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A Failure of Substance and a Failure of Process: The Circular Odyssey of Oklahoma's Corporate Law Amendments in 2010, 2012, and 2013

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A FAILURE OF SUBSTANCE AND A FAILURE OF PROCESS: THE CIRCULAR ODYSSEY OF OKLAHOMA'S CORPORATE LAW AMENDMENTS IN 2010, 2012, AND 2013

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> *When we passed [the bill in 2010], . . . Chesapeake came in here and told us we had to do this in order to protect Oklahoma corporations from the likes of Carl Icahn.*[1]
>
> *And then [in 2012] we bailed ONEOK and OGE out . . . because, in bailing out Aubrey [McClendon and Chesapeake in 2010], we caught up a couple of good corporations who've been doing what they were supposed to be doing.*[2]
>
> *And so now that [it's 2013 and Chesapeake] is governed in a different manner, it looks like we're undoing the sweetheart deal [of 2010]. That probably doesn't give a very good perception to the public.*[3]

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1. *Bill Information for HB 1646: Video*, OKLA. ST. LEGISLATURE (Feb. 12, 2013), http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1646&Session=1300 (follow "Video"; then follow "HB 1646" hyperlink) [hereinafter 2013 House Debate] (quoting Rep. Cory Williams (D-Stillwater) at 23:50).
2. *Id.* (quoting Rep. Williams at 58:57).
3. *Id.* (quoting Rep. Mike Reynolds (R-Oklahoma City) at 22:48).

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We may suspect that legislators sway legislative outcomes to favor those who wield power,[4] but rarely do legislators expressly admit to enacting special-interest legislation that favors an individual or a corporation. Oklahoma legislators, however, candidly admitted to enacting legislation in 2010 to protect Aubrey McClendon—the colorful co-owner of an NBA franchise, the Oklahoma City Thunder—and the corporation that he co-founded—Chesapeake Energy Corporation (Chesapeake)—from famed corporate raider Carl Icahn.[5]

When enacting that special-interest legislation to protect McClendon and Chesapeake, Oklahoma legislators overshot their mark, prompting them, in 2012, to enact additional special-interest legislation.[6] ONEOK, Inc. (ONEOK) and OGE Energy Corp. (OGE), two of Oklahoma's largest employers, requested that 2012 change, which exempted them from the earlier enactment.[7]

While legislators intended the 2010 enactment to protect Chesapeake from significant change at the managerial level, the market reacted negatively to decisions and failures by Chesapeake's management that came to light in the spring of 2012—shortly before Chesapeake was to hold its annual shareholders meeting. Despite the 2010 enactment, and due to pressures from the market, including those from Carl Icahn, significant turnover occurred at the board and executive levels of Chesapeake.[8] Chesapeake's newly installed managers disfavored the "protections" provided by the 2010 enactment and alerted the market—indirectly threatening Oklahoma legislators—of their willingness to reincorporate to Delaware if the 2010 enactment was not repealed.[9] Consequently, in 2013, the Oklahoma Legislature amended the same provision of the state's corporate code for the third time in four years,

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4. *See generally* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 328–31 (3d ed. 2002) (discussing public purpose requirements, rules against special legislation, and rules requiring uniformity); *id.* at 328 (referencing "various forms of rent-seeking by private groups at the public's expense"); *see also* Sen. Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 YALE L. & POL'Y REV. 235, 240–41 (2010) (discussing "legislative capture").

5. *See supra* notes 1-3 and accompanying text.

6. *See infra* Part II.A-B.

7. *See infra* Part II.A.

8. *See, e.g.*, Appendix A.

9. *See infra* Part III.A.7.

effectively repealing the 2010 and 2012 acts.[10] The legislature's odyssey had come full circle.[11]

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Following a brief description of the corporate law that Oklahoma's recent enactments affected, Part I addresses the 2010 enactment (2010 Amendment) intended to protect McClendon and Chesapeake. Part II addresses the 2012 enactment (2012 Amendment) intended to provide relief to ONEOK and OGE from the 2010 Amendment. Part III addresses the 2013 enactment (2013 Amendment) that effectively repealed the 2010 and 2012 Amendments. This article offers criticism of those amendments, including their substance and the processes by which the legislature adopted them. Moreover, because Oklahoma's corporate law was modeled after that of Delaware, which is the leading provider of corporate law,[12] this article will also contrast the substance of, and process behind, the Amendments with that of Delaware's law.

Each of the 2010, 2012, and 2013 Amendments dealt with a single provision of Oklahoma's corporate code.[13] Under the internal affairs doctrine, Oklahoma regulates matters internal to the operations of corporations that are incorporated in Oklahoma.[14] Because each of Chesapeake, ONEOK, and OGE is incorporated in Oklahoma,

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10. *See infra* Part III.B.

11. Though this article focuses on events that occurred in Oklahoma, the import of the article extends beyond its borders, and is reflective of events that have occurred in many states. State legislatures commonly act to protect corporations operating with their borders from acquisition—whether it is Arizona acting to protect Greyhound; Connecticut acting to protect Aetna; Missouri acting to protect TWA; Pennsylvania acting to protect Hershey's; or Washington acting to protect Boeing. *See* DALE A. OESTERLE, THE LAW OF MERGERS AND ACQUISITIONS 615-16 (3d ed. 2005); Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 136-38 (1987); Michael J. de la Merced & Andrew Ross Sorkin, *Some Rivals Weigh Bids for Cadbury*, N.Y. TIMES, Nov. 23, 2009, at B1. Fearing the impact of an acquisition on the local economy, state legislators enact legislation in hopes of impeding unwanted acquisitions. *See* Romano, *supra*, at 136-38.

12. *See* Steven J. Cleveland, *Process Innovation in the Production of Corporate Law*, 41 U.C. DAVIS L. REV. 1829, 1832 (2008); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749 *passim* (2006).

13. 18 OKLA. STAT. § 1027 (Supp. 2013).

14. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89-91 (1987) (discussing internal affairs doctrine, and noting "[i]t thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares").

Oklahoma may regulate their internal affairs, such as their corporate governance structures.[15]

Corporate shareholders generally centralize the management of their business in the hands of directors, who typically possess greater expertise and are better able to oversee business operations.[16] Directors remain accountable to shareholders, who periodically elect them. Most jurisdictions, including Oklahoma prior to the 2010 Amendment, generally provide that the shareholders elect directors to one-year terms.[17] In most jurisdictions, including Oklahoma prior to 2010 Amendment, the one-year term for a board member is a statutory default, from which the board and shareholders are empowered to deviate by, for example, opting for a staggered board.[18] Instead of a single class of directors, all of whom serve one-year terms, a staggered board classifies directors into more than one class, with each director serving a multi-year term.[19] Corporations that choose to stagger their boards most commonly classify their boards into three classes, with board members in each of the three classes serving three-year terms and with only one class of directors coming up for election each year.[20]

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15. *See id.* As a corollary, Oklahoma cannot regulate the internal affairs of corporations that are incorporated in other states, even though such corporations may operate or be headquartered in Oklahoma. *See id.*; VantagePoint Venture Partners v. Examen, Inc., 871 A.2d 1108 (Del. 2005). Consequently, Oklahoma's corporate code is inapplicable to many corporations that operate in Oklahoma, but are organized under the laws of another state, such as Devon and the Williams Companies, each of which is organized under the laws of Delaware. *See* Devon Energy Corp., Quarterly Report (Form 10-Q) (Nov. 6, 2013) (reflecting incorporation in Delaware); The Williams Cos., Inc., Quarterly Report (Form 10-Q) (Oct. 31, 2013) (same).

16. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2011) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . ."); 18 OKLA. STAT. § 1027(a) (2011) (virtually same); *see also* MODEL BUS. CORP. ACT § 8.01 (2007) (virtually same).

17. *See* MODEL BUS. CORP. ACT § 8.05(b) ("The terms of all . . . directors expire at the next . . . annual shareholders' meeting following their election . . . ."); *see also* DEL. CODE ANN. tit. 8, § 211(c) ("If there be a failure to hold the annual meeting [of shareholders] . . . , the Court of Chancery may summarily order a meeting to be held upon the application of any stockholder or director."); 18 OKLA. STAT. § 1056(c) (virtually same).

18. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(d); 18 OKLA. STAT. § 1027(d) (Supp. 2013); *see also* MODEL BUS. CORP. ACT § 8.06.

19. *See, e.g.*, 18 OKLA. STAT. § 1027(d).

20. *Id.* Delaware, Oklahoma, and the rules of the NYSE cap the number of classes at three. *See* DEL. CODE ANN. tit. 8, § 141(d) ("The directors . . . may . . . be divided into 1, 2 or 3 classes . . . ."); 18 OKLA. STAT. § 1027(d); NYSE, LISTED COMPANY MANUAL Rule 304, *available at* http://nysemanual.nyse.com/lcm/sections/ (follow "Section 3" hyperlink) ("The

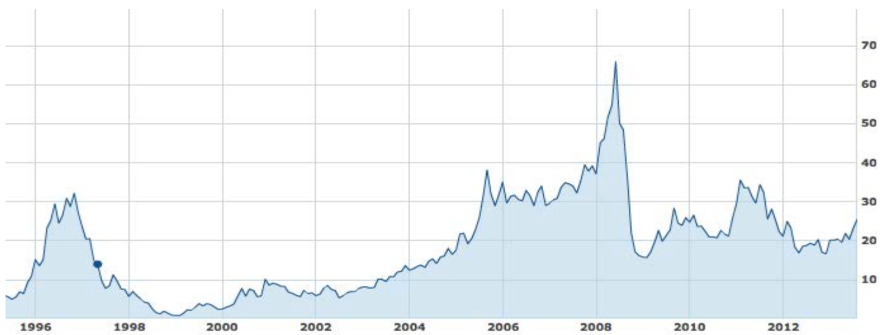
Perspectives on staggered boards differ. On the one hand, a one-year term for board members may enhance accountability to shareholders, as dissatisfied shareholders may elect an entirely new board at a single meeting.[21] On the other hand, a staggered board may increase managerial stability and encourage the board to plan and implement long-term strategy.[22]

I. The 2010 Amendment

A. Events Leading to the 2010 Amendment

In the years leading to the 2010 Amendment, investors and commentators questioned Chesapeake's managerial decisions. After climbing dramatically for a decade, the company's stock price declined precipitously in 2008.[23]

Chesapeake's Stock Price[24]
August, 1995 – August, 2013



Exchange will refuse to authorize listing where the Board of Directors is divided into more than three classes. Where classes are provided, . . . directors' terms of office should not exceed three years.").

21. *See supra* note 17.

22. *See* Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy*, 54 STAN. L. REV. 887, 897-98 (2002). In this light, staggered boards may be viewed as akin to the U.S. government, where the electorate is unable to displace all of the members of Congress in one fell swoop; instead the terms of the senators and representatives are multi-year and staggered, so that some experienced politicians are not up for election each year. *See* U.S. CONST. art. I, §§ 2-3.

23. *Chesapeake Energy Corporation*, YAHOO! FINANCE, http://finance.yahoo.com (search "Quote Lookup" for "CHK"; then follow "Historic Prices" hyperlink; then enter "Jan. 01, 1998" for "Start Date"; then enter "Jan 01, 2009" for "End Date"; then select "Weekly" for "Set Date Range"; then select "Get Prices").

24. *Chesapeake Energy Corporation*, YAHOO! FINANCE, http://finance.yahoo.com/echarts?s=CHK+Basic+Chart&t=1d (follow "Custom" tab; then enter "08-01-1995" for "Start Date"; then enter "08-31-2013" for "End Date").

In particular, several board decisions invited skepticism. First, the compensation committee of Chesapeake's board, which generally should pursue a compensation scheme that aligns the interests of the chief executive officer (CEO) with those of the shareholders, generously compensated the CEO.[25] Despite Chesapeake's falling stock price in 2008, and despite the company's performance trailing that of its peers,[26] Chesapeake's CEO received compensation worth over $112 million for the year,[27] which was the sixth highest compensation received by anyone working for a reporting company that year.[28] Second, as its stock price plummeted in 2008, Chesapeake's board agreed to purchase from its CEO a number of antique maps for $12 million.[29] The board's

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25. *Compare Chesapeake Energy Corporation Proxy Alert*, ISS PROXY ADVISORY SERVS. 2 (May 18, 2011) [hereinafter *Chesapeake Energy Corporation Proxy Report*] ("The board's repeated failure to link CEO pay to pre-established performance criteria . . . indicates poor stewardship by the Compensation Committee of the company's pay practices."), *with* Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 4 (Apr. 19, 2013) ("As a part of our commitment to exceptional governance practices, we want to ensure that the Company's executive compensation programs appropriately tie executive pay to Company performance."). *See generally* Doreen E. Lilienfeld & Veronica M. Wissel, *Executive Compensation Planning for Pre-IPO Companies*, 44 SEC. REG. & L. REP. 157, 157 (Jan. 23, 2012) ("Shareholder advisory groups and institutional shareholders have also become more active in policing executive compensation policies and voting against . . . directors . . . that do not measure up to their standards.").

26. *See Chesapeake Energy Corporation Proxy Report*, *supra* note 25, at 2 (noting Chesapeake's "pay-for-performance disconnect" in "a time of sustained relative TSR [total shareholder return] underperformance").

27. Joshua Schneyer et al., *Special Report: Inside Chesapeake, CEO Ran $200 Million Hedge Fund*, REUTERS (May 2, 2012, 6:46 PM), http://www.reuters.com/article/2012/05/02/us-chesapeake-mcclendon-hedge-idUSBRE8410GG20120502 (discussing McClendon's "total compensation package worth $112 million . . . includ[ing] a one-time cash bonus of $75 million to help him meet requirements for paying the costs of his personal stakes in Chesapeake-owned wells"). The Founder's Well Participation Program is discussed *infra* Part III.A.6.

28. David Goldman, *The Top 10 Highest Paid CEOs Are...: Ten CEOs Take Home More Than $70 Million in 2008, with Blackstone's Stephen Schwarzman Topping the List with More Than $700 Million in Compensation*, CNN MONEY (Aug. 14, 2009, 10:06 AM), http://money.cnn.com/2009/08/14/news/companies/highest_paid_ceos/.

29. Following a lawsuit by shareholders, Chesapeake rescinded the purchase. Russell Gold, *Chesapeake Tweaks Big Payday*, WALL ST. J., Nov. 3, 2011, at B1 ("As part of a legal settlement, Mr. McClendon agreed to buy back, with 2.28% interest, a collection of more than 500 antique maps . . . [that he] sold to the firm for $12.1 million in December 2008 after financial stress forced margin calls."); Anna Driver & Brian Grow, *Special Report: Chesapeake CEO Took $1.1 Billion in Shrouded Personal Loans*, REUTERS (Apr. 18, 2012,

generosity seemed tied to the personal needs of its CEO, not to the company's performance. To cover a margin call,[30] McClendon involuntarily sold 30,000,000 shares of Chesapeake—or approximately 94% of the shares he owned—over the course of three days in October 2008.[31] Following those sales, the board responded, but not as the market might have expected;[32] the board amended McClendon's employment agreement to reduce his required investment in Chesapeake,[33] which weakened the link between his personal interests and the interests of Chesapeake's shareholders.

Chesapeake's shareholders were restless, worried that the company's staggered-board governance regime unduly insulated the board members and rendered them insensitive to shareholder concerns. Earlier in 2008, a shareholder precatory proposal to de-stagger the board received

8:04 AM), http://www.reuters.com/article/2012/04/18/us-chesapeake-mcclendon-loans -idUSBRE83H0GA20120418.

30. Loosely speaking, when one buys stock on margin, one buys on credit—with the stock serving as collateral for the debt—but creditors become uneasy when the stock falls in value. *See generally* Marcel Kahan, *Securities Laws and the Social Costs of "Inaccurate" Stock Prices*, 41 DUKE L.J. 977, 993 (1992) (sourcing margin maintenance payments and describing how a significant drop in stock price can force an investor to sell to make the requisite payments); Eugene N. White, *The Stock Market Boom and Crash of 1929 Revisited*, 4 J. ECON. PERSP. 67, 68 (1990) (referencing the "vertical price drops on Black Thursday, October 24, and Black Tuesday, October 29, [that] forced margin calls and distress sales of stocks, prompting a further plunge in prices").

31. *See* Chesapeake Energy Corp., Current Report (Form 8-K) Exhibit 99.2 (Oct. 14, 2008); Aubrey K. McClendon, Statement of Changes in Beneficial Ownership (Form 4) (Oct. 10, 2008). On October 7, 2008, McClendon owned 33,454,424 shares of Chesapeake, and immediately after October 10, 2008, McClendon owned 1,931,501 shares of Chesapeake. *See* Aubrey McClendon, Statement of Changes in Beneficial Ownership (Form 4) (Oct. 10, 2008). *Compare* Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 28 (Apr. 29, 2008) (reflecting McClendon's beneficial ownership of 29,529,975 shares of Chesapeake), *with* Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 32 (Apr. 30, 2009) (reflecting McClendon's beneficial ownership of 502,298 shares of Chesapeake).

32. John Bussey, *The Business: What Chesapeake Owes Shareholders*, WALL ST. J., May 11, 2012, at B1 (criticizing the board for failing to "tighten oversight of Mr. McClendon because of his failed personal finances"); Schneyer et al., *supra* note 27 (discussing how McClendon selling over 90% of his shares "contributed to an 88 percent fall in Chesapeake's share price").

33. Chesapeake Energy Corp., Current Report (Form 8-K) Exhibit 10.2.1 (Jan. 7, 2009) (reducing McClendon's required equity investment from 500% to 200% of his annual salary and cash bonuses); Nell Minow, *#payfail at Chesapeake Energy*, CBS NEWS (June 15, 2011, 7:45 AM), http://www.cbsnews.com/8301-505123_162-48140708/payfail-at-chesapeake-energy/ (noting the board "allowed [McClendon] to amend his employment agreement to reduce his required equity ownership when he had a margin call").

approval from a majority of those shares that voted.[34] In 2009, a shareholder precatory proposal to de-stagger the board received approval by a majority of outstanding shares.[35] As precatory proposals, however, those proposals were non-binding;[36] only the board of directors could initiate the change that shareholders desired.[37] Despite the shareholders' preference, the board was not legally required to initiate, and did not initiate, any action to de-stagger the board. In 2010, a particular shareholder entered the mix.

Famed corporate raider Carl Icahn, who strongly opposes staggered boards,[38] acquired a stake in Chesapeake during the first quarter of 2010—a stake which continued to rise during the summer of 2010.[39] During 2010, Icahn became the second largest owner of Chesapeake common stock.[40] Although Icahn commonly announces to the public the

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34. *See* Chesapeake Energy Corp., Proxy Statement (Form 14A) 15-18 (Apr. 29, 2008); Chesapeake Energy Corp., Current Report (Form 8-K) Exhibit 99.1 (June 19, 2009) (reflecting approval by 61% of the votes cast, but only 45% of the shares outstanding).

35. *See* Chesapeake Energy Corp., Current Report (Form 8-K) Exhibit 99.1 (June 19, 2009) (reflecting approval by 59% of the shares outstanding).

36. JESSE H. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 537 (8th ed. 2013) ("Not infrequently, corporate managements have simply disregarded precatory proposals that received a majority shareholder vote.").

37. *See* 18 OKLA. STAT. § 1077 (2011) (requiring that amendments to the certificate of incorporation be initiated by the board and then submitted to shareholders for approval).

38. Carl Icahn, *The Absurdity of the Staggered Board*, ICAHN REP. (June 15, 2008), *available at* http://www.icahnreport.com/report/2008/06/the-staggered-b.html (password-protected site, material on file with author).

39. *See* Icahn Capital LP, Institutional Investment Managers Ownership Report (Form 13F) (May 17, 2010) (listing ownership of 2,122,949 shares of common stock of Chesapeake Energy Corp. for the quarter ending on March 31, 2010); Icahn Capital LP, Institutional Investment Managers Ownership Report (Form 13F) (Aug. 16, 2010) (listing ownership of 12,739,478 shares of common stock of Chesapeake for the quarter ending on June 30, 2010); Icahn Capital LP, Institutional Investment Managers Ownership Report (Form 13F) (Nov. 15, 2010) (listing ownership of 16,643,030 shares of common stock of Chesapeake for the quarter ending on Sept. 30, 2010). During 2010, Icahn controlled as much as 5.8% of Chesapeake. *See* Carl C. Icahn, Beneficial Ownership Report (Schedule 13D) 16 (Dec. 17, 2010) (listing ownership of 38,629,417 shares of common stock of Chesapeake). However, during the first quarter of 2011, Icahn sold the majority of his stake in Chesapeake. *Compare* Icahn Capital LP, Institutional Investment Managers Ownership Report (Form 13F) (May 17, 2011) (listing ownership of 1,954,908 shares of common stock of Chesapeake for the quarter ended March 31, 2011), *with* Icahn Capital LP, Institutional Investment Managers Ownership Report (Form 13F) (Feb. 14, 2011) (listing ownership of 20,880,627 shares of common stock of Chesapeake for the quarter ended December 31, 2010).

40. *See* Alex Cameron, *McClendon: Don't Fear the Raider* (Feb. 24, 2011, 10:42 PM), NEWS9.COM, http://www.news9.com/story/14136005/mcclendon-dont-fear-the-raider.

changes that he would like implemented by the corporations in which he has invested,[41] he remained relatively silent about his investment in Chesapeake.[42] Icahn loomed as a threat to Chesapeake's management.[43] Although he could not have run a rival slate of director-nominees at Chesapeake's 2010 annual meeting of shareholders,[44] Icahn continued to accumulate shares of Chesapeake during the summer and fall of 2010,[45]

41. See Bob Tita & Chelsey Dulaney, *Ichan Takes Manitowoc Stake, Urges Split of Crane and Kitchen Businesses*, WALL ST. J., Dec. 30, 2014, at B3.

42. *See* Ryan Dezember & Daniel Gilbert, *Gas Titan's Blueprint Rests on More Deals*, WALL ST. J., Jan 26, 2012, http://online.wsj.com/news/articles/SB100014240529702046242 04577183270372638912 ("Mr. Icahn was mum about his intentions . . . ."). Companies that carry too much debt have prompted Icahn to invest and push for debt reduction, which appears to have been a motivating factor for his investment in Chesapeake. *See id.* ("[S]hortly after [Icahn's] investment [,Chesapeake] unveiled a plan to trim long-term debt 25% by the end of 2012 . . . ."); *see also* Vinod Venkiteshwaran et al., *Is Carl Icahn Good for Long-Term Shareholders? A Case Study in Shareholder Activism*, J. APPLIED CORP. FIN., Fall 2010, at 45, 50 (noting Icahn's historic practice of targeting firms that carry too much debt). It was subsequently reported that debt-reduction at Chesapeake, in part, motivated Icahn. *See* Cameron, *supra* note 40 (video at 2:05:00).

43. *See generally* Lilienfeld & Wissel, *supra* note 25, at 157 ("[I]n the event of an uninvited change in ownership, a new owner may be more likely to terminate senior management.").

44. At its annual meeting to be held in June 2010, Chesapeake's shareholders were scheduled to elect three of nine directors. *See* Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 3 (Apr. 30, 2010) (setting forth business to be conducted). If Icahn had wanted to nominate individuals for election to Chesapeake's board at that meeting, then he would have had to notify the company by March 14, 2010. *See* Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 67 (Apr. 30, 2009) ("Our annual meeting of shareholders is generally held on the second Friday of June. Assuming that our 2010 annual meeting is held on schedule, we must receive notice of your intention to introduce an item of business at that meeting no earlier than February 12, 2010 and no later than March 14, 2010. The chairman of the meeting may disregard any nomination of a candidate for director or refuse to allow the transaction of any business under a proposal if such is not made in compliance with the procedures in our Bylaws or other requirements of rules under the Securities Exchange Act of 1934."). Despite accumulating shares of Chesapeake during the spring of 2010, Icahn never notified Chesapeake of an intention to, and thus could not have, run a rival slate of nominees for the director vacancies to be filled at Chesapeake's 2010 annual meeting.

45. *See supra* note 39 and accompanying text (discussing Icahn's increasing stake in Chesapeake). After Chesapeake promised "to sell off assets and pledged to pay down debt[,]" its "stock climbed to $35.61 in February 2011, a level it hasn't reached since." Ryan Dezember & Daniel Gilbert, *Icahn Expected to Disclose Stake in Chesapeake*, WALL ST. J., May 13, 2012, http://online.wsj.com/news/articles/SB1000142405270230350550457740255 3480182824. A few weeks after Chesapeake issued that promise, Icahn liquidated enough of his Chesapeake shares to fall below the 5% ownership threshold. *Id.* By reducing his

suggesting that he would continue to push the company to implement changes to increase shareholder value. Perhaps Icahn hoped to prompt Chesapeake to make such changes without bearing the expense of trying to unseat directors in 2010,[46] while preserving the possibility of doing so in 2011.[47]

The market trend against staggered boards[48]—when added to the shareholders' precatory proposals to de-stagger Chesapeake's board and Icahn's increasing ownership stake in Chesapeake—likely amplified the pressure on Chesapeake's management to de-stagger.[49] Bucking market convention (e.g., the trend toward de-staggered boards) when contrary to shareholders' preferences can jeopardize a company's future, as well as

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holdings, Icahn ended his obligation to disclose such holdings. *See* 15 U.S.C. § 78m(d) (2012).

46. A proxy contest is the typical means by which a dissident shareholder gets her own nominees elected to the board over those who were nominated by the corporation. Proxy contests may be extraordinarily expensive. *See* CHOPER ET AL., *supra* note 36, at 535–56. While the corporation (and indirectly the shareholders) bears the expense of campaigning for the corporation's nominees, the dissident shareholder bears the expense of campaigning for her nominees, *see id.* at 536. The high cost of the proxy contest and the concentration of costs on the dissident serve as deterrents to launching a proxy contest. *Id.*

47. For example, Icahn has threatened to, and sought to, displace incumbent directors with his preferred director nominees. *See* Annie Gasparro, *Icahn Seeks Ouster of Clorox's Board*, WALL ST. J., Aug. 20, 2011, at B3 (noting Icahn's statement of intent "to nominate [eleven] people including himself, to replace Clorox Co.'s whole board"); *Kerr-McGee Sues to Fend Off Icahn, Investors*, L.A. TIMES, Mar. 12, 2005, http://articles.latimes.com/2005/mar/12/business/fi-Icahn12 (stating that after acquiring a sizeable minority stake, "Icahn and Rosenstein . . . said . . . if Kerr-McGee continued to ignore their suggestions, they would seek election as directors at the shareholder meeting in May."); *see also* Icahn Capital LP, Beneficial Ownership Report (Schedule 13D) Exhibit 1 (Dec. 6, 2011) (stating that Icahn was prompted to launch a tender offer for Commercial Metals Co., after he "tried and failed to reason with the Board and management . . . [regarding] the lack of good corporate governance . . . includ[ing] . . . the retention of a staggered board").

48. *See infra* Part I.C.1.a (charting market trend). *See generally* GLASS LEWIS & CO., PROXY PAPER GUIDELINES: 2012 PROXY SEASON 5 (U.S. ed. 2012) ("Glass Lewis favors the repeal of staggered boards in favor of the annual election of directors. We believe that staggered boards are less accountable to shareholders than annually elected boards. Furthermore, we feel that the annual election of directors encourages board members to focus on protecting the interests of shareholders."); INSTITUTIONAL S'HOLDER SERVS. INC., 2011 U.S. PROXY VOTING GUIDELINES SUMMARY 17 (2011) ("Vote AGAINST proposals to classify (stagger) the board. Vote FOR proposals to repeal classified boards and to elect all directors annually.").

49. *See* Re-Jin Guo et al., *Undoing the Powerful Anti-Takeover Force of Staggered Boards*, 14 J. CORP. FIN. 274, 282 (2008) ("The existence of prior shareholder proposals to de-stagger the board . . . is strongly related to the firms' decision to de-stagger.").

its managers' futures with that company.[50] In the face of such pressure, Chesapeake turned to the Oklahoma Legislature for relief during 2010. If the legislature required Chesapeake (or rather, a more generic category of companies that included Chesapeake) to have a staggered board, then Chesapeake could not lawfully amend its charter to de-stagger its board, despite calls from shareholders or the market to do so.[51] It merits emphasis that a staggered board of directors serves as an anti-takeover device.[52]

B. The Legislative Process of the 2010 Amendment

During 2009, the Oklahoma Legislature contemplated statutory amendments regarding limited partnerships. The Senate and the House passed separate versions of the same bill (each named the "Uniform Limited Partnership Act of 2009"), but neither version was acceptable to the other legislative body.[53] Those bodies formed two successive joint conference committees, each of which produced an ultimately rejected bill.[54] A third joint conference committee failed to reach any agreement.[55] The 2009 legislative session ended without action on those bills, none of which addressed corporate boards of directors.

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50. *See* Che Odom, *As Proxy Season Looms, Experts Offer Tips for Positive Shareholder Votes*, CORP. COUNS. WKLY., Jan. 25, 2012, at 25, 25 (Jan. 25, 2012) ("[M]anagement must keep in mind the wishes of both major institutional investors and proxy advisors when crafting its message.").

51. *See* 18 OKLA. STAT. § 1006(B)(1) (2011) ("[T]he certificate of incorporation may also contain . . . [a]ny provision for the management of the business . . . of the corporation . . . if such provision[is] not contrary to the laws of this State.").

52. *See* Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 17 (Apr. 30, 2009) (describing a staggered board as an "Essential Takeover Defense").

53. *See* S. 1332, 52d Leg., 1st Sess. (Okla. 2009); H. Amend. to S. 1132, 52d Leg., 1st Sess. (Okla. 2009); *see also Bill Information for SB 1132 (2009-2010)*, OKLA. ST. LEGISLATURE, http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1132&Session=1000 (follow "History" hyperlink) (noting House Amendments to Senate Bill 1132 following initial passage by the Senate, and then the Senate's rejection of such amendments following passage by the House and return to the Senate).

54. *Bill Information for SB 1132* (2009-2010), *supra* note 53.

55. *Id.* (noting third conference committee edits were rejected and a further conference requested).

In March 2010, the Senate appointed conferees to a fourth joint conference committee to resume discussions regarding the prior year's bills; the House named its conferees on April 27, 2010.[56] The conferees apparently made little progress.

During the 2010 legislative session, Chesapeake resorted to the Oklahoma Legislature for anti-takeover protection, but it did so too late for the introduction of a new bill.[57] All was not lost for Chesapeake, however, because Oklahoma's legislative rules do not prohibit the amendment of a timely introduced bill. Nonetheless, Chesapeake faced another procedural hurdle, but one that was not insurmountable. The Oklahoma Constitution generally requires that each bill address a single subject, preventing Chesapeake from simply tacking its preferred language to any existing bill.[58] Because there was an existing bill concerning business law—The Uniform Limited Partnership Act of 2010—already before the state legislature, legislators revised that bill to include the language favored by Chesapeake.[59] The enrolled bill totaled 115 pages, almost all of which dealt with limited partnerships and were inapplicable to Chesapeake, a corporation.[60] Only the last few pages of the bill—that is, only two substantive provisions—addressed corporate

56. *Id.*

57. *See, e.g.*, *Legislative Deadlines*, OKLA. ST. LEGISLATURE, http://www.okhouse.gov/legislation/LegislativeDeadlines.aspx (last visited Aug. 16, 2013) (setting forth deadlines for bill draft requests, substantive language, and filing of legislation, all of which precede the commencement of the session).

58. OKLA. CONST. art. V, § 57 ("Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title . . . ."); Douglas v. Cox Retirement Props., Inc., 2013 OK 37, ¶ 4, 302 P.3d 789, 792 ("This provision is commonly known as the single-subject rule. The purposes of the single-subject rule are to ensure the legislators or voters of Oklahoma are adequately notified of the potential effect of the legislation and to prevent logrolling. . . . Logrolling is the practice of ensuring the passage of a law by creating one choice in which a legislator or voter is forced to assent to an unfavorable provision to secure passage of a favorable one, or conversely, forced to vote against a favorable provision to ensure an unfavorable provision is not enacted."). Because Chesapeake's preferred language would have amended an existing statutory provision, an exception to the single-purpose requirement may have applied. OKLA. CONST. art. V, § 57 ("except . . . bills adopting a . . . revision of statutes").

59. *See* S. 1132, 52d Leg., 2d Sess. (Okla. 2010) (as enrolled June 1, 2010). The legislature revised the bill to include language that insulated Chesapeake from the threat of an acquisition. *See infra* Part I.C.2.c.

60. S. 1132 *passim*.

law.[61] The first of those substantive sections required staggered boards for certain large corporations for a period of years,[62] and the second of those sections limited the ability of shareholders of certain large corporations to act without convening a meeting.[63]

On May 25, 2010, the revised bill was read before the Senate.[64] The Senate passed the bill on May 26, 2010,[65] and the House passed the bill on May 27, 2010,[66] without question, objection, or debate,[67] just before the conclusion of Oklahoma's legislative session.[68] The Governor signed the bill on June 7, 2010.[69]

C. Criticisms of the 2010 Amendment

1. Criticisms of Substance

In 2010, the Oklahoma Legislature amended its code to require any large, publicly traded corporation organized under the laws of the state to have a staggered board of directors until 2015, after which time, such a corporation could opt out of the requirement.[70] This amendment dramatically altered the governance regime of those corporations to which the statute applied. Prior to the 2010 Amendment, the legislature's statutory default was a non-staggered board.[71] So, for publicly traded corporations, the 2010 Amendment not only flipped the

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61. *Id.* §§ 105-106 (as enrolled June 1, 2010). In essence, there were two substantive provisions, and one procedural provision that provided an effective date for the substantive provisions. *Id.* §§ 105, 106, 110 (as enrolled June 1, 2010).

62. *Id.* § 105 (as enrolled June 1, 2010).

63. *Id.* § 106 (as enrolled June 1, 2010). The second substantive section, which also lessened the likelihood of a takeover, exceeds the scope of this article.

64. *Bill Information for SB 1132 (2009–2010)*, *supra* note 53.

65. *Id.*

66. *Id.*

67. Okla. House of Representatives, *House Session—Legislative Day 69*, OKLA. ST. LEGISLATURE (May 27, 2010), http://www.oklegislature.gov/ (follow "Video"; then follow "House Video"; then follow "2010"; then follow "House Session—Legislative Day 69 May 27, 2010"; then follow "SB 1132 Sherrer" hyperlink) [hereinafter 2010 House Debate] (quoting Rep. Ben Sherrer (D-Pryor Creek) at 6:25:45 regarding S. 1132, 52d Leg., 2d Sess. (Okla. 2010)).

68. Note that May 27, 2010 was the last Thursday of the month. *See* OKLA. CONST. art. V, § 26 ("The Legislature shall meet in regular session . . . and the regular session shall be finally adjourned sine die not later than five o'clock p.m. on the last Friday in May of each year.").

69. *Bill Information for SB 1132 (2009–2010)*, *supra* note 53.

70. S. 1132 § 105 (as enrolled June 1, 2010).

71. 18 OKLA. STAT. § 1027(d) (Supp. 2009).

statutory default, but also converted a *statutory default*—from which the parties could deviate by agreement—into a *statutory requirement* for a period of years. Prior to the 2010 Amendment, the legislature entrusted to a corporation's board and shareholders the decision of whether that corporation should have a staggered or non-staggered board.[72] The 2010 Amendment legislatively displaced informed decisions by publicly traded Oklahoma corporations—acting through their boards and shareholders—to *not* have staggered boards.[73]

If the Oklahoma Legislature believed that, for publicly traded corporations, staggered boards are superior to non-staggered boards, then the legislature should require staggered boards. But this the legislature did not do, as it required staggered boards only until 2015, after which the affected corporations could opt out.[74] If the Oklahoma Legislature believed that publicly traded corporations—acting through their boards and shareholders—should be free to determine whether to have staggered boards, then the legislature should allow an opt-out of the statutory default. But this the legislature did not do, as the opt-out period did not begin until 2015.[75]

a) Deviation from Market Trend

Did a market trend motivate the Oklahoma Legislature to require staggered boards for its large, publicly traded corporations? No, for large, publicly traded corporations, the market trended away from, not toward, staggered boards. In 2004, over 50% of the S&P 500 companies had staggered boards, but at the end of 2012, only 17% of the S&P 500 companies had staggered boards.[76] The Oklahoma Legislature was bucking the market trend, and in so doing, it deviated from its common refrain of favoring market solutions over legislative ones.[77]

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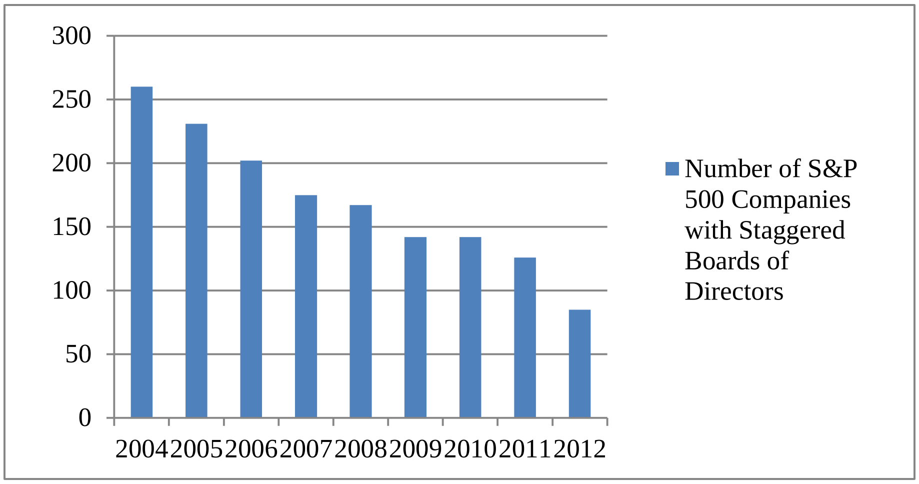
72. *See id.*
73. S. 1132 § 105 (as enrolled June 1, 2010).
74. *Id.*
75. *Id.*
76. *See infra* note 78 and accompanying text.
77. *See generally* 2013 House Debate, *supra* note 1 (quoting Rep. Cory Williams (D-Stillwater) at 58:37) ("Why in the world would we [legislators] be getting in the way of how a corporation runs itself and how the shareholders elect their board?"); *id.* (quoting Rep. Scott Inman (D-Oklahoma City) at 39:24) ("[W]e were asked to come in and run special legislation that ran contrary to free market principles . . . . We're going to restrict . . . how corporations can do things for basically protectionist purposes . . . .").

S&P 500 Companies with Staggered Boards of Directors[78]



b) Statutorily-Mandated, Value-Reducing Corporate Governance

The market is probably trending away from staggered boards because, generally speaking, staggered boards negatively impact firm value.[79]

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78. Daniel Gilbert, *Oklahoma Board Rule Benefits Chesapeake*, WALL ST. J., July 11, 2011, at B1 (noting that, in 2011, less than one-third of the companies comprising the S&P 500 had staggered boards, down from 53% in 2005); Martin Lipton, *Some Thoughts for Boards of Directors in 2013*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 31, 2012, 8:10 AM), http://blogs.law.harvard.edu/corpgov/2012/12/31/some-thoughts-for-boards-of-directors-in-2013/#more-38035 (noting that only 15% of S&P 500 companies had staggered boards at end of 2012); SHAREHOLDER RIGHTS PROJECT, THE SHAREHOLDER RIGHTS PROJECT 2012 REPORT 8 (2012), *available at* http://srp.law.harvard.edu/releases/SRP-2012-Annual-Report.pdf (noting that 126 S&P 500 companies had staggered boards at the end of 2011); Matteo Tonello, *Poison Pills in 2011*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 3, 2010, 9:49 AM), http://blogs.law.harvard.edu/corpgov/2011/04/03/poison-pills-in-2011/.

79. Lucian A. Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409, 410 (2005) ("We find that, controlling for firm characteristics including other governance provisions, staggered boards are associated with a reduced firm value. . . . [That] is not only statistically significant, but also economically meaningful."); Olubunmi Faleye, *Classified Boards, Firm Value, and Managerial Entrenchment*, 83 J. FIN. ECON. 501, 503 (2007) (providing "evidence of a negative relation[ship] between firm value and classified boards," and showing that "this relation[ship] is robust to controls for other takeover defenses and concerns for endogeneity"); *id.* at 514-15 (providing empirical evidence of negative stock price reaction to announcements that corporations have staggered their boards and positive stock price reaction to announcements of their elimination); Guo et al., *supra* note 49, at 275-77 (concluding that the team's empirical findings "make it much harder to

The negative impact of staggered boards appears traceable to different factors.

First, "a staggered board is [one of] the most powerful takeover defense[s] available," rendering other defenses irrelevant.[80] A staggered board "increase[es] considerably" the likelihood of a corporation fending off an unwanted acquisition proposal.[81] If incumbent

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make the case that staggered boards are good for shareholders" because, among other things, they found that cumulative abnormal returns were significantly and positively related to a corporation de-staggering its board). Bebchuk and Cohen provide evidence suggesting that "staggered boards at least partly cause, and not merely reflect, a lower firm value." Bebchuk & Cohen, *supra*, at 411, 426-28. Other studies generally suggest that anti-takeover statutes decrease firm value. *See* Marianne Bertrand & Sendhil Mullainathan, *Enjoying the Quiet Life? Corporate Governance and Managerial Preferences*, 111 J. POL. ECON. 1043, 1045-46 (2003) (concluding that, following a state's enactment of antitakeover legislation, companies incorporated in that state suffered declines in productivity and efficiency); *see also* Paul Gompers et al., *Corporate Governance and Equity Prices*, 118 Q. J. ECON. 107, 108-09 (2003) (concluding that firms with fewer antitakeover defenses "earned significantly higher returns, were valued more highly, and had better operating performance"). A statute that requires staggered boards would constitute an anti-takeover statute. *See* Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1353 (2013) ("If a firm has a staggered board, no other defense is relevant . . . .").

Staggered boards need not be value reducing for each and every corporation, but, rather than statutorily mandating staggered boards, a statute that permits corporate participants to opt in to a staggered-board governance structure seems preferable.

80. Klausner, *supra* note 79, at 1353. In the presence of a hostile offer, staggered boards are more likely to adopt poison pills than non-staggered boards. *See* Randall A. Heron & Erik Lie, *On the Use of Poison Pills and Defensive Payouts by Takeover Targets*, 79 J. BUS. 1783, 1796 (2006). A staggered board coupled with a poison pill leaves a corporation virtually takeover-proof. *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 114, 129 (Del. Ch. 2011); Bebchuk et al., *supra* note 22, at 890-91. Whether or not a target corporation has already implemented a poison pill, any potential acquirer must assume the presence of a pill because one can be adopted quickly and without shareholder approval. *See* John C. Coates IV, *Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence*, 79 TEX. L. REV. 271, 287-88 (2000). Note that Chesapeake previously adopted a pill without shareholder approval. Chesapeake Energy Corp., Current Report (Form 8-K) Exhibit 99.1 (July 16, 1998) (stating that Chesapeake adopted a shareholder rights plan). Moreover, Chesapeake viewed a staggered board as an "essential takeover defense." *See* Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 17 (Apr. 30, 2009) (arguing against shareholder's proposal to de-stagger the board, and labeling a staggered board as an "Essential Takeover Defense").

81. Bebchuk & Cohen, *supra* note 79, at 414; Bebchuk et al., *supra* note 22, at 891 ("Specifically, we find that an [effective staggered board] *nearly doubles* the likelihood that the average target . . . will remain independent, . . . *halves* the likelihood that the first bidder will be successful, . . . and reduces the likelihood that a target will be forced to sell to a white knight or other subsequent bidder . . . ."); *see also* Thomas W. Bates et al., *Board*

management fends off a hostile proposal, shareholders generally are worse off.[82] Theoretically, the higher premiums attributable to the enhanced negotiating power of a staggered board might offset any shareholder loss attributable to the occurrence of fewer transactions at premiums over market prices.[83] Evidence, however, does not appear to support this theory. Effective staggered boards (ESBs) "do not seem to provide sufficiently large countervailing benefits for shareholders of hostile bid targets, in the form of higher deal premiums, to offset the substantially lower likelihood of being acquired. In fact, the evidence is not sufficient even to conclude that [ESBs have] any positive effect . . . on deal premiums."[84]

Second, staggered boards "benefit CEOs at the expense of shareholders by shielding them and their compensation packages from the effect of poor firm performance."[85] To properly incent their CEOs, corporations commonly award bonuses if corporate performance targets are met.[86] Compared to annually elected boards, staggered boards set

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Classification and Managerial Entrenchment: Evidence from the Market for Corporate Control, 87 J. FIN. ECON. 656, 665 (2008) (finding that targets with staggered boards respond hostilely to acquisition attempts at twice the rate of targets without staggered boards); *cf. id.* at 657-58 (finding that "targets with a classified board are ultimately acquired at an equivalent rate as targets with a single class of directors," but acknowledging that staggered boards deter acquisitions).

82. *See* Bebchuk et al., *supra* note 22, at 891 (reporting reduced returns of 8–10%).

83. *Id.* at 935-36. *See generally* note 250

84. Bebchuk et al., *supra* note 22, at 936, 939 (arguing that the authors' own study understated shareholder losses because the study could not account for losses attributable to bids that were deterred by staggered boards); *id.* at 891 (finding that "ESBs do not provide sufficient countervailing benefits in terms of increased premiums and may even provide no such benefits at all").

If the shareholders of a corporation could relatively easily do away with a staggered board, such as, for example, a shareholder-initiated bylaw amendment, then such a staggered board would not be "effective," according to Bebchuk and his coauthors. *Id.* at 894. Oklahoma's 2010 Amendment, which statutorily required staggered boards for large publicly traded corporations, would likely result in an ESB for those companies.

85. Faleye, *supra* note 79, at 526; *id.* at 503 ("[T]he evidence suggests that [staggered] boards are adopted for managerial self-serving purposes . . . ."); Harry DeAngelo & Edward M. Rice, *Antitakeover Charter Amendments and Stockholder Wealth*, 11 J. FIN. ECON. 329, 329 (1983) ("Although inconclusive, the evidence provides weak preliminary support for the hypothesis that antitakeover amendments are best explained as a device for managerial entrenchment.").

86. *See supra* note 25.

lower, more easily achieved performance targets for their CEOs.[87] Compared to annually elected boards, staggered boards are less likely to remove their CEOs.[88] Moreover, one would expect a tight link between the removal of a CEO and underperformance by the corporation relative to its peers; however, compared to an annually elected board, "a [staggered] board significantly reduces the sensitivity of [CEO] turnover to firm performance."[89]

Years ago, Massachusetts adopted a statute that generally requires its publicly held corporations to have staggered boards.[90] Firms incorporated in Massachusetts are worth less and receive fewer takeover bids than firms incorporated elsewhere.[91] Compared to firms incorporated in Massachusetts or other states with strong anti-takeover statutes,[92] firms incorporated in Delaware are worth more and receive more takeover bids.[93]

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87. Faleye, *supra* note 79, at 526; *see also* Gompers et al., *supra* note 79, at 133 ("[C]ompensation rises for CEOs of firms adopting takeover defenses." (citing Kenneth A. Borokhovich et al., *CEO Contracting and Antitakeover Amendments*, 52 J. FIN. 1495 (1997))).

88. Faleye, *supra* note 79, at 503 (discussing empirical results of involuntary CEO turnover rate of 30% at corporations with non-staggered boards compared to 16% at corporations with staggered boards). Removal is lower if the CEO also serves as chairman of the board. *See* Vidhan K. Goyal & Chul W. Park, *Board Leadership Structure and CEO Turnover*, 8 J. CORP. FIN. 49, 59-60 (2002).

89. Faleye, *supra* note 79, at 524.

90. MASS. GEN. LAWS ANN. ch. 156D, § 8.06 (2012).

91. Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 546 (2001). Daines addresses concerns about selection bias and endogeneity. *Id.* at 549-53.

92. Pennsylvania enacted the most extreme anti-takeover legislation, and corporations organized under its laws suffered significant negative returns compared to corporations organized elsewhere. *See* Samuel H. Szewczyk & George P. Tsetsekos, *State Intervention in the Market for Corporate Control: The Case of Pennsylvania Senate Bill 1310*, 31 J. FIN. ECON. 3, 4 (1992) (negative abnormal returns of 9.09% for 56 publicly traded firms, or approximately $4 billion in shareholder wealth). Pennsylvania empowered corporations to opt-out of the anti-takeover provisions, and those corporations that exempted themselves entirely from those provisions generally experienced significant positive returns. *Id.* As is typical, Pennsylvania enacted the legislation when one of its corporations was under siege by a hostile acquirer, and legislators feared that an acquisition would result in job loss. *Id.* at 5. Unions and other Pennsylvania corporations, whose membership and management arguably benefitted by deterring others from attacking Pennsylvania corporations, supported the legislation. *See id.* Not all Pennsylvania constituencies reacted favorably; the investment manager of the state's pension fund notified the legislature that passage of the legislation would deter further investment in Pennsylvania corporations. *See id.* at 5, 17.

Both Indiana and Iowa recently enacted similar amendments to their respective corporate codes. *See* IND. CODE ANN. § 23-1-33-6(c) (LexisNexis 2010); IOWA CODE §

c) Deviation from Delaware

Delaware is the nation's leading provider of corporate law.[94] Delaware's legislators annually update the corporate code, promptly responding to the market's needs.[95] Delaware's specialized judiciary promptly resolves corporate disputes.[96] Delaware's time-tested, one-hundred-year-old corporate code and its rich body of common law offer guidance and predictability unrivaled by any other jurisdiction.[97]

In 1986, thanks to the efforts of a subcommittee of the Oklahoma Bar Association—the General Corporation Act Committee (OK Bar Committee)—the Oklahoma Legislature essentially adopted Delaware's corporate code as its own.[98] The Oklahoma Legislature did so, in part, to benefit from Delaware's rich body of common law,[99] which would guide Oklahoma corporations and their advisers and enhance the law's predictability.[100] By enacting Delaware's corporate code, the Oklahoma

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490.806A (2013). Iowa's legislature acted to impede a hostile acquisition of one of its state's corporations. Matthew G. Doré, *The Iowa Business Corporation Act's Staggered Board Requirement for Public Corporations: A Hostile Takeover of Iowa Corporate Law?*, 60 DRAKE L. REV. DISCOURSE 1, 4–5 (2012), http://students.law.drake.edu/lawReview/docs/lrDiscourse201206-dore.pdf.

93. Daines, *supra* note 91, at 527-28. Interestingly, Chesapeake, which was once incorporated in Delaware, reincorporated in Oklahoma in 1996. Chesapeake Energy Corp., Current Report (Form 8-K) (Mar. 6, 1997) (identifying its state of incorporation as Oklahoma); Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 17 (Nov. 5, 1996) (proposing reincorporation from Delaware to Oklahoma to save $150,000 annually in taxes that would otherwise be paid to Delaware).

94. *See* CHOPER ET AL., *supra* note 36, at 230–32.

95. *Id.* at 230.

96. *Id.* at 231.

97. Cleveland, *supra* note 12, at 1837–42, 1867.

98. Gary W. Derrick, *News from OBA Sections: Report from the General Corporation Act Committee of the Business Association Section*, 62 OKLA. BAR J. 650, 657 (1991).

99. *See* Atl. Richfield Co. v. Oklahoma *ex rel.* Wildlife Conservation Comm'n, 1983 OK 14, ¶ 8 n.7, 659 P.2d 930, 934 n.7; *see also* Brook v. James A. Cullimore & Co., 1967 OK 251, ¶ 5, 436 P.2d 32, 34; *In re* Estate of Fletcher, 1957 OK 7, ¶ 25, 308 P.2d 304, 311. "A statute adopted from another state comes to [Oklahoma] burdened with construction previously placed upon it by the highest court of that [other] state. This is so because [Oklahoma's] legislature is presumed to have been aware of such construction and to have adopted the statute as so construed." *Atl. Richfield Co.*, ¶ 8 n.7, 659 P.2d at 934 n.7.

100. *See* Robert J. Melgaard, *Business and Corporation Law: General Corporation Act Committee*, 69 OKLA. BAR J. 4107, 4127 (1998); *cf.* 2013 House Debate, *supra* note 1 ("[T]hat's not a predictable situation for business. That's not stable. . . . We're changing our corporation laws on a yearly basis to situate whoever brings the most lobbyists down to the capitol.") (quoting Rep. Cory Williams (D-Stillwater) at 57:57).

Legislature adopted the Delaware Supreme Court's interpretations of the code.[101] Delaware's chancery court decisions also guide Oklahoma's corporations, their advisors, and Oklahoma courts.[102]

The OK Bar Committee monitors changes to Delaware's corporate code and periodically works with the Oklahoma Legislature to implement those changes in Oklahoma's corporate code.[103] By only periodically updating Oklahoma's corporate code to reflect amendments to Delaware's corporate code, the Oklahoma Legislature only periodically adopts Delaware's then-current common law precedent.[104]

By enacting the 2010 Amendment, the Oklahoma Legislature deviated from Delaware's corporate code.[105] Delaware generally does not require a staggered board for large, publicly traded corporations;[106] as a result of the 2010 Amendment, however, Oklahoma did require a staggered board for large, publicly traded corporations.[107] The 2010 Amendment is another in a string of Oklahoma anti-takeover amendments that deviate from Delaware's corporate code. In 1987, Oklahoma enacted the Control Share Acquisition Act, which generally lowered the voting power of one's shares as one's holdings passed certain thresholds.[108] Unlike the 2010 Amendment, which permitted no opt-out for five years,[109] an Oklahoma corporation could promptly opt out of the Control Share Acquisition Statute.[110] In 1991, acting contrary

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101. *Atl. Richfield Co.*, ¶ 8 n.7, 659 P.2d at 934 n.7.

102. *See, e.g.*, Kurtz v. Clark, 2012 OK CIV APP 103, ¶¶ 17-28, 290 P.3d 779, 786-89 (looking to Delaware for guidance and citing decisions by Delaware's supreme and chancery courts).

103. Derrick, *supra* note 98, at 657.

104. *See* Melgaard, *supra* note 100, at 4127; *see also In re* Fletcher, ¶ 25, 308 P.2d at 311-12 (noting that, despite the legislature's adoption of another state's code, Oklahoma courts are not bound by decisions of that other state that are subsequent to the time that the Oklahoma legislature enacted the code).

105. *Compare* S. 1132, 52d Leg., 2d Sess., § 105 (Okla. 2010) (as enrolled June 1, 2010), *with* DEL. CODE ANN. tit. 8, § 141(d) (2011) (defaulting to annually-elected boards, but permitting staggered boards through specified opt-in procedures).

106. DEL. CODE ANN. tit. 8, § 141(d).

107. S. 1132, § 105 (as enrolled June 1, 2010).

108. 18 OKLA. STAT. §§ 1145–1155 (2011).

109. S. 1132 § 105 (as enrolled June 1, 2010).

110. 18 OKLA. STAT. § 1148(e)(2) (providing that a corporation will not be subject to the act if the board of directors amends its bylaws to opt out within 90 days of the effective date of the act).

When Chesapeake re-incorporated from Delaware to Oklahoma in 1996, it opted out of the Control Share Acquisition Statute. *See* Chesapeake Energy Corp., Proxy Statement to the Delaware code, Oklahoma effectively prohibited shareholders of large, publicly traded corporations from acting outside of meetings by requiring that shareholders act unanimously.[111] By lessening shareholders' powers, the 1991 amendment indirectly enhanced the powers of incumbent boards. In 2001, the Oklahoma Legislature turned on its head the previously enacted Delaware provision concerning bylaws, again generally lessening shareholder authority and enhancing director authority.[112] These repeated deviations from Delaware leave uncertain Oklahoma's adoption of Delaware's common law precedent, at least within the realm of takeovers, which is an area that gives rise to significant litigation because of the dollars at issue and the apparent

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(Schedule 14A) 19 (Nov. 5, 1996) (noting that in recommending reincorporation from Delaware to Oklahoma, "[t]he Company's Board of Directors does not intend the Reincorporation to result in additional anti-takeover protections. Therefore, Chesapeake Oklahoma Certificate of Incorporation includes a provision whereby Chesapeake Oklahoma will be excluded from the provisions of the Control Share Acquisition Act").

111. *Compare* 18 OKLA. STAT. § 1073(b) (Supp. 2009) (generally permitting shareholders of a publicly traded corporation with 1000 shareholders to act outside of a meeting only if they do so unanimously), *amended by* S. 1132, 52d Leg., 2d Sess. § 106 (Okla. 2010) (as enrolled, June 1, 2010) (eliminating the prior possibility of opting-out via the certificate of incorporation), *with* DEL. CODE ANN. tit. 8, § 228(a) (permitting shareholders to act outside of a meeting; if unanimous approval were to be required, such requirement would have to be set forth in the certificate of incorporation).

When Chesapeake reincorporated from Delaware to Oklahoma in 1996, it opted out of the statutory default of unanimous consent by shareholders to act outside of a meeting. *See* Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 19 (Nov. 5, 1996) (noting that in recommending reincorporation from Delaware to Oklahoma, "[Oklahoma's] unanimous consent requirement is intended to effectively preclude action by written shareholder consent and to require any shareholder vote to be taken at a meeting only after proper notice and appropriate disclosure. To maintain Company shareholder's voting rights, the Chesapeake Oklahoma Certificate of Incorporation includes a provision permitting voting by written shareholder consent").

Though this article focuses on the staggered board amendment, in 2010, the legislature required that, if the shareholders of large publicly traded corporations desired to act outside of a meeting, they had to do so unanimously, without the possibility of opting out of the requirement via the certificate of incorporation. S. 1132, § 106 (as enrolled, June 1, 2010) (amending 18 OKLA. STAT. § 1073).

112. *Compare* 18 OKLA. STAT. § 1013(A) (generally empowering the board to amend the bylaws, but permitting the shareholders to do so if the certificate of incorporation so provides), *with* DEL. CODE ANN. tit. 8, § 109(a) (generally empowering the shareholders to amend the bylaws, but permitting the board to do so if the certificate of incorporation so provides).

conflicts of interest.[113] These deviations undermine one of the principal rationales for mirroring Delaware's corporate code in the first place: adopting Delaware's common law enhances the predictability of Oklahoma's corporate law.

As the prior paragraph suggests, one of the benefits of Delaware's corporate code is that it provides an array of default rules, while still enabling parties to tailor a corporation's characteristics to suit their needs.[114] In particular, Delaware generally provides that corporations have non-staggered boards, but permits corporations to opt in to a governance structure with a staggered board.[115] As a result of the 2010 Amendment, Oklahoma requires that large, publicly traded corporations have staggered boards and prohibits any opt-out for a number of years.[116] Given the trend against staggered boards, and the benefits of maintaining consistency with Delaware, a default rule of non-staggered boards, with the possibility of opting-in to a staggered-board governance regime, seems preferable.[117]

d) Faulty Premises

Some legislators exported their preferred management structure for state-run organizations to the realm of privately run corporations. To encourage populism, and to dampen the ability of a newly elected governor to stock a state-run entity with cronies, the Oklahoma Legislature generally requires that any such entity be governed by a staggered board, whose members enjoy terms exceeding that of the governor, and also generally limits the governor's power to remove incumbent managers.[118] Legislators, however, erred in exporting such a management structure from state-run entities to privately run corporations, as the 2010 Amendment does. State-run entities are likely to heavily impact Oklahoma citizens, and if the citizens are dissatisfied with state-run entities or with the checks on the governor's ability to remove or appoint managers, then a wide swath of citizens can either

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113. *See, e.g.*, Mills Acquisition Co. v. MacMillan, Inc. 559 A.2d 1261 (Del. 1989); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

114. *See* CHOPER ET AL., *supra* note 36, at 229–30; *see, e.g.*, DEL. CODE ANN. 8 tit., § 102(b)(7) (permitting the elimination of specified types of director liability).

115. *See* DEL. CODE ANN. 8 tit., § 141(d).

116. *See supra* Part I.B.

117. Romano, *supra* note 11, at 186.

118. *See, e.g.*, 70 OKLA. STAT. § 3302 (2011) (providing for seven-year staggered terms for member of the Board of Regents). In Oklahoma, the governor serves a four-year term and is term-limited. *See* OKLA. CONST. art. VI, § 4.

lean on the legislature to amend the relevant statute or elect new representatives that will amend that statute. On the other hand, the managerial structure of a large, publically held corporation is likely to heavily impact shareholders, but many of those shareholders will not reside in Oklahoma and will be unable to prompt an amendment to an Oklahoma statute. Consequently, the 2010 Amendment may concentrate benefits in the state, but export costs on nonresidents. Every legislator would like to concentrate benefits in the state while exporting costs to nonresidents, but Oklahoma did so by altering the rules of the game ex-post.

Finally, some legislators assumed that if a staggered-board requirement was favorable to one large, publicly traded corporation, namely Chesapeake, then the requirement would be favorable for all large, publicly traded corporations. This is not the case. The preceding section, in part, explains the opt-in and opt-out provisions so prevalent in both Oklahoma and Delaware's corporate codes.

2. Criticisms of Process

a) Logrolling

The Oklahoma Constitution generally requires that legislative bills address a single subject[119] to prevent logrolling.[120] Although it seems that an exception to that requirement may have rendered the restriction inapplicable in the case of the 2010 Amendment,[121] the framers' concern—logrolling—loomed large. "Logrolling is the practice of ensuring the passage of a law by creating one choice in which a legislator . . . is forced to assent to an unfavorable provision to secure passage of a favorable one . . . ."[122]

During the 2010 legislative session, the proposed amendment to the Uniform Limited Partnership Act (ULPA) was destined to fail. It had failed during the 2009 session, and the legislature made little progress during the first half of the 2010 session. Because of its size (one-hundred-plus pages), the bill was expected to languish for several years in the legislature as interested parties took time to review and comment

119. OKLA. CONST. art. V, § 57 ("Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title . . . .").

120. Douglas v. Cox Ret. Props., Inc., 2013 OK 37, ¶ 4, 302 P.3d 789, 792 (stating that one of "[t]he purposes of the single-subject rule [is] . . . to prevent logrolling").

121. OKLA. CONST. art. V, § 57 (providing an exception for bills that "adopt[] a . . . revision of statutes").

122. *Douglas*, ¶ 4, 302 P.3d at 792.

upon it. Eventually, the bill would likely have passed, but not during the 2010 legislative session. Those knowledgeable about business law generally favored the amendments to the ULPA, but opposed passage of the staggered-board provisions that Chesapeake sought to append to the ULPA bill. Those with political savvy suspected, however, that Chesapeake's preferred provisions would ultimately pass after being appended to a bill, whichever bill that happened to be. Consequently, some of those knowledgeable about business law were prepared to trade a positive development in limited-partnership law for a negative development in corporate law, because the negative development in corporate law was forthcoming, whether or not in conjunction with the ULPA bill. On the other hand, the legislators—who expected, and may have preferred, that the amendments to the ULPA would take several years—were prepared to expedite the process if adoption of the ULPA amendments enabled them to deliver to Chesapeake its desired protections under corporate law. Combining the ULPA provisions with the staggered-board provisions ensured the bill's passage.[123]

Of course, the legislative process is entirely about compromise and horse-trading, but the single subject constitutional provision exists to ensure that such compromise and horse-trading occurs within the realm of a single subject.

b) Evasion of Deadline

The framers designed the Oklahoma Constitution to provide legislators with notice about the legislation on which they are called to vote.[124] Moreover, the legislature imposes deadlines by which bills must be introduced so that the legislators and the public are aware of the

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123. *Id.* ¶ 6, 302 P.3d at 793 ("The purpose [of the constitutional requirement is] . . . to prevent the Legislature from making a bill 'veto proof' by combining two totally unrelated subjects in one bill."). Depending on the level of abstraction, corporate law and limited-partnership law may be related or unrelated. Both are related to business law; but there are significant differences between the law regarding each entity, which is why the legislature authorized the separate and distinct entities in the first place. *See* CHOPER ET AL., *supra* note 36, at 701-05.

124. *See* OKLA. CONST. art. V, § 34 ("Every bill shall be read on three different days in each House, and no bill shall become a law unless, on its final passage, it be read at length . . . ."); *id.* art. V, § 57 ("Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title . . . ."); *Douglas*, ¶ 4, 302 P.3d at 792 (stating that one of "[t]he purposes of the single-subject rule [is] to ensure the legislators . . . of Oklahoma are adequately notified of the potential effect of the legislation").

matters that legislators may address.[125] Such notice facilitates dialog. Interested parties can alert legislators of the effect, including the unintended consequences, of any proposed legislation; moreover, the notice allows legislators time to initiate contact with the public to obtain such information.[126]

While the ULPA bill was submitted timely, the bill originally did not address corporate law, so the public was caught unaware.[127] Importantly, as discussed in Part II.A, ONEOK and OGE, two of the largest corporations operating in Oklahoma and organized under its corporate code, were caught off-guard by the proposed amendment regarding staggered boards.[128] Aside from some lobbying efforts on Chesapeake's behalf, there were no meaningful lobbying efforts in favor of, or in opposition to, the proposed legislation.[129] Undoubtedly, neither ONEOK nor OGE mounted any efforts in opposition because neither was aware of the proposal.[130]

Despite some suggestion to the contrary, there was no attempt to smuggle the amendment through the legislative process.[131] Nonetheless, the manner in which the legislative process operated likely left some unaware of the import of the bill's new staggered-board requirement for

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125. *See, e.g.*, *2013–14 Legislative Deadline Calendar, 2nd Session-54th Legislature*, OKLA. SENATE, http://www.oksenate.gov/schedule/deadlines.htm (last visited Feb. 8, 2014); *Legislative Deadlines, 54th Legislature, 2nd Regular Session*, OKLA. HOUSE OF REPRESENTATIVES, http://www.okhouse.gov/legislation/LegislativeDeadlines.aspx (last visited Feb. 8, 2014); *cf.* Romano, *supra* note 11, at 125 ("Connecticut requires all bills for consideration in a legislative session to be introduced by a specific date.").

126. *See* Romano, *supra* note 11, at 125-26 (discussing Connecticut). In Connecticut,

> [a] procedural advantage of the amendment process is that public discussion of a bill may be bypassed. Connecticut mandates a public hearing for all bills considered by the legislature, but there is no requirement that an additional hearing be held on a bill that has been substantively amended after its prescribed hearing. As a consequence, no public hearings were held on the [anti-takeover] statute.

Id. at 126.

127. *See infra* notes 214-17 and accompanying text.

128. *See infra* Part II.A.

129. *Id.*

130. *Id.*

131. 2010 House Debate, *supra* note 67 (statement of Rep. Ben Sherrer (D-Pryor Creek) at 6:25:54). When he introduced the bill on the floor of the House, Ben Sherrer specifically stated that there had been provisions added at the end of the bill that dealt with corporate law "relat[ing] to . . . staggered terms of board members," but there were no questions regarding the bill from other representatives, no objection to the bill's adoption, and no debate on the bill. *Id.*

large, publicly traded corporations. Even if one is following a bill, the content of a bill may change dramatically when conferees from the House and Senate meet to resolve any differences, and the 2010 Amendment repeatedly proceeded through failed conferences before emerging near the end of the legislative session.[132] The title of the bill reflected its subject matter,[133] but because the bill itself totaled over one-hundred pages, and the title of the printed bill spanned more than six pages.[134] Changes to the title were virtually nonexistent and of little consequence until its end.[135] The same goes for the essence of the bill, which largely remained unchanged until the last few of those one-hundred pages, which addressed corporate law. Most importantly, its sponsors presented the bill for approval at the end of the legislative session, when there is an onslaught of bills presented,[136] leaving legislators little time to simply read bills, much less solicit constituent reactions to them.[137]

Oklahoma legislators subsequently acknowledged their failure to properly vet the staggered-board requirement. "[I]n our haste to help one company—one multimillion dollar corporation that hires thousands of Oklahomans— . . . we neglect[ed] to put the word out enough so another company who has a different viewpoint on [that bill] may not know what it is we are doing . . . ."[138] Another legislator remarked,

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132. *See supra* Part I.B.

133. S. 1132, 52d Leg., 2d Sess. (Okla. 2010) (as enrolled, June 1, 2010); *see also* OKLA. CONST. art. V, § 57 ("Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title . . . .").

134. S. 1132 (as enrolled, June 1, 2010).

135. *See id.*

136. *See* 3 Transcript of the Record at 193, State v. Terrill, CF-2010-8067 (D. Okla. Cnty. 2013) (testimony of former Oklahoma Governor, Brad Henry: "[In the] last week [of the legislative session] there are probably 2[00] to 300 bills . . . that passed both Houses and end up on [the Governor's] desk").

137. *See id.* at 179 (testimony of Rep. Mike Christian: "Q[:] Do you and the other representatives, in your experience, read every word of every bill that is voted on in the last week of the session? A[:] I'm under oath, aren't I? Q[:] You are. A[:] No. No. No, I don't read"); 5 Transcript of the Record at 20 (testimony of Rep. Chris Benge: "Q[:] . . . [I]s it possible for you to read every word of every bill, as the Speaker of the House, before they go onto the floor during those last two weeks of session? A[:] It's not. Q[:] Basically, there's just not enough time in the day for you to look at everything; is that correct? A[:] That would be correct. Uh-huh").

138. 2013 House Debate, *supra* note 1 (quoting Rep. David Dank (R-Oklahoma City) at 43:36). One member of the House mentioned contacting a representative of an impacted corporation, at the same time that the discussion on the floor of the House was ongoing, and

"Whenever you go out and tamper with some [legislation] on the behest of one CEO of a corporation in your state, you can really screw it up for the rest of the state.[139]

The failure to vet changes to the corporate law appears typical of jurisdictions other than Delaware.[140]

c) Special Interest

Every bill operates to someone's benefit and to another's detriment.[141] Consequently, special-interest legislation is inevitable, but the apparent ease with which the 2010 Amendment benefitting Chesapeake sailed through the legislative process, without proper vetting, is troubling. Chesapeake presaged its legislative influence when it reincorporated from Delaware to Oklahoma.[142] Corporations commonly reincorporate to their home jurisdictions when concerned about future takeovers, in hopes of achieving legislative favor.[143]

Oklahoma legislators subsequently acknowledged that the 2010 Amendment amounted to special-interest legislation to benefit

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alerted the members that there was no objection to the proposal. *Id.* (quoting Rep. Paul Wesselhoft (R-Moore) at 44:30).

139. *Id.* (quoting Rep. Cory Williams (D-Stillwater) at 57:09).

140. *See* Romano, *supra* note 11, at 138 ("[Anti-]takeover statutes are approved . . . with virtually no publicity . . . surrounding their introduction and passage.").

141. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 394 (2000) ("[E]very law or government policy 'singles out' some to bear a disproportionate burden for the benefit of others . . . .").

142. Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 19 (Oct. 25, 1996) ("The Oklahoma Legislature has responded to the needs of corporations organized under the laws of Oklahoma through numerous amendments to the Oklahoma Act . . . .").

143. Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 398-403 (2003) (noting that firms incorporate in their home states to influence corporate law); Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1590 (2002) (noting that firms concerned about future takeovers incorporate in their home states due to favor paid by legislators to the home business).

At the time of its reincorporation to Oklahoma from Delaware, and to its credit, Chesapeake did not avail itself of all of the anti-takeover protections afforded by Oklahoma. *See* Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 18-19 (Oct. 25, 1996) (opting out of Oklahoma's Control Shares Acquisition Act). In retrospect, however, Chesapeake's articulated reason for the reincorporation—emphasizing excess annual incorporation fees of two hundred thousand dollars—rings hollow when contrasted with its compensation practices. *Compare id.* at 19, *with* Schneyer, *supra* note 27 (referencing a $75 million bonus for an executive untethered to corporate performance).

Chesapeake and its CEO, at the expense of shareholders, by insulating the company from the threat of an acquisition:

> When we passed [the bill in 2010], . . . Chesapeake came in here and told us we had to do this in order to protect Oklahoma corporations from the likes of Carl Icahn.[144]
>
> [W]hy in the world would we [legislators] be getting in the way of how a corporation runs itself and how the shareholders elect their board? . . . It's what Aubrey [McClendon] needed. We bailed somebody out."[145]
>
> As I recall th[e 2010] bill was run especially for one corporation in the state of Oklahoma. It was a sweetheart deal.[146]
>
> [W]e changed [the corporate code] to help one company . . . .[147]
>
> [We] . . . tamper[ed] with some[legislation] on the behest of one CEO of a corporation . . . .[148]
>
> Just because a lobbyist comes in and tells you [a legislative amendment] . . . for the shareholder, doesn't actually mean it's for the shareholder.[149]
>
> If you've got enough stroke out there, you can come in here [to this legislative chamber] and change the rules whenever you want.[150]
>
> [W]hen it benefitted a few in [2010], we were asked to come in and run special legislation that ran contrary to free market principles . . . .[151]

d) Legislative Drafting Responsibilities

Few expect part-time state legislators to wield the pen when new bills are drafted.[152] Although it is not uncommon for private parties to draft

144. 2013 House Debate, *supra* note 1 (quoting Rep. Cory Williams (D-Stillwater) at 23:50).

145. *Id.* (quoting Rep. Cory Williams at 58:37).

146. *Id.* (quoting Rep. Mike Reynolds (R-Oklahoma City) at 22:41).

147. *Id.* (quoting Rep. Joe Dorman (D-Rush Springs) at 36:12).

148. *Id.* (quoting Rep. Cory Williams at 57:09).

149. *Id.* (quoting Rep. Cory Williams at 59:24).

150. *Id.* (quoting Rep. Scott Inman (D-Oklahoma City) at 40:06).

151. *Id.* (quoting Rep. Scott Inman at 39:21).

legislation,[153] given the risk of self-interest, the legislature must proceed with caution. If the legislature can avoid relying on parties to draft legislation that directly affects them, then the legislature should do so.

Chesapeake "participated in drafting" the portion of the bill that required large, publicly traded corporations to have staggered boards.[154] The Oklahoma Legislature need not have relied on Chesapeake, as it typically relies upon the OK Bar Committee to draft updates to the state's corporate code.[155]

In 1984, the OK Bar Committee was formed to revise Oklahoma's corporate law.[156] The OK Bar Committee proposed statutory amendments to the legislature, which adopted them in 1986.[157] Since 1986, the OK Bar Committee repeatedly has proposed updates to Oklahoma's corporate code that the Oklahoma Legislature has adopted.[158] Moreover, when the Oklahoma Legislature previously desired to amend the corporate code, it delegated drafting responsibilities to the OK Bar Committee, even regarding anti-takeover statutes.[159] After the U.S. Supreme Court upheld the validity of Indiana's Control Share Acquisitions Chapter, an anti-takeover statute,[160] the Oklahoma Legislature, which was then in session, tasked the OK Bar Committee with drafting a similar act.[161] "[V]irtually overnight," the OK Bar Committee drafted a bill, which the legislature enacted soon thereafter.[162]

If the Oklahoma Legislature had turned to the OK Bar Committee to draft the 2010 Amendment, the Committee would have rebuffed the request, as a majority of the Committee opposed the staggered-board

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152. *See generally* ESKRIDGE, JR. ET AL., *supra* note 4, at 417.

153. *See, e.g.*, DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 46 (2012) ("Although the assignment of drafting a law was given to an interdepartmental commission appointed by President Roosevelt, there is little doubt that Friendly, along with other industry representatives, was the moving force in drafting the Civil Aeronautics Act.").

154. Gilbert, *supra* note 78 (crediting Chesapeake's outside counsel as the bill's architect).

155. Derrick, *supra* note 98, at 657.

156. *Id.*

157. *Id.*

158. *Id.* (discussing a 1988 amendment by the Delaware legislature that prompted a 1989 amendment by the Oklahoma legislature).

159. *See id.* at 657-58.

160. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987).

161. Derrick, *supra* note 98, at 657-58.

162. *Id.* The Oklahoma Control Share Provisions can be found at 18 OKLA. STAT. §§ 1145–1155 (2011).

requirement. Nonetheless, legislators could have communicated that their concerns (the general welfare of the state) extended beyond the concerns of the OK Bar Committee (the general welfare of the Oklahoma General Corporation Act), and sought advice on the staggered-board requirement. Members of the OK Bar Committee could have tailored the bill to suit the legislators' goal (to protect Chesapeake) while limiting the unintended consequences of the staggered-board requirement. That is, a second amendment to the provision could have been avoided.

In certain respects, Oklahoma has modeled itself after Delaware, the leading provider of corporate law. Delaware relies upon a committee of its bar association to draft updates to its corporate code, and so too does Oklahoma in the typical case.[163] But, while Delaware relies upon a multistep process that entails vetting and approval at each step within the bar association before a proposed amendment reaches the legislature,[164] Oklahoma displayed its willingness to bypass the OK Bar Committee and not seek its reaction to the 2010 proposal.[165] Moreover, Delaware would never entrust a single corporation with the responsibility of drafting updates to its corporate code, as Oklahoma did in 2010.[166]

163. Hamermesh, *supra* note 12, at 1756.

164. *Id.* In Delaware, if a member of the bar committee ("Council") suggests a possible amendment to the corporate code, then the full Council will vote whether to explore the proposal. *Id.* If the full Council approves, then the matter is delegated to a subcommittee of Council to draft a proposal. *Id.* The full Council may reject any such draft and remand the subcommittee's initial draft for revisions. *Id.* If full Council approves of a draft, then the draft is submitted to the Corporate Law Section of Delaware Bar Association and the Bar Association's Executive Committee. *Id.* With approval therefrom, the draft is presented to the Delaware Legislature. *Id.*

165. Connecticut encountered a similar problem with its corporate statutes:

> The Secretary of State's office was not involved in the drafting of the takeover provision and was not even aware of the addition to its bill until after the amended bill was scheduled for a vote on the senate floor. The bar committee was similarly not apprised of the amendment until the eleventh hour.

See Romano, *supra* note 11, at 126.

166. *See* Hamermesh, *supra* note 12, at 1758 (noting that Delaware "avoid[s] legislation that would expose the General Assembly to criticism for favoring the parochial interests of one corporation or for favoring local businesses over Delaware corporations headquartered elsewhere"); Daines, *supra* note 91, at 540 ("Delaware's unique political economy insulates its legislature from the lobbying of firms subject to takeover bids . . . .").

D. Non-Corporate Law Explanations for the 2010 Amendment

As a matter of corporate law, the legislature acted unwisely in 2010 by requiring large, publicly traded corporations to have staggered boards, even if only until 2015. So, why would the Oklahoma Legislature have enacted the 2010 Amendment? Legislatures deal in tradeoffs, and the legislature accepted a negative development in the state's corporate code to further other interests.[167] While the special-interest legislation aided in further insulating McClendon and Chesapeake's board from challenge, the legislators' concerns extended well beyond Chesapeake's corner offices.[168]

Oklahoma has relatively few large corporations operating within its borders.[169] If one of those corporations were acquired and its headquarters moved to another jurisdiction, as commonly happens,[170] then Oklahoma would suffer significantly.[171] Job loss would be expected, and unemployment costs would be high and persistent.[172]

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167. 2013 House Debate, *supra* note 1 (quoting Rep. Cory Williams (D-Stillwater) at 58:38: "[W]hy in the world would we [legislators] be getting in the way of how a corporation runs itself and how the shareholders elect their board? . . . It's what Aubrey [McClendon, CEO & Chairman of Chesapeake] needed. We bailed somebody out."); *id.* (quoting Rep. Mike Reynolds (R-Oklahoma City) at 22:41: "[A]s I recall th[e 2010] bill was run especially for one corporation in the state of Oklahoma. It was a sweetheart deal.").

168. *See* Fred Morgan, *Legislation Is Step in Right Direction*, OKLAHOMAN, Dec. 27, 2010, at 9A ("Oklahoma public companies invest millions in capital on land, equipment and plants. They produce thousands of jobs and they pay sizable taxes to our state to support critically important education, health and social service programs and infrastructure. These companies create jobs, and it is incumbent upon us as a state to provide policies and laws to help . . . retain our existing companies.").

169. *See Oklahoma Stocks*, SMALL CAP REVIEW, http://smallcapreview.com/oklahoma_stocks.htm (last visited July 2, 2014).

170. *See generally* Mark Maremont, *Election 2012: Behind Perry's Jobs Success, Numbers Draw New Scrutiny*, WALL ST. J., Oct. 11, 2011, at A1 (discussing the import of a corporation's headquarters to Houston and the addition of 820 jobs).

171. *See infra* note 186. The legislators' concerns appear to have been well placed. *See* Daniel Gilbert, *Chesapeake's Financial Web Complicates Notion of Sale*, WALL ST. J., July 2, 2012, at B3 (noting that Icahn and another shareholder with significant holdings, who caused an overhaul in the composition of Chesapeake's board in 2012, have "advocated for the company to consider a sale for a rich enough price"); Daniel Gilbert & Joann S. Lublin, *Corporate News: Chesapeake to Cut Costs, Open Board Nominations*, WALL ST. J., Jan. 8, 2013, at B2 (noting Chesapeake's decision to cut overhead costs as well as "charitable, political and trade-related spending by 30%, 40% and 50% . . . over the next three years").

172. *See* Jonathan S. Masur & Eric A. Posner, *Regulation, Unemployment, and Cost-Benefit Analysis*, 98 VA. L. REV. 579, 633 (2012) ("[C]ontrary to conventional wisdom in the cost-benefit literature, unemployment costs are significant . . . ."); *id.* at 583 ("[R]ecent

Chesapeake employs thousands of the state's citizens,[173] and is one of the state's largest employers.[174] One would expect Oklahoma to benefit from Chesapeake's payment of corporate, sales, and excise taxes.[175] Chesapeake has contributed millions of dollars to the Oklahoma community for charitable and educational purposes.[176] The author's employer, the University of Oklahoma, has benefitted from Chesapeake's generosity.[177] Not only does the company make such

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literature has made clear that unemployment costs are high and persistent."); *see also infra* notes 186-88.

173. Miguel Bustillo, *Chesapeake's Hometown Woes: Oklahoma City Benefited from Aubrey McClendon's Boosterism and Largess, Which Now Is at Risk*, WALL ST. J., May 29, 2012, at B1 (noting that the Chesapeake campus in Oklahoma City has more than 4600 workers).

174. OKLA. DEP'T OF COMMERCE, MAJOR OKLAHOMA EMPLOYERS 1-2 (Spring/Summer 2010), *available at* http://www.digitalprairie.ok.gov/cdm/compoundobject/collection/stgovpub/id/19594/rec/1 (compiling, without independently verifying, employee data, and listing Chesapeake as the second largest energy industry employer, just behind ConocoPhillips and just ahead of OGE).

175. *See* OKLA. ADMIN. CODE § 710:50-17-5 (2011); INST. ON TAXATION & ECON. POLICY, WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES 88 (3d ed. 2009), *available at* http://www.itepnet.org/whopays3.pdf; Bustillo, *supra* note 173 (noting that a Chesapeake subsidiary is among the ten biggest taxpayers in OKC). *But see* INST. ON TAXATION & ECON. POLICY & CITIZENS FOR TAX JUSTICE, CORPORATE TAX DODGING IN THE FIFTY STATES, 2008-2010, at 12 (2011), *available at* http://www.itep.org/pdf/CorporateTaxDodgers50StatesReport.pdf (reflecting a negative average state income tax for Chesapeake during the period of 2008-10); *id.* at 27 (reflecting a lower average state income tax for the 2008-10 period for Chesapeake (-2.1%) than other large Oklahoma-based corporations—Devon Energy (0.6%), The Williams Companies (1.0%), or ONEOK (1.1%)).

176. *See* Daniel Gilbert, *Oklahoma City Fears an End to Chesapeake's Largess*, WALL ST. J., Feb. 7, 2013, at B1 (stating that rumored cutbacks on spending "worries . . . local government officials, nonprofit leaders and . . . sports fans, all of whom have benefited from the largess of Chesapeake and its co-founder and chief executive"); Gilbert & Lublin, *supra* note 171 ("Chesapeake spent more than $56 million on charitable causes between 2010 and 2011 . . . ."); *Keeping Oklahoma Green*, CMTY. TIES (Chesapeake Energy Corp., Okla.) Winter Ed. 2011, at 2 (describing the corporation's contribution of 2000 trees at no cost to communities across the state); *Lending Santa a H.E.L.P.ing Hand*, CMTY. TIES (Chesapeake Energy Corp., Okla.) Winter Ed. 2011, at 1 (describing the corporation's contributions to the Salvation Army during the holiday season); *Notes of Appreciation: Chesapeake Funds Instruments and Private Lessons for Music Students*, CMTY. TIES (Chesapeake Energy Corp., Okla.) Winter Ed. 2011, at 2-3 (describing the corporation's contributions to an Oklahoma City school that facilitated music lessons and the purchase of musical instruments).

177. *See Incoming Student Scholarships*, UNIV. OF OKLA. COLL. OF LAW, http://www.law.ou.edu/content/scholarships (last visited Feb. 11, 2012) ("The Chesapeake Energy

contributions to the Oklahoma community, but so do its employees.[178] Aubrey McClendon has been exceptionally generous to various schools in the state, again including the author's employer, the University of Oklahoma.[179]

Oklahoma previously has seen the headquarters of significant corporations depart the state. For example, the headquarters of Phillips Petroleum and Kerr-McGee each departed Oklahoma for Texas. In the 1920s, the Phillips brothers organized Phillips Petroleum Company and based its headquarters in Bartlesville, Oklahoma.[180] During the 1980s, Carl Icahn and T. Boone Pickens each attempted a hostile acquisition of Phillips, but the company remained independent for the remainder of the century.[181] Then, in 2002, Conoco acquired Phillips, and the combined company's corporate headquarters relocated to Texas.[182] When Conoco officials contemplated moving the corporate headquarters from

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Corporation Scholarship is awarded to incoming students with a demonstrated interest in the oil and gas industry.").

178. Bustillo, *supra* note 173 (noting that one-quarter of donations to the United Way of Central Oklahoma came from employees of Chesapeake ($5.5 million of $22 million)).

179. *See, e.g.*, *id.* (McClendon "shower[ed] arts groups and schools with millions in donations . . . ."); Gilbert, *supra* note 176 (stating that Chesapeake's former CEO, Aubrey McClendon, had "pledged to donate to Oklahoma schools the amount of fees Chesapeake pays for naming rights multiplied by his ownership stake in the team[,]" which is 19%); *McClendons Give $12.5 Million to Support Various Academic and Athletics Projects at OU*, UNIV. OF OKLA.: GIVE TO OU (May 8, 2008), http://www.ou.edu/give/about/news_/mcclendons_give_12.html.

180. *Our History 1909-1929*, CONOCOPHILLIPS, http://www.conocophillips.com/who-we-are/our-legacy/history/Pages/1909-1929.aspx (last visited Jan. 25, 2014).

181. *See* William Gruber, *Raider Carl Icahn—A Pirate or a Patriot?*, CHI. TRIB., May 12, 1985, http://articles.chicagotribune.com/1985-05-12/business/8501290769_1_raider-carl-icahn-phillips-petroleum-motive ("Icahn's targets have included Phillips Petroleum . . . ."); *see also* Mesa Partners v. Phillips Petroleum Co., 488 A.2d 107 (Del. Ch. 1984) (granting T. Boone Pickens' request for declaratory judgment that Phillips did not benefit from a standstill agreement protecting a company that had been acquired by Phillips).

182. *See Our History 1990-Present*, CONOCOPHILLIPS, http://www.conocophillips.com/who-we-are/our-legacy/history/pages/1990-present.aspx (last visited Oct. 25, 2014); *see also* ConocoPhillips Co., Current Report (Form 8-K) (Jan. 25, 2012). Interestingly, a predecessor of Conoco—Marland Oil Company—was founded in Ponca City, Oklahoma, but, in the 1920s, J.P. Morgan Jr. ousted Mr. Marland and caused the company to merge with Continental Oil and Transportation Co., which became Conoco. *Our History: 1909-1929*, *supra* note 180. Conoco relocated its headquarters to Houston, Texas, well before its transaction with Phillips. Rod Walton, *ConocoPhillips Jobs in Jeopardy*, TULSA WORLD (Nov. 8, 2008, 12:00 AM), http://tulsaworld.com/business/energy/conocophillips-jobs-in-jeopardy/article_6620c770-a27a-591d-b568-b390535f19a1.html.

Oklahoma to Texas, Oklahoma politicians expressed concern about the potential job loss in Oklahoma and hoped to appeal to Conoco's CEO, who hailed from Oklahoma.[183] If the corporate headquarters departed Oklahoma, then high-paying, white-collar jobs would also depart the state.[184] Oklahoma politicians tried to retain the corporate headquarters—and those high-paying, white-collar jobs—by discussing the elimination of state income tax, which Texas had previously eliminated.[185] Beyond those high-paying jobs, Oklahoma politicians and residents were also concerned about lower-paying, white-collar jobs, as well as blue-collar jobs, and the ripple effect that would occur if those jobs were eliminated.[186] Initially, Conoco officials remained vague on the topic of job cuts in Oklahoma.[187] Eventually, the headquarters departed the state (and so, too, did the highest-paying jobs), and the merger precipitated job loss in certain Oklahoma communities.[188]

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183. Associated Press, *Keating to Urge Conoco to Return to Oklahoma from Texas*, LUBBOCK AVALANCHE-J., Dec. 11, 2001, http://lubbockonline.com/stories/121101/upd_phillips.shtml.

184. *Id.*

185. *Id.*

186. *See* Danny M. Boyd, *Conoco Merger Worries Okla. Town*, ASSOCIATED PRESS (Nov. 20, 2001, 3:56 AM), http://www.apnewsarchive.com/2001/Conoco-Merger-Worries-Okla-Town/id-e27a388bd38893866365733d2f44e2bb; Beverly Bryant, *City Leaders React to Announcement*, PONCA CITY NEWS, Feb. 17, 2009, at 1A (quoting city manager, "[It's] about more than jobs and money . . . 'These are our friends and neighbors, so it's much more personal'").

187. *Keating to Urge Conoco to Return to Oklahoma from Texas*, *supra* note 183.

188. *ConocoPhillips to Close Ponca City Demonstration Plant*, VICTORIA ADVOC., Oct. 31, 2004, at 1C (discussing the elimination of 120 jobs); Rod Walton, *Ponca City Losing Hundreds of ConocoPhillips Jobs*, TULSA WORLD, Feb. 17, 2009, http://www.tulsaworld.com/archives/ponca-city-losing-hundreds-of-conocophillips-jobs/article_27f4c42f-95d4-51a3-8c16-c8532d381304.html (discussing the relocation of 750 non-refinery positions); Michael Overall, *Video: Life After Conoco: Losing 'the Company' Changes Ponca City*, TULSA WORLD, June 28, 2009, http://www.tulsaworld.com/news/local/video-life-after-conoco/article_99ff4115-004f-5adc-a2da-cfece5f751e6.html?mode=story) (quoting a former employee that employment with the company once was "'the ultimate prize . . . [providing] a job for life and . . . a sense of security and stability'"). It merits mention that, while the merger resulted in the migration of higher-paying, white-collar jobs from Oklahoma to Texas, many jobs in Oklahoma simply migrated from one location in Oklahoma (Ponca City, OK) to another location in Oklahoma (Bartlesville, OK). *Id.*; Walton, *supra*. The merger did not hurt Bartlesville as much as many feared. Murray Evans, *Okla. Towns Eye Split of ConocoPhillips Operations*, BLOOMBERG BUSINESSWEEK (July 14, 2011), http://businessweek.com/ap/financialnews/D9OFNI1O0.htm. Nonetheless, given reasonable concerns, politicians will not wait and hope for the best; but instead, will act to preempt job loss and the negative ripple effect to the extent that they are able.

Beyond jobs, Phillips contributed to the Bartlesville community. Phillips gave millions of dollars to local charities and donated to a local museum a multi-million dollar building, which was designed by Frank Lloyd Wright.[189] With the departure of the highest-paying jobs, the community suffered.[190]

In 2005, Carl Icahn once again rattled a company based in Oklahoma. By late 2004, Icahn had acquired a sizeable stake in Kerr-McGee.[191] Knowing that Icahn, his ownership stake, and his clout could influence other shareholders' votes, Kerr-McGee filed suit in hopes of voiding any votes cast by Icahn and barring his acquisition of additional shares of the company.[192] Icahn reported that, if Kerr-McGee ignored his suggestions for improving shareholder value, he would seek to elect others to the company's board.[193] The parties settled the suit, with Icahn agreeing not to unseat any incumbent directors and Kerr-McGee agreeing to buy back four billion dollars of its shares at "prices that would represent all-time highs."[194] Soon after a company fends off a hostile acquirer, the company commonly agrees to be acquired in a friendly transaction;[195] such was the case for Kerr-McGee, which agreed to be acquired in 2006 by Anadarko Petroleum Corporation.[196] The combined company located its headquarters in Houston, Texas, where Anadarko was headquartered.[197] Because of redundancies between the headquarters, Anadarko eliminated many of the two hundred jobs that previously existed in Oklahoma,[198] many of which were high-paying

189. Boyd, *supra* note 186.

190. *See supra* note 188-89 and accompanying text.

191. *See* Carl. C. Icahn, Beneficial Ownership Report (Schedule 13D) (Apr. 18, 2005).

192. *See Kerr-McGee Sues to Fend Off Icahn, Investors*, *supra* note 47.

193. *See id.*

194. *See TSC Staff, Icahn Gets Rich Price from Kerr-McGee*, THESTREET (Apr. 14, 2005), http://www.thestreet.com/story/10217543/1/icahn-gets-rich-price-from-kerr-mcgee.html.

195. *See, e.g.*, Schreiber v. Burlington N., Inc., 472 U.S. 1 (1985); Martin M. Cohen, *"Poison Pills" as a Negotiating Tool: Seeking a Cease-Fire in the Corporate Takeover Wars*, 1987 COLUM. BUS. L. REV. 459, 508.

196. *See* Don Mecoy, *Oklahoma Losing Landmark Corporate Headquarters*, NEWSOK (June 23, 2006), http://www.newsok.com/oklahoma-losing-landmark-corporate-headquarters/article/1877190.

197. *Id.*

198. *See* Don Mecoy, *Departure to Be Blow for City*, NEWSOK (June 24, 2006), http://www.newsok.com/departure-to-be-blow-for-city/article/1877406; Mecoy, *supra* note 196. (quoting Anadarko's chairman and chief executive officer, who stated that those individuals previously working at the Oklahoma headquarters were "most at risk").

jobs of the sort that Oklahoma tries to attract.[199] During 2004, Kerr-McGee paid "more than $85 million in payroll and benefits in [Oklahoma]."[200] While lamenting the negative economic impact Kerr-McGee's departure caused, the President of the Greater Oklahoma City Chamber of Commerce regretted losing part of the "fabric of the community."[201]

Kerr-McGee's corporate leaders also contributed to the Oklahoma City community. For example, after visiting Denmark and being impressed by the Tivoli Gardens, Dean McGee worked with civic leaders to create the Myriad Gardens in downtown Oklahoma City.[202] Moreover, he "endowed the eye institute at the [University of Oklahoma] Health Sciences Center that bears his name."[203]

Although the departures from Oklahoma of Phillips and Kerr-McGee's corporate headquarters may have harmed the state, Oklahoma legislators could not have prevented their departures by amending Oklahoma's corporate code,[204] because neither company was incorporated in Oklahoma,[205] rendering its corporate code inapplicable to both companies.[206] In contrast, because Chesapeake is incorporated under Oklahoma law, Oklahoma could amend its corporate code to protect Chesapeake.

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199. Mecoy, *supra* note 198 (quoting Oklahoma City mayor). It is worth noting that, given its far-flung operations, many Kerr-McGee jobs were not located in Oklahoma. *See* Don Mecoy, *Corbett Believes He Kept Promise on City Location*, NEWSOK (June 24, 2006), http://www.newsok.com/corbett-believes-he-kept-promise-on-city-location/article/1877414 (indicating that only 206 jobs located in Oklahoma City, with largest operations in Denver and Houston).

200. Mecoy, *supra* note 198.

201. *Id.*

202. Bill O'Brien, *Kerr McGee's Civic Impact Will Outlast Its Move Away from OKC*, EDMOND SUN, July 11, 2006, http://www.edmondsun.com/opinion/kerr-mcgee-s-civic-impact-will-outlast-its-move-away/article_a3cada96-1441-5225-8056-e039d6c05e5f.html.

203. *Id. See generally Our Story*, DEAN MCGEE EYE INST., http://www.mei.org/our-story (last visited Feb. 10, 2012).

204. The Oklahoma Legislature did hastily enact a statute designed to impede Conoco's efforts to acquire Phillips by requiring the approval by a state commission of certain transfers of energy resource assets. *See* S. 143, 40th Leg., 1st Sess. (Okla. 1985). However, the statute fell to a constitutional challenge. Mesa Partners II v. Unocal Corp., 607 F. Supp. 624, 629-30 (W.D. Okla. 1985).

205. *See* Kerr-McGee Corp., Current Report (Form 8-K) (Aug. 10, 2006) (noting incorporation under Delaware law); Phillips Petroleum Co., Current Report (Form 8-K) (Nov. 16, 2000) (same).

206. *See supra* note 15 and accompanying text (discussing internal affairs doctrine).

States may act to retain corporations that are being wooed by other states or that are under attack by hostile acquirers.[207] For example, the State of Washington acted quickly when Boeing—headquartered in Seattle—was under attack by a hostile acquirer, and Massachusetts acted quickly when Gillette—headquartered in Boston—was under attack by a hostile acquirer.[208] In 2010, the Oklahoma Legislature acted to protect one of its corporations to further statewide interests.

As noted in the prior section, Delaware's political economy does not allow for special-interest legislation benefitting one corporation that is facing a hostile acquisition.[209] Delaware's statutory code attracts many corporations that are headquartered and operated in other states.[210] Therefore, "[t]he direct political salience of other interests (such as corporate employees . . . [and] citizens affected by corporate behavior . . .) is not vivid in influencing Delaware lawmakers. Those other interests neither vote in Delaware elections nor [do they] directly provide franchise fees."[211] Consequently, Delaware "will not tilt its corporation law to favor a corporation that happens to have its headquarters [in the state] . . . . The cost to [its] integrity and [its] ability to preserve [its] advantage . . . would be too high."[212] Because Oklahoma has not made a comparable investment in its corporate code

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207. OESTERLE, *supra* note 11, at 615-16. Such competition may manifest itself in various ways, including lowered state taxes, enhanced employee training, and construction of new roads, schools, or facilities. *See id.*

208. *See id.* at 615.

209. Daines, *supra* note 91, at 540 ("Delaware's unique political economy insulates its legislature from the lobbying of firms subject to takeover bids . . . ."); *id.* at 541 ("[T]arget managers typically win entrenching legislation from state legislators by arguing that a takeover will reduce local employment levels."); *see id.* at 542 (discussing the legislative response by the Arizona legislature when one of its corporations–Greyhound–was threatened).

210. *See* DEL. CODE ANN. tit. 8, § 101(a) (2011) (In Delaware, "[a]ny person . . . without regard to such person's . . . residence . . . may . . . organize a corporation"); *id.* § 131(a) ("Every corporation shall have and maintain in [Delaware] a registered office which may, but need not be, the same as its place of business.").

211. Mark J. Roe, *The Corporate Shareholder's Vote and Its Political Economy in Delaware and in Washington*, 2 HARV. BUS. L. REV. 1, 29 (2012), *available at* http://www.hblr.org/wp-content/uploads/2012/07/HLB204.pdf.

212. Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 680 (2005); *see also* Hamermesh, *supra* note 12, at 1759 ("It is just not that hard to leave client interests at the door when those interests are so diverse that any particular initiative will be attractive to some clients but unattractive to others.").

and does not rely upon annual fees from corporations to the extent that Delaware does,[213] Oklahoma appears more willing to accept a negative development in its corporate code to assuage the concerns of a single corporation.

II. The 2012 Amendment

A. Events Leading to the 2012 Amendment

The 2010 Amendment caught many unaware. Corporate lobbyists were caught off guard, in part because the bill originally did not address staggered boards or corporations and, when revised without publicity to address staggered boards and corporations,[214] there were only a few days remaining in the legislative session.[215] Hearing only from representatives of Chesapeake, legislators wrongly assumed that, if the 2010 Amendment benefitted one publicly traded Oklahoma corporation (Chesapeake), then it would benefit all publicly traded Oklahoma corporations (such as ONEOK and OGE). Legislators did not test their assumption, in part because limited support staff does not allow much in the way of constituent outreach[216] and in part because the bill was presented for approval at the end of the legislative session, when there is an onslaught of bills presented, leaving little time to read bills, much less solicit constituent reaction to them.[217]

Having never been consulted regarding the 2010 Amendment, ONEOK proceeded with its annual meeting of the shareholders in 2011, as if the 2010 Amendment had not been enacted.[218] This proved

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213. *See* CHOPER ET AL., *supra* note 36, at 230 n.9 (noting that, in 2011, Delaware collected $854 million in incorporation fees, which amounted to 26% of its "tax" income).

214. *See* 2013 House Debate, *supra* note 1 (quoting Rep. David Dank (R-Oklahoma City) at 43:45: "[S]ometimes we neglect to put the word out enough so another company who has a different viewpoint on [that bill] may not know what it is we are doing . . . ."). *See generally* Romano, *supra* note 11, at 138 ("[Anti-]takeover statutes are approved by wide margins . . . *with virtually no publicity* . . . surrounding their introduction and passage.") (emphasis added).

215. *See supra* notes 64-68 and accompanying text.

216. *See generally* Romano, *supra* note 11, at 136.

217. *See supra* note 137.

218. In February 2010, at the request of two members of the OK Bar Committee, the chair of the committee circulated to other committee members a proposal to amend the corporate statute (which was subsequently enacted in the form of the 2010 Amendment). A member of the committee was associated with ONEOK, and should have received notice of the proposal, and could have surmised who was ultimately responsible for the proposal, but that committee member does not recall receiving notice of the proposal; so it never occurred

problematic for ONEOK. In 2008, consistent with the preferences of its shareholders, ONEOK de-staggered its board of directors, so that shareholders annually could elect the entire board,[219] which shareholders did in 2009 and 2010.[220] And, unaware of the 2010 Amendment, ONEOK did likewise in 2011, inviting shareholders to elect the entire board,[221] contrary to the 2010 Amendment.[222] Soon after the 2011 annual meeting of shareholders, ONEOK learned of the 2010 Amendment and that it had just held an election of directors inconsistent with the 2010 Amendment.[223]

ONEOK was confounded: "[W]e are disappointed that the legislature took this action and did so in a manner that did not afford us, as the largest publicly traded company in Oklahoma, the opportunity to participate in the debate regarding the advisability of this legislation."[224] ONEOK was particularly troubled in light of its recent actions to de-

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that such a statutory amendment was a possibility. A vast majority of the committee members responded negatively to the proposal, but the proponents proceeded individually and without support of the committee, and that proposal was implemented in the form of the 2010 Amendment. Some committee members, recognizing that such amendment would pass, favored its addition to the ULPA to ensure its passage. *See supra* Part I.C.2.a.

219. *See* ONEOK, Inc., Current Report (Form 8-K) Item 5.03 (May 19, 2008) (discussing shareholder approval of an amendment to the Certificate of Incorporation to "eliminate the classified structure of [the] Board of Directors and provide for the annual election of directors").

220. *See* ONEOK, Inc., Proxy Statement (Schedule 14A) 2 (Mar. 26, 2010) ("The 2010 annual meeting of shareholders of ONEOK, Inc., an Oklahoma corporation, will be held . . . for the following purposes: . . . to elect the 12 directors named in the accompanying proxy statement to serve a one-year term . . . ."); ONEOK, Inc., Proxy Statement (Schedule 14A) 2 (Mar. 27, 2009) ("The 2009 annual meeting of shareholders of ONEOK, Inc., an Oklahoma corporation, will be held . . . for the following purposes: . . . to elect the 11 directors named in the accompanying proxy statement to serve a one-year term . . . .").

221. ONEOK, Inc., Proxy Statement (Schedule 14A) 2 (Apr. 4, 2011) ("The 2011 annual meeting of shareholders of ONEOK, Inc., an Oklahoma corporation, will be held . . . to consider and vote on . . . election of the 11 directors named in the accompanying proxy statement to serve a one-year term . . . .").

222. *See supra* Part I.B.

223. ONEOK, Inc., Current Report (Form 8-K) Exhibit 99.1 (June 23, 2011) ("We recently learned that the Oklahoma legislature – in the waning days of the 2010 session – passed last-minute legislation requiring [corporations, such as ONEOK] to have classified, or staggered, boards of directors. . . . As a result, the directors of ONEOK have been classified automatically by the Oklahoma statute into three classes with staggered terms of office, rather than all of the directors being part of a single class and elected annually, as mandated by our certificate of incorporation.").

224. *Id.*

stagger its own board: "We continue to believe that [the] decision [by our] shareholder[s] to have an *annual* election [for all] directors is consistent with best practices in corporate governance."[225] John Gibson—President, CEO, and Chairman of ONEOK—expressed concern to Oklahoma's governor about the staggered-board requirement, and the governor expressed her commitment to working with ONEOK and the Oklahoma Legislature to develop a solution.[226]

The 2010 Amendment also came as a surprise to OGE. Following nonbinding shareholder votes in 2008 and 2009 to de-stagger its board of directors, OGE's board of directors, in 2010, unanimously proposed to shareholders that the company amend its corporate constitution to require an annual election of the entire board.[227] To implement shareholder will, the board made its recommendation, notwithstanding the fact that a classified board is "a useful tool in the event of a coercive takeover attempt."[228] With overwhelming approval from shareholders, OGE essentially declassified its board on May 20, 2010.[229] That is, OGE de-staggered its board of directors one week before the 2010 Amendment passed both houses of the Oklahoma Legislature, and fewer than three weeks before the governor signed the bill.[230] OGE likely would not have gone to such trouble to de-stagger its board if it had been aware of the looming legislative efforts to require staggered boards. Moreover, OGE likely would have expended lobbying efforts against the 2010 Amendment if it had been aware of the legislature's intentions.

225. *Id.*

226. *Id.*

227. OGE Energy Corp., Proxy Statement (Schedule 14A) 17–18 (Mar. 31, 2010). De-staggering the board of directors requires that the proposal be initiated by the board and subsequently approved by shareholders. 18 OKLA. STAT. § 1006 (2011). Therefore, the shareholders' votes in 2008 and 2009, which were not preceded by approval by the board, were nonbinding. *See id.*

228. OGE Energy Corp., Proxy Statement (Schedule 14A) 17 (Mar. 31, 2010).

229. OGE Energy Corp., Current Report (Form 8-K) (May 25, 2010) (setting forth the results from the May 20th meeting of shareholders: 81,978,404 in favor of de-staggering the board; 1,153,131 against de-staggering the board; and 685,956 abstaining). OGE "essentially" declassified its board on that date because Oklahoma state law requires compliance with formalities, in addition approval by the board and shareholders. 18 OKLA. STAT. § 1007.

230. *Bill Information for SB 1132 (2009–2010)*, *supra* note 53 (setting forth the dates of actions by the House, Senate, and Governor).

In 2012, lobbyists for each of ONEOK and OGE worked with legislators, convincing them that the 2010 Amendment had been overbroad to achieve its purposes.[231] Legislators acknowledged their error: "[I]n our haste to help one company—one multimillion dollar corporation that hires thousands of Oklahomans [i.e., Chesapeake]—that sometimes we neglect to put the word out enough so another company who has a different viewpoint on [that bill] may not know what it is that we are doing . . . .[232] Another legislator remarked, "[W]henever you go out and tamper with some[legislation] on the behest of one CEO of a corporation in your state [i.e., McClendon of Chesapeake], you can really screw it up for the rest of the state.[233]

After acknowledging their error, the legislators responded.

B. The Legislative Process of the 2012 Amendment

Due to the positions of ONEOK and OGE, the bill became a legislative priority, and sponsors introduced it in the House of Representatives on the first day of the legislative session.[234] The bill passed each of the House and the Senate without objection, and was signed by the governor less than a month after being introduced in the House.[235] The import of the 2012 Amendment was to render the 2010 Amendment inapplicable to companies like ONEOK and OGE, which had de-staggered boards at the time that the 2010 Amendment became effective.[236]

From the perspective of ONEOK and OGE, however, it was not enough for the legislature to *act quickly* in rendering the 2010

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231. *See* 2013 House Debate, *supra* note 1 (quoting Rep. Scott Inman (D-Oklahoma City) at 38:28, and noting the lobbyists and their efforts to "fix" the 2010 Amendment).

232. *Id.* (quoting Rep. David Dank (R-Oklahoma City) at 43:36).

233. *Id.* (quoting Rep. Cory Williams (D-Stillwater) at 57:09).

234. H.R. 2658, 53d Leg., 2d Sess. (Okla. 2012) (as introduced Jan. 19, 2012); *see also Bill Information for HB 2658 (2011-2012)*, OKLA. ST. LEGISLATURE, http://www.oklegislature.gov/BillInfo.aspx?Bill=hb2658&Session=1200 (follow "History" hyperlink) (referencing the first reading of the bill on February 6, 2012).

235. *See Bill Information for HB 2658 (2011-2012)*, *supra* note 234 (noting the bill was approved by both the House and the Senate on February 29, 2012, and approved by the Governor on March 1, 2012).

236. *Compare* S. 1132, 52d Leg., 2d Sess., §§ 105, 110 (Okla. 2010) (requiring staggered boards for large, publicly traded corporations as of September 1, 2010), *with* H.R. 2658 § 1 (as enrolled Feb. 29, 2012) (returning 18 OKLA. STAT. § 1027 to a state "as if [the 2010 Amendment] was never enacted," and exempting large publicly traded corporations from the staggered board requirement, if the boards of such corporations were de-staggered "prior to September 1, 2010").

Amendment inapplicable to them; the legislation had to *become effective quickly*. This was the case because each company had an annual meeting of shareholders looming on the horizon.[237] Under ordinary circumstances, Oklahoma legislation takes effect ninety days after the end of the legislative session.[238] Ninety days from the end of the legislative session would have been late August.[239] Each of ONEOK and OGE, however, typically held its annual meeting of shareholders in May,[240] and each was required to distribute to shareholders information regarding director-nominees well in advance of the actual meeting date.[241] Consequently, under the ninety-day delayed effective date for typical legislation, assuming that the meeting was convened in May as usual, each of ONEOK and OGE would have been required to proceed with its annual meeting of shareholders in compliance with the 2010 Amendment (electing only one-third of the board), even though the legislature had enacted not-yet-effective legislation to allow ONEOK and OGE to retain de-staggered boards. To avoid such delayed effectiveness, and to act in a manner consistent with the preferences of ONEOK and OGE, the legislature enacted emergency legislation, which took effect upon signature by the governor.[242]

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237. *See infra* note 240.

238. OKLA. CONST. art. V, § 58 ("No act shall take effect until ninety days after the adjournment of the session at which it was passed, . . . unless, in case of emergency, to be expressed in the act, the Legislature, by a vote of two-thirds of all members elected to each House, so directs.").

239. *Id.* art. V, § 26 ("[T]he regular session shall be finally adjourned sine die not later than five o'clock p.m. on the last Friday in May of each year."). Therefore, in 2012, the 53d Legislative Session would have ended on May 25, 2012.

240. *See, e.g.*, OGE Energy Corp., Proxy Statement (Schedule 14A) ii (Mar. 31, 2010) (providing notice of annual meeting of shareholders to be convened in May 2010); ONEOK, Inc., Proxy Statement (Schedule 14A) 2 (Mar. 26, 2010) (same).

241. *See* 15 U.S.C. § 78n (2012); 17 C.F.R. § 240.14a (2014).

242. OKLA. CONST. art. V, § 58 ("No act shall take effect until ninety days after the adjournment of the session at which it was passed, . . . unless, in case of emergency, to be expressed in the act, the Legislature, by a vote of two-thirds of all members elected to each House, so directs."); H.R. 2658, 53d Leg., 2d Sess. § 2 (Okla. 2012) (as enrolled Feb. 29, 2012) ("It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.").

C. Criticisms of the 2012 Amendment

1. Criticisms of Substance

On the plus side, the 2012 Amendment lessened the impact of the 2010 Amendment, restoring de-staggered boards to those corporations that had de-staggered their boards—consistent with the preferences of managers and shareholders—prior to the effective date of the 2010 Amendment. Nonetheless, the 2012 Amendment amounted to special-interest legislation, effectively drafted by two impacted corporations and enacted at their request.

> [W]e changed [the corporate code] to help one company [i.e., Chesapeake] . . . . And then we changed it one other time because a utility company felt like the needs of their stockholders were not met.[243]

> [W]e bailed ONEOK and OGE out . . . because, in bailing out Aubrey [McClendon and Chesapeake in 2010], we caught up a couple of good corporations who've been doing what they were supposed to be doing.[244]

The 2012 Amendment may have assuaged the concerns of the shareholders of ONEOK and OGE, who voted to de-stagger their boards in 2008 and 2010, respectively.[245] To the extent that the 2012 Amendment attempted to implement the agreed-upon structure of corporate managers and corporate shareholders, however, the 2012 Amendment did not go far enough. That is, the 2012 Amendment did nothing to quiet the concerns of Chesapeake's shareholders.[246] The 2012 Amendment left in place the prohibition against opting out of the staggered board until 2015.[247] Consequently, even if Chesapeake's board suddenly decided that it favored a de-staggered board, and its shareholders continued to favor a de-staggered board, their preferences could not have been implemented until 2015.

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243. 2013 House Debate, *supra* note 1 (quoting Rep. Joe Dorman (D-Rush Springs) at 36:11).

244. *Id.* (quoting Rep. Cory Williams (D-Stillwater) at 58:56).

245. *See supra* notes 219-20, 227 and accompanying text.

246. *See supra* Part I.A.

247. H.R. 2658 § 1 (as enrolled Feb. 29, 2012). This on-going prohibition precipitated another amendment to the statute in 2013. *See infra* Part III.

2. Criticisms of Process

As was the case with the 2010 Amendment, the legislature amended its corporate code without the involvement of the OK Bar Committee. The amendments were drafted by those corporations (with assistance from outside counsel) seeking favored treatment. Even if the legislature did not task the Committee with drafting the bill's language, members of the legislature could have consulted with the Committee for its reaction to the bill. This the legislature did not do.

Though the legislature did not consult the OK Bar Committee regarding the 2012 Amendment, it did consult Chesapeake. Keenly aware of Chesapeake's legislative influence, ONEOK and OGE ensured that Chesapeake—the intended beneficiary of the 2010 Amendment—would not object to the 2012 Amendment. Because the 2012 Amendment would not impact Chesapeake, Chesapeake had no objection.[248]

III. The 2013 Amendment

A. Events Leading to the 2013 Amendment

Legislators intended the 2010 Amendment to benefit Chesapeake by requiring it to have a staggered board—an anti-takeover defense—notwithstanding its shareholders' preference for a de-staggered board.[249] Nonetheless, a staggered board does not leave a corporation takeover-proof.[250]

In the weeks following the legislature's adoption of the 2012 Amendment, some troubling details regarding Chesapeake and its

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248. *Cf.* Romano, *supra* note 11, at 124 ("Before actively promoting Aetna's takeover bill with [Connecticut] legislators, the [Connecticut lobby] consulted some of its other members concerning the merits of the draft legislation. There were no objections. There is a straightforward explanation for this consensus: . . . most would be untouched by the proposal.").

249. Daniel Gilbert, Ryan Dezember & Vipal Monga, *Chesapeake Board Revamp Curbs McClendon's Power*, WALL ST. J., June 5, 2012, at B1 (noting Chesapeake described the staggered board "structure as an 'essential anti-takeover defense'").

250. If a corporate has a staggered board with three classes of directors, then an acquirer could seize control of the board (and the corporation) by launching successful proxy contests in two successive years. *See supra* notes 18-20 and accompanying text. In contrast, if a corporation has a non-staggered board, then an acquirer could gain control by launching a successful proxy contest in one year. *See supra* note 17. Thus, a staggered board imposes additional costs and delays on an acquirer's quest for control, but a staggered board does not leave a corporation takeover-proof.

management emerged.[251] This new information, coupled with prior managerial shortcomings[252] and a falling stock price,[253] presented problems for the company as it headed toward its annual meeting of shareholders in June 2012.[254]

1. Chesapeake's General Oversight

When founders invite the public to invest in the stock of a corporation, the investing public expects the corporate board to link executives' compensation to the corporation's performance, to provide some level of monitoring of the corporation and its executives, and to provide a check on management's self-interested behavior.[255] Chesapeake's board provided less than stellar service in those regards. Some of its shortcomings were already known to the market. Recall in 2009, when McClendon was forced to liquidate 94% of his holdings of Chesapeake stock, the board lowered the minimum equity investment requirement for its CEO,[256] paid him exceedingly generous compensation—notwithstanding the company's poor performance—and agreed to purchase his private map collection for twelve million dollars.[257]

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251. Bussey, *supra* note 32 (referencing "a gusher of revelations about Mr. McClendon's personal business dealings[,] . . . a raft of shareholder complaints, Wall Street downgrades, threats of litigation, inquiries from regulators, and bad corporate earnings").

252. *See supra* notes 23-33 and accompanying text.

253. *Chesapeake Energy Corporation*, YAHOO! FINANCE, http://finance.yahoo.com (search "Quote Lookup" for "CHK"; then follow "Historic Prices" hyperlink; then enter "Mar. 20, 2012" for "Start Date"; then enter "May 17, 2012" for "End Date"; then select "Daily" for "Set Date Range"; then select "Get Prices") (reflecting a closing price of $25.58 on March 20, 2012 and a closing price of $13.55 on may 17, 2012).

254. *See* Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 7 (May 11, 2012) (noticing annual meeting of shareholders to be held on June 8, 2012).

255. Steven Davidoff Solomon, *In Silicon Valley, Chieftains Rule with Few Checks and Balances*, N.Y. TIMES, July 4, 2012, http://dealbook.nytimes.com/2012/07/04/in-silicon-valley-chieftains-rule-with-few-checks-and-balances/ (contrasting the corporate norm of today with the corporate norm from the 1970s, as well as the corporate norm of today's technology companies). "[B]oards are expected to be actively involved in supervising executives and participating in major decisions affecting the company." *Id.*

256. Minow, *supra* note 33 ("[T]he board allowed [McClendon] to amend his employment agreement to reduce his required equity ownership when he had a margin call.").

257. *Id.* (contrasting McClendon's performance (one of the highest paid CEOs of the year) with Chesapeake's performance (40% drop in share price for the year)). Relatedly, until 2011, the board had not tied the CEO's compensation to the company's performance. Russell Gold, *Board Turns on Chesapeake's CEO: Directors Target Investment Perk; SEC Opens Informal*

Those missteps by the board, in addition to matters described below,[258] which seemingly benefitted McClendon at the expense of Chesapeake's shareholders, led some to believe that McClendon "handpicked" the board, which then simply "rubberstamped" his preferred courses of action.[259] Because McClendon served as both Chairman of the Board and CEO[260]—contrary to the preference of some corporate-governance mavens—one means of oversight (an independent chairman) was unavailable to Chesapeake.[261] The generous compensation that board members received even invited some suggestion that the board was paid not to meddle in how McClendon ran the company.[262]

Probe, WALL ST. J., Apr. 27, 2012, at B1 [hereinafter Gold, *Board Turns*] (stating McClendon "resisted performance-based pay measures until he faced a shareholder revolt" in 2011); Daniel Gilbert, *Chesapeake CEO Faces Storm*, WALL ST. J., June 10, 2011, http://online.wsj.com/news/articles/SB10001424052702304778304576375743181597036 ("Unlike many executives in the country, Mr. McClendon's compensation [wa]s set solely at the nine-member board's discretion and ha[d]n't been tied to stated performance standards [until 2011].").

258. *See infra* Part III.A.2-6.

259. Gold, *supra* note 29 ("[McClendon] has run the company largely by his own rules since he co-founded it in 1989."); Christopher Helman, *The Two Sides of Aubrey McClendon, America's Most Reckless Billionaire*, FORBES (Oct. 5, 2011, 5:17 PM), http://www.forbes.com/sites/christopherhelman/2011/10/05/aubrey-mcclendon-chesapeake-billionaire-wildcatter-shale/; Ernest Scheyder & Brian Grow, *SEC Starts Probe of Chesapeake CEO's Well Stakes*, REUTERS (Apr. 26, 2012, 7:44 PM), http://www.reuters.com/article/2012/04/26/us-chesapeake-idUSBRE83P0PX20120426 ("Critics of [Chesapeake] have long complained the company's board acted a[s] little more than a rubber stamp for McClendon . . . .").

260. *See* Russell Gold, *Chesapeake Board Crimps CEO's Power*, WALL ST. J., May 1, 2012, http://online.wsj.com/articles/SB10001424052702304050304577377781801653726 [hereinafter Gold, *Board Crimps CEO's Power*].

261. "A cozy sense of entitlement is a tendency that separating the jobs [of CEO and Chairman] is intended to combat . . . ." Jeff Sommer, *The C.E.O. Triumphant (at Least at Apple and Chase)*, N.Y. TIMES, May 25, 2013, http://www.nytimes.com/2013/05/26/your-money/at-apple-and-jpmorgan-a-good-week-for-the-ceo.html?pagewanted=all&_r=0 (citing Erik Gordon, a professor of law and business at the University of Michigan); *id.* (contrasting the typical preference of corporate governance experts of separating the positions of Chairman and CEO with a recent vote by shareholders of JP Morgan Chase opposing the separation of Chairman and CEO, positions held by Jamie Dimon, but noting his relative success during the mortgage crisis and that seven of the ten largest institutional shareholders of the company are run by individuals that hold both positions).

262. Jeff Goodell, *The Big Fracking Bubble: The Scam Behind Aubrey McClendon's Gas Boom*, ROLLING STONE (Mar. 15, 2012), http://www.rollingstone.com/politics/news/the-big-fracking-bubble-the-scam-behind-the-gas-boom-20120301. In fact, the board members were compensated generously and significantly higher than board members at peer companies. Gilbert, *supra* note 257 ("Directors' pay for 2010 averaged above half a million

2. Chesapeake's Aggressiveness and the Incurrence of Debt

When the market for natural gas was flourishing, McClendon's aggressiveness served Chesapeake and its shareholders well.[263] McClendon, however, remained aggressive despite changing market conditions.[264] Between 2006 and 2011, Chesapeake "aggressively acquired leases in natural gas shale plays . . . and unconventional oil plays . . . ."[265] Quite simply, Chesapeake was spending billions more than its operations produced.[266] According to plans announced in early

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dollars . . . . Both ISS and Glass Lewis say that [Chesapeake] director compensation is significantly higher than at peer companies."); Daniel Gilbert & Joann S. Lublin, *Chesapeake Draws Shareholder Ire*, WALL ST. J., Apr. 19, 2012, http://online.wsj.com/news/articles/SB10001424052702304331204577354381117840896 ("In addition, Chesapeake board members are allowed up to 40 hours of flight time on company leased aircraft every year. Only 2% of S&P 500 companies let their board members use corporate aircraft for personal purposes . . . ."); Mark Maremont & Daniel Gilbert, *Chesapeake's Private Jets In Cross Hairs*, WALL ST. J., May 9, 2012, http://online.wsj.com/news/articles/SB10001424052702304363104577392542273995870 (stating that Chesapeake "owns fractional shares in 22 different jets [, which] . . . is a large number given" the company's size, and that, for 2011, Chesapeake expended $2.9 million for management's personal air travel, which is significantly more than its regional competitors–Anadarko Petroleum Corp. ($633,000) and Devon Energy Corp. ($98,000)). Shortly before the 2012 annual meeting of shareholders, the board's compensation was dramatically reduced and the aircraft perquisite was eliminated. Chesapeake Energy Corp., Current Report (Form 8-K) Exhibit 99.1 (May 31, 2012) (stating Chesapeake "[r]educ[ed] directors' annual compensation by 20%, to a level that is at or below that of the Company's peers"); *see also* Daniel Gilbert, *Chesapeake Energy Probe of McClendon Drags into 2013*, WALL ST. J., Dec. 30, 2012, http://online.wsj.com/articles/SB10001424127887323635504578211433215730800 (stating Chesapeake "eliminated a perk that allowed directors to use company aircraft for personal travel").

263. "It was . . . a period in which Chesapeake—with Mr. McClendon as the leader, chief promoter and visionary-in-chief—helped jump-start a revolutionary change in the U.S. energy landscape." Gold, *Board Crimps CEO's Power*, *supra* note 260 ("While . . . there was a land rush to gobble up the acreage, Chesapeake was a Wall Street darling.").

264. Helman, *supra* note 259 ("[McClendon is] the most reckless, the alpha wildcatter with an off-the-charts risk tolerance.").

265. Chesapeake Energy Corp., Annual Report (Form 10-K) 2 (Mar. 1, 2013).

266. Daniel Gilbert, *Chesapeake Faces Costly Cuts*, WALL ST. J., June 7, 2012, http://online.wsj.com/articles/SB10001424052702303296604577452820329167592; Gilbert et al., *supra* note 249 (citing Chesapeake's announcement that "it would spend as much as $9.6 billion [in 2012], despite projecting less than $3 billion in cash flow, and recently borrowed $4 billion"); *see also* Liam Denning, *Chesapeake's Working-Capital Conundrum*, WALL ST. J., June 1, 2012, at C10 (charting, since 2003, Chesapeake's mostly negative working capital and its peers' mostly positive working capital). Net working capital is a company's current assets minus its current liabilities, or a measure of a "company's efficiency and short-term liquidity." *Id.*

2012, Chesapeake sought to "raise as much as $14 billion dollars . . . in financial transactions—more than quadruple what it expect[ed] to generate by selling oil and gas . . . ."[267] For perspective, Chesapeake needed to raise an amount of money that exceeded the amount at which the market valued the company.[268] Despite issuing stock at a rate much higher than its peers, Chesapeake could not cover its expenses and incurred significant debt.[269] As concerns of default increased, credit-rating agencies downgraded Chesapeake,[270] and the company repeatedly borrowed on unfavorable terms.[271] Additionally, in hopes of evading those unfavorable terms, Chesapeake resorted to "an exotic menu of

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267. Dezember & Gilbert, *supra* note 45.

268. Liam Denning, *Chesapeake Fuels Reputation for Risk*, WALL ST. J., Apr. 18, 2012, http://online.wsj.com/articles/SB10001424052702303425504577352113862801738 (comparing Chesapeake's then-market capitalization of $12.7 billion market capitalization with its "off-balance sheet obligations of [an estimated] $6 billion . . . on top of existing net debt of $10.3 billion."); *see also* Liam Denning, *Drilling into Chesapeake's Balance Sheet*, WALL ST. J., May 2, 2012, http://online.wsj.com/news/articles/SB100014240527023038776045773801222566 28742?mod=_newsreel_4 (comparing Chesapeake's then-market capitalization of approximately $11 billion with its $15 billion financing plans).

269. Helman, *supra* note 259 (noting McClendon "expand[ed] shares outstanding by an average 12% a year versus 2% for the industry[, but it was] . . . still not enough, and the difference [came] from borrowing—Chesapeake's debt-to-capital ratio of 40% [was] the highest in its peer group").

270. Gold, *Board Turns*, *supra* note 257 ("[D]ebt-rating agency Standard & Poor's lowered Chesapeake's ratings to two notches below investment grade because of concerns about the company's corporate governance and Mr. McClendon's activities."); Jonathan Fahey, *Chesapeake to End CEO Investment Program*, YAHOO! FINANCE (Apr. 26, 2012), http://finance.yahoo.com/news/chesapeake-end-ceo-investment-program-130658910.html (stating "[t]he bond rating agency Fitch lowered its outlook on Chesapeake's debt," citing low natural gas prices and potential difficulties the company might have raising money because of the uncertainties around McClendon's loan deals).

271. Gilbert et al., *supra* note 249 (noting that Chesapeake borrowed $4 billion through a high-cost loan to improve its liquidity); Angel Gonzalez & Matt Wirz, *Chesapeake Energy Increases Loan Sale to $4 Billion*, WALL ST. J., May 15, 2012, http://online.wsj.com/articles/SB10001424052702304192704577406631428253866 (evidencing Chesapeake's weakened financial ability and increased risk of default by noting the increasing rate of interest that it was required to pay on the $4 billion debt, 8.5% through 2012, and 11% thereafter); Matt Wirz & Daniel Gilbert, *Chesapeake Bank Loan Jars Bond Investors*, WALL ST. J., May 15, 2012, http://online.wsj.com/articles/SB10001424052702304192704577403962652915598 (noting "[c]oncerns about the possibility of default" increased); Chesapeake Energy Corp., Current Report (Form 8-K) Exhibit 99.1 (May 17, 2012) (describing the $4 billion debt); *see also* Dezember & Gilbert, *supra* note 45 (noting that, in 2010, Chesapeake issued $1 billion in senior notes and paid only 6.13% in interest, but in 2011, when it issued $1.3 billion in senior notes, it had to pay 6.78% in interest).

financial stratagems" of a sort that none of its peers practiced, which invited market scrutiny and skepticism.[272] In retrospect, the board probably should have tempered McClendon's aggressiveness.[273] Given that this aggressiveness previously contributed to the company's success, perhaps Chesapeake was just "unlucky."[274] Nonetheless, "by continuing to spend profligately, reducing its flexibility to deal with [market and industry] vagaries . . . , Chesapeake ma[de] its own luck."[275]

3. Chesapeake's Corporate Mission

Corporations generally are free to seek profit by any legal means.[276] Although corporations may pursue different missions as they evolve over time, a corporation commonly identifies its core competencies and then seeks profits based upon those competencies for which it possesses a competitive advantage.[277] A lack of corporate focus reflects poorly on corporate management. Chesapeake's overly aggressive focus on acquiring leasehold interests resulted in a burgeoning debt load, forcing Chesapeake to deviate from its one-time focus and undertake an array of profit-seeking activities.

For much of its existence, Chesapeake focused on locating and developing natural gas fields.[278] As the price of natural gas fell, so did

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272. *See* Daniel Gilbert, *Corporate News: Chesapeake Boosts Cash Goal*, WALL ST. J., Feb. 14, 2012, at B3; Goodell, *supra* note 262 (quoting Bob Brackett, a financial analyst: "'Chesapeake's poor credit rating pushes them to turn to unconventional financing.'"); Helman, *supra* note 259 (noting none of Chesapeake's peers "engage in such odd financing").

273. *See* Gold, *Board Crimps CEO's Power*, *supra* note 260 ("[A]s natural-gas prices have dropped, investors have valued financial discipline over growth, and Chesapeake has faltered.").

274. *Id.*; Denning, *supra* note 268

275. *Id.*

276. *See* DEL. CODE ANN. tit. 8, § 102(a)(3) (2011) (requiring the certificate of incorporation to set forth the "nature of the business or purposes to be conducted [but that i]t shall be sufficient to state . . . that the purpose of the corporation is to engage in any lawful act . . ."); 18 OKLA. STAT. § 1006(a)(3) (2011) (same).

277. MICHAEL E. PORTER, COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE (1985). For example, over time, Apple has morphed from a producer of desktop computers to a producer of portable hand-held devices, but all the while the company focused upon its innovative technologies and its knowledge of consumer preferences. *See* Apple Inc., Annual Report (Form 10-K) 30 (Oct. 31, 2012) (reflecting annual sales of $6.04 billion for desktop computers, $5.62 billion for iPods, $80.45 billion for iPhones, and $32.42 billion for iPads).

278. Chesapeake Energy Corp., Annual Report (Form 10-K) 3 (Mar. 1, 2011) ("From 2000 through 2008, our focus was on finding and developing natural gas resource plays.").

Chesapeake's profits—forcing it to seek other means of profit generation. For example, although Chesapeake had not previously focused on oil, the corporation turned to oil as the differential between the price of oil and natural gas widened.[279] For 2012, its oil sales outpaced its natural gas sales.[280] Chesapeake's increased emphasis on oil could not, however, advance unimpeded, because the company had to sell some of its most valued holdings to pay down outstanding debt.[281] Of course, with the price of natural gas falling, its natural gas holdings would not have drawn an attractive price, so Chesapeake perversely had to sell its oil holdings while trying to expand into that field.[282]

In addition, to pay down debt, Chesapeake sold some of its pipeline assets, undermining its business strategy of vertical integration.[283] Although, in the short term, those pipeline sales generated revenue, those sales translated to future debt, as Chesapeake eventually will have to pay the new owner of the pipelines to transport its own natural gas.[284]

"Chesapeake's [hedging] plays in the market resemble[d] the approach of a hedge fund more so than an exploration company . . . ."[285] In the company's own words, "'[W]e . . . hedge to make money.'"[286] Knowing that the price of oil and gas is beyond their control, oil and gas

279. Clifford Krauss, *Trouble with the Top Man*, N.Y. TIMES, Apr. 26, 2012, http://mobile.nytimes.com/2012/04/27/business/energy-environment/chesapeake-energy-to-end-chiefs-compensation-plan.html?_r=0 (stating Chesapeake "has [recently] tried to move more of its drilling into oil, since prices for crude are still high"); Chesapeake Energy Corp., Annual Report (Form 10-K) 3 (Mar. 1, 2011) ("In the past two years, our focus has shifted to finding and developing plays with oil and natural gas liquids (NGL) since oil and NGLs are more highly valued in the U.S. than natural gas . . . .").

280. Chesapeake Energy Corp., Annual Report (Form 10-K) 6 (Mar. 1, 2013) (reflecting increasing oil sales: $822 million for 2010, $1.52 billion for 2011, and $2.83 billion for 2012; and decreasing natural gas sales: $3.169 billion for 2010, $3.13 billion for 2011, and $2.00 billion for 2012 (all totals are exclusive of derivatives)).

281. Krauss, *supra* note 279 ("But in an indication of Chesapeake's weakening condition, Mr. McClendon is poised to sell its 1.5 million acres in the West Texas Permian basin, one of the hottest drilling spots in the country."); Gilbert, *supra* note 272 (quoting criticism by Mark Hanson, an analyst at Morningstar: "You don't just acquire [the Permian Basin asset in October 2011], flip it [in February 2012]").

282. *See* Krauss, *supra* note 279.

283. *See* Chesapeake Energy Corp., Annual Report (Form 10-K) 3–4 (Mar. 1, 2011) (discussing a "business strategy" that includes "vertical integration").

284. Liam Denning, *Chesapeake Energy Pays the Piper*, WALL ST. J., June 9, 2012, at B16.

285. Russell Gold, *Hedges Gone Awry Set Back Chesapeake*, WALL ST. J., June 4, 2012, at B1.

286. *Id.*

companies commonly enter contracts to minimize, or hedge, their risk.[287] Oil and gas companies typically "lock in prices for a year or two so [they] can concentrate on finding and producing oil and natural gas. Chesapeake, in contrast, [wa]s an active trader in the commodities markets, buying and selling financial contracts on exchanges . . . for short-term gains—or losses."[288] Like similarly situated companies, Chesapeake entered into contracts to hedge risk, but it sold a number of those protective contracts in the fall of 2011.[289] These sales yielded $353 million in profit, but Chesapeake eventually suffered losses of more than $750 million during late 2011 and early 2012, when it had to sell natural gas at market prices that had fallen to decade-low levels.[290] Such hedging losses were significant given that, for the first quarter of 2012,[291] Chesapeake posted a gain from operations of only six million dollars.[292]

Chesapeake earned profits, "not from selling the gas itself, but from buying and flipping the land that contain[ed] the gas. [In 2012, t]he company [was] the largest leaseholder in the United States, owning the drilling rights to some 15 million acres—an area more than twice the size of Maryland,"[293] but it would have taken the company thirty years to drill the leases that it had acquired.[294] Its aggressive acquisitions were met with a cratering market for natural gas, as unaffordable lease fees accumulated.[295] In addition to billions due in lease payments, the terms of certain leases forced Chesapeake to drill at a loss on some

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *See infra* Part III.A.4 (suggesting that Chesapeake may disguise its hedging gains and losses as "operational" gains and losses).

292. Chesapeake Energy Corp., Quarterly Report (Form 10-Q) 5 (May 11, 2012).

293. Goodell, *supra* note 262.

294. Helman, *supra* note 259 ("[During 2007-2011,] Chesapeake . . . entered into 600,000 leases covering 9 million acres, paying out $9 billion in lease bonuses to landowners in the process—so much land that it would take Chesapeake 30 years to drill it all.").

295. *See* Daniel Gilbert, Joann S. Lublin & Russell Gold, *Chesapeake Overhauls Board*, WALL ST. J., June 21, 2012, http://online.wsj.com/articles/SB10001424052702304898704577480352163444694 (stating Chesapeake is "saddled . . . with debt and . . . vulnerable to sinking prices for its principal product"); Russell Gold, *Costly Liabilities Lurk for Gas Giant*, WALL ST. J., May 11, 2012, at A1 (noting that Chesapeake "continued to spend billions to lease new acreage and drill new wells, leaving it with a projected gap of $10 billion between operational cash flow and its spending and debt-reduction plans").

properties because those leases specified dates by which the company was required to drill to avoid losing its rights to do so.[296] Consequently, Chesapeake began selling the leaseholds that it had aggressively acquired.[297] This leasehold-transaction business "amount[ed] to a shadow company within Chesapeake, [costing] some $6.5 billion in cash a year . . . and [generating] $5 billion in proceeds[, or] . . . almost as much cash in and cash out as the supposedly core oil and gas business."[298]

4. Chesapeake's Financial Statements and Their Transparency

Because one cannot take a corporation for a test drive to assess its value, the market heavily relies upon corporate disclosure, particularly a corporation's financial statements, to assess a company's worth.[299] Chesapeake appears to have been less than transparent in its financial statements,[300] as the corporation reportedly understated its debt and obscured its earnings from operations.

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296. Gilbert, *supra* note 266 (noting payment of $20 billion in connection with leases entered into between 2008 and 2012, which leases required drilling at a loss (due to the falling price of natural gas) or risk losing the lease); Goodell, *supra* note 262 (describing the leases as including a hidden cost–the obligation to drill by specified dates); Helman, *supra* note 259 (describing Chesapeake drilling "at a breakneck pace in [Louisiana and Texas], even at a loss").

297. Chesapeake Energy Corp., Annual Report (Form 10-K) 3 (Mar. 1, 2010) ("[W]e have shifted our strategy from drilling inventory capture to drilling inventory conversion and monetization. In doing so, we have de-emphasized acquisitions of proved properties, . . . capturing value by selling a portion of our leasehold and producing properties."); Gilbert et al., *supra* note 249. Following the change of control in 2012, Chesapeake planned divestitures, more so than acquisitions. Chesapeake Energy Corp., Annual Report (Form 10-K) 2-3 (Mar. 1, 2013) ("[W]e aggressively acquired leases in natural gas shale plays from 2006 through 2008 and unconventional oil plays from 2009 through 2011. . . . We believe this extensive leasehold position . . . offers valuable divestiture opportunities . . . . Our undeveloped leasehold acquisition phase in now substantially complete.").

298. Helman, *supra* note 259. The leasehold transactions were not clearly reflected in the company's income statement. *Id.* For more on the lack of transparency, *see infra* Part III.A.4.

299. *See* JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 578-80 (7th ed. 2013).

300. A corporation's disclosures may be less than transparent to further its interests and those of its investors. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 290–93, 310–11 (1991). For example, a company may not be forthcoming about a new discovery or innovation because disclosure might advantage its competitors more than its own investors. *Id.* However, this does not appear to have been the case for Chesapeake regarding the disclosures that will be discussed in this section.

As discussed above, as Chesapeake became increasing indebted, the terms at which it borrowed became increasingly unfavorable.[301] Chesapeake consequently resorted to unconventional financing transactions, for which its balance sheets did not reflect obligations of more than one billion dollars.[302]

Chesapeake obscured its earnings from operations by treating seemingly nonoperational income as operational income. Utilizing permissible—but atypical—accounting methods, Chesapeake mixed proceeds from assets sales with operational revenue.[303] Financial analysts generally treat assets sales by an exploration and production company as one-time gains or losses and would exclude such items from a company's operational profitability.[304] Chesapeake, on the other hand, offset its operational expenses in 2011 by nine billion dollars from assets sales and similarly treated transactions, leaving unclear the efficiency of its operations.[305] Just as Chesapeake may have been overinclusive regarding its operational earnings, it may have been underinclusive regarding its operational expenses.[306] Even if the lack of

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301. *See supra* Part III.A.2.

302. Gold, *supra* note 295 (noting that Chesapeake "made a number of long-term commitments to Wall Street banks that require it to deliver specific amounts of oil and natural gas each month through 2022, in exchange for upfront cash . . . . [Chesapeake] told investors how much the unusual deals . . . brought in for the company . . . [, b]ut it ha[d]n't provided details about the costs to fulfill the contracts," which analysts subsequently estimated to be $300 million in 2012, $270 million in 2013, and $800 million between 2014 and 2022); *see also* Denning, *supra* note 268 (noting that Chesapeake incurred "off-balance sheet obligations of [an estimated] $6 billion"); Gilbert, *supra* note 272 ("[Chesapeake sold] future oil and gas production from a field in the Texas Panhandle for cash up front, the 10th such deal it has done [between] 2007 [and February 2012]. . . . Some analysts are unnerved by this manner of raising cash, which they say creates obligations that don't show up on the company's balance sheet."); Helman, *supra* note 259 (noting that credit rating agencies consider the volumetric-production-payment transactions to be off-balance-sheet debt where "loans [are] to be repaid in gas instead of cash").

303. Ben Casselman, *Critics: Chesapeake's Murky Books Obscure Costs*, WALL ST. J., May 20, 2012, http://online.wsj.com/articles/SB100014240527023047917045774164830 70025516; *see also* Helman, *supra* note 259 ("The land business amount[ed] to a shadow company within Chesapeake . . . . But you wouldn't know it from the income statement. No land acquisitions or sales show up there.").

304. Casselman, *supra* note 303.

305. *Id.*

306. *Id.* ("Chesapeake . . . accounts for its exploration and drilling expenses using a method that accounting experts say is generally more aggressive and less transparent than the approach many other big energy companies use. . . mak[ing] it hard to figure out the true costs of Chesapeake's drilling programs and their success . . . . For example, the company

transparency in its financial statements never rose to the level of fraud, Chesapeake, by obscuring its financial condition, invited skepticism and discounted valuations.[307]

5. Chesapeake's Conflicts of Interest

A corporate executive's personal finances generally would not be a matter of concern to the board of directors. In the case of Aubrey McClendon, however, Chesapeake's board should have been more aware of transactions giving rise to potential conflicts of interest. When McClendon personally risked his investment in Chesapeake, resulting in his sale of millions of shares of Chesapeake stock in 2008, the board learned that McClendon's penchant for risk in his personal finances could negatively impact Chesapeake.[308] If not prior to 2008, then certainly thereafter, the board should have done more to monitor McClendon's personal financial activities. When the transactions described below came to light in 2012, shortly before the annual meeting of shareholders, the market reacted negatively.[309]

From 2004 to 2008, while serving in the dual roles of Chesapeake's Chairman and CEO, McClendon helped to run a two hundred million dollar hedge fund.[310] During that time period, McClendon "engaged in 'near daily' communications and 'exhaustive' calls to help direct the

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last year spent $776 million in interest, according to securities filings, but reported only $44 million on its income statement.").

307. *See* Daniel Gilbert & Tom Fowler, *Chesapeake Targets 'Aubrey Discount'*, WALL ST. J., Jan. 30, 2013, http://online.wsj.com/articles/SB10001424127887323926104578274272217881136 (referencing the "Aubrey discount"); Krauss, *supra* note 279 ("'When it comes to disclosure with [McClendon], there always seems to be something amiss, something in the picture that hasn't come out,' said Mark Hanson, an energy stock analyst at Morningstar.").

308. *See supra* Part I.A.

309. Chesapeake's share price fell by 25% between the beginning of the year and the midyear shareholder meeting, reaching a low point on May 17, 2012. *Chesapeake Energy Corp.: Historical Prices*, YAHOO! FINANCE, http://finance.yahoo.com/q/hp?s=CHK+Historical+Prices (search "Start Date" for "Jan. 3, 2012"; then search "End Date" for "June 7, 2012"; then follow "Get Prices") (showing Jan. 3, 2012 closing price of $23.60; May 17, 2012 closing price of $13.55; June 7, 2012 closing price of $17.85).

310. Bussey, *supra* note 32; Russell Gold & Daniel Gilbert, *The Many Hats of Aubrey McClendon*, WALL ST. J., May 8, 2012, at B1; Schneyer et al., *supra* note 27. Chesapeake was, once again, less than transparent; prior to the reporting by Reuters in 2012, Chesapeake had not publicly disclosed McClendon's involvement in the hedge fund. Schneyer et al., *supra* note 27.

fund's trading," according to another who helped run the fund.[311] McClendon frequently met with the fund's traders and regularly met with potential fund investors.[312] McClendon cofounded the fund, which listed Chesapeake as its mailing address, and its listed phone number was answered "Chesapeake Energy" by one who was unfamiliar with the fund.[313] If the distraction from simultaneously managing significant companies was not troubling in and of itself,[314] then the fact that McClendon's hedge fund traded in the commodities that Chesapeake generated, which created the potential for self-interested trades, should have been.[315] Unlike trading in stocks, insider trading in commodities is not illegal, absent manipulation.[316] Nonetheless, in contrast to Chesapeake's practices,[317] oil and gas companies generally prohibit such trading.[318] Because Chesapeake accounted for 5% of natural gas production, a public announcement by Chesapeake regarding natural gas could move the market, presenting an opportunity for McClendon's hedge fund to trade profitably ahead of that announcement.[319] Additionally, at some point, it may have been in Chesapeake's best interests to take a particular action regarding natural gas that would have decreased the value of a position held by McClendon's hedge fund, presenting the risk that McClendon would not have caused Chesapeake to take that action.[320]

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311. Schneyer et al., *supra* note 27.

312. *Id.*

313. *Id.*

314. McClendon had other wide-ranging investment interests, but there has been no indication that he played a significant managerial role in those other investments. *See* Gold & Gilbert, *supra* note 310 (listing ownership stakes in a television station, Jamba Juice Co., the Oklahoma City Thunder, a cattle ranch, and a cancer-treatment center).

315. Schneyer et al., *supra* note 27.

316. *See* 15 U.S.C. § 78i (2012).

317. Neither Chesapeake nor McClendon responded to requests for information on the issue; Chesapeake's Code of Ethics did not clearly address the issue. Schneyer et al., *supra* note 27.

318. Maria Lokshin, *SEC Examining Insider Trading Rules For Commodities Markets, White Says*, 45 SEC. REG. & L. REP. 1429, 1429 (2013); Schneyer et al., *supra* note 27.

319. Schneyer et al., *supra* note 27 (describing "front-running"). Reuters listed an example of Chesapeake's market-moving actions: "On January 23, the company announced sharp output curbs in response to low prices. In response, U.S. natural gas futures surged by 8 percent the same day." *Id.*

320. *Id.*

6. Chesapeake's FWPP

Chesapeake provided McClendon with a virtually unique opportunity to personally profit on each well the company drilled.[321] Under the Founder Well Participation Program (FWPP) that shareholders approved in 2005,[322] McClendon was entitled to buy a 2.5% stake in each well drilled by Chesapeake, but it was all-or-none to prevent cherry picking by the CEO.[323] In theory, the FWPP could align McClendon's personal interests with the interests of Chesapeake's shareholders. Regarding the FWPP, however, the alignment of McClendon's personal interests with those of Chesapeake's shareholders was jeopardized in various regards, some of which are addressed here.[324]

First, following the margin call, McClendon's personal holdings of Chesapeake stock fell below 1%, while his personal interest in Chesapeake's wells remained at 2.5%.[325] By percentage interests alone, McClendon faced greater incentives to ensure the profitable operation of Chesapeake's wells than of Chesapeake as a whole.

Second, if the terms of the FWPP properly motivated McClendon, then those terms should have been firm when, in effect, they were not.

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321. Russell Gold, *Tough Talks Loom at Chesapeake*, WALL ST. J., Apr. 27, 2012, http://online.wsj.com/articles/SB10001424052702303990604577370343158069850. The program was not unique because SandRidge Energy, Inc. (SandRidge) also permitted its founder, Tom Ward, to participate in a similar program. *Id.* Interestingly, Ward and McClendon cofounded Chesapeake in 1989, before Ward left Chesapeake and organized SandRidge. *Id.*; David Wethe & Joe Carrol, *Chesapeake Co-Founder Ward Funding New Energy-Production Company*, BLOOMBERG, Oct. 17, 2013, http://www.bloomberg.com/news/2013-10-17/chesapeake-co-founder-ward-funding-new-energy-production-company.html. SandRidge, however, terminated its well-participation program in 2008. Gold, *supra*. Although SandRidge had permitted Ward a 3% stake in each well (compared to McClendon's 2.5% under Chesapeake's program), Ward's aggregate stakes were one-tenth the size of McClendon's aggregate stakes. *Id.*

322. Chesapeake Energy Corp., Proxy Statement (Form 14A) 13-14 (Apr. 29, 2005) (submitting the continuation of the FWPP to shareholders for approval in 2005, but noting that the program had been in force since the company's initial public offering in 1993); Chesapeake Energy Corp., Current Report (Form 8-K) Exhibit 10.2.1 (June 15, 2005) (same).

323. Gold, *supra* note 295; Driver & Grow, *supra* note 29.

324. An extensive analysis of the FWPP exceeds the scope of the article.

325. Christopher Helman, *It's High Time Chesapeake's McClendon Felt the Heat*, FORBES (June 10, 2011, 12:12 PM), http://onforb.es/tfL7qt (noting that McClendon's well interests, not his shares in Chesapeake, allowed him "to stay on the Forbes 400 list of richest Americans. These interests also give McClendon enormous incentive to make deals to sell Chesapeake's developed acreage to other buyers").

With respect to some wells, McClendon sold his personal interests,[326] partially severing the link between his personal interests and those of Chesapeake and its shareholders.[327]

Third, a contract that specifies a percentage of the whole, without providing for the possibility that the whole may deviate substantially in size, may be poorly crafted.[328] During the FWPP's first full year, the year following shareholder approval of the FWPP, Chesapeake drilled only nineteen wells.[329] Due in part to Chesapeake's aggressive acquisition of leasehold interests, Chesapeake eventually drilled more oil and gas wells per year than any other company,[330] drilling as many as 1700 wells in 2011.[331] To meet the all-or-nothing requirement of the FWPP, McClendon had to bear his share of the increasingly large costs of operating so many wells. For example, in 2011, he had to pony up $457 million.[332] During 2012, it became public that McClendon had borrowed over one billion dollars to continue his participation in the FWPP, which was troubling in certain regards.[333] McClendon pledged his interests in the wells as collateral until the loans were repaid,[334] potentially de-linking his personal interests from the interests of Chesapeake and its shareholders.[335] Moreover, McClendon caused Chesapeake to transact with companies to which he was personally

326. Gold, *Board Turns*, *supra* note 257 ("In 2008, he sold off future production from his minority stakes in several thousand wells to . . . Wells Fargo & Co. He was paid $132.45 million in 2008 under the deal and agreed to provide oil and gas from the wells for a 10-year period.").

327. *See, e.g.*, 26 U.S.C. §§ 421, 422(b)(5) (2012) (providing favorable tax treatment by a corporation of its grants of stock options, which corporations commonly utilize to align the interests of their executives with the interests of their shareholders, but only when any "such option by its terms is not transferable by such individual").

328. *See generally* Jones v. Harris Assocs. L.P., 537 F.3d 728, 729–33 (7th Cir. 2008) (Posner, J., dissenting from denial of rehearing en banc), *vacated and remanded on other grounds*, 559 U.S. 335 (2010).

329. Gold, *Board Crimps CEO's Power*, *supra* note 260.

330. Gold & Gilbert, *supra* note 310; *see also* Gold, *Board Turns*, *supra* note 257 (stating Chesapeake had become the "most active driller in the nation").

331. Gold & Gilbert, *supra* note 310.

332. *Id.* ("At the end of [2011], his ownership stake made him the 25th largest oil-and-natural-gas producer in the U.S. To fund this, he needed to raise $457 million in 2011 alone."); *see also* Gold, *Board Crimps CEO's Power*, *supra* note 260; Gold, *supra* note 321.

333. Bussey, *supra* note 32; Driver & Grow, *supra* note 29; Gold, *Board Crimps CEO's Power*, *supra* note 260.

334. Gold, *Board Turns*, *supra* note 257; Gold, *supra* note 321.

335. Driver & Grow, *supra* note 29.

indebted, presenting potentially stark conflicts of interests. McClendon's largest lender, EIG, "received favorable terms on its Chesapeake investments."[336]

> In one instance, he arranged for [personal] loans of up to $1.4 billion from private-equity group EIG . . . while Chesapeake was negotiating to sell it hundreds of millions of dollars in corporate assets . . . . In other cases, Wells Fargo & Co. and Goldman Sachs Group Inc. made [personal] loans [to McClendon before] . . . Chesapeake selected these companies to act as financial advisers and handle [another transaction].[337]

Fourth, McClendon's personal indebtedness resulted in a different type of conflict between his personal interests and those of Chesapeake's shareholders. McClendon may have been unable or unwilling to continually increase his personal borrowing to participate in the FWPP, whereas risk-averse shareholders of a corporation want the corporation to increase debt to pursue promising long-term strategies.[338] Though certainly not the only explanation, this short-term/long-term conflict suggests a rationale that explains Chesapeake's "shadow" land business.[339] By causing Chesapeake to acquire valuable leasehold interests, prove their worth by drilling, and then sell those interests,

336. *Id.*

337. Gold, *Board Crimps CEO's Power*, *supra* note 260; *see also* Joe Carroll, *Chesapeake Board Backtracks on What It Knew on CEO Loans*, BLOOMBERG (Apr. 26, 2012, 3:43 PM), http://www.bloomberg.com/news/2012-04-26/chesapeake-board-back tracks-on-what-it-knew-about-ceo-loans-2-.html ("McClendon got a $1 billion line of credit with EIG Management Co. LLC . . . . EIG Management is a unit of EIG Global Energy Partners LLC, which participated in a $1.2 billion preferred-shares purchase in the Chesapeake subsidiary on April 9."); Gold, *Board Turns*, *supra* note 257 ("In recent years, [McClendon] has taken two loans that are controlled by EIG . . . . In the last six months, EIG has participated in groups that have purchased about $2.5 billion in Chesapeake assets."); Gold, *supra* note 295 (referencing that Wells Fargo had participated in one of Chesapeake's VPP programs); Gold, *supra* note 321 (discussing the transactions between EIG and McClendon and EIG and Chesapeake).

338. *See, e.g.*, N.J. Carpenters Pension Fund v. Infogroup, Inc., No. Civ.A. 5334-VCN, 2011 WL 4825888, at *8-10 (Del. Ch. Sept. 30, 2011) (finding it reasonable to infer that the company's founder and significant shareholder acted in self-interest when he had a significant liquidity need and caused the corporation to engage in a transaction, because minority shareholders–unlike the founder–could easily liquidate their small positions, so the founder's liquidity need was unique among shareholders); CHOPER ET AL., *supra* note 36, at 210-12 (describing shareholders appropriating wealth from debtholders by increasing the riskiness of the corporation).

339. Helman, *supra* note 259.

McClendon would limit his personal costs under the FWPP to the short-term, but Chesapeake's sales would allow McClendon to collect his share of discounted, long-term profits. The potential conflict would arise from the differing needs to limit costs; McClendon might have been unable or unwilling to continue to borrow, but Chesapeake's shareholders might have preferred that the company continue to exploit, rather than sell, productive land, and bear the costs of doing so.

Failing to perform "basic due diligence,"[340] Chesapeake's board "did not review, approve or have knowledge of the specific transactions engaged in by Mr. McClendon [to finance his participation in the FWPP] or the terms of those transactions."[341] After learning that McClendon was personally indebted to companies that had transacted with Chesapeake, the board stripped McClendon of his chairmanship on May 1, 2012, approximately five weeks before the annual meeting of shareholders.[342] By agreement, the FWPP was terminated.[343]

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340. Scheyder & Daily, *supra* note 259 (quoting Jake Dollarhide, CEO of Longbow Asset Management, Tulsa, OK); *id.* (allowing McClendon "free rei[gn]").

341. Krauss, *supra* note 279; *see also* Nathan Koppel, *Chesapeake Backtracks on What Board Knew of CEO's Transactions*, WALL ST. J., Apr. 26, 2012, http://online.wsj.com/articles/SB10001424052702303990604577368382228834906 (noting that, after stating that board was "fully aware" of the transactions whereby McClendon financed his FWPP costs, board clarified that it was unaware of particular financing transactions and only "generally aware" that McClendon posted his stakes under the FWPP as collateral for the loans). Chesapeake did not disclose "the number, amounts, or terms of McClendon's loans" that enabled his continued participation in the FWPP. Driver & Grow, *supra* note 29. Although federal rules specifically require disclosure of pledges of stock by executives to secure loans, those rules do not extend to pledges of interests in wells. *Id. But see* Anna Driver & Brian Grow, *Chesapeake Discloses Loans After Reuters Report*, REUTERS (Apr. 20, 2012, 8:18 PM), http://www.reuters.com/article/2012/04/21/us-chesapeake-idUSBRE83J0QJ20120421 ("Wall Street analysts . . . said more was needed."). The Securities and Exchange Commission commenced an informal inquiry into the FWPP. Gold, *Board Turns*, *supra* note 257; Gold, *Board Crimps CEO's Power*, *supra* note 260. A shareholder suit regarding the FWPP and non-disclosures was filed on April 19, 2012 and is on-going. Mallow v. McClendon, No. 5:12-cv-00436-M (W.D. Okla. 2012).

342. Gold & Gilbert, *supra* note 310; Denning, *supra* note 268; Daniel Gilbert, *Chesapeake CEO McClendon to Exit*, WALL ST. J., Jan. 29, 2013, http://online.wsj.com/articles/SB10001424127887324329204578272353396167988 [hereinafter Gilbert, *Chesapeake CEO*] (stating that McClendon cited "'philosophical differences' with a board of directors largely installed by shareholders to curb his risk-taking and free-spending ways."). The market reacted favorably to the news. Gilbert & Fowler, *supra* note 307 (noting stock price increase of 6%). McClendon's severance agreement requires Chesapeake to pay him $50 million over four years. Gregory Zuckerman & Daniel Gilbert, *For CEOs, Buyout Game Can Be Second Act*, WALL ST. J., Mar. 28, 2013, http://online.wsj.com/articles/SB100014241278873233618045

7. Chesapeake's Board of Directors Shake-Up

The foregoing precipitated further change at Chesapeake,[344] despite years of the company resisting change at the board level,[345] despite the company's staggered board, and despite the 2010 Amendment that required companies like Chesapeake to retain their staggered boards until 2015.[346] Icahn reappeared, disclosing in late May 2012, weeks before Chesapeake's annual meeting of shareholders, that he had increased his holdings to over 7%.[347] Icahn criticized Chesapeake's management, pointing to the "enormous risk associated with an ever changing business strategy, enormous capital funding gap, poor governance, and unchecked risk taking."[348] Icahn's position commanded support from others,[349] including Southeastern Asset

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8386400318570598. This severance agreement includes triple the cash amount required by contract, which prompted renewed criticism of Chesapeake's compensation practices. Daniel Gilbert, *Proxy Advisers Again Take Aim at Chesapeake*, WALL ST. J., June 5, 2013, http://online.wsj.com/articles/SB10001424127887324299104578527691959222894?mg=reno64_wsj.

Following an inquiry by the board of directors, Chesapeake issued a press release, which stated the inquiry "did not reveal any improper benefit to Mr. McClendon or increased cost to [Chesapeake] as a result of the overlap in the financial relationships." Chesapeake Energy Corp., Current Report (Form 8-K) Exhibit 99.1 (Feb. 20, 2013). Moreover, "[b]ased on the documents reviewed and interviews conducted, no intentional misconduct by Mr. McClendon or any of the company's management was found by the Board concerning th[o]se relationships and/or th[o]se transactions and issues." *Id.* The board's nuanced findings invite speculation that McClendon did benefit, albeit not improperly, and that he did engage in misconduct, albeit not intentionally. The board's findings hardly constitute ringing endorsements of the transactions.

343. Chesapeake Energy Corp., Current Report (Form 8-K) 2, Exhibit 1.2 (May 2, 2012) (setting forth letter agreement to terminate the FWPP as of June 30, 2014, or 18 months early).

344. *See infra* Appendix A.

345. Daniel Gilbert, *Icahn Ally Is Joining Board of Chesapeake*, WALL ST. J., June 18, 2012, http://online.wsj.com/articles/SB10001424052702303836404577475063484621778 [hereinafter Gilbert, *Icahn Ally*]. Such resistance was reflected by Chesapeake's lobbying efforts in favor of the 2010 Amendment that mandated staggered boards. *See supra* Part I.

346. *See supra* Part I.C.1.

347. Ryan Dezember & Daniel Gilbert, *Icahn Takes Chesapeake Energy Stake*, WALL ST. J., May 25, 2012, http://online.wsj.com/articles/SB10001424052702304840904577426622973904532.

348. *Id.*

349. *See infra* note 352 (discussing the results of the 2012 annual meeting of shareholders); *see also* Venkiteshwaran et al., *supra* note 42 ("[Icahn's] acquired targets posted a positive abnormal return of almost 25% from the time of Icahn's disclosure of his

Management (SEAM), which was Chesapeake's largest shareholder, at just under 14%.[350] In June 2012, succumbing to pressure from shareholders, Chesapeake agreed to reconstitute its nine-member board, with a majority of the board selected or endorsed by Icahn and SEAM.[351]

Moreover, in resolving disputes with those shareholders, the company announced, just days prior to its 2012 annual meeting of shareholders,[352] that the board would "seek relief from the Oklahoma statute mandating classified boards of directors . . . so that shareholders will have the

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investment to the sale of the company. In sharp contrast, the returns to the surviving firm subsample were a surprisingly negative 60%.").

350. Clifford Krauss, *Chesapeake Agrees to Revamp Its Board*, N.Y. TIMES, June 4, 2012, http://www.nytimes.com/2012/06/05/business/chesapeake-agrees-to-new-board.html?pagewanted=all (noting SEAM owns 13.6% of Chesapeake stock); *see also* Gilbert, *supra* note 171.

351. Gilbert, Lublin & Gold, *supra* note 295. The original concern of the Oklahoma Legislature—that Chesapeake could be acquired in a manner detrimental to the state, and that prompted the 2010 Amendment—was at risk of being realized. Icahn and SEAM advocated that Chesapeake consider selling itself. Gilbert, *supra* note 171.

352. At Chesapeake's 2012 annual meeting of shareholders, at which only two directors were up for election (due to Chesapeake's staggered board), shareholders displayed their disapproval of the incumbent nominees: V. Burns Hargis, president of Oklahoma State University, commanded support from only 26% of the votes cast, and Richard Davidson, former chief executive of Union Pacific Corp., received support from only 27% of those votes. *See* Gilbert, *Icahn Ally*, *supra* note 345; Chesapeake Energy Corp., Current Report (Form 8-K) 2 (June 8, 2012). Those levels were the lowest received by any director nominee of any S&P500 company for the prior five years. *See* Russell Gold & Daniel Gilbert, *Chesapeake Directors Rejected by Shareholders*, WALL ST. J., June 8, 2012, http://online.wsj.com/articles/SB10001424052702303753904577454132886187926. Despite such anemic support, each of the incumbents was reelected because directors are elected by plurality under Oklahoma's corporate code and Chesapeake's bylaws. Chesapeake Energy Corp., Current Report (Form 8-K) 2 (June 8, 2012); 18 OKLA. STAT. § 1061(3) (2011). At the same meeting, although the shareholders' vote failed to meet the high threshold of two-thirds of the outstanding shares for approval to amend the bylaws, the board—on its own—amended the bylaw, to deviate from the default rule of plurality approval to elect any director, and going-forward director nominees will be required to receive approval by a majority of votes cast to be elected. Chesapeake Energy Corp., Current Report (Form 8-K) 2 (June 8, 2012). "Shareholders also delivered a strong reprimand to the way Chesapeake pays its top executives. The company's pay practices were opposed by 80% in a nonbinding vote, a reflection of discontent with the company's pay to and supervision of Aubrey McClendon . . . ." Gold & Gilbert, *supra*; *see also* Gilbert & Lublin, *supra* note 171 (noting that, during 2012, Chesapeake was one of only a few corporations to have lost a non-binding advisory vote by shareholders on executive compensation).

opportunity to elect the entire board of directors at the 2013 Annual Meeting of Shareholders."[353]

Further changes to the board,[354] and the passage of several months, did nothing to change the board's sentiment. As the 2013 legislative session approached, Chesapeake's board reiterated its commitment to "seek relief from the Oklahoma statute mandating classified boards of directors . . . ."[355] Moreover, Chesapeake's board, broadly speaking, threatened the Oklahoma Legislature: "In the event the Oklahoma Legislature declines to grant relief from the classified board statute, the Board intends to take the steps necessary to allow the Company to re-incorporate in Delaware."[356] That threat did not go unnoticed: "Carl Icahn and the rest of the gang say they are going to take Chesapeake's corporation to Delaware if we don't [adopt the pending bill]."[357] Moreover, Chesapeake lobbied the legislature to enact an effective repeal of the 2010 Amendment.[358]

B. The Legislative Process of the 2013 Amendment

On the first day of the legislative session, representatives introduced the bill to "undo" the 2010 and 2012 Amendments in the House.[359] While Chesapeake effectively drafted its language, Representative Jordan nominally authored the bill.[360] Within days, a House Committee unanimously approved the bill; approximately one week after its introduction, the House approved the bill by the vote of seventy to

353. Chesapeake Energy Corp., Current Report (Form 8-K) Exhibit 99.1 (June 6, 2012).

354. *See infra* Appendix A.

355. Chesapeake Energy Corp., Current Report (Form 8-K) 2 (Jan. 7, 2013).

356. *Id.* at 3.

357. 2013 House Debate, *supra* note 1 (quoting Rep. Cory Williams (D-Stillwater) at 59:09).

358. *See* Daniel Gilbert, *Chesapeake Gets Reversal of Oklahoma Staggered-Terms Law*, WALL ST. J., Mar. 19, 2013, http://online.wsj.com/articles/SB10001424127887323639604578370730747650130; Joe Wertz, *First Bill Signed into Law in 2013 Undoes a Law Chesapeake Energy Helped Write*, NAT'L PUB. RADIO (Mar. 6, 2013), http://stateimpact.npr.org/oklahoma/2013/03/06/first-bill-signed-into-law-in-2013-undoes-a-law-chesapeake-energy-helped-write/ ("Chesapeake Energy has been pushing for a new law to undo a previous law the company helped write.").

359. H.R. 1646, 54th Leg., 1st Sess. (Okla. 2013); *Bill Information for HB 1646*, OKLA. ST. LEGISLATURE, http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1646&Session=1300 (follow "History" hyperlink) (last visited Nov. 2, 2014) (reflecting introduction and first reading on February 4, 2013).

360. *Bill Information for HB 1646*, *supra* note 359. Representative Jordan also authored the 2012 Amendment. *See Bill Information for HB 2658 (2011-2012)*, *supra* note 234.

twenty-four, with seven members excused.[361] Within two weeks, and after a committee thereof unanimously supported the bill, the Senate passed the bill without opposition.[362] A month after its introduction, the governor signed the bill, which was the first bill she signed in 2013.[363]

C. Criticisms of the 2013 Amendment

Although the 2010 and 2012 Amendments merit criticism, the restoration of ex-ante status quo was the proper move from a corporate law perspective. But although it was the right thing to do, the bill amounted to special-interest legislation yet again, as the legislature enacted a statute effectively drafted by—and essentially benefitting—a single corporation.

During the debate on the bill in the House, the legislators criticized themselves:

> [A]nd so now that [it's 2013 and Chesapeake] is governed in a different manner, it looks like we're undoing the sweetheart deal. That probably doesn't give a very good perception to the public.[364]
>
> [W]hen we've monkeyed with this twice by passing more laws, we've actually made things worse on companies in Oklahoma.[365]
>
> [W]hen it benefitted a few in [2010], we were asked to come in and run special legislation that ran contrary to free market principles . . . . We . . . restrict[ed] how corporations [could] do things for basically protectionist purposes, and we all supported [the bill in 2010] because we all care about those companies. But now . . . we're going to turn around and say, "Well, we're going to ignore those protectionist principles we

361. *Bill Information for HB 1646*, *supra* note 359 (follow "Votes" hyperlink; then follow "HB1646_VOTES.HTM All House Votes" hyperlink) (reflecting vote in the House).

362. *Id.* (follow "Votes" hyperlink; then follow "HB1646_VOTES.HTM All Senate Votes" hyperlink) (reflecting vote of 44-0, with 4 excused).

363. *Id.* (follow "History" hyperlink) (showing first reading on Feb. 4, 2013, and approval by the governor on Mar. 5, 2013); Wertz, *supra* note 358.

364. 2013 House Debate, *supra* note 1 (quoting Rep. Mike Reynolds (R-Oklahoma City) at 22:48).

365. *Id.* (quoting Rep. Joe Dorman (D-Rush Springs) at 37:13).

> set up a couple of years ago, and open it back up to basic free market principles again."[366]
>
> This is the third time [that we have amended this statute]. . . . If we're doing it for the shareholders [of Chesapeake] this time, does that mean I was duped into doing it for the CEO [of Chesapeake] the first time . . . ?[367]

Though the overall process demands criticism, the legislature's action in 2013 shored up some of the deficiencies of the process accompanying the 2010 and 2012 Amendments.

For example, the legislature consulted the OK Bar Committee about the 2013 proposal, the Committee expressed approval, and the proposal moved forward with the Committee's support. The Committee did not draft the amendment, however, as it historically has done since its creation.[368]

Although Chesapeake moved forward in 2010 without the knowledge or support of other significant Oklahoma corporations—namely ONEOK and OGE—in 2013, Chesapeake solicited and received the support of those companies.[369]

Conclusion

After much to do, the Oklahoma legislature restored the appropriate language in the staggered-board statutory provision, which, once again, sets the default consistent with the prevailing choice of managers and investors, while allowing those parties to deviate from the norm. If the legislature had consulted the OK Bar Committee, then the committee would have counseled against the 2010 Amendment. If the legislature had persisted, then the OK Bar Committee would have crafted a legislative compromise that would have negated the need for the 2012 Amendment. By following the standard operating procedure for implementing updates to the Oklahoma corporate code—utilization of the OK Bar Committee—the legislature involves those with the most pertinent expertise. Moreover, the members of the committee generally

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366. *Id.* (quoting Rep. Scott Inman (D-Oklahoma City) at 39:21).

367. *Id.* (quoting Rep. Cory Williams (D-Stillwater) at 57:19).

368. *See supra* notes 98-104.

369. Neither ONEOK nor OGE lobbied the legislature for the 2013 Amendment because their concerns had been addressed in 2012, and because Chesapeake's proposal (restoration of the ex ante status quo) would permit them to have their preferred de-staggered boards. *See supra* Part II.

represent different constituencies—litigators and transactional attorneys, in-house attorneys and outside counsel, defense attorneys and plaintiffs' attorneys. By representing such varied interests, the members of the OK Bar Committee are more likely to craft well-grounded and well-rounded legislation. Granted, attorneys may be impacted by the legislation that they craft, and may be motivated by self-interest,[370] but, unless legislators themselves possess the appropriate business law expertise and are willing to wield the drafting pen, the OK Bar Committee should initially draft updates to the Oklahoma corporate code. Thereafter, the legislation crafted by the OK Bar Committee can be circulated to other constituencies for commentary,[371] to eliminate, or at least weaken, any self-interested efforts.

370. *See* Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 473 (1987) ("[W]e conclude that Delaware law reflects a political equilibrium among the various interest groups within the state in which the lawyers enjoy a dominant position.").

371. *See supra* Part I.C.2.b.

APPENDIX A

Chesapeake's Board Composition, Pre-Shareholder Action of 2012 [372]	*Chesapeake's Board Composition, Post-Shareholder Action of 2012* [373]
Aubrey McClendon, Chairman & CEO[374]	Archie W. Dunham, Chairman
Richard K. Davidson[375]	R. Douglas Lawler, CEO[376]
Kathleen M. Eisenbrenner[377]	Vincent J. Intrieri[378]
V. Burns Hargis[379]	Louis A. Raspino[380]
Frank Keating[381]	Bob G. Alexander[382]
Charles T. Maxwell[383]	R. Brad Martin[384]
Don Nickles[385]	Frederic M. Poses[386]
Louis A. Simpson[387]	Thomas L. Ryan[388]
Merrill A. Miller, Jr.	Merrill A. Miller, Jr.

372. Chesapeake Energy Corp., Proxy Statement (Schedule 14A) 1, 7-9 (May 11, 2012) (noticing shareholders of the upcoming annual meeting and identifying members of the board).

373. By mid-2013, Chesapeake has replaced all but one of its directors with individuals recommended or approved by its largest shareholders. Gilbert, *Chesapeake CEO*, *supra* note 342.

374. McClendon was removed as Chairman in May 2012. Gold, *Board Crimps CEO's Power*, *supra* note 260. By agreement with the Board, McClendon stepped down as CEO on April 1, 2013. Chesapeake Energy Corp., Current Report (Form 8-K) (Apr. 19, 2013).

375. Despite receiving only 27% of the vote at the 2012 annual meeting of shareholders, Davidson was reelected to the board under Chesapeake's extant bylaws. Chesapeake Energy Corp., Current Report (Form 8-K) (June 8, 2012). Davidson, Eisenbrenner, Keating, and Nickles resigned in June 2012. Press Release, Chesapeake Energy Corporation Announces Reconstituted Board, June 21, 2012 [hereinafter Chesapeake Announces Reconstituted Board].

376. Effective June 17, 2013, Lawler joined Chesapeake as CEO and a member of the board. Chesapeake Energy Corp., Current Report (Form 8-K) (May 20, 2013).

377. Eisenbrenner resigned on June 8, 2012. Press Release, Chesapeake Announces Reconstituted Board, *supra* note 375.

378. Intrieri was proposed by Carl Icahn, who, at the time, was Chesapeake's second largest shareholder. *Id.*

379. Hargis received only 26% of the vote at the 2012 shareholder meeting, which was

the lowest amount for a nominee of an S&P 500 company over the prior five years. *See* Gold & Gilbert, *supra* note 352. Hargis was elected to the board under Chesapeake's extant bylaws. Chesapeake Energy Corp., Current Report (Form 8-K) 2 (June 8, 2012). Hargis tendered his resignation; however, as chairman of the Audit Committee, Hargis was retained, pending completion of the ongoing inquiry regarding the suspicious transactions involving McClendon. Press Release, Chesapeake Announces Reconstituted Board, *supra* note 375. On March 7, 2013, following completion of the inquiry, which found no intentional misconduct by McClendon, Hargis resigned. Chesapeake Energy Corp., Current Report (Form 8-K) 2 (Mar. 7, 2013). Despite some suggestion that Hargis was not independent because Chesapeake donated two million dollars to Oklahoma State University, where Hargis served as president, *see* Gilbert, *supra* note 262, Chesapeake's largest shareholder, which had advocated for a shakeup of the board's composition, favored retaining Hargis until the inquiry was complete. *Id.*

380. The board appointed Raspino to replace Hargis. Chesapeake Energy Corp., Current Report (Form 8-K) 2 (Mar. 7, 2013). *See generally* 18 OKLA. STAT. § 1068(a)(1) (2011) (empowering the board to fill board vacancies).

381. Keating resigned on June 8, 2012. Press Release, Chesapeake Announces Reconstituted Board, *supra* note 375.

382. Alexander was proposed by Chesapeake's largest shareholder. *Id.*

383. Maxwell retired on June 8, 2012, the date of the shareholder meeting. *Id.*

384. Martin was proposed by Chesapeake's largest shareholder. *Id.*

385. Nickles resigned on June 8, 2012. *Id.*

386. Poses was proposed by Chesapeake's largest shareholder. *Id.*

387. In 2011, Simpson joined the board at the request of Chesapeake's largest shareholder. *Id.* However, Simpson resigned on May 3, 2013. Chesapeake Energy Corp., Current Report (Form 8-K) 2 (May 3, 2013).

388. "Ryan was recommended by [Chesapeake's] largest shareholder, Southeastern Asset Management, Inc." Chesapeake Energy Corp., Current Report (Form 8-K) 2 (May 3, 2013).