

# The Rise of Anti-Activist Poison Pills

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GCGC 2023



THE UNIVERSITY OF CHICAGO  

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# The Paper



Studies the rise of “anti-activist” poison pills

- ▶ Lower trigger thresholds; “acting-in-concert” provisions; “NOL pills”

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- ▶ Use hedge fund clicks on issuer SEC filings as a proxy for interest

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Pills that make it impossible to acquire substantial ownership stakes are associated with fewer such stakes

# Institutional Setting: Delaware Law



Poison pills make it practically impossible for an investor to acquire shares past a pre-determined threshold

- ▶ Were developed to deter takeover attempts by corporate raiders
  - ▶ Idea: force the raiders to negotiate with the board
- ▶ Activist hedge funds have a different business model
  - ▶ Buy moderately sized chunks ( $\approx 5\%-10\%$ ) and push for changes
  - ▶ Some evidence that the threat of hedge fund activism increases shareholder value

**Delaware Law:** A poison pills to address a threat of a **takeover** is generally permissible

- ▶ A pill to address a general threat of **activism** is not (*In re Williams Companies Stockholder Litigation* 2021)

# Institutional Setting: Tax Law



Many companies have tax losses on their balance sheets (**NOLs**)

- ▶ These losses can be carried forward to offset profits in the future  
⇒ **valuable asset**

Under applicable tax law (§382), an “ownership change” jeopardizes these assets

- ▶ “**ownership change**”: if a  $\geq 5\%$  shareholder increases ownership by  $> 50\text{pp}$  over lowest ownership percentage in the last 3 years
  - ▶ Rules sweep in groups of shareholders acting in concert
- ▶ Punchline: once a shareholder (or group) own  $\geq 5\%$  shares, changes in holdings can reduce firm value **if the firm has NOLs**
  - ▶ This risk is increasing in the amount of the NOLs

**Challenge:** How do we distinguish a bona fide (shareholder value preserving) NOL pill from a sub rosa (management entrenching) anti-activist pill?

# My Comments



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**Suggestion:** The real gem in the project is the granular pill data

- ▶ Lean into that!
- ▶ Rather than a noisy proxy on a set of characteristics, dig into the governance implications of the granularity you're seeing!

# Anti-Activist Poison Pills



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The authors frame this as a problem

- ▶ Idea: Managers are using NOL pills (and other low trigger pills?) pretextually

But surely *some* NOL pills do preserve shareholder value?

- ▶ How can we distinguish the genuine from the pretextual?



# What do we Already Know About These Pills?

The existence of anti-activist poison pills is well known in the literature

- ▶ Scholarly work: Kahan & Rock (2019)
- ▶ Multitudes of law firm reports / practitioner pieces
- ▶ Substantial Delaware case law

The fact that NOL pills can be used to deter activism is also well known

# Evolution of Poison Pills



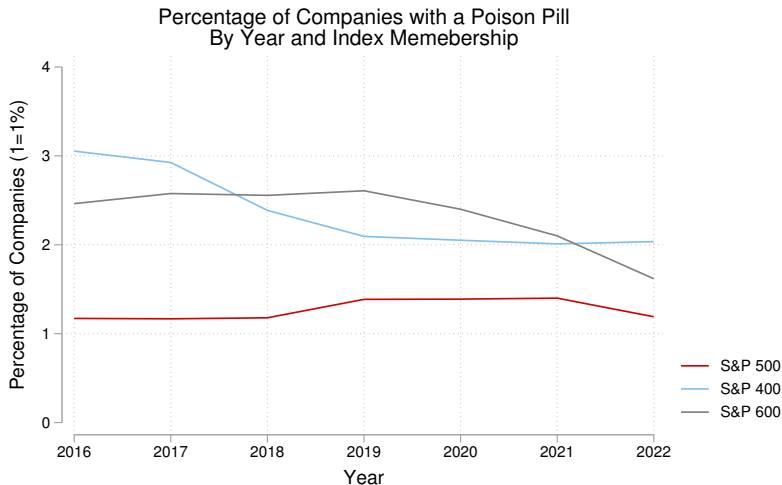
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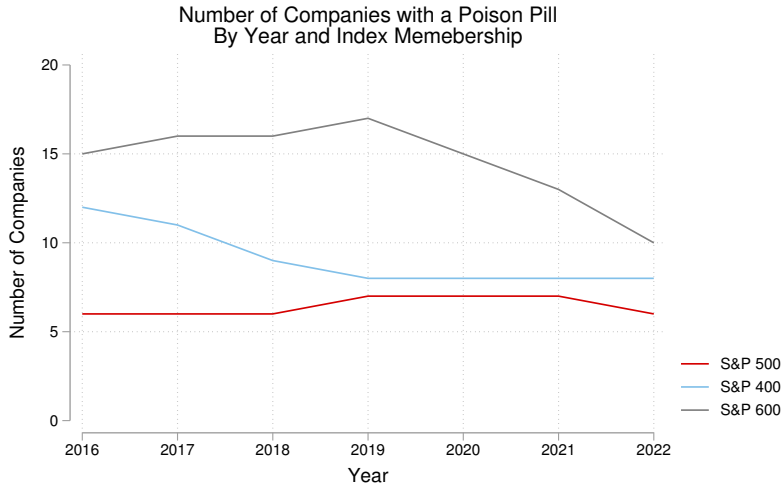


Data Source: ISS Governance Data, available on WRDS

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# Suggestion: Broaden the Focus

Situate this in the broader evolution of the poison pill

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Situate this in the broader evolution of the poison pill

- ▶ What can we learn from the huge changes in this space?

The paper has a strong normative valence  $\Rightarrow$  highly skeptical of management

- ▶ Yet there can be legitimate reasons for at least some of these pills
- ▶ Some language in the paper suggests that the pills reflect a tradeoff

Take that tradeoff seriously

- ▶ Ultimately we care about shareholder value  $\Rightarrow$  there seems to be a more nuanced story here

# Some Questions This Raises



Why are certain companies adopting these provisions?

- ▶ The total number of pills is small: you can investigate the context

How many dogs didn't bark?

- ▶ How many of the companies with NOL pills didn't have NOLs?
- ▶ How many lost substantial NOLs because they didn't have an NOL pill?
- ▶ How many companies with substantial NOLs didn't adopt one?

# Hedge Fund Clicks



The authors use a fun dataset of access to SEC filings as a proxy for hedge fund interest

- ▶ Idea: if an activist hedge fund is interested in a company, it is likely to access its filings

The authors find that hedge fund clicks predict pill adoption

- ▶ There is a strong negative valence in the paper ⇒ framed as managerial entrenchment



# Limitation of Click Data

Companies can't observe these clicks, so there must be an alternative mechanism

- ▶ Engagement? Rumors?
- ▶ Could there be reverse causality?

Normative implications are unclear

- ▶ If the pill is legitimate, isn't this exactly what we would want management to do?

**Suggestion:** Instead of the core of the paper, the clicks should just be one piece of a much larger story



# Some Questions This Raises

Propagation of the pills & heterogeneity

- ▶ What is driving the heterogeneity?
- ▶ Are certain law firms involved?

What happens after pill adoption?

- ▶ These are short term pills  $\Rightarrow$  do the hedge funds come back? If not, why not?

What happened after *Williams*?

- ▶ The decision motivates the paper, but the click data don't allow you to study it
- ▶ Moving beyond that data source opens up this possibility

# Low Trigger Pills Deter Activism



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**Comment:** Isn't this relationship kind of mechanical?

- ▶ How can a pill with a 5% threshold not reduce the number of 13D filings?



# Suggestion



Rather than focus on short term 13D filings, focus on things we care about

- ▶ See prior suggestions for more examples

Try to give management a fair shake

- ▶ It's certainly possible that this is intended to entrench
- ▶ At least entertain the possibility that they are being good fiduciaries

# Conclusion



- ▶ Great data on an important topic
- ▶ Right now, concerns about identification are constraining the payoffs from that data
- ▶ Forget about “identification” and lean into the institutional setting

