

# **Is Delaware's Antitakeover Statute Unconstitutional? Evidence from 1988-2008**

**Guhan Subramanian  
Steve Herscovici  
Brian Barbetta**

August 2009

## ABSTRACT

*Delaware's antitakeover statute, codified at Section 203 of the Delaware corporate code, is by far the most important antitakeover statute in the United States. When it was first enacted in 1988, three bidders challenged its constitutionality under the Commerce Clause and the Supremacy Clause of the U.S. Constitution. All three federal district court decisions upheld the constitutionality of Section 203 at the time, relying on empirical evidence indicating that Section 203 gave bidders a "meaningful opportunity for success," but leaving open the possibility that future empirical evidence might change this constitutional conclusion. This Article presents the first systematic empirical evidence since 1988 on whether Section 203 gives bidders a meaningful opportunity for success. The question has become more important in recent years because Section 203's substantive bite has increased, as Exelon's recent hostile bid for NRG illustrates. Using a new sample of all hostile takeover bids against Delaware targets that were announced between 1988 and 2008 that were subject to Section 203 (n=60), we find that no hostile bidder in the past nineteen years has been able to avoid the restrictions imposed by Section 203 by going from less than 15% to more than 85% in its tender offer. At the very least, this finding indicates that the empirical proposition that the federal courts relied upon to uphold Section 203's constitutionality is no longer valid. While it remains possible that courts would nevertheless uphold Section 203's constitutionality on different grounds, the evidence would seem to suggest that the constitutionality of Section 203 is up for grabs. This Article offers specific changes to the Delaware statute that would preempt the constitutional challenge. If instead Section 203 were to fall on constitutional grounds, as Delaware's prior antitakeover statute did in 1986, it would also have implications for similar antitakeover statutes in thirty-two other U.S. states, which along with Delaware collectively cover 92% of all U.S. corporations.*