is particularly problematic from a policy perspective because the majority of staggered boards were established before the judicial developments that gave them their antitakeover potency.").

168 *Id.*

169 *Id.*

170 *See generally* Frakes, *supra note* 153 (Frakes creates in-depth statistical models and regression analyses to correct for variables and co-variables such as other anti-takeover measures, firm size, firm value among others).

shareholder value.[171] The Frakes and Bebchuk studies suggest that there could be added costs to target shareholders from how board entrenchment may affect manager and director behavior, though the studies specifically did not explore this aspect of staggered boards.[172] This suggestion, although still not conclusively proven, provides a supplemental argument to the aforementioned return on investment concerns when a board of directors is allowed to unilaterally enact entrenching defensive measures.

As previously stated, these studies are not conclusive and there are arguments that defensive measures actually increase shareholder value.[173] However, the argument that defensive measures provide the board of directors a negotiating advantage to achieve higher premiums for the shareholders in a hostile or friendly takeover[174] has largely been undermined by Harvard Professor of Law and Business Guhan Subramanian.[175] His research suggests that the bargaining power hypothesis is only applicable in a narrow subset of acquisitions.[176] Professor Subramanian argues that takeover

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171 *See Id.* at 150-51 (meaning that the more robust the defensive mechanism employed by the board of director, the lower shareholder value would tend to be).

172 *See* Frakes, *supra* note 153, at 114, 150; Bebchuk, *supra* note 157, at 939 (suggesting that when managers and directors are protected by defensive measures, they may not act as efficiently as possible, or in the best interest of the shareholders, because the directors know they cannot be ousted by discontent shareholders).

173 *See* Frakes, *supra* note 153 (citing Lucian A. Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U CHI. L. REV. 973, 1011 (2002) (explaining that some of the major arguments in favor of defensive measures by the board of directors are: defensive measures allow management to avoid distractions and focus on current operations; without defensive measures directors may focus excessively on short-term results to the detriment of long-term value; and most importantly, that defensive measures give management a bargaining power that allows them to maximize the premium paid to shareholders in a hostile takeover)).

174 *See generally* Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L. J. 621, 629-30 (2003).

175 *See* Subramanian, *supra* note 174, at 623.

176 . *Id.* ("I demonstrate that the bargaining power hypothesis only applies unambiguously to negotiations in which there is a bilateral monopoly between buyer and seller, no incremental costs to making a hostile bid, symmetric information, and loyal sell-side agents. These conditions suggest that the bargaining power hypothesis is only true in a subset of all deals, contrary to the

defenses do not help a target company's shareholders nearly to the extent argued by the "bargaining power" proponents of defensive measures, even in friendly, negotiated acquisitions.[177]

Although not dispositive, the above-mentioned legal economists provide strong evidence that supports promoting the neutrality of a target board of directors in a hostile takeover situation. There remains, however, the problem The Code Committee faced on how to address "short-term" investors in a takeover, while still requiring the target board of directors to remain neutral.

B. Studies of the Effects of "Short-term" Investors

Modern financial market practices can lead to a distortion of shareholder voting rights by decoupling those voting rights from an economic interest in the company.[178] This often happens through the buying and selling of call options or put options on shares borrowed from brokers, or using other forms of derivatives.[179] In mergers and acquisitions, voting disparity will arise in merger arbitrage,[180] or

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claim of some defense proponents that the hypothesis applies to all negotiated acquisitions.").

177 *Id.* at 684.

178 *See* TR Investors, LLC v. Genger, 2010 Del. Ch. LEXIS 153, 70-71 (Del. Ch. July 23, 2010) (explaining how the voting rights and residual claims of shares can be separated and thereby result in situations where a stock holder might vote adversely to the interests of the company because their economic interests do not align with shareholders who have a long-term, residual claim vested in their shares) (citing Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL. L. REV.775).

179 For discussions on the intricacies of methods of decoupling share voting rights from share economic interests *see* Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL. L. REV. 775. *See also* Henry T. C. Hu and Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006).

180 Merger arbitrage is when an investor buys shares of the target company after the announcement of a merger or tender offer. The investor hopes to profit on the premium paid by the acquirer to the target shareholders over the market price that the investor bought the shares after the announcement. The major risk for this type of investment is if the companies fail to consummate the transaction, the shares will likely be worth less than what the investor paid to acquire them. *See Merger Arbitrage*, FUNDAMENTALFINANCE (Jan. 16, 2012, 5:49 PM),

alternatively, when a shareholder has a negative economic interest[181] arising when the investor short sells her shares.[182]

In the modern M&A marketplace, the most influential short-term investors are typically hedge or mutual funds.[183] Institutional investors like mutual funds are, in practice, the only investors with the resources to attain voting rights sufficient to affect the outcome of a shareholder vote.[184] There are recent examples of hedge funds being able to use their voting power to block or alter acquisitions from both the acquiring side and the target side.[185] This institutional investor activism is not always detrimental to the established individual shareholders of these companies.[186] However, the possible decoupling of the economic interests from the voting rights in a merger arbitrage situation poses serious complications with respect to the established shareholders.[187] This section will attempt to

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http://www.fundamentalfinance.com/mergers-acquisitions/merger-arbitrage.php.

[181] An investor might have a negative economic interest in a company when he or she makes a profit if the share price declines. *See* Hu & Black, *supra* note 179, at 832-34.

[182] Short selling is when an investor borrows shares from their broker, and sells those shares immediately. The investor is then required to "cover" those borrowed shares by buying identical securities and giving them back to the broker. The investor is attempting to profit by betting that the share price will fall between when they sell the borrowed shares and when they have to "cover" those shares. A price drop will give the investor a profit of the difference in price of the initially sold shares and the bought back "covering" shares. If the price rises within that time frame, however, the investor will realize a loss equal to that same difference. *See* Brigitte Yuille, *Short Selling: What is Short Selling?*, INVESTOPEDIA (Jan. 16, 2012, 6:14 PM), http://www.investopedia.com/university/shortselling/shortselling1.asp#axzz1jf8S8DOx.

[183] *See* Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1442 (2008).

[184] *See supra* note 148.

[185] *See* Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1034-36 (2007) (explaining, how Deutsche Borse was forced to abandon its bid for the London Stock Exchange because of its own dissatisfied hedge fund and mutual fund shareholders).

[186] *Id.* (explaining how Chiron institutional shareholders expressed dissatisfaction with Novartis' bid for Chiron and eventually forced Novartis' premium paid up from 23% to 32%).

[187] *See infra* Part III.B.1-2.

summarize the major concerns regarding the disconnect between voting rights and economic interests that have arisen over the last two decades and how those concerns pertain to mergers and tender offers. The following sections will discuss a typical merger arbitrage situation, and the decoupling of votes and economic interests.

1. *Merger Arbitrage Situations*

It does not take a large inferential leap to realize that there can be situations where merger arbitrageurs may be able to obtain the votes to approve the sale of a target company, or to tender enough target company shares, to force a transaction that may not maximize value for established individual shareholders.[188] A working paper by Georgetown finance professor Lee Pinkowitz used statistical analysis to highlight that companies with a large aggregate institutional shareholder block are more likely to be targets of takeovers, and that those takeovers are more likely to be successful.[189] Pinkowitz's analysis revealed that institutional investors are important to the takeover process because they either quickly tender their shares to the bidder, or quickly sell their shares on the open market to merger arbitrageurs.[190] The study posits that the potential of these quick sales make the target stock more liquid, and thus more likely to make the acquisition successful.[191]

Likewise, Chancellor Chandler of the Delaware Chancery Court recently noted in the *Air Products* case that the threat of merger arbitrageurs tendering into an inadequate offer could be a legitimate threat under the first prong of a *Unocal* test,[192] "if the offer is indeed

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188 For a prime example *see* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 109 (Del. Ch. 2011) (explaining that merger arbitrageurs tendering into an inadequate offer may be a reasonable threat to a corporation).

189 Lee F. Pinkowitz, *Monitoring by Transient Investors? Institutions and Corporate Control* 21, 24 (unpublished manuscript) (on file at with Georgetown University, McDonough School of Business), http://faculty.msb.edu/lfp/Inst101800.pdf.

190 *Id.* at 24.

191 *Id.* at 28.

192 *See* Unocal Corp. v. Mesa Petroleum Co., 493 A. 2d 946, 955 (Del. 1985) (stating that for board defensive measures to fall under the protection of the business judgment rule that the board must: 1) demonstrate that they had reasonable grounds for believing that a danger to corporate policy and effectiveness

inadequate."[193] In this case, by the time the suit was filed, almost half of the target company shareholders were merger arbitrageurs,[194] which may demonstrate the prevalence and potential impact of arbitrageurs on takeovers. While *Air Products* concedes that merger arbitrageurs help complete acquisitive transactions, Chancellor Chandler strongly derides the possible adverse impact of merger arbitrageurs on target company shareholders in a takeover.[195] As Chancellor Chandler explained in one case:

> [T]he bad [arbitrageurs] and hedge funds who bought in, had obviously bought their shares from folks who were glad to take the profits that came with market prices generated by the Merger and Vector Capital's hint of a higher price. These folks, one can surmise, had satisfied whatever long-term objective they had for their investment in Inter-Tel.[196]

Merger arbitrageurs clearly have an impact on M&A transactions in general, but there remains skepticism as to how much arbitrageurs negatively affect shareholders of the target company. Individual established shareholders still must choose to sell their shares to the "short-term" investors in the first place, thereby satisfying their own investing goals.

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existed and 2) that their defensive measure in response was reasonable in comparison to the threat posed).

193 Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A. 3d 48, 109 (Del. Ch. 2011) (explaining, however, that in this case there was no legitimate threat because the offer was, in fact, adequate).

194 *Id.* ("The argument is premised on the fact that a large percentage (almost half) of Airgas's stockholders are merger arbitrageurs—many of whom bought into the stock when Air Products first announced its interest in acquiring Airgas, at a time when the stock was trading much lower than it is today—who would be willing to tender into an inadequate offer because they stand to make a significant return on their investment even if the offer grossly undervalues Airgas in a sale." In short, the risk is that a majority of Airgas's stockholders will tender into Air Products' offer despite its inadequate price tag, leaving the minority "coerced" into taking $70 as well).

195 *Id.* ("The defendants do not appear to have come to grips with the fact that the arbs bought their shares from long-term stockholders who viewed the increased market price generated by Air Products' offer as a good time to sell").

196 *Id.* at 109 n. 413 (citing Mercier v. Inter-Tel (Delaware), Inc., 929 A.2d 786, 815 (Del. Ch. 2007)).

2. *Problems with Decoupling Voting Rights and Economic Interests*

Further compounding this institutional investor complex is how derivatives[197] can decouple the economic interest from the voting rights of shares. Two examples can help to illustrate this principle. First, imagine a proposed acquisition where a target company institutional shareholder is strongly interested in consummating a proposed stock for stock merger, only the investment community and influential acquiring company shareholders think it is a bad deal and begin to convince the acquiring company to back away. The institutional shareholder then buys almost 9.9% of the acquiring company stock, but immediately short sells[198] another 9.9%. This transaction gives the institutional shareholder the 9.9% vote from the first stock purchase, but completely removes any economic risk from that purchase because the short sale will totally offset any gain or loss from the voting stock. Therefore, the institutional shareholder has a block of shares to vote for the transaction against the wishes of most of the acquiring company shareholders, at no economic risk, and then benefits greatly from its target company stock after it is sold at an acquisition premium, to the acquiring company.[199]

A second example occurred in Hong Kong in early 2006 where a deal, of which most minority target shareholders approved, was blocked by a hedge fund.[200] The fund had borrowed target

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[197] Examples include, futures contracts, forward contracts, options and swaps. *See Derivative*, INVESTOPEDIA (Jan. 18, 2011, 1:35 PM), http://www.investopedia.com/terms/d/derivative.asp#axzz1jqBsyPgK.

[198] *See supra* note 182

[199] This entire example is heavily based on the Mylan Laboratories offer for King Pharmaceuticals, where Perry Hedge Fund acted much like the example institutional investor. For an excellent review of this situation s*ee* Anish Monga, Note, *Using Derivatives to Manipulate the Market for Corporate Control*, 12 STAN. J. L. BUS. & FIN. 186, 196-97 (2006).

[200] *See* Hu & Black, *supra* note 179, at 834-35 ("Henderson Land offered to buy the 25% minority interest in Henderson Investment, a publicly held affiliate. Most minority shareholders favored the buyout, and Henderson Investment's share price increased substantially. Under Hong Kong law, however, the buyout could be blocked by a negative vote of 10% of the "free floating" shares—in this case about 2.5% of the outstanding shares. To everybody's surprise, 2.7% of the shares were voted against the buyout. Henderson Investments shares fell 17% the day after the

company shares, and short sold them to make a profit off of the collapsed deal when the target share price declined sharply after the deal fell through.[201] Other economic and voting decoupling complications can arise in various contexts, including other merger and acquisition situations.[202] While many of the risks and pitfalls that are pervasive throughout merger arbitrage stand out and beg to be addressed by different takeover regimes, it remains unclear if target company shareholders suffer due to these merger arbitrageurs. To summarize, the Board Neutrality Rule appears to well protect shareholders, while it remains far from conclusive that "short-term" investors do, or do not have a negative impact on shareholders.

IV. WHY THE TAKEOVER CODE AMENDMENTS WILL WORK

The Code Committee may have gotten the 2011 Takeover Code amendments just right. The staggering number of variables in any regulation means that only time will tell if The Committee did, in fact, hit a bull's eye with these amendments, or if corrective changes will be necessary sooner rather than later. This section will hypothesize that the amendments will accomplish the goal of leveling the playing field between targets and acquirers, all while continuing to robustly protect shareholders, and not overreaching to the detriment of other members of the M&A marketplace.

The Code Committee and the Takeover Panel set out to fix the perceived imbalance of power in favor of acquiring companies over target companies, and more importantly, the perceived adverse effect of "short-term" investors.[203] The amendments should help to rectify this imbalance in a number of ways. First, the mandatory "Put

voting outcome was announced. It appears that . . . hedge funds borrowed Henderson Investment shares before the record date, voted against the buyout, and then sold those shares short, thus profiting from its private knowledge that the buyout would be defeated").

201 *Id.*

202 *See generally* Martin & Partnoy, *supra* note 179, at 788-92.

203 *See supra* Part I.

Up or Shut Up" deadline should combat the "virtual bid" issues with hostile takeovers in the United Kingdom.[204]

The mandatory "Put Up or Shut Up" deadline gives only a limited window of four weeks for a potential bidder to make a firm offer or walk away for six months.[205] The amount of pressure to blindly sell the target company applied to a company by merger arbitrageurs should be partially alleviated by the limited window imposed by this deadline.[206] If a company can no longer besiege a target,[207] then this will decrease the likelihood that the composition of the shareholders will have changed significantly through arbitrageurs buying from established shareholders at small price increases.[208] Smaller voting blocks of merger arbitrageurs means that there would likely be more established target shareholders available to vote on the merits of the offer as they see fit. Unlike in *Air Products*, where by the time the suit was filed almost half of the shareholders were arbitrageurs, the limited window and the Announcing All Bidders requirement should prevent large scale arbitrage from taking place in the takeover of United Kingdom public companies and should protect the established shareholders of the target companies in the original spirit of The Code.[209] Although The Code forbids coercive offers,[210] the besieging of a target company was in a way coercive by allowing arbitrageurs to erode target shareholder support. The "Put Up or Shut Up" deadline should make great strides in rectifying the erosion that results from the uncertainty of a protracted "virtual bid" period; and the added secrecy and cost that may be placed on

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204 *See supra* text accompanying notes 61-62.

205 *See supra* Part I.A-B.

206 These merger arbitrageurs will have likely bought target stock on the open market after a slight increase in price due to the looming potential offer. From that stock they would use their voting power to attempt to consummate the transaction, and realize a gain on the acquisition premium paid by the acquirer.

207 Under the pre-amendment rules a company could besiege a target by announcing that it is thinking about making a bid, while never actually making a bid for months on end.

208 *See supra* note 195; *see also supra* text accompanying note 25.

209 *See supra* note 12.

210 *See Takeover Code*, *supra* note 3, Rule 9.1 at F1-F13 (requiring a bid to all target shareholders if a bid is made for over 30% control, and requiring a best offer, that the best offer made to any shareholder is made to all shareholders).

acquiring companies is worth the benefits to the target shareholders.[211]

The deal protection ban will likely have a small impact in protecting shareholders, but to what extent remains to be seen. The possibility exists that the inducement fee ban will actually decrease the amount of acquiring companies that want to make an offer because they will fear spending money on the preparation only to lose out to a topping bidder.[212] That may help the target company,[213] but it may hurt the target company shareholders.[214] However The Code Committee left itself an out by requiring a review of the amendments in September 2012.[215] The Committee's one year review returned positive reviews of the amendments.[216] The Committee admitted that it was difficult to assess if any potential offerors have been deterred by the amendments, however it does state that overall bid activity remained at a similar level the year after the amendments were enacted.[217] The Committee also noted that the year after the amendments saw none of the major concerns of the critics of the amendments come to fruition.[218] The general consensus of The Committee was that in the first year, the Amendments successfully curbed the problems of the "virtual bid" while not overly burdening bidding companies.[219]

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211 *See supra* Part II.B.

212 *See supra* Part II.B.

213 It may help the target company to remain independent, and therefore the target company board to keep their jobs, because the target will not receive any bids at all. Or, it could help the target by allowing it to court a white knight topping bid with a company that the board prefers, even if that company will not offer a maximum bid.

214 It can hurt the shareholders, as Professor Bebchuk's study showed, by diminishing the return to the shareholders because the target company remains independent. *See supra* note 167.

215 *See Response Statement*, *supra* note 89, at 5.

216 *See generally One Year Review*, *supra* note 99.

217 *One Year Review*, *supra* note 99, at 5.

218 For example, the Review noted that no instances of more well-prepared bidders "flushing out" less-prepared bidders were realized. *Id.* at 5-6. The Review also stated that there was a significant reduction in an "offer period" being commenced due to an untoward movement in share prices instead of because of a firm offer. *Id.* at 6.

219 *See One Year Review*, *supra* note 99, at 5-10.

As The Committee said in its Response Statement, inducement fees as they were used in practice before the amendments may just as well have hurt the target shareholders by precluding any topping bids by competing bidders.[220] The Committee states in their One Year Review that they generally consider the ban on deal protection measures a success.[221] By not making any earth shattering changes to the deal protections used in the United Kingdom,[222] and by allowing room to change any detrimental effects of this ban, The Code Committee has provided a very balanced approach to attempting to protect target shareholders through the deal protection ban.

The enhanced disclosure requirements should substantially help to provide target company shareholders with more crucial information about the acquiring company's financial outlook, its intentions, and its stakeholders. The acquiring company will also benefit from enhanced disclosures from the target company.[223] These enhanced disclosures were strongly supported in the Response Statement,[224] and for good reason. Enhanced disclosure and better information improves decision-making. Furthermore, The Committee reviewed the disclosure requirements in their one year review and found that they improved transparency in offers.[225]

An easy argument for an American commentator to make regarding the initial perceived imbalance favoring acquirers would be to simply advocate for a target company's board to be able to use defensive measures like in Delaware.[226] However, economic studies show a trend that those very defensive measures can lead to

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220 *See Response Statement*, *supra* note 89, at 39.

221 *One Year Review*, *supra* note 99, at 10-13. The Committee also noted, though, that some bidders and targets still included some agreements that the Committee Executive considered in violation of the amendments. *Id.* at 11.

222 Banning the deal protection measures is still only a decrease of 1% in the size of the inducement fees. *See supra* text accompanying note 113.

223 *See supra* Part II.D.

224 *See Response Statement*, *supra* note 89, at 68, 80.

225 *One Year Review*, *supra* note 99, at 15-17.

226 *See* Patrone, *supra* note 5 at 85.

significantly lower returns to the target shareholders.[227] In light of these studies by prominent economists, it is hard to imagine that repealing the Board Neutrality Rule would not lead to occasional situations that harm shareholder investments significantly. The Takeover Panel should be applauded for remaining so steadfastly in support of the Board Neutrality Rule as it embodies the shareholder protection that is one of the main goals of The Code.[228] Target shareholders can rest assured that the board of directors will typically be serving the shareholders' best interest and not their own. The target shareholders also should assume that they will get close to the maximum merited premium on their shares, and thus the best return on investment they could possibly receive in a given takeover scenario.

The economic studies generally support keeping the target board of directors neutral in a hostile takeover. But, The Code Committee had to address the merger arbitrageurs and their influence on bids in a measured fashion.[229] The Committee achieved this in intelligent fashion by enacting the deadline rules and ultimately rejecting a proposal for more stringent regulation of "short-term" investors.[230] The Committee originally proposed, but later rejected, a rule that would bar all investors who acquired shares in the target after an announcement started a waiting period, from voting on the merger or from tendering their shares.[231]

This proposal would have been too draconian of an approach to regulating "short-term" investors. Law professors who have written about the problems of decoupled voting rights and economic interests in shares[232] never mention an instance where merger arbitrageurs bought target company shares only to severely harm the

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[227] *See supra* Part III.A (an average of 11.6% lower returns for shareholders whose boards of directors were using entrenching defensive mechanisms).

[228] *See Takeover Code*, *supra* note 3, *Introduction*, ¶ 2(a) at A1.

[229] *See Response Statement*, *supra* note 89, at 5.

[230] *Consultation Paper*, *supra* note 4, at 20.

[231] *Id.*

[232] *See generally* Martin & Partnoy, *supra* note 179; Hu & Black *supra* note 179.

target company through tendering into a totally inadequate offer.[233] Like Chancellor Chandler noted in *Air Products*, arbitrageurs have to buy their shares from long-term investors who must have felt content with the return on their investment.[234] To take away that option would harm some target company long-term shareholders in contravention of the principles of The Code.

If The Code Committee were to limit the voting rights for "short-term" investors, there would likely be a noticeable decrease in arbitrage activity. This would mean fewer opportunities for established shareholders to sell their stock at the slight price increase that will result from the potential offer.[235] Stripping some shareholders of the ability to gain from their investment to protect all of the shareholders does not align itself with The Code principles,[236] and The Code Committee made the right decision by ultimately rejecting this proposal.

The Panel should not foreclose the proposed amendment to disenfranchise "short-term" investors in its entirety. If, and only if, during its mandatory annual review of the 2011 amendments, The Panel decides that the amendments are not adequately correcting the imbalance of power in favor of bidders, The Panel should consider enacting this amendment on a *limited* basis. Instead of eliminating the voting or acceptance rights of all investors who purchase target company stock after the announcement of a potential bid, The Panel should consider halving those "short-term" investors' vote. This could allow for more voting power to remain with established shareholders, without reducing the value of the shares purchased after the announcement of a potential offer to the same extent those

233 *See supra* Part III.B.2.

234 *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 109 n. 413 (citing Mercier v. Inter-Tel (Delaware), Inc., 929 A.2d 786, 815 (Del. Ch. 2007)).

235 For example, if Company A's stock is trading at $20 per share, and Company B offers to buy all of the stock of Company A at $30 per share, there will be an immediate price increase upwards towards that $30 mark. It will not reach $30 because there is the risk that the transaction will not happen, but the price increase does provide an immediate opportunity to profit from an investment by selling to a merger arbitrageur.

236 *See Takeover Code*, *supra* note 3, *Introduction*, Gen. Principles 1-6; *Takeover Code*, *supra* note 3, *Introduction,* ¶ 2(a) at A1.

shares would be devalued under a scheme of total disenfranchisement.

This potential variation on the proposed amendment could be further narrowed in scope by tying it to the Rule 8.3 disclosure requirements.[237] Rule 8.3 requires that any person who is or becomes interested in 1% or more of the securities of any party to a transaction, either before the announcement or during the offer period, must disclose to the public their interest in any securities relevant to the transaction as well as the details of any short positions in any relevant securities to the transaction.[238] If only those "short-term" investors who have both over 1% interest and short positions in opposing, relevant securities were to have their voting power halved, then many of the problems associated with decoupling economic interest and voting rights could be improved without overly burdening established shareholders who want to sell their shares to "short-term" investors. In other words, Rule 8.3 will make it known which shareholders hold significant interests on both sides of the transaction, and furthermore which have short positions which decouple their economic interests and voting interests. Investors in these situations will almost always be arbitrageurs. By halving the vote of those arbitrageurs with significant voting power, established shareholders will retain more power over the decision to accept the bid, but this will not entirely preclude those long-term investors who want to sell to arbitrageurs from doing so. This could result in a "best of both worlds" situation that optimizes both established shareholder protections and the liquidity of a company's stock.

The Panel would have to undertake a consultation period and another study to determine the feasibility of such a narrowly tailored disenfranchisement amendment. It may not be possible to keep track of, or distinguish, all of the shareholders who may be affected by this variation of the proposed amendment, and so this proposed amendment variation may ultimately be deemed impossible to implement. However, The Panel should leave itself the option of

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[237] *Takeover Code*, *supra* note 3, Rule 8.3 at E21.

[238] *Takeover Code, supra* note 3, Rule 8.3(a)-(b) at E21; *Takeover Code*, *supra* note 3, Rule 8, note 5(a)(ii) at E27.

exploring this possible amendment if the current amendments fail to live up to their goals.

In sum, the United Kingdom's 2011 Takeover Code amendments were almost spot-on in their repairs of target shareholder protections in hostile takeovers. The one year review has returned positive results. The review supports the amendments and conclude, that at least within the first year, the amendments have protected target shareholders but not overreached to the point of chilling the M&A market. The amendments as they were enacted will continue protect target companies and target shareholders who are under siege from a hostile bidder. The amendments will increase shareholder access to information and allow them to choose the best offer presented to them, or reject all offers, without being bear-hugged into submission during the "virtual bid" period. A potential incremental increase in shareholder protection may be able to be achieved by exploring the possibility of limiting, but not totally excluding, the voting rights of the few "short-term" investors who also have short positions in a security relevant to the transaction. Moreover, The Code Committee's commitment to the Board Neutrality Rule appears to be the strongest protection for established target company shareholders that the Takeover Code can provide.[239] Lastly, The Code Committee was smart in not committing to an almost draconian measure that likely would have harmed target shareholders as much or more than it would have protected them. The measured response from The Panel may be remembered as a great stride forward in modern M&A practice. Only time will tell.

CONCLUSION

The Kraft takeover of Cadbury flared tempers around the United Kingdom. Although The Panel operated quickly, and in what could have been viewed as a reactionary manner, its response to the Kraft-Cadbury takeover will likely be remembered as a strong improvement in the United Kingdom's takeover regulation. The Announcing All Bidders requirement and the mandatory twenty-eight day "Put Up or Shut Up" deadline should do an excellent job of addressing the pre-amendment problems with the "virtual bid." The

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239 *See generally* Part III.A.

inducement fee ban could allow target company shareholders more flexibility and freedom to entertain opposing or topping bids. The enhanced disclosure requirements will increase information and aide in the decision making of the shareholders as well as the companies involved in a transaction. These amendments are designed to tilt the balances of power back to a more equivalent position between acquiring companies and target companies in hostile takeovers. Furthermore, The Code Committee did not overreach when it adopted these amendments and thus the amendments will not act as too burdensome of a detriment to the mergers and acquisitions market. Therefore, the 2011 Takeover Code amendments will likely be successful in achieving their goals and protecting target shareholders to an optimal extent.