An Efficiency Analysis of Defensive Tactics

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AN EFFICIENCY ANALYSIS OF DEFENSIVE TACTICS

Ronald J. Gilson* and Alan Schwartz**

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Abstract

For thirty five years, courts and scholars have divided over the effects of defensive tactics in the market for corporate control. Strong defensive tactics locate authority to accept a hostile bid in the target’s board. The board can bargain for a higher takeover price than uncoordinated shareholders could realize but high takeover prices may reduce shareholder returns by reducing the likelihood of receiving a bid. The Delaware Courts themselves disagree. The Delaware Chancery Court would locate ultimate decision authority in the target’s shareholders, while the Supreme Court, by permitting strong defensive tactics, allocates extensive power to the target’s board. Though the Supreme Court’s view settles the legal issue in Delaware for now, the normative debate among scholars and decision-makers regarding whether the shareholders or the board should decide remains unresolved.

The Delaware courts ask whether defensive tactics maximize target shareholder welfare: the shareholders’ expected return from acquisitions. But the more important question concerns social welfare: do defensive tactics reduce efficiency in the market for corporate control? Empirical difficulties so far have prevented analysts from answering either the private or social welfare question rigorously. Regarding private welfare, the analyst cannot observe bids a target’s defensive tactics level deterred. Regarding public welfare, the analyst cannot observe how an otherwise identical market would behave under weak and then strong defensive tactics levels.

We address the two empirical questions by creating a structural model that predicts how the market for corporate control performs under varying defensive tactics levels and then testing the model by simulating market performance. A simulation permits us to isolate the effect of different defensive tactics levels. It also permits us to

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solve for a target’s optimal tradeoff between the increased share of an acquisition’s gain
strong defensive tactics can permit a target to capture and the reduced probability of
receiving bids in consequence of the acquirer’s reduced gain.

The simulated corporate control market performs poorly, making 15% fewer
acquisitions under strong defensive tactics than under weak defensive tactics. Target
boards, however, apparently have been faithful fiduciaries for their shareholders,
choosing defensive tactics levels that optimize the tradeoff between bid frequency and
bid returns. On the other hand, we show, the privately optimal target defensive tactics
level greatly exceeds the socially efficient level. Finally, we suggest that some firms’
recent efforts further to strengthen defensive tactics, such as combining a staggered
board with a poison pill, reduce both efficiency and target shareholder welfare.

Our results do not support a call for an immediate regulatory response. Initially,
we do not rigorously analyze other possible justifications for defensive tactics, such as
that they encourage potential targets to take long-term projects that the market may
undervalue. Also, simulations raise an external validity question: do the researcher’s
assumed simulation parameters capture real world patterns? We argue that our
parameters do well on this measure, but a simulated market cannot perfectly capture
real world behavior. On the other hand, the magnitude of our results and their
consistency with theoretical predictions strongly support our central claim: today’s
market for corporate control is so unlikely to maximize the number of value increasing
acquisitions that scholars, regulators and courts should revisit the defensive tactics
debate.

I. Introduction
   I.1 The Market for Corporate Control
   I.2 Rationales for Defensive Tactics
   I.3 What this article does
II. Delaware Law’s Narrow Focus
III. Model and Predictions
   III.1 A Structural Model
   III.2 Predictions
IV. Proxy Variables and Simulated Search
   IV.1 Market Participants
   IV.2 Strategies, Search Costs and Surplus Splits
V. Results I: Exchange Efficiency
   V.1 How the Simulations Work
   V.2 The Exchange Efficiency Result
VI. Results II: Private Welfare
   VI.1 Defensive Tactics and Shareholder Welfare
   VI.2 The Delaware Courts: Reprise
I. Introduction

I.1 The Market for Corporate Control

The “market for corporate control” is the market in which companies or investment vehicles such as private equity firms search for other companies to buy. The companies that search are called “acquirers”; the companies that are searched for are called “targets”. A private target usually is controlled by a small number of shareholders; a public target is owned by a much larger number of shareholders. We study the subset of the market for corporate control in which public or private acquirers search for public targets to buy.

The shareholders of a private company can accept, reject or respond with a counteroffer to a request to buy their company. It is otherwise with public companies. Under the default rules in corporate law, the shareholders of a public company hold the residual interest in the company and the right to elect directors under whose authority the company is managed and who select the corporate officers. In addition, the shareholders are entitled to decide whether to accept or reject an offer to buy the shares, thereby selling the company.

Before 1985, an acquirer would approach a potential target’s board with an offer to buy. If the board said yes, the two parties would agree on the terms of an acquisition. The target’s shareholders would then accept or reject the deal. Acceptance, as today, could take the form of a vote in favor of the acquisition (if the acquisition was structured as a merger or purchase of the target’s assets) or take the form of a direct sale of shares from the shareholders to the acquirer. If the target board rejected the acquirer’s offer, however, the acquirer could make an offer directly to the target shareholders – a hostile offer – to buy their stock. If a substantial enough majority of the shareholders accepted the offer, the acquirer would then control the target. The acquirer would either elect its own board, who either would merge the target into itself or operate the target as

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1 Delaware Corporate Code §141.
an independent entity. A successful direct offer to buy target shares was, and still is, called a “hostile takeover”.

In the mid-1980s, the Delaware Chancery Court, which in Delaware is the trial level court for corporate legal questions, evaluated the legal status of “defensive tactics”. These tactics transfer much of the power over a hostile offer from the target shareholders to the target’s board of directors. For example, the “poison pill”, one of the most effective defensive tactics, entirely precludes a hostile bid by making it impossible for a potential acquirer to realize value from buying target shares. When a target is “pill protected”, a potential acquirer’s choices are either to make an offer high enough to induce the target’s board to agree, or to undertake the lengthy, expensive and uncertain task of running a proxy contest to oust the board and elect new directors that would be more inclined to sell. At the extreme, a hostile bid for a target with a staggered board would require the potential acquirer to win two successive proxy contests.

Reviewing defensive tactics, Delaware Chancery held that a target’s board could use the poison pill and other defensive tactics to buy the board time to evaluate a bid and to interest other bidders. But the board’s power was time limited: ultimately, the board had to let the shareholders accept or reject the bid of a persistent potential acquirer. The Chancery Court’s position on defensive tactics created what we call a “defensive tactics unfriendly” legal regime. But in a series of later decisions, the Delaware Supreme Court overruled the Chancery Court, holding that as long as the target’s board was acting as a faithful fiduciary for the shareholders, the board could prevent the shareholders from considering a bid. The Delaware Supreme Court thus created what we call a “defensive tactics friendly” legal regime. Hostile takeovers are very much more difficult in this regime.

2 Chancellor Chandler provides a detailed account of the history of Delaware law in his opinion in Air Products and Chemicals, Civ. Action No. 5249CC (Del. Ch. 2011).

3 See Jonathan M. Karpoff and Michael D. Wittrey, Institutional and Legal Context in Natural Experiments: The Case of State Antitakeover Laws, 78 J. Finance 657, 696 (2018) (“…we agree that classified boards and poison pills combine to offer a strong takeover defense. But this insight does not imply that no other defenses matter. … even for firms with classified boards, other types of defenses can increase a firm’s takeover protection.”).

4 A company has a staggered board when only a fraction of its directors are elected annually rather than have all of the directors elected annually. A Delaware Chancellor once remarked that no acquirer had succeeded in winning two proxy contests in a row. See Air Products and Chemicals, Civ. Action No. 5249CC (Del. Ch. 2011).

I.2 Rationales for Defensive Tactics

There are four rationales for defensive tactics. It is helpful, in explicating these, to set out two relevant definitions of efficiency. "Exchange efficiency" holds that assets should move to an agent who values the assets more highly than the current owner does. Exchange efficiency is realized (on an expected basis) when a private company owner accepts a bid. The acquirer must believe that the target is worth more to it than the bid price and the owner must believe that the bid is worth more to her than the value she would derive from continuing to own the target.

The market for corporate control is similar, but not identical. To see the difference, suppose that the present discounted value of a potential target’s net income is $1,000 and there are 100 target shares outstanding. If the market prices the target accurately, each share should sell for $10. Let an acquirer bid $12 a share for all of the shares. The acquirer must believe, as the acquirer of the private company believed, that the target is worth more than $12 per share in its hands. If the target shareholders accept the bid, the acquisition then is ex ante exchange efficient in the standard way: the acquirer prefers owning the assets and the sellers – the shareholders –are happy to receive a premium above the target’s current value.

The first rationale for defensive tactics holds that board control permits a target to prevent inefficient acquisitions. In particular, this rationale rejects the assumption that the corporate control market prices companies accurately. To see what follows from this rejection, make two heuristic assumptions: (a) the market price of our illustrative target is an inaccurately low $7 a share; (b) the target’s board has private information that the target actually is worth $10 a share but cannot credibly communicate this information to the market. On these assumptions, target shareholders might accept a bid of $8.50 a share – a 21.4% premium. The acquisition would be exchange inefficient, however, if the target would be worth only $9.50 a share in the acquirer’s hands. The target’s

6 The early academic debates largely focused on exchange efficiency. Compare Frank Easterbrook & Daniel Fischel, Auctions and Sunk Costs in in Tender Offers, 35 Stan. L. Rev. 1 (1982) (arguing that all defensive tactics should be prohibited based on a social welfare measure), with Ronald J. Gilson, Seeking Competitive Bids versus Pure Passivity in Tender Offer Defense, 35 Stan. L. Rev. 51 (1981) (arguing that the returns to acquirer search for good targets depends on whether the best searchers are also the best parties to realize acquisition gains); and Lucian Bebchuk, The Case for Facilitating Hostile Tender Offers: A Reply and Extension, 35 Stan. L. Rev. 23 (1982) (same).
board, this rationale holds, should have the power to block bids *until* the market comes to see that the target’s true value is $10 a share.⁷

The second rationale for defensive tactics is distributional: it holds that a board’s power to block a hostile bid yields higher prices for targets than a target’s shareholders could realize on their own.⁸ The shareholders, being dispersed and unorganized, would accept any bid that is nontrivially above the pre-bid price.⁹ By contrast, a board with blocking power has the ability to negotiate as would a single owner of the target’s assets. In the example above, while target shareholders may accept a twenty or twenty one percent premium, the second rationale holds that a board with control might negotiate a 30% premium.¹⁰

Two features of this distributional rationale should be noted. Initially, the rationale facilitates inefficient outcomes. If it would be exchange efficient for our illustrative target to change hands at $12 a share, the transaction costs of the acquirer/board negotiations that yield a $13 price are a dead weight *social* loss. Turning to the second feature, a target board that has the power to block bids has an economic problem to solve. Strong defensive tactics give a board the power to increase the price the target can command *conditional on receiving a bid*. But strong defensive tactics, we will see, reduce the

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⁷ According to Delaware courts, a takeover bid “substantively coerces” target shareholders when it offers them the opportunity to accept a bid that may be below the “true” value of the company but the shareholders will not recognize that their company is underpriced. This view is assessed in Ronald J. Gilson and Reinier Kraakman, “Delaware’s Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?”, 44 Bus. Law. 247 (1989). Edward Fox, Merrit Fox & Ronald J. Gilson, “Economic Crisis and the Integration of Law and Finance: The Impact of Volatility Spikes”, 116 Col. L. Rev. 325 (2016), evaluate empirically when, if ever, substantive coercion might exist. A board that believes that every bid will likely be below a target’s true value can effectively opt out of the market for corporate control by adopting very strong defenses. In our simulations, such a firm would be a “noise firm” whom acquirers searching for targets could not buy.


⁹ The intermediation of equity through institutional investors calls the standard negotiation argument into question. We note but do not address here the tension between the dispersed shareholder argument and increased equity concentration in institutional investors as record holders. For a discussion, see Ronald J. Gilson & Jeffrey Gordon, The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights, 113 Col. L. Rev. 883 (2013); Ronald J. Gilson & Jeffrey Gordon, Agency Capitalization: Further Implications of Equity Intermediation, in Research Handbook on Shareholder Power (J. Hill & R. Thomas, eds. 2015).

¹⁰ For suggestive data that defensive tactics permit targets to realize a substantial fraction of an acquisition’s expected return, see Theodosios Dimopoulos & Stefano Sacchetto, Preemptive Bidding, Target Resistance, and Takeover Premiums, 114 J. Fin. Econ. 444 (2014) (target resistance explains 74% of the premium in single bidder contests.)
probability that the target will receive bids because acquirers are less willing to purchase when the target board’s negotiating power reduces the portion of the expected acquisition gain acquirers can keep. Thus, a target board acts in its shareholders’ best interest only if it chooses the defensive tactics level that optimally trades off bid size against bid frequency. A target board that rejects bids in order to protect its independent position, on the other hand, is unfaithful.

The issue for a state court, however, is not whether a target’s board is maximizing social welfare – i.e., exchange efficiency – but whether the board is a faithful fiduciary. On this understanding, the second, distributional rationale is the more important of the first two. And it motivates the Delaware Supreme Court, we will see, to give target boards great leeway to choose privately efficient defensive tactics levels.

The third rationale for defensive tactics posits that board control facilitates “investment efficiency”. This efficiency concept holds that an owner should invest in her assets until the marginal expected value increase equals the marginal investment cost. To understand the relevance of investment efficiency, suppose that the corporate control market accurately values targets as they are currently run but the market tends to undervalue long-term growth prospects. Then let a company have a choice of two projects: project A has an expected value of $v_A$ and pays off in two years; project B has an expected value of $v_B$ and pays off in five years. Finally, project B (discounted to present value) has a higher value than A. Now let the market value project A correctly but possibly *undervalue* project B: the B market price per share could be below true project value. As in the example above, if the target pursued project B, its shareholders could accept a bid that is lower than the value the target ultimately will come to have. Such a bid would permit the *acquirer* to realize the full value $v_B$ when project B matures for a fraction of the investment cost; and would leave the target with unreimbursed investment expenses.

The investment efficiency concern, however, manifests ex ante. Conditional on the target taking the higher valued project B, society is as well off if much of the gain goes to the acquiring company as society would be if all of the gain went to the target company. But in a world without defensive tactics the target would respond to the prospect of losing investment gains by pursuing the lower valued project A. The investment efficiency rationale for defensive tactics thus holds that board control would permit the target to take the higher valued project B because a board would block bids until the market recognized the value project B would create.

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The fourth rationale for defensive tactics concerns the welfare of stakeholders. These are individuals or entities who are neither target nor acquirer shareholders, but who are affected by acquisitions. Such stakeholders include customers, suppliers and employees of a potential target and may include members of a local community such as merchants and property owners. An acquisition may be value maximizing for shareholders of the acquiring and target companies but value reducing for some stakeholders. For example, a successful acquirer may move target assets to another location, thereby disadvantaging local merchants and those employees who are reluctant to relocate. Defensive tactics give a target board the power to weigh the gains to shareholders from an acquisition against the costs to stakeholders. If the costs are too high, the board could use the power defensive tactics provide to reject a bid that would be value maximizing only for target and acquirer shareholders.\footnote{We note that decisions regarding how to divide gains among stakeholders other than as dictated by the factor markets in which stakeholders participate presents a distributional decision that is typically a matter of real governance, made by politically accountable decision makers. Under this fourth rationale, these decisions are made by corporate directors. See Ronald J. Gilson, From Corporate Law to Corporate Governance, Oxford Handbook of Corporate Law and Governance (eds. J. Gordon & Georg Ringe) 2018}

Each of the four rationales raises questions. Regarding the exchange and investment efficiency rationales, academic commentators reject the views that capital market pricing is so inaccurate as to permit many value minimizing takeovers, and also believe that there are few projects with expected virtues a company could not credibly communicate to the market. The second rationale, that protected boards can get higher prices, is correct but socially questionable. Finally, there is a general view that corporate boards should manage for stakeholders as well as for shareholders, but there is no consensus about how boards should do this.\footnote{For example, should a target board prevent its shareholders from considering a bid that has a 20\% premium over the pre-bid price in order to protect local jobs but permit a bid with a 40\% premium to go forward? More generally what weights should a board attach to shareholder and stakeholder interests? Should the weights vary with the type of stakeholder? Today, there are no well-grounded answers to these questions. The theoretical difficulty of deriving weights for stakeholders is analyzed in Michael Magill, Martine Quinzil & Jean-Charles Rochet, A Theory of the Stakeholder Corporation, 83 Econometrica 1685 (2015); Electronic copy available at: https://ssrn.com/abstract=3549527} Nevertheless, the four rationales are motivating for decision makers and so should be subject to serious scrutiny.

\textit{1.3 What this article does}
We focus on the first two rationales for defensive tactics: whether defensive tactics are exchange efficient and whether target boards choose privately optimal or excessively high defensive tactics levels. To pursue these questions, we suppose that capital market prices are roughly accurate and that boards can credibly disclose their private information to the market. On these assumptions, the exchange efficient level of defensive tactics actually is zero: acquirers should capture all of the expected surplus from an acquisition. This one-sided split would maximize the incentive of acquirers to find good targets to buy. The theoretically optimal level of defensive tactics is impossible to achieve in practice, however, because each target is to some extent unique. As a consequence, targets have monopoly power in themselves, and will use that power to extract some surplus from a potentially efficient deal. The question is whether defensive tactics permit targets to extract too much.

To answer this question, we need two things: a causal theory explaining how defensive tactics affect corporate control market efficiency; and an empirically testable definition of efficiency in this market. Beginning with the definition, the corporate control market is “exchange inefficient” unless it maximizes the number of value increasing “matches” between searching acquirers and saleable targets. A value increasing match occurs when the value of the combined company exceeds in expectation the sum of the stand-alone values of the acquirer and the target. To formalize this definition, suppose that in a period there are M in number potential targets that would increase in

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13 “If surplus from a match were split equally between the partners, then all agents invest too little in search effort because none accounts for the share of the surplus gained by the future partner were the agent to make the match. Search efforts made by all in a Nash equilibrium are efficient when the matchmaker receives all the surplus ….” Dale T. Mortensen, Property Rights and Efficiency in Mating, Racing, and Related Games, 83 Econometrica 1685, 1697 (1982). Further, “Although efficient search obtains when the matchmaker takes all the surplus, the members of any particular pair are not likely to divide the surplus in this way, ex post. Once they meet, the two face a bilateral bargaining problem with other more plausible solutions.” Id.

14 Efficiency is commonly measured in matching markets by whether matches are stable. See Eduardo M. Azevado & Jacob D. Leshno, A Supply and Demand Framework for Two-Sided Matching Markets, 124 J. Pol. Econ. 1235 (2016). This measure is satisfied by definition in the acquisition market for made matches because ownership of the target transfers to the acquirer. Another efficiency measure appears in the corporate control literature. First, the credible threat of a takeover may cause target managers to maximize target returns rather than behave self-servingly or ineffectively. This conjecture has been difficult to test empirically. However, a relatively recent paper reported that a rigorous test finds: “strong evidence that the enactment of M&A Laws [which reduce barriers to takeovers] increases the sensitivity of CEO turnover to poor performance…. we provide evidence that an external market for corporate control, when available, can be an effective substitute for internal-governance mechanisms.” Uge Lel & Darius P. Miller, Does Takeover Activity Cause Managerial Discipline: Evidence from International M&A Laws, 28 Rev. of Fin. Stud. 1588. 1590 (2015). Because increasing the ex-ante probability of acquisitions increases the pressure on managers to maximize, the match efficiency measure is consistent with the incentive increasing measure.
value were they to combine with an acquirer. Let there be N in number potential acquirers that are searching for targets to buy, one for each. Define the ratio N/M as σ. Then the market inefficiency is 1 – σ. To illustrate, assume that every searching acquirer makes a value increasing match with a target. Then N/M = 1 and the acquisition market inefficiency is zero: the market for corporate control would be perfectly exchange efficient. But let only one third of the searching acquirers find a good target to match with, so that σ = 1/3. Then the market inefficiency is 1 – σ = 2/3. The market fails to make 67% of the possible value increasing matches.

We are interested in two numbers. Even without defensive tactics, potential acquirers will make suboptimal – i.e., too few -- searches for targets because the acquirers cannot capture all of the expected surplus from a deal. The first number we are interested in therefore is the “minimally achievable market inefficiency”. To illustrate, suppose that acquirer searches yield a sigma of 2/3 only because targets can command a portion of the acquisition gain. Then the minimally achievable market inefficiency is 33%: the market for corporate control “naturally” fails to make one third of the possible value increasing matches. As the second rationale for defensive tactics indicated, board control yields higher prices: that is, board control permits a target to realize a higher fraction of expected deal surplus at the expense of the searching acquirer.

Our causal theory then follows: defensive tactics would be exchange inefficient if the reduced surplus shares they yield for acquirers materially reduce the number of searches the acquirers make, and thus materially reduce the number of good matches the market makes. The second number we are interested in thus is the marginal contribution of defensive tactics to the market inefficiency. Again to illustrate, suppose that the (fewer) searches defensive tactics induce yield a σ of 1/3. Then the corporate control market inefficiency is 67%. Recalling that in our example the minimally achievable corporate control market inefficiency was one third, and so the marginal contribution of defensive tactics to the market inefficiency would be 1/3.

The ideal way to find the two numbers on which we focus would be to identify the actual number of potential targets and acquirers in the market for corporate control in a specified period, then prevent the targets from using defensive tactics and, finally, find σ (the ratio of actual acquisitions to possible acquisitions). This would reveal the minimally achievable market inefficiency. The researcher next should retain the same number of acquirers and targets, but now permit the targets to choose privately optimal defensive tactics levels. She would then find the new σ. This method would permit the researcher precisely to identify the marginal contribution of defensive tactics to the market inefficiency.
inefficiency. The problem, however, is that this method obviously is impossible to implement. And this restates the basic problem with counterfactual causal analysis: the researcher cannot directly test her causal theory because she cannot keep everything constant except the variable of interest. Importantly, the standard empirical fixes for this methodological problem have not worked in the corporate control market because the empirical researcher cannot recover the data: the actual numbers of good targets and acquirers in the corporate control market at any one time. As a result, today no one knows how exchange inefficient the market for corporate control is.

This article introduces a new empirical method to test for exchange inefficiency in the market for corporate control. We first create an informal structural model of the corporate control market. The structural method applies "models based in economic theory. Structural modeling attempts to use data to identify the parameters of an underlying economic model, based on models of individual choice or aggregate relations derived from them." In our model, there are two types of potential acquirers: (i) firms seeking synergy partners a combination with whom would increase the value of the combined firms and (ii) firms seeking targets whose performance could be improved by better management There are three types of targets: (i) possible synergy partners; (ii) potentially improvable targets; (iii) “noise firms” – firms that have chosen defensive tactics levels so high as effectively to opt out of the market for corporate control.

The model supports three predictions: First, even when potential targets do not use defensive tactics, inefficiency in the market for corporate control is high. There are two reasons: a) targets’ natural monopoly power prevents acquirers from capturing all of the surplus from matches; and b) search is particularly costly in the actual corporate control market because supply side heterogeneity is substantial: that is, there are several different possible target types. Heterogeneity reduces search effectiveness because a searcher cannot determine whether a firm would be a good acquisition partner without analyzing the firm in detail. As a consequence, the greater the variety of potential targets the more likely it is that an acquirer will visit – i.e., analyze -- too many firms whom the acquirer could not profitably buy; and thereby visit too few potentially profitable targets. Anticipating that much costly search could be wasted, potential acquirers will reduce their search intensity accordingly. This will increase the corporate

15. Empirical researchers have studied the effect of single defensive tactics, such as a staggered board, but have not studied the current congeries of tactics as a whole. In our view, the single tactic studies have been illuminating but so far inconclusive. See TAN at __.
17 A synergy acquisition improves value by combining complementary assets: a manufacturer combines with a retail distribution network. An acquisition of an improvable firm increases value by replacing the current target’s board (and managers) with a board (and managers) that execute the target’s current strategy more effectively or cause the target to switch to a better strategy.
control market inefficiency. Our second prediction is that defensive tactics should materially increase that inefficiency because they materially reduce the surplus share going to potential acquirers. Third, we predict that a target board that maximizes shareholder welfare would choose a higher defensive tactics level than a social planner would choose. This is because the board only considers the reduction in bids the target may receive from a high defensive tactics level rather than the marginal contribution of the firm’s high defensive tactics level to the average market defensive tactics level. When every potential target’s board considers only its own company’s welfare, the average market defensive tactics level is inefficiently high.

We test these theoretical predictions by simulating corporate control market performance. Following the theory, we specify the number and types of the potential acquirers and targets and the strategies they pursue: how the acquirers search; and how the targets choose defensive tactics levels. Defensive tactics levels are first permitted only to be weak and then permitted to be strong. The simulation permits us to run the ideal procedure. We can simulate corporate control market performance when everything is the same except for the targets’ defensive tactics levels. The simulation thus permits us to observe the two relevant numbers: the minimally achievable corporate control market inefficiency and the marginal contribution of defensive tactics to that inefficiency.

The (simulated) evidence is consistent with the theoretical predictions. The minimally achievable market inefficiency is large and defensive tactics increase the inefficiency substantially. The second and third predictions together imply, and we observe, a large marginal contribution of defensive tactics to corporate control market inefficiency: the simulated market makes 15% fewer acquisitions under the current defensive tactics-friendly legal regime than would be made under a defensive tactics unfriendly legal regime. The actual corporate control market makes over 1.5 trillion dollars of acquisitions a year. Our simulations thus suggest that the Delaware Supreme Court’s move, in the 1980s, from the Chancery Court’s defensive tactics-unfriendly legal regime, which time-limited defensive tactics, to the current defensive tactics-friendly legal regime with no time limit, reduced deal value in the market for corporate control by close to two hundred billion dollars a year.

Turning to shareholder welfare, the simulations permit us to address a target’s optimal tradeoff between bid frequency, which falls as the target’s defensive tactics level increases, and bid size, which increases as the target’s defensive tactics level

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18 In this article, “weak” defensive tactics connote the surplus share from an acquisition that a target’s natural – or monopoly – power alone can command. “Strong” or “friendly” defensive tactics connote the tactics – poison pill, staggered board – that potential targets today are legally permitted to adopt to increase the target’s share.

19 In 2018, the market value of deals for U.S. targets totaled $1.7 trillion. Thomas Reuters, Mergers and Acquisition Review (Legal Advisors).
increases. Our simulations together with real world evidence show, perhaps surprisingly, that target boards choose defensive tactics levels that correspond, more or less, to the theoretically privately optimal levels.\textsuperscript{20} Our third prediction is supported, however: the privately optimal defensive tactics level exceeds the level that would be exchange efficient.

These dramatic results do not support an immediate call for regulatory reform for two distinct reasons. The first is methodological. A simulation is persuasive to the extent that the variables the researcher uses are accurate proxies for the real world variables the researcher cannot observe. We make the case for the external validity of our variables in Part III below, but the correspondence between the computer simulation program and the world is never exact. Therefore, the primary virtue of a simulation is to develop suggestive evidence regarding the magnitudes of the effects that theory predicts will occur in the relevant market.\textsuperscript{21}

The second reason why we do not advocate immediate reform is simple: we analyze in depth only two of the four rationales for defensive tactics. A similarly deep study of the third and fourth rationales, discussed in Part VI(3), may justify the current high defensive tactics level. But even putting these two cautions together, the market exchange inefficiency seems so large that the other rationales would require much stronger empirical and theoretical support than now exists to justify current law.

Our analysis proceeds as follows. Section II highlights Delaware law’s narrow focus regarding defensive tactics. Section III describes the model in detail and specifies our important assumptions. Section IV then describes our simulation program. Section V presents the simulation market results and Section VI presents the shareholder welfare result. Section VI also discusses the conflict between private and social efficiency in the corporate control market and briefly analyzes the defensive tactics rationales we do not consider in detail. Section VII concludes. Appendix 1 provides a narrative description of the coding and search algorithms for our simulation program and Appendices 2, 3 and 4 contain relevant tables. The simulation code itself is available to researchers on line.\textsuperscript{22}

\textsuperscript{20} Directors’ faithfulness – i.e, their commitment to shareholder welfare -- appears to have evolved over the period since the appearance of significant numbers of hostile takeovers. As the business culture came to understand that the directors’ obligation in connection with a hostile takeover was to secure the highest return to shareholders, informal constraints on defensive tactics may have become more important. See Ronald J. Gilson, Catalyzing Corporate Governance: The Evolution of the United States’ System in the 1980s and 1990s, 24 Corp. and Sec. Law J. 143 (2006) (reviewing evolution of independent directors’ perception of the change in independent directors’ role in a hostile takeover).

\textsuperscript{21} We note a recent methodological observation by two researchers: “Simulations have proven to be useful for generating conjectures, and \textit{can be essential for developing quantitative results}”. Drew Fudenberg & David K. Levine, Wither Game Theory? Towards a Theory of Learning in Games, 30 J. Econ. Perspectives. 151 (2016) at 165-66 (emphasis added). Our interest is in “quantitative results”.

\textsuperscript{22} https://sarahbraasch.wixsite.com/corpcontrolmtkdesign
II. Delaware Law’s Narrow Focus

A board that uses defensive tactics to block a bid may be faithful\textsuperscript{23} and correct – the bid is too low -- or faithful and mistaken, or unfaithful. Which of these motives obtains in a particular case is difficult for a court to determine. The Delaware Supreme Court thus has eschewed an inquiry into motive in favor of a rule-like assessment of whether a defensive tactic either is “draconian” or is “preclusive” of a hostile bid.\textsuperscript{24} Though a poison pill would preclude a hostile offer, the Supreme Court explained that the pill is preclusive \textit{only} if it also makes a successful proxy fight to replace directors in favor of candidates who would eliminate defensive barriers “mathematically impossible or realistically unattainable.”\textsuperscript{25}

The Delaware Supreme Court does not ask whether these defensive tactics maximize social welfare. Rather, the Court asks only how defensive tactics affect target shareholder welfare \textit{given that} a potential acquirer has bid. The courts’ narrow focus is understandable, however, because the legal question hostile takeover lawsuits present is whether the directors’ response to a bid violated their fiduciary duty to maximize shareholder welfare, \textit{not} whether their decision affected negatively the public or the shareholders of other companies.\textsuperscript{26}

III. Model and Predictions

\textit{III.1 A Structural Model}

Before introducing our model we make two comments. Initially, structural models sometimes are solved analytically: that is, the researcher characterizes the model mathematically, and then derives the mathematically grounded conclusions that the model’s assumptions imply. Some markets, however, are too complex to admit of precise mathematical treatment given the modeling strategies that are available to the researcher. That is the case here. Two types of models characterize markets in which numerous parties attempt to make deals with each other: search models and matching models. Search models explore the relation between buyer shopping behavior and market outcomes, but they fit poorly with the market for corporate control because in search models the buying side searches while the selling side chooses prices; the

\textsuperscript{23} A target board is “faithful” when it uses its power to maximize shareholder welfare rather than insulate itself from being dismissed after a takeover.
\textsuperscript{25} Id. at 1388-9.
\textsuperscript{26} Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. S. Ct. 1986) (limiting board’s consideration of a takeover only to shareholder value rather than considering its impact on other stakeholders).
sellers maintain those prices during a relevant period; and the sellers passively wait for buyers.\textsuperscript{27} In the corporate control market, by contrast, a fraction of potential targets actively searches for acquirers who will buy them; targets do not necessarily maintain their prices (i.e., they may change their defensive levels after being actively searched); and some target/sellers are reluctant to accept (or will not accept) an offer to buy.\textsuperscript{28}

Matching models, which explore how well agents match with complementary agents, also are poor fits because in these models every market participant is actively seeking to match. In the corporate control market some firms -- the financial targets and noise firms -- prefer not to match.\textsuperscript{29} Thus, current search and matching models cannot yield mathematically grounded predictions regarding how an accurately specified market for corporate control functions under the current Delaware defensive tactics-friendly legal regime or how it might function under a defensive tactics-unfriendly regime.\textsuperscript{30}

When analytical solutions are unavailing, the researcher can attempt to solve the model empirically. An empirical solution can take two forms. In both, the researcher uses the relevant theory -- for us search theory -- to derive predictions regarding how the market should perform given the assumptions. In the first form, the researcher attempts to find real world evidence that is consistent with, or contradicts, those predictions. For data unavailability reasons, causal theories of the effect defensive tactics have on the market for corporate control cannot be tested directly. Therefore, we use a more novel empirical strategy: to simulate how the market for corporate control performs. Our


\textsuperscript{28} Wenyu Wang recently did solve a structural model of the corporate control market analytically, but the assumptions that characterized his model are starkly counter-factual. For example, Wang assumed that firms do not use defensive tactics and that every firm that could benefit from an acquisition seeks to match. See Wenyu Wang, Bid Anticipation, Information revelation and Merger Gains, 128 J. Fin. Econ. 320, 337 (2018). The model thus is unhelpful to the researcher who seeks to understand a market in which defensive tactics are ubiquitous and some firms prefer to remain independent.

\textsuperscript{29} In the usual matching model, persons search for spouses, or firms search for employees while employees search for firms.

structural model guides the simulation program, and the program’s inputs are the assumptions we make about the characteristics of market participants and the market’s structure.

Beginning with participants, acquirers in the model search sequentially for targets to buy and (many fewer) potential targets search for acquirers with which to merge. An agent searches sequentially by equating the marginal expected value of finding a good target with one more search -- another detailed analysis of a potential target -- with the cost of that search. We assume that acquirer search costs are quadratic: that is, the cost of a second search exceeds the cost of the first search; the cost of the third search exceeds the cost of the second search; and so forth.\textsuperscript{31} As a consequence of this assumption, an acquirer either will make a good match or exit the market before matching because the increased cost of its next search would exceed the expected gain.

A potential target (who is not searching) has a different maximization problem. In the model, the target’s task is to choose a defensive tactics level. This is not simple because strong defensive tactics increase the target’s gain from an acquisition, conditional on the target receiving a bid, but a high defensive tactics level reduces the probability of receiving a bid (because the lower is the acquirer’s expected gain from a made deal, the lower is the potential acquirer’s incentive to search for such a deal). In order to isolate the exchange efficiency effect of defensive tactics, we assume that target boards maximize their companies’ expected return from an acquisition. A faithful board chooses the defensive tactics level that implements its company’s optimal tradeoff between maximizing the probability of a bid and maximizing the price conditional on a bid actually occurring.

The market is populated with many potential targets and many potential acquirers.\textsuperscript{32} There are three target types. A “synergy target” is maximizing expected returns from its assets and business model, and so would not do better under different management. However, the synergy target’s assets may complement the assets of at least one of the potential acquirers. A value increasing match would occur when two firms with complementary assets conclude a deal. A “financial target” does not maximize expected returns. A value increasing match would occur if an acquirer with the ability to improve firm performance finds a financial target. A “noise firm” is not a target: the firm, that is, would reject every bid.

There are two acquirer types. A “synergy buyer” searches for an efficient synergy target. We assume that this searcher lacks the technology to improve firm performance other than by combining complementary assets and so would not bid for a financial

\textsuperscript{31} We motivate the assumption of quadratic search costs in Part IV below.
\textsuperscript{32} We set our assumptions out largely in narrative form.
target if the searcher discovered one. A “financial buyer” searches for targets whose performance the acquirer has the capacity to improve. We assume that a financial buyer is not a synergy match for, and so would not bid for, a synergy target. Some synergy targets search for acquirers with whom to match. For reasons detailed below, we assume that many more acquirers search than targets. Hence, we focus on acquirer search, but note here that target search and acquirer search are complements: theory predicts and our simulations show that the probability that an acquirer and a target will match is higher when acquirers and targets both search.

The corporate control market is “semi-strong information efficient”. Therefore, a potential target’s market price – price per share times the number of shares -- approximates the target’s stand-alone value plus the expected premium from a possible bid. This assumption importantly implies that every successful acquisition is ex-ante exchange efficient because a willing buyer and a willing seller concluded it. A potential acquirer would not bid unless it believed that it would realize value in excess of the bid price and the target’s board would not recommend that its shareholders accept a bid unless the bid exceeded the probable target shareholders’ reservation price, which exceeds the target’s stand-alone value. Failed acquisitions, however, are not

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33 Financial buyers usually are private equity firms whose only “asset” is the ability to improve target performance, often by causing the target to cease certain business strategies or to choose others.
34 Semi-strong efficiency exists in the market for corporate control when the market price of a company (price per share times number of shares) incorporates all public information relevant to the company’s value. Ronald J. Gilson & Reinier Kraakman, “The Mechanisms of Market Efficiency”, 70 Va. L. Rev. 549 (1984). The assumption is particularly plausible in the acquisition context. A board that opposes an offer based on private information can release that information and so make the market more informationally efficient. While the effectiveness of disclosure is limited by the strategic costs of disclosure or by the difficulty of making a credible disclosure given the target board’s potentially mixed motivations, the option to disclose does move the target’s price toward information efficiency.
35 Recent evidence is consistent with our assumption that many matches are ex-ante efficient. See Matthew Cain, Stephen B. McKeon and Steven Davidoff Solomon, ”Do takeover laws matter? Evidence from five decades of hostile takeovers”, 124 J. Financial Economics 464, __ (2017) (”Column 1 reports a strong and economically significant correlation between takeover susceptibility and firm value, indicating that firm value is increasing in its susceptibility to hostile takeovers.”); Asli M. Arikan & Rene M. Stulz, ”Corporate Acquisitions, Diversification, and the Firm’s Life Cycle”, 71 J. Fin. 139, 140-41 (2016) (“We find strong support for the predictions of neoclassical theories that acquisitions are made by better performing firms and firms with better growth opportunities, and that acquisitions create value. … Our evidence of a positive relation between a firm’s acquisition rate and its Tobin’s q supports the neoclassical view of acquisitions, which holds that firms use acquisitions to reallocate corporate assets to more productive uses.”); Vojislav Makismovic, Gordon Phillips & Lin Yang, ”Private and Public Merger Waves”, 68 J. Fin. 2177, 2179 (2013)(”We find that acquisitions are efficiency improving, both on and off the [merger] wave.”). Wenyu Wang, supra note __, applies his structural matching model of the M&A market to data and finds that “the value of an active merger market is estimated to be 12.6% for an average acquirer and 47.32% for an average target.” Ran Duchin & Breno Schmidt, ”Riding the Merger Wave: Uncertainty, Reduced Monitoring, and Bad Acquisitions”, 107 J. Fin. Econ. 69 (2013) is in part consistent with these conclusions; it finds favorable results for mergers in general but less favorable results for acquisitions that take place during a wave of acquisitions. A potentially large source of inefficiency exists in stock for stock mergers because acquirers may bid with overvalued shares based on private information available only to the bidder, thereby
necessarily efficient. A target board may reject a value increasing bid because it wants to remain independent or because it mistakenly believes that the target can do better by remaining independent.

At the beginning of a market period, potential targets choose their defensive tactics levels and potential acquirers choose their search strategy. Acquirers know the average market defensive tactics level but not the level at particular firms. To learn that, and other relevant information, the acquirer must investigate. Because a target board can adopt a poison pill quickly, however, and because pills increase target bargaining power, potential acquirers (in our simulations and in actual practice) assume that every target will have a pill when an offer is made. While an individual target cannot affect the market average defensive tactics level by the level it chooses, the target can affect the probability that it will be bought. A sequential searcher may pass on a firm whose defensive tactics level seems high in light of the acquirer’s view of the distribution of defensive tactics levels in the market. The targets in our model thus act as do sellers in standard search models, whose choice of a price – here a defensive tactics level -- cannot affect the market price distribution but can affect the individual seller’s demand. Finally, a potential target can increase the cost of buying it after receiving a bid – for example, by finding competitive bidders.

purchasing targets though other possible bidders have higher valuations. Li, et. al. use a structural model to estimate the magnitude of the inefficiency, with a sample of 2,503 deals from 1980 to 2013, finding “that an overvalued bidder crowds out a bidder with a higher synergy in 7% of the deals … the aggregate efficiency loss is 0.63% of the target’s pre-announcement value, with a standard error of 0.19%”. (at 3). Di Li, Lucian A. Taylor, and Wenyu Wang, “Inefficiencies and Externalities from Opportunistic Acquirers”, 130 J. Fin. Econ. 265 (2018).

36 We follow the standard convention in search models that sellers do not advertise: a searcher can learn the firm’s price only by investigating the firm. Because, we later show, defensive tactics largely determine prices, we thus assume that a potential acquirer can learn how a potential target’s defensive tactics level affects the division of expected deal surplus only by investigating the target.


38 It is not customary to include information intermediaries in search models, but investment banks sometimes play an intermediary role in the market for corporate control. To see why we do not consider investment banks, consider “conjunctive search” for goods: the searcher screens potential products using one or two “cutoff attribute levels” such as product safety. The searcher than makes full attribute comparisons over the products that survive the screen. In the market for corporate control, the bankers sometimes perform the first of these functions: identifying a subset of firms in which an acquirer is likely to be interested. The acquirer then makes a full investigation of a fraction, or all, of the potential targets in the subset. Define the cost of creating the screened subset \( c_s \) and the cost of making a full comparison \( c_f \), so \( c = c_s + c_f \). Impressionistic evidence suggests that \( c_s/c \) is small: the majority of acquirer costs is incurred in making full investigations. Some acquirers use investment bankers while others do not, but the relative fraction of banker users is unknown. For these reasons, we let \( c_s = 0 \). Relaxing this assumption would have an ambiguous effect on our results. On the one hand, search costs would increase to include bankers’ fees; on the other hand, bankers may increase the probability that an acquirer finds a good target. We do not characterize this tradeoff here.
III.2 Predictions

This model generates three qualitative predictions:39

One: The minimally achievable corporate control market inefficiency would be high even if defensive tactics were banned. This is because acquirer search is suboptimal.40 There are three reasons: search is especially costly, insufficiently rewarding and ineffective at locating good targets. In the usual search model, agents search for low prices, and price information is convenient to access. In the market for corporate control, acquirers search for matching targets but match information is costly to acquire. Whether a potential target is a good synergy match for a strategic buyer commonly requires investigation into how combining the two firms would produce a larger joint gain. Similarly, whether and by how much a financial buyer could improve a potential target commonly requires careful investigation and (usually) access to non-public information concerning the nature of existing management’s failures and the extent to which an acquirer’s management has the skills to eliminate or ameliorate those failures. In addition, both types of acquirers must identify and evaluate the efficacy of each potential target’s defensive tactics level.

Further, acquirer search could be socially efficient only if the acquirer could capture the full return from searching. But as explained in the Introduction, targets are not fungible, which implies that each target has some monopoly power. As a result, concluding an acquisition/match necessarily requires bilateral bargaining in which, after a potential acquirer finds an appropriate target, the two sides negotiate to divide the expected match gain.

Finally, heterogeneity among potential targets reduces search effectiveness because it increases the number of wasted searches: searches in which an acquirer “hits on” the wrong target.41 For example, a financial buyer may find a target that would only be valuable as a synergy partner. Similarly, a synergy buyer may find a target that requires improvement. Finally, either buyer type may find a noise firm, which is not for sale. The costs of determining that an acquirer had found the wrong partner type or a...
noise firm are wasted. Wasted searches are especially inefficient in our structural model because search costs increase in the number of prior searches. To explain this effect, consider a sequence of three searches; the first costs $100, the second $110 and the third $120. An acquirer initially hits a noise firm, which is a wasted search. But now, the second and third searches, over potentially profitable matches, become the first and second searches. In effect, because the acquirer wasted a $100 search, it is restricted to two draws from the distribution of possible good matches, with the first draw costing $110 and second costing $120. In short, wasted searches increase the cost of productive searches. The consequence is to increase the probability that a potential acquirer will exit the market before it matches. And for these three reasons, acquirer search is suboptimal, so that the corporate control market, even in the pre-defensive tactics era, should have been materially exchange inefficient.

**Two:** The marginal contribution of defensive tactics to the market inefficiency is large. There are two reasons. To understand the first, suppose that heterogeneity is absent: all targets are alike. Defensive tactics nevertheless increase a target’s bargaining power in an acquisition negotiation above the power the target’s monopoly power alone could command. The less match surplus searching acquirers expect to realize, the lower is acquirer search intensity. Second, and more subtly, supply side heterogeneity and defensive tactics should be mutually (negatively) reinforcing. As just argued, defensive tactics reduce the acquirer’s gain from search and supply side heterogeneity increases the acquirer’s cost of search. The combination of strong defensive tactics and supply side heterogeneity thus should reduce acquirer search intensity more than either factor alone could do.

**Three:** A faithful target board chooses a defensive tactics level that (a) permits an acquirer to share in the expected surplus from a match; but (b) exceeds the socially efficient level. Regarding (a), potential acquirers that expect to receive no portion of the surplus from the transaction will not search, so the target would receive no bids. Regarding (b), a faithful target board chooses the defensive tactics level that optimizes the tradeoff between maximizing target surplus conditional on receiving a bid and maximizing bid frequency. The board, however, will not consider the effect of its choice on the market average defensive tactics level. Because every board considers only its own shareholders’ welfare, the market average defensive tactics level will exceed the socially efficient level.

Theory yields these predictions, but the decision maker would like to know the magnitude of the predicted effects. The public decision maker -- a legislature, say -- cannot control the number and type of targets in the market and their intrinsic uniqueness. The decision maker, however, can control the level of defensive tactics

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42 Part VII below explains in detail how defensive tactics increase target bargaining power.
43 We describe here a standard search externality: sellers choose prices or contract terms without taking into account the effect of their choices on the total amount of search in the market.
firms choose. The policy relevant empirical issue thus concerns the *marginal contribution* of defensive tactics to the market inefficiency. The greater that contribution is, the less efficient the current Delaware defensive tactics-friendly law becomes. For the reasons set out in the Introduction, assessing the magnitude of defensive tactics’ marginal contribution cannot be done “naturally” because the researcher cannot observe the number and type of targets that are available to buy. As well, the private welfare question – the strategy that best serves target shareholders – turns on the number of bids that a particular firm’s defensive tactics level deterred, but the researcher cannot observe unmade bids. A simulation overcomes these limitations for the simulated market.

IV. Proxy Variables and Simulated Search

A corporate control market simulation specifies search strategies for acquirers (and searching targets) and defensive tactics strategies for targets. The simulation also specifies the different surplus divisions between acquirers and targets that different legal regimes governing defensive tactics yield. Finally, the simulation specifies parameter values: (a) the total number of matches that it is possible for agents to make – the $m$ in our social welfare measure; (b) the number of acquirers and targets in the market and their types; and (c) the cost function for searching acquirers.

IV.1 Market Participants

We simulate the takeover market for public companies. Hence, our actors maximize expected monetary returns. A target is a firm that would be a good match for the appropriate acquirer; and an acquirer makes at most one match per period. In this Subpart, we discuss how we chose the number of agents of each type in the simulated market and the ratios among them. Subpart IV.2 then describes the acquirers’ search strategy and derives the surplus splits under the two legal regimes: defensive tactics friendly and unfriendly.44

The actual number of good targets in the market in any period is not observable but the number and type of acquisitions that took place in that period is observable. For two reasons, we suppose that the ratio of actual synergy acquisitions to actual financial acquisitions should reflect the true ratio of synergy targets to financial targets in the full market population. First, if the observed acquisition ratio is consistent across time -- say at three to one -- there should be roughly three times as many potentially good synergy

44 Burkart and Raff’s model has shareholders permitting managers to make ex-ante inefficient acquisitions (that generate private benefits for the managers) in order to induce the managers to exert high effort in earlier periods. In our model, acquirers maximize expected utility by making matches. We do not consider the Burkart & Raff possibility because it is difficult to assess the magnitude of the effect. Mike Burkart and Konrad Raff, Performance Pay, CEO Dismissal, and the Dual Role of Takeovers, 19 Rev. of Fin. 1383 (2015).
matches as financial matches in the market at large unless it is much less costly for a synergy buyer to evaluate a potential synergy match than it is for a financial buyer to evaluate a financial match. There is no reason to believe that such a cost difference exists.

Our second reason follows from statistical analysis. Consider an urn that has red balls and white balls: the total number of balls and the ratio of red balls to white balls are unknown. An experimental subject will draw ten balls from the urn, each time returning the chosen ball to the urn, and then estimate the red/white ratio. The initially uninformed experimental subject’s rational strategy would begin with the assumption that the experimenter filled the urn randomly: on this assumption, there should be a fifty/fifty division of red and white balls in the urn. Now suppose that, on her initial try, the subject draws three red balls and seven white balls. A rational subject would update her initial belief to suppose that the urn contains considerably fewer red balls than white balls.45 Let the subject then repeat the ten-draw process four more times. On average, she consistently draws three red balls and seven white balls. After five such draws, the experimental subject should believe that the urn population is much closer to a ratio of three red balls to seven white balls than to a ratio of half of each (though the subject still would not know how many balls in total the urn contains).

We assume that “nature” distributes potential target types in the corporate control market. Accordingly, we suppose that each completed acquisition is analogous to the draw of a ball from an urn the total population of which is unknown. We have five years of data, which is equivalent to five draws from the urn. If the ratio of actual synergy to financial acquisitions is consistent across time, statistical analysis therefore supports the view that the synergy/financial acquisition ratio approximately reflects the true market ratio. Both intuitive and statistical reasoning suggest, therefore, that the data regarding actual acquisitions is informative about the market population.

Turning to the data, Table 1 contains for recent years the number of acquisitions in which the acquiring company was public (a synergy-motivated match) or private (a financially motivated match).

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45 If the ratio of red balls to white balls in the urn were .5, the binomial formula shows that the chance of the subject drawing three red balls in ten trials is 11.7%. The formula is

\[
\frac{n!}{k!(n-k)!}(1-p)^{n-k}
\]

The number of trials is \(n = 10\); the number of successes is \(k = 3\) (i.e., red balls drawn) and the assumed probability of red balls in the urn is \(p = .5\).
Table 1 exhibits a consistent ratio between synergistic and financial acquisitions: between 2012 and 2016, synergy acquisitions averaged about 70% of the total, with a standard deviation of 2.7%.46

The market also contains noise firms, which are not for sale. When we interviewed market participants about how a potential target responded to an inquiry to buy, the most common response the participants received was that the target “is not for sale.” Actual searching firms also remarked that they hit many “dry holes” – targets that were costly to search but that ultimately proved not to be a match. We reflected these answers in our simulations by assuming that noise firms are a large fraction of the firms over which potential acquirers may search.

To complete our market description, we let there be relatively few synergy targets who search. There are three reasons. First, search for synergy partners requires a different skill set than running a business; many firms in the normal course specialize in running their businesses, but will consider a good offer should one appear.47 Second, a synergy-seeking firm can either buy a synergy target or recast itself as a synergy target and sell itself to another firm. Success in a synergy motivated acquisition requires both search and implementation skills. We classify synergy seekers that want to buy – those who believe they have implementation skills – as acquirers. Consistent with this analysis, impressionistic evidence suggests that non-distressed firms seldom attempt to sell themselves. Finally, synergy search is an endgame: the target synergy searcher wants to sell itself. In contrast, acquirer search is common, with some acquirers making

<table>
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<th>Private Acquirer</th>
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<td>232</td>
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<td>2012</td>
<td>344</td>
<td>245</td>
<td>99</td>
<td>71.22</td>
</tr>
</tbody>
</table>

Table 1

U.S. PUBLIC AND PRIVATE ACQUIRERS

Source: Bloomberg Law, Mergers and Acquisitions, Deal Attributes

Explanation for choices:
1) Target has to be public (otherwise defensive tactics issue doesn’t arise)
2) Public acquirer is a proxy for strategic searcher
3) Private acquirer is a proxy for financial searcher

46 The Table is drawn from Bloomberg Law, Mergers and Acquisitions. We also searched Fact Set for acquisitions during the same period. The Fact Set data base had fewer acquisitions in each category but the ratio of synergy acquisitions to financial acquisitions is approximately the same. The Fact Set Table is in Appendix 4.

47 Gilson (1982), supra note 3.
repeated acquisitions. The number of searchers for a particular target type should be a function of the number of targets of that type acquirers expect the market to contain. We use this reasoning to suppose that the ratio of synergy searchers to financial searchers approximates the ratio of synergy targets to financial targets.

The actual numbers we used for the simulations are: passive synergy targets 96; active synergy targets that search for acquirers 4; materially improvable targets 50; noise firms 525; synergy searchers 295; financial searchers 130. A little less than 70% of the simulated targets would be synergy matches and a little more than 30% would be improvable matches. Hence, 19% of the total firms over which acquirers search in the simulated market (150/775) are “targets”: firms that would be good matches for the appropriate acquirers. Given what market participants report about the difficulty of finding matches, this percentage may be high. We chose it because we wanted to analyze the strongest case for current law. The higher the ratio of actual targets to total firms the more productive an acquirer’s search for targets should be, even under strong defensive tactics.

IV.2 Strategies, Search Costs and Surplus Splits

Choosing a defensive tactics level is effectively choosing a price because the level determines the split of acquisition surplus. Thus, we follow the convention of assuming that searchers learn the defensive tactics levels at particular firms only by investigating those firms. Searching for targets in the corporate control market differs from searching for prices in standard search models, however. While prices are immediately apparent in search models, determining a potential target’s defensive


49 In additional simulations (available on request), and holding the other parameters constant, sigma (the ratio of made matches to total available matches) did not materially increase as the number of synergy searchers increased until these searchers comprised much more than 10% of the total synergy targets in the simulated market. For the reasons in text, this is an unrealistically high fraction. Because sigma is insensitive to increases in the number of searching targets below 10%, we use the apparently realistic number of four searching targets.

50 Regarding the relation between defensive tactics and bid prices, define an acquirer’s value from an acquisition as v and the target’s cost – its standalone value – as c. The deal surplus thus is S = v – c. Then let the acquirer’s share of the deal surplus, as a function of the target’s defensive tactics level, be λ (0 < λ < 1) and let the acquirer’s bid be b. The acquirer’s net gain from the deal thus is v – b = λS: that is, the acquirer’s gain is the share of the surplus the acquirer can realize under the defensive tactics level the seller chose. Rearranging terms, the bid must be b = v – λS. The lower the acquirer’s surplus share is (i.e., the smaller lamda is), the higher the acquirer’s bid must be. Intuitively, defensive tactics create the target’s bargaining power; the higher the defensive tactics level, the more bargaining power the target has. Targets use strong bargaining power – i.e., larger surplus shares – to extract higher prices from acquirers.
tactics level and hence the likely price necessary to accomplish the acquisition requires investigation.

There are two search strategies in the search literature; sequential search and fixed sample size search. When search is sequential, the acquirer searches until the marginal cost of the next target search equals the expected marginal gain. In contrast, when the agent searches over a preset universe, the agent chooses a sample size to explore before beginning, and buys at the best price her sample revealed. Our model supposes that acquirers search sequentially because fixed sample size search is unrealistic in the corporate control context. An agent searching pursuant to a fixed sample size strategy would return to an earlier draw if it yielded the lowest price. Fixed sample size models thus assume that sellers do not alter their prices after buyers visit them. In contrast, a searched target is likely to learn that it is in play. The target may then use the defensive tactics that it had adopted to increase the price. For example, a firm with poison pill protection may attempt to attract competing bidders. The corporate control market searcher thus seldom can return to the “same” firm that it initially visited because, in a Heisenberg-like effect, the initial visit changes the target. Therefore, agents in our model search sequentially: that is, they search until the agent finds a target or the next search would yield a negative expected gain.

We set the costs of an initial search at about two percent of the match surplus. The researcher may assume either constant or increasing search costs. Increasing

51 Hanka & Pradaa provide a more extensive definition: “We study two search methods, namely, simultaneous and sequential search. Under a simultaneous [that is, fixed sample size] search strategy, the consumer samples a fixed number of alternatives and purchases the alternative with the lowest price (or highest utility) in this set. The set of alternatives searched is obtained by looking at the subset for which the expected maximum utility net of search costs is the highest among all possible subsets. A limitation of the simultaneous search strategy is that it does not take into account new information that the consumer might obtain during the search process. So, if the consumer observes a very low price (or very high utility) for an alternative early in the search process, the benefit of an additional search may be below the marginal cost of that search. In a sequential search strategy, on the other hand, the number of alternatives is not fixed, but is a random variable that depends on the outcome of the search; this allows a consumer to economize on information costs. In this case, the consumer weighs the expected benefits and costs of gathering additional price information after each new quote is obtained. If an acceptable price is obtained early on, the expected gains from additional searches are small and there is no need to pay the cost of additional searches.” Elizabeth Honka & Pradeep Chintagunta, Simultaneous or Sequential? Search Strategies in the U.S. Auto Industry, 36 Marketing Sci. 21, 21-22 (2017). A more technical definition of sequential search holds that the agent begins searching with a reservation value — the acceptable value of a deal — and continues searching until the current option less the cost of another draw equals the reservation value. Taking the next draw thus would yield a negative return. See Jean-Michael Benkert, Igor Letina & Georg Noldeke, Optimal Search from Multiple Distributions with Infinite Horizon, U. of Zurich, Working Paper No. 262 (2017). Our simulated agents follow this search rule.

52 Data about actual acquirer search costs is difficult to observe. Breakup fees compensate a bidder for costs incurred if a target that provisionally accepted a bid changes its mind. These fees are observable and today approximate 4% of deal value. Fernan Restrepo & Guhan Subramanian, The New Look of Deal Protection, 69 Stan. L. Rev. 1013 (2017). An acquirer that receives a breakup fee, however, has concluded
costs is more realistic here because both synergy and financial acquirers order search. An acquirer begins its search with possible targets that, its prior knowledge suggests, may be good matches. These targets would be less costly to evaluate than firms with whom the acquirer is less familiar. If the acquirer has not matched, it will search for less familiar targets that it should be more costly to evaluate. In the simulations, then, search costs increase as the searcher analyzes more possible targets.

The empirical observer cannot conveniently observe actual surplus splits. However, we can derive the simulated splits we use for the two legal regimes from actual market data. To see how we proceed, let p be the (correct) pre-bid market price of the target; p thus is the target’s cost of accepting a bid. The acquirer’s value for the target is v; the winning bid is b. We let b = (1 + α)p, where 0 < α < ∞ is the premium acquirers pay; and v = (1 + β)p, where 0 < β ≤ ∞ is the gross value the acquirer expects to realize. Note that both the bid and the value are specified as a function of the target’s pre-bid price p. The acquirer’s return is value less price: v – b, or (1 + β)p – (1 + α)p = p(β - α). The match surplus is value less cost, or: (1 + β)p – p = pβ. The successful acquirer realizes λ of the surplus from a completed transaction, where λ is the buyer’s gain divided by the match surplus, or \[ \frac{p(β - α)}{pβ} = \frac{β - α}{β}. \] This is less than one because α > 0 and β > α.

Regarding the surplus shares we use, a paper studied 5,136 takeover contests between 1998 and 2006 (during which time the legal regime was friendly to defensive tactics) and found an average premium above the pre-bid price of 50% (the α in the algorithm derived above) and estimated an average acquirer value above the pre-bid price of .81 (the β). Using our algorithm for lamda, an acquirer’s surplus share from

its initial search, begun due diligence and negotiated with the target. We are interested in the first of these costs – deciding whether a potential target would be a good match. We let that cost be half the breakup fee average.

In the simulations, the surplus from a deal is 100 utils, which sellers and buyers divide. The matlab code sets the cost of searching over one potential target as minus 2 utils. Search costs increase as the agent searches more possible targets under the rule: search costs = 2 + (number/2)^2 - .25. This function is quadratic over whole integers such as the number of sequential searches an acquirer makes. Constant marginal search costs would be a plausible assumption if every seller is as convenient to evaluate as every other seller. Standard search models thus often assume constant marginal search costs because the agent is observing each visited firm’s price. In contrast, we argue that it is costlier for an acquirer to investigate (visit in search theory terms), say, the third potential target than to visit the first because acquirers begin with the potential targets (or industries) they know best. Consumers behave in the way we assume firms behave: that is, consumers order search beginning with the product that they believe is likely to generate the highest match utility and be the least costly to evaluate. See Mark Armstrong, Ordered Consumer Search, 15 J. European Econ. Assoc. 989 (2017).

See Dimopoulos and Sacchetto, supra note 10. Recent data regarding premiums, adjusted for the market anticipating a deal, is consistent with the earlier data. When the market anticipates a deal, the target’s share price will increase above its standalone value to reflect a part of the match surplus the target could capture from a bidder. Hence, measuring the true deal premium by the difference between the bid and the target’s share price when a deal closes understates how much the acquirer must pay above the target’s standalone
completing an acquisition would be .39. Because market participants believe that premiums may have fallen in recent years, our simulations use a surplus split of .4 for acquirers and .6 for targets when defensive tactics are strong. We lack firm data for the defensive tactics-unfriendly regime. Market participants estimate premiums then to be around 30% above the pre-bid price. If bidder valuations were then as they are now, a successful bidder would have received 63% of the surplus. Our simulations use a conservative defensive tactics-unfriendly regime split of .6 for acquirers and .4 for targets.

A potential acquirer, however, will discount its surplus share by the probability that it will not buy a promising target its search uncovers. There are two reasons. First, an acquirer is imperfectly informed about a potential target’s reservation price and the target is imperfectly informed about the acquirer’s value. Attempted deals when both parties are uninformed sometimes fail. We do not analyze this cause of deal failure but note its qualitative effect below. Second, a target may interest other bidders. We represent this second effect formally as follows: the probability that the first searcher to discover the target buys it is denoted x. The probability that the target runs an auction is y. If the target does run an auction, the probability that the first acquirer succeeds is the probability, z, that the acquirer is the highest valuing bidder. The probability that the first acquirer buys thus is

\[ x = [(1 - y) + yz]. \]

Importantly, y, the auction probability, is increasing in the defensive tactics level because strong defensive tactics give the target time to interest other possible bidders. As y increases, the probability that the first searcher buys the target falls.

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value. Reflecting this analysis, a study of acquisitions between 2001 and 2010 found a premium over the target’s price when the market first learned that the company was in play of 51.4%. See Harold Mulherin & Sherif Aziz Simsir, Measuring Deal Premiums in Takeovers, Fin. Managment, 1 (2015), at p.2 and Table IV. A more recent paper found an average deal premium, measured a week before deal closing, of 36%, but the paper also estimated the “embedded premium” – the portion of the target’s share price that reflected the possibility that the target may be acquired – at over 10%. Benjamin Bennet and Robert Dam, Merger Activity, Stock Prices, and Measuring Gains from M&A, Working Paper (January 2018). The deals these papers studied also occurred under the current strong defensive tactics regime. In those deals, the real average premium thus exceeded 46%. An acquirer’s total cost includes the bid, transaction costs and deal implementation costs. Hence, the finding that the acquirer’s value (the \( \beta \) parameter) was .8 is plausible, and is the figure we use.

Firms in Wang’s structural model of the M&A market do not use defensive tactics (so all efficient matches are consummated). Thus, his market is similar to the pre-1985 defensive tactics unfriendly legal regime we analyze. Using more current data, he estimates the acquirer’s share of deal surplus as 0.629, which is essentially identical to our estimate of 0.630. See Wang, supra note 28, Table 2. As the text states, we use a slightly lower acquirer share in the simulations to make the strongest case for defensive tactics.

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Turning to the data, a study estimated the fraction of initial bidders that acquire targets as .9. However, this fraction falls if other bidders enter. Another study estimated the fraction of single bidder contests that succeed as .74 and the number of auctions that result in sales to one of the bidders as .78. We use this data and our analysis to suppose (a) every target that is visited by an acquirer with whom it would be a good match sells to someone; (b) the probability that a searching acquirer buys the target is materially lower when the defensive tactics level is high.

V. Results I: Exchange Efficiency

V.1. How the Simulations Work

The simulated model calculates the expected utility of acquirers (and targets) that search sequentially using our cost parameters, an assumed total value of a match (as a multiple of assumed acquisition costs) and an assumed split. An agent’s expected utility from a search is reported as the average of a thousand simulations for each one of the possible draws. How many acquisitions take place in the control market is a function of acquirer search intensity because every acquirer searches but a target can only match with an acquirer.

Turning to the corporate control market inefficiency, we calculate the probability that a particular target will match given the number of searches acquirers who want to buy targets of that type make. For example, if financial acquirers would optimally make three searches for possible improvable targets, we solve for the probability that an acquirer will buy such a target when its search intensity is three. We then multiply the total number of improvable targets in the market by this probability to get the number of improvable target matches. We repeat this exercise for synergy targets. The sum of the mismanaged and synergy matches together is the total number of matches. Dividing the number of made matches by the number of ex-ante efficient matches that the market could make yields the market sigma. The market inefficiency is 1 – σ.

Finally, our tables often specify a whole number plus a fraction: i.e., there are 5.3 matches. Because we do thousands of simulations, such a result means that agents make five matches under the specified parameters with a 30% chance of making a 6th.

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56 Dimopoulos and Sacchetto, supra note 10. Heron and Lie also find that multiple entrants reduce the likelihood that the initial bidder succeeds but do not increase the probability that the target remains independent. Randall A. Heron & Erik Lie, The Effect of Poison Pill Adoptions and Court Rulings on Firm Entrenchment, 35 J. Corp. Fin. 286 (2015).


58 Appendix 1 more extensively describes how the model unfolds; our online Appendix sets out the simulation program code.

59 Recalling that the Program measures results in utils, we report expected utility as whole numbers and fractions of utils: e.g. 2.35.
V.2. The Exchange Efficiency Result

The central empirical question we address is the marginal contribution of defensive tactics to the corporate control market inefficiency. We begin our empirical approach to this question with a “base case” as a benchmark. There is no heterogeneity in the base case: all acquirers are identical as are all targets. To facilitate reading, we summarize the results here.60

The market inefficiency should be lower in the base case market than in the actual corporate control market because every target is a good match for every acquirer; a wasted search can occur only when a searcher hits a noise firm. Importantly, because there is no heterogeneity among the target sellers, the base case is an almost pure test of how different surplus splits affect the corporate control market inefficiency. When defensive tactics are weak -- acquirers capture 60% of expected match surplus --, the market inefficiency is about 16%. Because defensive tactics are weak (in effect, absent), this is the minimally achievable market inefficiency: the market “naturally” makes 84% of the available matches. Given the size of the corporate control market, this result is consistent with our first prediction: the market naturally is materially inefficient. We let the target capture 60% of expected match surplus under the defensive tactics-friendly legal regime. The market inefficiency increases to 26%. This result is consistent with our second prediction. In the simplified conditions the base case assumes, the market makes 10% fewer matches under the defensive tactics-friendly legal regime.

We next add realism to the simulated corporate control market. The market now contains two types of acquirers – financial buyers and strategic buyers – and three types of targets – materially improvable firms (financial buyer targets), which do not search, passive potential synergy targets, and searching potential synergy targets. There also are noise firms. The more realistic simulations thus test for the joint importance of the surplus split and the effect of demand side heterogeneity on the corporate control market inefficiency.

Our second prediction, recall, is that the market inefficiency should be materially greater in this realistic market than in the base case market. The simulation results are consistent with the model’s prediction. The results are set out in Tables 2 and 3. In the Tables, an AH agent is a financial buyer who is searching for a materially improvable firm; an AS agent is a strategic buyer who is searching for a synergy match; a TM agent is a passive synergy target; a TA agent is an active, synergy target; a TP agent is a passive improvable target; and a P agent is a noise firm. Table 2 characterizes the defensive tactics-friendly legal regime; Table 3 characterizes the defensive tactics-friendly legal regime.

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60 The supporting Tables are in Appendix 2.
unfriendly regime. Again, an acquirer searches over potential targets until it either matches or exits the market because the next search would yield negative utility.

### TABLE 2

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<th>5</th>
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<td>0.248</td>
</tr>
<tr>
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<td>0.248</td>
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<tr>
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**TABLE 3**

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<tr>
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<td>0.248</td>
</tr>
<tr>
<td>Acquire</td>
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<td>0.248</td>
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<tr>
<td>Total</td>
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</table>

Electronic copy available at: https://ssrn.com/abstract=3549527
In the defensive tactics-friendly regime (the current Delaware regime), financial buyers either make a match or exit after two searches; strategic buyers either make a match or exit after four searches. The market makes 68 matches, yielding a sigma of .45, and a market inefficiency of 55%. In the defensive tactics-unfriendly regime, the financial buyers either make a match or exit after four searches; the strategic buyers either make a match or exit after making five searches. Because potential acquirers search more intensely in the defensive tactics-unfriendly regime, the market should make more matches. The simulations generate approximately 91 matches, which yields a sigma of .60, and a market inefficiency of 40%. A move from the defensive tactics-friendly legal regime to the defensive tactics-unfriendly regime thus would reduce inefficiency in the market for corporate control by 15%.

The more realistic simulations also suggest that it is particularly important to encourage financial buyer search because it creates a positive externality. A deterred synergy match is only a welfare loss. A deterred financial match also is a welfare loss, but the possibility that a financial buyer will purchase a materially improvable target may increase the incentive of target managers to protect their positions by improving their firms. In our simulations, there is twice as much financial buyer search in the defensive tactics-unfriendly legal regime than in the Delaware Supreme Court’s current defensive tactics-friendly regime. Thus, returning to the earlier Chancery Court’s defensive tactics-unfriendly regime would do more than produce additional matches; it also would increase the market’s ability to discipline shirking managers.

Practitioners and academics sometimes argue that defensive tactics deter an immaterial number of bids because there are many acquisitions each year. To the contrary, our simulations suggest that the corporate control market is much less exchange efficient under the defensive tactics-friendly legal regime. Today’s corporate control market makes almost two trillion dollars of deals per year. Our simulations show that moving to a defensive tactics-unfriendly legal regime would increase ex ante efficient acquisitions by a third. Thus, to the extent that our simulations resemble the

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61 Another way to view this result is that, if there are T in total targets, moving to the defensive tactics unfriendly regime would increase the number of made matches by a third: (.60 - .45)T/.45T = .33). Our results about the relative intensity of search in the two regimes are broadly consistent with two recent studies. One study of the antitakeover laws passed in the last five decades found that a firm’s susceptibility to a hostile takeover peaked at 40% in 1973 (when there were no defensive tactics and no state antitakeover laws), and fell to 8.1% in 2014. Matthew D. Cain, Stephen B McKeon and Steven Davidoff Solomon, Do Takeover Laws Matter? Evidence from Five decades of Hostile Takeovers, 124 J. Fin. Econ. 464 (2017). The second study found that “deal hostility has fallen dramatically since the 1980s. While 34% of our sample takeovers was hostile in the 1980s, this fraction falls to less than 10% in the latter two periods.” Tingting Liu and J.Harold Mulherin, How has Takeover Competition Changed Over Time? 49 J. Corporate Fin. 104, 112 (2018).
real world, strong defensive tactics reduce deal value by over a hundred fifty billion dollars a year.62

We conclude our exploration of the corporate control market inefficiency with some qualifications. These suggest that the actual inefficiency could be either larger or smaller than the simulation results yield. Regarding smaller, some deterred acquisitions could have turned out badly. The welfare loss from unmade acquisitions should be adjusted to reflect the possibility that these transactions would not have improved performance or achieved synergy. Further, though the data suggest that acquisitions are ex ante efficient as a general matter, some acquisitions may occur in consequence of empire building by the acquirer’s management or because the acquirer is buying with overvalued stock. Finally, our simulations count an acquirer’s investigation of a matched firm as a wasted search.63 This is unrealistic because in life already matched firms are easy to distinguish from unmatched firms; public targets are required to disclose when a match occurs so an acquirer can cheaply identify a matched firm. Therefore, while in our simulations an acquirer may stop searching after, say, three searches, if one of those searches hit on a matched firm, a real world acquirer may make a fourth search. Acquirers thus may search somewhat more than our simulation program permits, which would reduce the corporate control market inefficiency.

On the other hand, our simulations also may understate acquisition market inefficiency. Initially, we let the ratio of possibly target matches to total firms be unrealistically high. This makes acquirer search more effective than it probably is in fact. Further, the simulations suppose that lawyer and investment banker fees are invariant to the legal regime. These transaction costs should be considerably higher when an acquirer has to overcome a strong defensive tactics barrier than a weak barrier. If so, search costs are higher in the defensive tactics-friendly legal regime than the simulations allow, which will reduce search. As a consequence, the simulated results overstate the probability that acquirers make matches in that regime. Finally, we assume that bargaining between acquirers and targets always results in a value improving match. Asymmetric information bargaining sometimes fails, however, so that

62 Comparing the possible inefficiency here to other search deterring market practices that have recently been uncovered, a paper measured the loss from the lock in effect that capital gains taxes exert on M&A activity. The authors estimate an efficiency loss of $3.06 billion per year for the United States. See Lars P. Feld, Martin Ruf, Ulrich Schreiber & Maximilian Todtenhaupt, Taxing Away M&A: The Effect of Corporate Capital Gains Taxes on Acquisition Activity, ZEW Discussion Paper No. 16-007 (2016). Another paper estimated the welfare loss that price dispersion caused, due to inefficient consumer search, in the credit card market. If every consumer purchased at the lowest market price, welfare (exclusive of search costs) would improve by $36 billion per year. Victor Stango & Jonathan Zinman, Borrowing High versus Borrowing Higher: Price Dispersion and Shopping Behavior in the U.S. Credit Market, 29 Rev. of Fin. Stud. 979 (2015). Perhaps more directly in point, Lie et al., supra note ?, estimate the welfare loss from foregone synergies when bidders purchase with overvalued shares at $4.4 billion a year.

63 Because we define a match as a completed deal, we do not permit an acquirer to make a competing bid when its search uncovers a matched firm.
an acquirer who finds a good target may not necessarily succeed in buying it. The prospect of bargaining failure also should reduce search.

These competing considerations are difficult to net out, but there is nonetheless a clear result. The simulation parameters are plausible, the exchange inefficiency results accord with theoretically grounded predictions and those results are very large. Decision makers therefore should take as a working assumption that the marginal contribution of defensive tactics to corporate control market inefficiency is substantial.

VI. Results II: Private Welfare

VI.1 Defensive Tactics and Shareholder Welfare

The board of directors authorizes defensive tactics in response to management recommendations.64 In turn, courts set the level of allowable defensive tactics while resolving litigation brought by shareholders or by the acquirer with respect to a particular transaction.65 As Part II showed, the Delaware courts now give target boards great leeway in setting the level of defensive tactics. There are two difficulties in assessing whether this discretion is desirable. The first is a measurement problem. The question is how different defensive tactics levels affect shareholder welfare (recall that Delaware courts do not consider social welfare). Comparing defensive tactics levels is difficult, however, because they are “qualitative”. For example, is a poison pill a stronger deterrent to hostile bids than a fair price law? It would be helpful, in answering such questions, to have a method for converting defensive tactics levels into the common metric of money: how various tactics affect the target’s share of expected acquisition surplus.66 To date, no such metric exists. After deriving a metric, the second difficulty is

64 Some defensive tactics, most importantly poison pills, can be authorized and deployed by the board without shareholder approval. Other defensive tactics, such as a staggered board or a barrier to a post-acquisition freeze-out of target shareholders, require a charter amendment, and therefore shareholder approval after board initiation. Defensive tactics that require shareholder approval are unnecessary because the ultimate defensive tactic is for shareholders to reject insufficient bids. The adoption of a staggered board is an exception – shareholder approval ties later shareholders’ hands. Eliminating a staggered board also requires a charter amendment and so requires the board to initiate the process (or shareholders to launch a proxy fight) before a charter amendment can be presented to the shareholders.

65 There are exceptions. The original Delaware Supreme Court decision that approved the legality of the initial (and less toxic) version of a poison pill intended to discourage offers was challenged by a Household director and large shareholder, who favored selling the company. Moran v. Household International, Inc., 500 A.2d 1346 (Del. 1985).

66 The empirical legal literature in particular focuses on the impact of defensive tactics once an offer is made. See, e.g., Lucian Bebchuk, John C. Coates IV & Guhan Subramanian, The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy 54 Stan. L. Rev. 887 (2002) (measuring impact of the presence of a staggered board on success rates for hostile tender offers). We are interested in the ex post effect of a defensive tactic because that effect can be anticipated by a potential bidder and so affects its level of search.
identifying the defensive tactics level that maximizes expected target shareholder welfare.

We begin with the measurement problem. Bargaining theory permits us to develop a common metric by which the effect of different defensive tactics levels can be assessed. Two factors affect bargaining power in a negotiation: the bargainers’ disagreement points and their discount rates. Regarding the first factor, the better a party’s alternative to bargaining failure, the better the agent will do in the bargain: the counterparty will have to give up a larger portion of the surplus to make the deal. Regarding the latter factor, the lower a party’s discount rate is relative to her counterparty, the more bargaining power the party will have. The high discount rate party is less patient: that is, less able to wait for a better offer. A party seldom can affect her counterparty’s disagreement point or her discount rate. A target, however, can stretch the future out so that, even if a target and acquirer have the same discount rate, the acquirer is functionally less patient.

A long future is unfriendly to an acquirer. Its payoff – its share of expected deal surplus – falls as the time between finding a possible target and buying it increases. The acquirer may have to tie up resources for a longer period, focus executive time on a deal for a longer period, pass up other business opportunities, negotiate more intensively with the target, and confront a competitor for the acquisition opportunity. In addition, time permits the target to continue a value decreasing strategy or to delay implementing a value increasing strategy. This not only reduces target value but also may constrain the acquirer’s ability to increase value, depending on the type of acquirer, by integrating the acquirer and target in a synergy-motivated acquisition or by improving the target in a financial-motivated acquisition.

Defensive tactics permit targets to extend the period between receiving a bid and possibly concluding a deal. Different defensive tactics permit targets to delay for different periods. A poison pill can delay an acquisition for up to a year because it can take a year for the acquirer to win a proxy contest and elect directors who will remove a pill. A poison pill with a staggered board can delay an acquisition for over two years because the acquirer must win two proxy contests, which in practice may block the offer. Other defensive tactics also facilitate delay.

To summarize, the longer the period during which defensive tactics prevent the acquirer who has identified a target from making an offer to target shareholders, the less bargaining power the acquirer has relative to the target. As a result, there is a

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67 Heron and Lie, supra note 47, at 287 find that “poison pills induce greater final takeover premiums, mostly as a result of bid increases after the initial bid.”
positive relationship between different tactics' delay facilitating properties and the share of acquisition surplus a tactic permits the target to realize.\footnote{Ronald J. Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers, 33 Stan. L. Rev. 819 (1981), provides an early statement of this position.}

The expected value of an acquisition to a target, however, also is a function of bid probabilities – the likelihood that the target will receive a bid. A firm can choose a defensive tactics level sufficiently high as to preclude bids altogether; that is, it can be a noise firm. A firm that does not completely reject acquisitions will consider bid probabilities because these affect the likelihood of an acquirer appearing. A faithful target board's problem, then, is to solve for the defensive tactics level that optimally trades off the probability of receiving a bid – which increases with weak defenses – against the price conditional on a bid being made – which increases with strong defenses.\footnote{Jonathon M. Karpoff, Robert Schonlau & Eric Wehrly, Do Takeover Defenses Deter Takeovers? 30 Rev. Fin. Stud., 2359 (2017) is consistent with this analysis: "...we find that takeover likelihood is negatively and significantly related to both the G-Index and the E-Index." Lower scores on these indices correlate with higher defensive tactics levels. In a later paper, these authors "find that 11 of the 24 G-index provisions are robustly and negatively related to takeover likelihood ..." The eleven provisions that negatively relate to takeover likelihood are anti-greenmail provisions, blank check preferred stock, classified boards, director contracts, director indemnification, director liability provisions, director duty provisions, executive severance contracts, fair price provisions, supermajority vote requirements, and unequal voting rights." Jonathon M. Karpoff, et al, Which antitakeover provisions matter? Working Paper at 5 (2016). The authors find that poison pills do not differentially affect bid probability because every firm has a pill, but they do not consider that pills deter acquirer entry and so can increase the market inefficiency. See also Dirk Jenter & Katharina Llewellyn, CEO Preferences and Acquisitions, 70 J. of Fin. 2813, 2815 (2015) ("the evidence suggests that managerial self-interest causes the overall frequency of takeovers to be lower than optimal for target shareholders"). Vicente Cunat, Mircea Gine & Maria Guadalupe, Price and Probability: Decomposing the Takeover Effects of Anti-Takeover Provisions, CEPR Discussion Paper No. DP12059 (2017), available at SSRN: https://ssrn.com/abstract=2971980, show that a shareholder vote to remove a takeover defense increases the probability that the firm will receive a bid by about 4.5% over five years. Similarly, a recent working paper found that anti-takeover legislation materially reduced the likelihood of becoming a takeover target. Marc Frattaroli, Does Protectionist Anti-Takeover Legislation Lead to Managerial Entrenchment? (2017), Swiss Fin. Inst. Res. Working Paper No. 17-66, available at SSRN: https://ssrn.com/abstract=3013077 . Also, combining a poison pill with a staggered board materially reduces the probability that a particular firm is acquired. E.g., Nguyen Duc Giang, The Endogeneity of Poison Pill Adoption and Unsolicited Takeovers, Working Paper, Graduate School of Economics, Waseda University (2015); Tatyana Sokolyk, The Effects of Antitakeover Provisions on Acquisition Targets, 17 J. Corp. Fin. 612 (2011); Bates, et al, supra note 47. Finally, reducing supermajority voting requirements increases tender offers for Delaware targets. Audra Boone, Brian Broughman & Antonio Macias, The Cost of Supermajority Target Shareholder Approval: Mergers versus Tender Offers, Indian. Legal Stud. Res. Paper No. 331 (2015), available at: http://ssrn.com/abstract=2629424. Many of the models that find negative correlations between corporate governance indices and firm value, however, may suffer from serious endogeneity problems. A recent study directly confronts this concern. Xin Chang & Hong Feng Zhang, Managerial Entrenchment and Firm Value: A Dynamic Perspective, 50 J. Fin. & Quant. Analysis 1083 (2015), argues that managerial entrenchment, which defensive tactics facilitate, materially reduces firm value.}
A target board thus should maximize a function such as

\[ \text{Max}_d E(R) = \pi(s(1 - \lambda(d))) - c(d) \]

where \( E(R) \) is the target’s expected return from a possible acquisition, \( d \) is the target’s defensive tactics level, \( \pi \) is the probability an acquirer will bid, \( (1 - \lambda(d)) \) is the target’s expected share of the acquisition surplus,\(^{70}\) which is \( s \), and \( c(d) \) is the cost of implementing defenses.\(^{71}\) A target board that maximizes this revenue function will choose an “interior solution”. To enact no defensive tactics would cause \( \lambda(d) \) to approach one: most of the deal’s surplus would go to the acquirer. This would cause the expected revenue function to approach zero. A board that instead chose a very high defensive tactics level would cause \( \lambda(d) \) to approach zero; a potential acquirer would expect to receive almost no surplus. This would cause the bid probability \( \pi \) to approach zero as well because potential buyers would not search. The target’s revenue function would then become negative because it would incur implementation costs but make no gains. Intuitively, at one “corner” the target would save the costs of enacting defensive tactics but realize no revenue, and at the other corner, the target would incur the costs of enacting defensive tactics but also realize no revenue.

Unless a firm is willing to deter acquisitions altogether, the privately optimal defensive tactics level therefore must permit a successful acquirer to realize a material gain. Given that expectation, some potential acquirers will search for targets to buy. And on this reasoning, a target’s expected payoff must increase as its defensive tactics level increases until the reduction in the bid probability effect dominates the increase in the surplus share effect. Expressed mathematically, a target’s expected revenue function should be strictly concave (i.e., maximized at a single point).

The simulation results are consistent with our model’s third prediction. We solved for the optimal acquirer search intensity – i.e., the amount of acquirer search – under each of ten surplus splits of the gains from an acquisition: from .1 going to the target to all going to the target. We then calculated a target’s expected return under each split, given that acquirers were searching optimally against that split. Figure 1 summarizes the results. In the Figure, the horizontal axis plots the target’s share of the surplus with increasing values for \( (1 - \lambda(d)) \); the vertical axis plots the target’s payoff.

\(^{70}\) Recall that \( \lambda \) is the acquirer’s surplus share.  
\(^{71}\) The cost of choosing a defensive tactics level includes legal and investment banker fees for advice and the cost, where applicable, of soliciting shareholder approval.
The lowest curve, TM, is the return to passive synergy targets who will match with a synergy acquirer; the second curve, TA, is the return to synergy targets that search for acquirers. This return is higher, despite the target’s search costs, because there is a greater probability of matching. The third curve, TP, is the return to passive, materially improvable targets, which do best because they match with financial acquirers but do not search themselves. The highest curve, T, sums the other three.72

The target’s revenue function is strictly concave, which implies that the target allows the searching acquirer to realize some surplus (this is part (a) of the third prediction). Further, the return function is maximized at a target surplus share of approximately .6. This, Part V showed, is inefficiently high (this is part (b) of the third prediction).

We make four remarks about the simulated private welfare result. Initially, the result supports our model and choice of parameters. The model predicts that a curve describing target expected returns as a function of target defensive tactics’ levels will be strictly concave, which is what the simulations yield. Further, the curve has a left-hand skew. This result is consistent with the sequential search strategy we specified for acquirers. That strategy assumed convex search costs: later searches are more costly for acquirers than earlier searches. Acquirer surplus shares, however, necessarily decrease linearly: an acquirer share would be .5, say, under moderate defensive tactics;

72 Appendix 3 contains the relevant tables from which Figure 1 is derived.
.4 under stronger defensive tactics; .3 under still stronger defensive tactics and so on. Note that target expected returns fall as acquirer search intensity falls. Because an acquirer’s search intensity falls quadratically when the acquirer’s expected surplus share falls linearly, the target’s return should fall by a larger and larger amount with each increase in the target’s share. For example, a target’s expected return should be greater when its share increases from .3 to .4 of deal surplus than when its share increases from .4 to .5. But then the target’s expected return should decline more rapidly as its surplus share exceeds the maximizing share -- here, .6 -- than the target’s expected return should increase as its share approaches the maximum. This is because the acquirer’s search costs are increasing at a higher rate beyond the target’s optimal surplus share than before it. Visually, our model predicts that a curve describing a target’s expected return as a function of the defensive tactics level it choses will both be concave and skew left. That the curve we derive behaves this way supports our model and choice of parameters.

Second, and substantively, the private welfare result we derive suggests that target boards have been optimally trading off bid frequency against bid size. To see why, recall that the market simulations set out in Part V let targets receive about 60% of the acquisition surplus under strong defensive tactics. This share was derived from actual market data. In our simulation, a faithful target board maximizes the target’s expected return when the target receives about 60% of acquisition surplus. This result suggests that the 60% share targets realize in real life approximates the maximizing share.73

Third, it is a live question whether courts have allowed boards to go too far. The data we use to infer a 60% split in favor of targets ended in 2006. Delaware courts now allow the poison pill/staggered board combination to create a delay period of up to two years. Therefore, some potential targets today may be choosing defensive tactics levels that yield surplus splits exceeding the privately optimal division. This possibility is concerning if target expected returns in the real world fall off as sharply when targets choose excessive defensive tactics levels as they do in the simulations.

Finally, the simulations show that private and social welfare conflict. Target shareholder welfare in the simulations, and apparently in the actual market, is maximized when a target’s share of the acquisition surplus is around 60 percent. As Part V shows, this share yields a suboptimal level of matches. The large difference between individual and collective welfare reflects the search externality described above. Recall that because an individual target cannot influence the average defensive

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73 Tingting Liu and J. Harold Mulherin, How has Takeover Competition Changed over Time? 49 J. Corporate Finance 104 (2018), argue that because takeover premiums have not declined over time, boards are choosing defensive tactics levels to increase their bargaining power rather than to entrench themselves. This claim is consistent with our result that boards appear to have chosen privately optimal defensive tactics levels, at least over the period for which we have data.
tactics level in the market, faithful target boards should ignore the search dampening effect of their choices. In equilibrium, every potential target thus chooses a defensive tactics level that, when aggregated, yields a market average level that is higher than the collectively efficient level. Because potential acquirers choose search intensities with the market average in mind, boards that maximize shareholder welfare are collectively reducing exchange efficiency in the corporate control market.

VI.2 The Delaware Courts: Reprise

Our simulation results also illuminate the disagreement between the Delaware Chancery Court and the Delaware Supreme Court over the acceptable level of defensive tactics. The Supreme Court in Unocal initially developed a standard of review for defensive tactics that falls between the strict entire fairness standard applied to ordinary conflict of interest transactions and the lenient business judgment rule that operates to shield a board’s decision from judicial review when there is no conflict. This intermediate standard, requiring a defensive tactic to be proportional to the threat the board perceived the offer to present, was apt because a board either can deploy defensive tactics to increase target welfare by strengthening target bargaining power, or to reduce target welfare by entrenching the directors and managers.

The Chancery Court then needed to decide how courts should apply the novel intermediate review standard.75 Under the Chancery Court’s regime, first announced in Interco, a faithful target board could deploy defensive tactics, such as the poison pill, to buy time to seek higher bids or to explain to its shareholders why the target’s market price understates the target’s real value. After the needed time has passed, however, the shareholders should be allowed to decide whether to accept an offer for the firm.76 That the shareholders might accept an offer over the board’s objections was not a threat that would warrant the board preventing the shareholders from determining the offer’s outcome.77

Two years after Interco, the Delaware Supreme Court rejected the Chancery Court’s approach. Reading that approach as the court “substituting its judgement for what is a ‘better’ offer for that of a corporation’s board of directors,” the Court, in Time-Warner, held: “[t]o the extent that the Chancery Court has recently done so... we hereby

75 Gilson & Kraakman, supra note 14, sets out the issues remaining open for Chancery Court resolution following the Supreme Court’s decision in Unocal.
77 “To acknowledge that directors may employ the recent innovation of ‘poison pills’ to deprive shareholders of the ability to effectively to choose to accept a noncoercive offer, after the board has had a reasonable opportunity to explore or create alternatives, or to attempt to negotiate on the shareholders’ behalf, would, it seems to me, be so inconsistent with widely shared notions of appropriate corporate governance as to threaten the legitimacy and authority of our corporate laws.” See City Capital Associates, supra note 76, at 799-800.
reject such an approach ....”78 The Supreme Court next extended Time-Warner in Unitrin, to allow a board to maintain its poison pill unless the pill would make a successful proxy fight to replace directors in favor of candidates who would redeem the pill “mathematically impossible or realistically unattainable.”79 As a result, a target board can delay a bid for as long as two election cycles.

Our results provide the first rigorous support for the Chancery Court’s solution. In the simulations, defensive tactics increase target shareholder welfare at the outset but then reduce it as the delay they permit extends to the point where the reduced number of bids effect outweighs the increased target share effect. Therefore, if private welfare is the relevant measure, time-limiting defensive tactics is a good strategy. The Chancery Court’s informal analysis and our simulations thus point generally in the same direction: giving the target board too much discretion to delay a hostile tender offer reduces social welfare and also can reduce target shareholder welfare.

VI.3 The Investment Efficiency Defense of Defensive Tactics

Recently, scholars have developed two versions of an investment efficiency justification for defensive tactics. The first version supposes that the capital market is myopic: that is, a firm’s market price will not fully reflect the return from a project that takes a long time to mature.80 When the target’s share price is inefficiently low, the shareholders may tender to a bid that is materially above that price but also materially below the company’s real value. Directors and managers may respond to this possibility by rejecting firm specific human capital investments that could create value for the company in the long-term. 81 To be sure, managers are partially compensated with stock, but stock is an inadequate response if the future value of the managers’ investments is not fully reflected in the target’s current price. Target shareholders are said to recognize that their firm’s controllers may manage for the short term. The

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78 See Paramount Communications, supra note 2. The Court went on to justify this result in part by the concern that “Time Shareholders might elect to tender into Paramount’s cash offer in ignorance or a mistaken belief of the strategic benefit which a business combination ... might produce.” Id., at 1153. For an analysis of the difficulty of assuming shareholder ignorance as a justification for blocking shareholders’ ability to choose to accept a tender offer in the face of the fact that 70 percent of the shareholders of large U.S. public corporations are institutional investors, see Gilson & Gordon, supra note 10.


80 The empirical claim that the stock market is myopic, on which this argument is based, is contested. Roe surveys the empirical and legal literature concerning short-termism. See, e.g., Mark Roe, Corporate Short-Termism in the Boardroom and in the Courtroom, 68 Bus. Law. 977 (2013)(summarizing the literature); Mark Roe, Stock Market Short-Termism’s Impact, http://ssrn.com/abstract=3171090 (2019).

81 This argument first appeared in Stein, supra note __. See also John Kay, The Kay Review of UK Equity Markets and Long-Term Decision Making, UK Department of Innovation and Skills (2012).
shareholders attempt to preclude this possibility by authorizing strong defensive tactics. These tactics therefore represent the shareholders’ commitment to the managers that the shareholders will not sell the target prematurely.\footnote{This argument resurrects the Delaware Supreme Court’s concern in \textit{Time-Warner} that sophisticated shareholders might tender erroneously, now because the shareholders lack information that the board and management has but somehow cannot credibly convey.}

There are two difficulties with this investment efficiency rationale for defensive tactics. Initially, the rationale assumes that shareholders authorize all defensive tactics. Shareholders do not have to approve the adoption of a poison pill, however. And they do not have to approve the combination of a poison pill and a pre-existing staggered board that was approved by shareholders before the era of hostile takeovers. Defensive tactics that boards can adopt unilaterally can be used either to increase value or entrench the boards.

Further, which efficiency concept should be given more weight in the market for corporate control raises an empirical question. Scholars recently have approached this empirical question by analyzing the effect of staggered boards -- the strongest defensive tactic -- on firm value. In our view, while the investment efficiency defense of staggered boards remains theoretically plausible, the evidence to date remains at best mixed.\footnote{Cremers, Sepe and coauthors have written several papers claiming that staggered boards increase firm value. K.J. Martijn Cremers, Lubomir P. Litov, Simone Sepe, Staggered boards and long-term value, revisited, 126 J. Financial Econ. 422 (2017); K.J. Martijn Cremers and Simone M. Sepe, The Shareholder Value of Empowered Boards, 68 Stan. L. Rev. 67 (2016); K.J. Martijn Cremers, Saura Masconele & Simone M. Sepe, Commitment and Entrenchment in Corporate Governance, 110 NW. Univ. L. Rev. 727 (2016). Their empirical analysis is contested. On the theoretical level, if staggered boards do increase value, the shareholders of de-staggering firms have voted for a value-reducing governance change, which seems implausible, especially given the intermediation of equity and, in particular, the rise of index-holding by institutions. A recent paper made this point, corrected for what the authors believe are spurious correlations in the data of the earlier papers, and argued that de-staggering boards does not reduce firm value. See Emiliano Catan and Michael Klausner, Board Declassification and Firm Value: Have Shareholders and Boards Really Destroyed Billions in Value?, NYU Law and Econ. Res. Paper No. 17-39 (2017), Available at SSRN: \url{https://ssrn.com/abstract=2994559}. A more recent paper corrected for other empirical defects in the Cremers, et al papers and showed that any value increasing effect was not statistically significant. Yakov Amihud, Markus Schmid and Stephen Davidoff Solomon, “Settling the Staggered Board Debate”, 166 U. Penn. L. Rev. 1475 (2018).}

The exchange efficiency objection to defensive tactics thus should be given more weight than the myopic market investment efficiency response.\footnote{Contracting also may ameliorate the investment inefficiency concern. A firm’s executives often have golden parachutes and a compensation package with a significant variable component. In the event of a successful hostile bid, the executive would receive a large payment from her golden parachute and, if the historical average regarding surplus splits holds, a large payoff from her stock. Sepe and Whitehead show that golden parachutes create incentives for managers to invest in innovation by compensating them if they are dismissed before an innovation comes to fruition. Simone M. Sepe and Charles K. Whitehead, \textit{Rethinking Chutes: Incentives, Investment and Innovation}, 95 Bos. Univ. L. Rev. 2029 (2015). Fich, et al, also show that golden parachutes materially increase deal completion probabilities, create large gains for target CEOs and may benefit target shareholders. Eliyzer Fich, Anh Tran \& Ralph Walking, On the}
The second version of the investment efficiency rationale holds that the prospect of a hostile takeover may discourage a firm’s customers and suppliers from making investments that are relationship-specific to the firm. An acquirer, who has no particular loyalty to these stakeholders, may exploit the sunk cost aspect of such investments by renegotiating the target’s deals.\textsuperscript{85} Anticipating such behavior, the stakeholders would be unwilling to make investments that generate higher returns for the target firm than for other firms. In this version of the investment efficiency claim, defensive tactics permit the firm’s managers credibly to commit to customers and suppliers that the firm has protected them from potential acquirer strategic behavior.

There are theoretical concerns with the customer and supplier version of the investment efficiency rationale. A supplier can protect itself with a long-term contract because such contracts can bind a future acquirer. A contract seems more secure than an implicit reputational sanction. To be sure, some contracts between companies and their customers and suppliers are implicit when it is too costly to contract explicitly over possibly significant future actions. Nevertheless, the short-term theory is incomplete. If implicit contracts are sufficiently attractive to existing management to make it in the target’s interest to comply voluntarily, both to facilitate deals and to create a good reputation, the implicit contracts should be equally attractive to an acquirer. The converse would follow as well. Proponents of this version of the short-term theory thus need to explain why a strategy that is maximizing for the target when independent is not also maximizing for the target as part of the acquirer.

VII. Conclusion

Strong defensive tactics give a target’s board substantial discretion to decide whether to accept an offer to buy the company; weak defensive tactics permit the target’s shareholders to decide even when the target’s board disfavors the offer. Delaware law permits public firms to adopt strong defensive tactics, and most firms have done so. There are four justifications for Delaware Law. (i) Markets may underprice public companies, so that shareholders may mistakenly tender to bids below a target’s true value. As a result, target assets sometimes may move from higher to lower valuing acquirers, which is exchange inefficient. Board control can prevent such inefficient takeovers; (ii) Boards with control can negotiate for higher prices than atomized shareholders could realize on their own; (iii) Unregulated defensive tactics

may be investment inefficient. Markets may underprice growth so that acquirers could expropriate target projects with long term payoffs. Anticipating this, targets would eschew such projects. Board control prevents such investment inefficient results. Finally, empowered boards can better protect stakeholders from acquisition caused losses.

This article extensively considers the first two justifications and reviews the case for the third. Regarding the first, we assume, along with most academic commentators, that capital market prices do not routinely skew low. Therefore, defensive tactics are unnecessary to achieve exchange efficiency. Indeed, these tactics are exchange inefficient because they permit targets to acquire a large share of the expected surplus from an acquisition and therefore reduce the returns to acquirers from finding good targets to buy. While this theoretical result has been in the literature for a long time86, the policy issue is magnitudes: is the exchange inefficiency in the market from corporate control first or second order? This is an empirical question, but conventional empirical techniques cannot yield an answer. This largely is because the researcher cannot run the real world experiment: how the same market with the same agents performs under weak and strong defensive tactics levels. Also, we argue, market wide cross sectional and time series studies have been too difficult for empiricists to do in the market for corporate control.

Turning to private welfare, a target board should trade off the bid reduction effect of strong defensive tactics against their surplus maximizing effect conditional on bids occurring. The empirical researcher, however, cannot observe whether actual boards are making this trade off efficiently or choosing entrenching defensive tactics levels. This importantly is because the researcher cannot observe unmade bids: the bids that particular targets’ defensive tactics levels deterred.

We attempt to answer the exchange efficiency and private welfare questions by developing an informal structural model of the corporate control market. In this model, potential acquirers search sequentially for potential targets to buy, taking into account the defensive tactics levels the targets choose; and the targets choose defensive tactics levels taking into account the search strategies the acquirers implement. The model supports three theoretically grounded predictions: (a) the corporate control market inefficiency87 is substantial, defensive tactics aside, largely because search is particularly costly in the corporate control market and because potential acquirers must share expected surplus from an acquisition with targets. Because the acquirer must split

87 We define the “market inefficiency” as one minus the ratio of made matches to total available matches in a period in which the corporate control market functions. For example, if searching acquirers and targets made sixty of a possible hundred matches, the market inefficiency would be 40%. The “marginal contribution” of defensive tactics to the market inefficiency is the difference between the market inefficiency when defensive tactics are strong and when they are weak.
surplus with the target, the acquirer equates its partial share of the marginal return from search to the its private marginal cost and so searches too little from an exchange efficiency viewpoint; (b) the marginal contribution of strong defensive tactics to the market inefficiency is large because strong defensive tactics take additional surplus from acquirers and also make search less productive; and (c) faithful target boards will choose defensive tactics levels that are privately efficient but socially excessive because the boards do not take into account the search dampening effect of their individual choices on the corporate control market as a whole.

Simulations permit us to test these theoretical predictions by running the natural experiment: that is, by observing how the same corporate control market performs under the two defensive tactics legal regimes: a defensive tactics unfriendly regime that constrains defensive tactics and a defensive tactics friendly regime, roughly like the current Delaware Supreme Court’s position, which gives target boards significant discretion to choose their level. Our results are consistent with the model’s predictions: the corporate control market inefficiency is substantial even when defensive tactics are weak; the marginal contribution of defensive tactics to the market inefficiency is high; and faithful boards do choose socially excessive defensive tactics levels. It is important to highlight the second, exchange inefficiency result. The simulated market makes 15% fewer acquisitions under strong defensive tactics levels than under weak defensive tactics levels. The resulting efficiency loss, if real, would be very large because the U.S. corporate control market today concludes close to $2 trillion a year of deals.

We do not argue that these results, standing alone, justify major legal change. The parameters we use − the ratio of financial to synergy targets, for example − are derived from real world data but not directly observed. Also, simulations are not the real thing. Rather, our goal is to revive the debate as to the desirability of defensive tactics. We do claim that our parameter values are plausible and our model is intuitive and theoretically grounded. Then the very large magnitude of our results − over a hundred billion dollars of foregone deals a year − strongly suggests that current Delaware law should be seriously rethought.

Regarding private welfare, our simulations suggest that, contrary to the views of many academics, as regards defensive tactics target boards have been relatively faithful fiduciaries for their shareholders despite legal rules that are less restrictive than would be optimal. We note, however, that corporate culture is dynamic, as powerfully evidenced by the Business Roundtable’s recent statement, perhaps largely rhetorical, that a board’s obligations run first to stakeholders and then to shareholders.88 This result suggests that agency theory explanations for a board’s choice of defensive tactics also should be rethought, but we stress that whether boards are behaving privately

optimally is quite different than whether the corporate control market is performing efficiently. Finally, we argue briefly that the evidence does not support the investment efficiency justification for strong defensive tactics. We leave the stakeholder question for another day.

Our results have substantive and methodological implications. Substantively, the results suggest that current legal rules allow defensive tactics levels that are privately as well as socially inefficient. Interestingly, they also shed light on a lengthy debate between the Delaware Supreme Court and the Delaware Chancery Court over precisely this issue. On this one, the Chancery Court has the better of the argument.
APPENDIX 1: Matching Problem Model/Code Description

All acquisition market models were simulated in Matlab, a software program designed for the manipulation of matrices. Matlab allows a user to write code to generate and simulate an agent-based model under various parameters. A simulation run of the market model begins by specifying a population size (in our case, 1,100 total risk neutral agent-firms) with agent-firms of one of six specified types. There are 425 total A (Acquiring) agent-firms in the simulated population. These firms are actively seeking to match with a target firm. Of these 425 A agent-firms, 295 are synergy (AS) type acquiring firms, and 130 are private equity (AH) type acquiring firms. AS type acquiring firms are actively seeking to match with those target firms with whom they may form a synergistic collaboration, e.g., an auto manufacturer seeking to match with a tire manufacturer.

Synergy target firms with whom AS type firms seek to match may be either themselves actively seeking to match with AS type firms (TA type target agent-firms), or they may be passive synergy targets who are willing to match with AS type firms, if approached (TM type target agent-firms). There are 4 TA type active, synergy target agent-firms, and 96 TM type passive, synergy target agent-firms. AS type acquiring firms only seek to match with either TA or TM type target firms. There are 50 materially improvable firms. AH type acquiring firms are actively seeking to match with these passive target (TP) firms. There are 525 TP type passive, noise firms.

The simulations begin by randomly populating the 1,100 total agent-firms. Starting with TA type firms, the code randomly selects an index (i.e., a location within the population matrix). If the indexed location within the population matrix is already occupied, the code selects again until an unoccupied indexed location has been selected. Then, the code populates that indexed location with one of the TA agents. This process repeats until all of the TA agents are in indexed locations within the population matrix. This process repeats for all six of the different agent-firm traits/types until the entire population matrix is populated. The order in which the six different agent-firm traits/types are placed within the population matrix is: TA, TP, TM, P, AS, and AH.

After the agent-firms are populated, the searching process begins. All of the searching agent-firms search over the same target universe. We let acquirers and actively searching synergy target (TA) agent-firms make up to twenty searches.89 There are 1000 simulation runs of each total search. A total search is defined as the point at which each acquiring agent-firm and each actively searching synergy target (TA) agent-

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89 Restricting searches to twenty is without loss of generality because, in the simulations, it is never optimal for an acquirer to take more than ten draws.

Electronic copy available at: https://ssrn.com/abstract=3549527
firm has had an opportunity to complete a search of a specified number of agent-firms (this is their “search intensity”). First, all of the searching agent-firms search a single agent-firm, then two agent-firms, then three, and so on, until completing a total search, which is defined as the point at which all of the searching agent-firms have had an opportunity to complete a search of twenty-two agent-firms. Thus, the population matrix is repopulated 1000 times for each total search.

For each simulation run at each search intensity, every searching agent-firm (i.e., the AS, AH, and TA agent-firms) in the population matrix can search for its desired match (AS firms search for TA and TM firms, AH firms search for TP firms, and TA firms search for AS firms). If a searcher has matched when its opportunity to search comes around, it does not search. Search is terminated in two ways: a searching agent-firm is matched because it found a desired match or has been found by a desired match, or the next search would generate negative utility for the acquiring agent-firm. Illustrating the latter possibility, let a potential acquirer realize positive expected utility at its third search, but the acquirer would realize negative expected utility from a fourth search. Then the model has this acquirer either matching in one of its first three searches, or exiting after fruitlessly searching three possible targets. It is the expected utility of the acquiring agent-firms (the AS and AH agent-firms) that dictates whether search occurs and what an agent’s search intensity is.

To be clear, we determine the point at which the acquiring agent-firms cease searching by having all of the searching agent-firms conduct a total search at each level of search intensity (over one agent-firm, over 2 agent-firms, . . . , over 20 agent-firms) for a 1000 simulation runs. If the expected utility for an acquiring agent-firm is positive when it searches over three agent-firms, but negative when it searches over four agent-firms, then this acquiring agent-firm stops searching after it has searched over three agent-firms.

When a match occurs, only the searching agent incurs search costs. This is so when the found agent is itself a searching type. Also, the agent-firm being searched, even when the search fails to result in a match, does not incur search costs. Only searching agents incur search costs.

A simulation run unfolds as follows: The code iterates through the entire population matrix of 775 agent-firms, one by one. First, it checks to ensure that the current population member is not already matched with a partner firm. In addition to the population matrix, which is called “pop,” there is a matching matrix, called “popMatch.” The population matrix, pop, has a single column, but the matching matrix, popMatch, has two columns. The rows of the first column of the popMatch (matching) matrix are initially populated with zeros (at the beginning of each new simulation run). As agent-firms are matched with one another, these rows in the first column of the popMatch matrix are filled with ones to indicate that the agent-firms in the corresponding indexed locations (rows) in the population matrix, pop, have been matched with partner firms. Thus, the first column of the matching matrix, popMatch, is populated entirely by ones.
and zeros. The code finds whether an agent-firm has been matched or not, by checking
the agent-firm’s index in the pop matrix within the first column of the popMatch matrix;
there has been a match if the indexed location (row) in the first column of the popMatch
matrix is a one, but not if it is a zero. Throughout the search process, the code
repeatedly checks to see if the current population member (agent-firm) has been
matched or not. This ensures that an agent-firm ceases searching upon having
achieved a match, and ceases incurring search costs as well. The second column of
the popMatch matrix holds the indexed location (row) in the pop matrix of the agent-firm
with whom the current population member is matched, if there is a match. Therefore,
we know not only whether an agent-firm is matched, but with whom the firm is matched.

Once the code has checked that the current population member is not matched
with an agent-firm, the code checks whether the current population member is a
searching agent-firm. To see how the simulations then proceed, suppose that the
current population member is an AS – that is, an acquiring synergy searching – firm.
The code searches for a match for this firm. To begin a search over 1, 2, … 20 agent-
firms, the code randomly selects an initial agent-firm within the population matrix, pop,
as its starting point. The code next checks to make sure that this initial agent-firm is not
the current population member engaging in a search. The code then starts searching,
iterating through the entire one draw, two draw, etc. universe, one by one, looking for
desired matches for the searching population member. If the current searcher is an AS
type, the code looks for either TA or TM type firms with whom the AS type may match.
If, however, the AS firm searches a TP or P type, then the AS firm incurs search costs
in consequence of these searches, but it will not match with any of the searched firms.
The searching AS population member will also incur search costs for searching any TA
and TM firms that have been matched. Searching acquirers (AS and AH type agent-
firms) do not incur search costs when they meet other searching acquirers, however.
Searching, active, synergy target (TA) type agent-firms also do not incur search costs
when they meet passive, materially improvable target (TP) agent-firms. The payoffs
from matches, and the costs from searches, are recorded for each population member
in a matrix called “popFitness.” The popFitness matrix is a single column, and the
indexed location in the popFitness matrix holds the total net payoff of the agent-firm
population member in the corresponding indexed location in the pop matrix. The
popFitness matrix is initialized as a column of zeros at the beginning of each new
simulation run.

As an example, suppose that the code is searching a TP type firm on behalf of
the AS searcher, and the other firm is the first firm to be searched. Upon recognizing
the type of current firm being searched, the code immediately checks whether the
current, searching AS firm is already matched. This occurs before instance of the code
imposing costs or awarding payoffs to current, searching population members. This is
so, because the current population member ceases to search and ceases to incur
search costs immediately upon having achieved a desired match. Once the code has
determined that the current, searching population member has not been matched, the
code imposes search costs upon the AS type for having searched a firm with whom the
current, searching population member did not match.

Turning to how the code calculates search costs, the cost for searching a sample
of a single agent is -2 utils. We chose this value because search costs, we assume, are
2% of the match surplus, which is set at 100 utils. The code is instructed that search
costs are quadratic; they vary according to the number of draws (number of agent-firms
searched) as follows: Search costs = -2 – (draw number/10)^2 + .25.

Thus, the search cost for searching one agent-firm is -2 utils; the search cost
imposed for searching a second agent is -2.75 utils, and so on. Search becomes
costlier as the search continues. The indexed location of the current, searching
population member in the pop matrix is altered in the popFitness matrix, so that the
current total net payoff of the current, searching population member reflects these
search costs for having searched and failed to match with a TP type firm. The line of
code appears as follows: popFitness(i) = popFitness(i) + cc; where cc is the variable for
search costs for the possible number of agent-firms searched. Remember that the
popFitness matrix is initialized as a column of zeros at the beginning of each simulation
run. If the current AS type had met and searched a P type agent-firm, the code uses
same process for imposing costs. This also is the case if the current AS type had met
and searched either a TA or a TM type that had already been matched with a different
AS type firm.

The code next turns to the next agent-firm that the AS firm will search. Suppose
that this second agent firm to be searched is an unmatched TA type. The code checks
whether this agent is matched by checking the indexed location (row) in the first column
of the popMatch matrix that corresponds to the indexed location (row) in the pop matrix
of the TA firm being searched. If the code determines that the TA type is unmatched,
the code checks again to make sure that the searching AS type is unmatched. If neither
firm is matched, the code makes a match, records it, charges search costs to the
searching firm and allocates payoffs between the agents. In particular, the code first
alters the indexed location (row) of the popFitness matrix that corresponds to the
indexed location (row) in the pop matrix of the current, searching AS type population
member. The popFitness matrix is altered as follows: popFitness(i) = popFitness(i) + B
+ cc, where B is the payoff that an AS type agent-firm receives for matching with a TA type
firm.

To see how B is calculated, suppose that the surplus generated by a successful
match is split equally between the A (acquiring) type agent-firm and the T (target) type
agent-firm. (Various splits of the surplus are possible. The code calculates asymmetric
splits, that favor either A or T agents, in order to approximate the markets that result
from legal regimes that are either friendly or unfriendly to defensive tactics). Because
we approximate the cost of searching a single agent at 2% of the surplus generated by
a successful match, and we set the search cost of searching a sample of a single agent
at two utils, B is equal to 100*(1/2). This is the payoff that an AS type agent-firm
receives for successfully matching with a TA type agent-firm. The TA type agent-firm that is searched (the second of two agent-firms being searched) receives a payoff for having achieved a desired match (by being found, but not by having found a match), but incurs no search costs. The popFitness matrix is altered as follows: popFitness(jj) = popFitness(jj) + E, where E is the payoff that a TA type firm receives for successfully matching with an AS type firm; and jj is the indexed location (row) in the pop matrix of the TA type firm that is being searched. Because the surplus generated by a successful match, in this example, is split equally between the A (acquiring) agent-firm and the T (target) agent-firm, E also equals 100 utils *(1/2). The TA agent-firm being searched incurs no search costs.

Having allotted payoffs to both firms that are now successfully matched with one another, as well as costs for having searched, the code now records that each is now matched, and also records who is matched with whom. First, the code places a “1” in the indexed location (row) in the first column of the popMatch matrix that corresponds to the indexed location (row) in the pop matrix of the current, searching AS type firm. Then, the code places a “1” in the indexed location (row) in the first column of the popMatch matrix that corresponds to the indexed location (row) in the pop matrix of the current TA type firm being searched. The second column of the popMatch matrix is reserved for recording the identities of the partners with whom the agent-firms are matched. An agent-firm’s identity is its indexed location (row) in the pop matrix. For example, the current, searching AS type firm’s second column of its indexed location (row) in the popMatch matrix is populated with the indexed location (row) in the pop matrix of the current TA type firm being searched. Similarly, the current TA type firm’s second column of its indexed location (row) in the popMatch matrix is populated with the indexed location (row) in the pop matrix of the current, searching AS type firm. These lines of code appear as follows:

popFitness(i) = popFitness(i) + B + cc;
popFitness(jj) = popFitness(jj) + E;
popMatch(jj,1) = 1;
popMatch(i,1) = 1;
popMatch(i,2) = jj;
popMatch(jj,2) = i;

In the example discussed above, a successful match was made, but agents may fail to match. Even so, each agent-firm member within the two-draw search intensity of the example has been searched as a potential match. Because the AS firm has exhausted its search, the code moves on to the next agent-firm in the pop matrix.

When all of the searching agent-firms in the population have either had a chance to search for a desired match or have been successfully matched by having been found, the simulation run is nearly over. It remains to record how well or poorly each agent type fared over each simulation run, and, subsequently, over the thousand simulation runs for each relevant search intensity. For each simulation run, the code records (for
each agent-firm type) the number of matched agents, the total payoff of the matched agents, the total payoff for all agent-firms of that type, and the total payoff of the unmatched agents, as well as the number of agents of that type. Subsequently, the code records the averages of each of these values over the thousand simulation runs for each search intensity level.

The code also records, for each simulation run, the expected utility of each agent type, as well as the probability of matching, for each agent type. The expected utility is calculated as the total payoff of matched agents (of whichever type) plus the total payoff of unmatched agents (of whichever type), the sum of which is divided by the number of agents of that type. The probability of matching for a particular agent type is the number of actual matched agents (of whichever type) divided by the number of agents of that type. Subsequently, the code records the averages of each of these values over the thousand simulation runs for each sample size (search intensity level). These total payoffs, probabilities of matching, and expected utilities for the various agent-firm types are then manipulated in an excel spreadsheet to determine which markets (identified by various parameters) are more or less match efficiently.
TABLE 4

|                | X | Y | Z | A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | Q | R | S | T | U | V | W | X | Y | Z |
| **Sample Set**     |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| **Sample Size**     |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| **Value**          |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| **Variances**      |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| **Covariances**    |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |

Here, we simulate only “acquirers” – the A row – and “targets” – the T row. The zero rows reflect market agents we do not simulate, such as financial buyers.

TABLE 5

|                | X | Y | Z | A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | Q | R | S | T | U | V | W | X | Y | Z |
| **Sample Set**     |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| **Sample Size**     |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| **Value**          |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| **Variances**      |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| **Covariances**    |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |

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In the order the tables are set out, the target realizes .4, .5, .6 and .7 of the surplus. The target’s expected return is maximized at the .6 split; and the positive difference between the .5 and .6 splits is smaller than the negative difference between the .6 and .7 splits.

Figure 1 in text is represented continuously because it connects all of the splits. This is why a target’s maximum expected return is set at approximately a 60% share.

### Table 6

<table>
<thead>
<tr>
<th>Sample Size</th>
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<th>3</th>
<th>4</th>
<th>5</th>
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<tbody>
<tr>
<td>Test (1%)</td>
<td>0.116</td>
<td>0.203</td>
<td>0.308</td>
<td>0.409</td>
<td>0.510</td>
</tr>
<tr>
<td>Test (5%)</td>
<td>0.415</td>
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<td>0.701</td>
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<tr>
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<td>0.425</td>
<td>0.441</td>
<td>0.457</td>
</tr>
<tr>
<td>Test (25%)</td>
<td>0.286</td>
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<td>0.344</td>
<td>0.372</td>
<td>0.399</td>
</tr>
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<td>Test (50%)</td>
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### Table 7

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Electronic copy available at: https://ssrn.com/abstract=3549527
### TABLE 8

Larger set of agents with 2% Costs (1300 Agents — 425 A, 136 A, 275 A, 125 P, 130 T; 84 A, 30 T; 95 TPs)

<table>
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<tr>
<th>Sample Size</th>
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<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
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<td>PTA TP (%)</td>
<td>0.012</td>
<td>0.020</td>
<td>0.027</td>
<td>0.031</td>
<td>0.049</td>
<td>0.069</td>
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<td>PTA TP (%)</td>
<td>0.049</td>
<td>0.053</td>
<td>0.075</td>
<td>0.087</td>
<td>0.094</td>
<td>0.102</td>
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<tr>
<td>PTA TP (%)</td>
<td>0.023</td>
<td>0.026</td>
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### TABLE 9

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54
Appendix 4: Acquisition Types

U.S. PUBLIC AND PRIVATE ACQUIRERS
Source: Fact Set

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<th>Year</th>
<th>Total Acquisitions of U.S. Public Companies</th>
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<th>Private Acquirer</th>
<th>% Public</th>
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<td>2016</td>
<td>293</td>
<td>182</td>
<td>37</td>
<td>62.11%</td>
</tr>
<tr>
<td>2015</td>
<td>310</td>
<td>209</td>
<td>35</td>
<td>67.41%</td>
</tr>
<tr>
<td>2014</td>
<td>261</td>
<td>188</td>
<td>27</td>
<td>72.03%</td>
</tr>
<tr>
<td>2013</td>
<td>236</td>
<td>160</td>
<td>40</td>
<td>67.9%</td>
</tr>
<tr>
<td>2012</td>
<td>261</td>
<td>172</td>
<td>46</td>
<td>65.90%</td>
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