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STAKEHOLDER CAPITALISM IN THE TIME OF COVID

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Abstract

This Article investigates critical corporate decisions with regard to the treatment of stakeholders during the first eighteen months of the COVID-19 pandemic. Posing heightened risks for stakeholders, this period followed and was accompanied by peak corporate support for stakeholder capitalism (“stakeholderism”). Thus, it serves as a constructive context for testing whether the action of corporate leaders matches their stakeholderist rhetoric.

Some supporters of stakeholder capitalism claim that corporate leaders should and do give weight to stakeholder interests because delivering value to stakeholders is a major dimension of corporate purpose. Other supporters maintain that corporate leaders considering a sale of the company should and do seek to benefit stakeholders, because fulfilling implicit promises to do so serves shareholders’ *ex ante* interest in inducing stakeholder cooperation, arguably essential to corporate success. We find that the evidence is inconsistent with both views.

We provide a detailed examination of all the $1B+ acquisitions of public companies that were announced during the COVID period, totaling more than 100 acquisitions with an aggregate consideration exceeding $700 billion. We find that deal terms provided large gains for the shareholders of target companies, as well as substantial private benefits for the corporate leaders. However, while at the time of the deal many transactions were viewed as posing significant post-deal risks for employees, corporate leaders largely did not negotiate for any employee protections, including any payments to employees in the event of post-deal termination. Similarly, we find that corporate leaders also chose to provide little protection to customers, suppliers, communities, the environment, or any other stakeholders.

After conducting various tests to examine whether this pattern could have been driven by other factors, we conclude that it is likely to have been driven by corporate leaders’ incentives to benefit stakeholders only to the level needed to serve shareholders’ interests, and not beyond. While we focus on decisions in the acquisition context, we explain why our findings also have implications for ongoing-concern decisions by corporate leaders. We also discuss and respond to potential objections to our conclusions.

Overall, our findings cast doubt on the claims made by supporters of stakeholder capitalism that corporate leaders can be expected and relied on to use their discretion to protect stakeholder interests. In the particular context of climate change, our findings indicate that rather than harboring illusory hopes that corporate leaders will address climate risk on their own, those concerned about this issue should concentrate their efforts on securing government regulations to meet this challenge.

Keywords: Stakeholders, stakeholderism, stakeholder governance, stakeholder capitalism, corporate social responsibility, corporate governance, corporate purpose, COVID-19, employees, agency costs, entrenchment, accountability, managerialism, mergers & acquisitions

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# Introduction

This Article seeks to contribute to the fundamental and heated debate on stakeholder capitalism (“stakeholderism”). Stakeholderism refers to the increasingly influential view that corporate directors and top executives (“corporate leaders”) should be encouraged and relied upon to use their discretion to serve stakeholders and not only shareholders.[[4]](#footnote-5) According to this view, corporate leaders should and will deliver value to stakeholders, including employees, suppliers, customers, local communities, and the environment.

This view is now officially supported by a large number of business leaders. In a widely heralded statement issued in 2019 by the Business Roundtable, many CEOs of major companies expressed their commitment to deliver value to all stakeholders rather than only to shareholders.[[5]](#footnote-6) A subsequent manifesto of the World Economic Forum urged companies to abandon shareholder primacy and embrace stakeholder capitalism.[[6]](#footnote-7)

But can corporate leaders be relied upon to use their discretion to serve stakeholders? This Article seeks to shed empirical light on this question using data about numerous corporate acquisitions during the COVID pandemic, a period which followed and was accompanied by peak support for stakeholder capitalism. In the time of COVID, we find that rhetoric about stakeholder capitalism failed to deliver on its promise.

Part II begins by discussing the stakeholderism debate and why examining large corporate acquisitions during the COVID pandemic could inform this debate. We discuss, in particular, the implications that two key versions of stakeholderism have for corporate acquisitions.

Supporters of the purpose-based version of stakeholder capitalism argue that corporate leaders should and do give weight to stakeholder interests because delivering value to stakeholders is a major element of corporate purpose.[[7]](#footnote-8) According to this view, corporate leaders with such a sense of purpose should and do pay attention to ensuring that stakeholders share in the larger pie produced by the sale of the company.

Another relevant and important version of stakeholderism was propounded in early academic works by prominent economists and law professors, such as Lawrence Summers and Andrei Shleifer, John Coffee, and Lynn Stout and Margaret Blair.[[8]](#footnote-9) Under this implicit promise view, corporate leaders should safeguard stakeholders in acquisition decisions, and indeed do so, because such behavior serves the *ex ante* interests of shareholders. Stakeholders, it is argued, would be encouraged to invest more in their relationship with the company, and thus to contribute to the company’s success, if they could expect to be treated well in the event of an acquisition down the road. Therefore, the argument continues, corporate value and the *ex ante* interests of shareholders would be served by corporate leaders fulfilling “implicit promises” to treat stakeholders well when considering an acquisition.

Both these versions of stakeholderism thus hold that corporate leaders should and do look after the interests of stakeholders when selling the firm. In contrast, the agency critique of stakeholder capitalism argues that corporate leaders have incentives not to safeguard stakeholder interests beyond what would serve the interests of shareholders.[[9]](#footnote-10) According to this view, regardless of how advisable it may be for corporate leaders to protect the stakeholders’ interests when selling the company, corporate leaders should not be expected to do so.

Part II also explains why the COVID pandemic provides a good context for testing these alternative predictions regarding the behavior of corporate leaders selling their companies. First, stakeholderism was recently embraced by many CEOs of large companies and prominent business groups, and it has become pervasive in business discourse. Second, the COVID pandemic heightened employees’ and other stakeholders’ concerns and uncertainties, thus arguably increasing their need for protection. Third, shareholders, after an initial value shock, enjoyed a soaring stock market and significant acquisition premiums, and were therefore likely to have prospered even if corporate leaders had allocated part of the acquisition gains to stakeholders. Finally, the pandemic period was accompanied by a large number of acquisitions of significant companies, and the transactions and choices we empirically investigate are consequently quite meaningful economically.[[10]](#footnote-11)

Part III describes the construction of our dataset and the universe of cases it includes. Our study provides a detailed examination of all the acquisitions of U.S. public companies with a value in excess of $1 billion that were announced during the first eighteen months of the pandemic. Our sample includes deals with an aggregate value of more than $700 billion and affecting companies that together employed more than 400,000 employees. We hand-collected and examined securities filings and other materials for each of the deals to study in detail the deal and the terms produced by it.

Part III documents the significant bargaining that was involved in producing the terms of the deals. Deals were commonly negotiated over a long period of time, often involved multiple offers (including improved terms obtained by target corporate leaders during the process), and frequently included deal protection provisions in return for the terms extracted from the buyers. The key question, of course, is for whose benefit corporate leaders bargained and what they obtained.

Part IV examines whether and to what extent the deal terms served the interests of shareholders and corporate leaders. Our data show that shareholders obtained significant premia, with a mean of 34% of the pre-deal market capitalization and aggregate value exceeding $160 billion across all deals. Corporate leaders, in turn, received large payoffs, both as shareholders and as executives or directors; in many cases, they also negotiated for continued positions after the sale.

Part V turns to the heart of our inquiry, examining whether, and to what extent, corporate leaders also bargained for stakeholder benefits and protections. We first examine whether stakeholders faced clear post-deal risks at the time the deals were concluded. To this end, we hand-collected and analyzed press releases, Q&A sessions, conference call transcripts, investor and analyst presentations, and media coverage of the deals. We found that acquisitions were often expected to be followed by cost-cutting, closing or relocation of facilities and offices, and risks to continued employment of some employees.

Part V proceeds to show that despite clear and present risks to employees, corporate leaders largely did not negotiate for any protections for employees, including any payments to employees in the event of post-deal termination. Part V also examines the extent to which corporate leaders safeguarded the interests of stakeholders other than employees, including suppliers, creditors, customers, local communities, and the environment. We find that corporate leaders chose to provide little or no protection to these or any other stakeholders.

Our findings are consistent with the view that corporate leaders face structural incentives not to benefit stakeholders beyond what would serve shareholder value. However, in Part VI we examine whether the general lack of stakeholder protections that we found could have been driven by factors that might have led otherwise stakeholder-oriented corporate leaders to agree to the terms we have documented. To examine each alternative potential factor, we identify a subset of our sample in which this factor was not present, and we examine whether substantial stakeholder protections are present in this subset of deals.

In particular, we examine subsamples based on: (i) deals not driven by economic distress: (ii) deals completed in later stages of the pandemic in which economic activity was returning to normalcy; (iii) deals that received shareholder support by a large margin, so securing some stakeholder protections by reducing premiums somewhat may not have threatened obtaining shareholder approval; (iv) deals to which the *Revlon* doctrine did not apply; (v) deals governed by constituency statutes; (vi) deals in which the target was represented by “stakeholderist” legal counsel that could have been relied on not to discourage corporate leaders from seeking stakeholder protections; (vii) deals to purchase targets that had high ESG ratings and whose leaders could thus be expected to be more stakeholder-oriented; and (viii) deals with acquirers with low ESG ratings and thus might have posed especially significant post-deal risks for stakeholders. We find that each of these subsamples was still characterized by a general lack of stakeholder protections.

Finally, to explore whether our findings could have been driven by some pandemic-related factors that the above testing did not address, Part VI concludes by examining the terms of a set of significant deals that closed during the year preceding the pandemic. This period, during which the Business Roundtable issued its stakeholderist statement on corporate purpose, was characterized by strong public stakeholderist rhetoric. Nonetheless, we find a pattern of lack of stakeholder protections in this pre-pandemic period similar to that documented for the pandemic period deals, suggesting that this pattern is not due to some unidentified pandemic-related factor.

We therefore conclude in Part VII that our findings are best explained by the incentives of corporate leaders rather than by other factors. We also discuss and respond to a number of objections to this conclusion. Among other things, we examine arguments that corporate acquisitions present a selection bias problem, that stakeholder protections are prohibitively costly, and that the lack of stakeholder protection could have been the result of inertia among deal designers. We also discuss the argument that stakeholder protections were unnecessary because stakeholders received sufficient protection through soft pledges, the selection of a stakeholder-friendly buyer, or their own contracts with the company. Finally, we discuss the objection that our findings are limited to corporate leaders’ choices in companies’ final-period situations, and explain that these findings have implications for the choices that corporate leaders should be expected to make in ongoing-concern situations.

Part VIII concludes. Overall, our findings cast doubt on the claims made by supporters of stakeholder capitalism that corporate leaders can be expected and relied upon to use their discretion to protect stakeholder interests. Thus, those who are concerned about the protections of stakeholders, as we are, should not rely on corporate leaders’ stakeholderist pledges but instead focus on external governmental actions that would provide real protection for stakeholders in a wide range of areas. In particular, in the specific context of climate change, our findings indicate that those concerned about this issue should focus their efforts on obtaining government interventions (such as a carbon tax) that would meet this challenge and not harbor illusory hopes that corporate leaders will address climate risk on their own. The failure of stakeholder capitalism during COVID period should give pause to all those attracted by the siren songs of stakeholderists.

# Testing Stakeholder Capitalism

In this Part, we discuss why examining the contractual terms of corporate acquisitions during the COVID pandemic is a particularly effective way to assess the promise of stakeholderism. As Section A discusses, two prominent and influential versions of stakeholderism—the purpose-based theory and the implicit promise / team production theory—argue that the discretion granted to corporate leaders to negotiate the sale of the company should be expected to be used to benefit stakeholders and not only shareholders. Section B then explains why the pandemic provides an excellent context for testing whether corporate leaders can be expected to act as stakeholderists predict. Indeed, this period was an especially apposite one for implementing stakeholderist decisions, as stakeholders faced more severe risks, shareholders enjoyed a booming stock market, and stakeholderism dominated business discourse.

## Stakeholderism and Its Implications for Acquisitions

The core argument of stakeholderism is that corporate leaders should be given broad discretion to consider the interests of stakeholders, not just of shareholders. Versions of this theory have been debated for decades.[[11]](#footnote-12) In the past few years, however, support for stakeholderism has become increasingly widespread and influential, and comes from legal scholars[[12]](#footnote-13) as well as from finance and management scholars.[[13]](#footnote-14) Furthermore, corporate leaders and practitioners have increasingly supported stakeholderism and pledged their commitments to deliver value to stakeholders.[[14]](#footnote-15)

In particular, two versions of stakeholderism have important implications for corporate acquisitions, the focus of our empirical investigation. According to one version, which we will refer to as “purpose-based” stakeholderism, creating value for stakeholders is an intrinsic element of the purpose of the corporation.[[15]](#footnote-16) According to this view, the role of corporate leaders is not merely to maximize the wealth of shareholders but to weigh and balance the interests of a plurality of constituencies. Thus, particularly when pursuing a sale of their company, corporate leaders guided by such a broad purpose should seek to ensure that stakeholders share in the larger pie that the acquisition will produce.

Advocates of purpose-based stakeholderism believe not only that corporate leaders should attach weight to stakeholder interests as a dimension of corporate purpose but that corporate leaders in fact do so. In their view, business and social norms, reputational incentives, or intrinsic motivation, lead corporate leaders to pursue this broader purpose.[[16]](#footnote-17) In the context of an acquisition, purpose-based stakeholderism predicts that the corporate leaders of the target company will allocate the surplus value created by the deal among shareholders and stakeholders.

Another version of stakeholderism posits that corporate leaders should and do deliver value to stakeholders because doing so maximizes shareholder value *ex ante* by inducing *ex ante* investments by stakeholders, even if in specific situations it may reduce shareholder value *ex post*. For example, when negotiating the sale of the company, corporate leaders might want to protect the interests of local employees and therefore might try to obtain a formal commitment from the buyer to keep the plant in its current location, even if a relocation would increase profits for shareholders. Although such a decision would reduce shareholder value *ex post*, corporate leaders agree to give weight to the interests of employees in this kind of situation in order to increase shareholder value *ex ante* by inducing employees to join the company and contribute to its success.

In the academic literature, this version of stakeholderism was advanced in influential studies by economists Andrei Shleifer and Larry Summers,[[17]](#footnote-18) by the prominent legal scholar Jack Coffee,[[18]](#footnote-19) and in the “team production” work developed by Margaret Blair and Lynn Stout.[[19]](#footnote-20) All these authors stressed that the *ex ante* interests of shareholders are served by inducing cooperation and investments from corporate stakeholders, such as employees, suppliers, and creditors. Stakeholders’ expectations that corporate leaders will treat them favorably in the future will encourage such cooperation and investments, thereby providing substantial benefits for the corporation’s development.

In particular, according to this view, if stakeholders can expect that corporate leaders will safeguard their interests in the event of an acquisition, corporate value will be enhanced, which, in turn, will be reflected in the value that will be captured in the event of an acquisition. Accordingly, the argument goes, shareholders will prosper if corporate leaders can be relied upon to fulfill “implicit promises” to treat stakeholders favorably, and corporate leaders indeed act in this way. In fact, the scholars advocating this view contend that it is therefore justifiable to provide corporate leaders with substantial power over acquisitions so that they can safeguard the interests of stakeholders and not be forced to agree to those terms that maximize value for shareholders *ex post*.[[20]](#footnote-21)

The expectations of the above versions of stakeholderism, however, are not universally shared. The agency critique of stakeholderism argues that the behavior of corporate leaders that such stakeholderists anticipate is not consistent with these leaders’ incentives.[[21]](#footnote-22) In particular, corporate leaders have an array of incentives to attach weight to shareholder interests and little incentive to attach comparable weight to stakeholder interests.[[22]](#footnote-23) According to this alternative position, corporate leaders negotiating the sale of the company will secure benefits for the shareholders and, to some extent, for themselves, but should not be expected to deliver material benefits to stakeholders. Which of these set of expectations, or predictions is correct—those of stakeholderism or those of its critics—is of course an empirical question and the one on which this Article focuses.

## The Time of COVID

Before proceeding to test the empirical predictions of stakeholderism, we would like to discuss why the first eighteen months of the COVID pandemic provide an apt context for our empirical analysis. We identify and discuss four reasons. First, this period was preceded and accompanied by peak support for stakeholderism in business discourse. Second, the public health and economic crisis triggered by the pandemic heightened risks for stakeholders. Third, shareholders enjoyed a booming stock market, which presumably would have made them especially inclined to accept a reallocation of surplus to stakeholders. Fourth, the deals in this period were of considerable economic significance.

### Record Support for Stakeholder Capitalism

In the period immediately preceding the outbreak of the COVID pandemic, stakeholderist rhetoric was at its height. Many prominent companies and institutions explicitly embraced this approach, and numerous experts and commentators supported the view that corporate America was moving away from shareholder primacy. In August 2019, a few months before the outbreak of the coronavirus, more than 180 members of the Business Roundtable, all CEOs of leading companies, signed a statement in which they committed to abandon shareholder primacy and to deliver value not only to shareholders but to all stakeholders.[[23]](#footnote-24) This statement was welcomed by the press as an historical change, a revolutionary moment for U.S. corporate governance.[[24]](#footnote-25) A few months later, the World Economic Forum issued a manifesto advocating a shift away from shareholder primacy and toward stakeholder capitalism;[[25]](#footnote-26) and a prominent law firm defined 2019 as a “watershed year” for corporate governance, due to the “advent of stakeholder governance.” [[26]](#footnote-27)

During the pandemic, these institutional bodies continued to profess their support for stakeholderism and expressed confidence that companies were taking the wellbeing of stakeholders into account in the midst of the global crisis. For example, on the first anniversary of the Business Roundtable statement, the president of the Business Roundtable, Joshua Bolten, claimed that the signatory companies had lived up to their commitment to deliver value to all stakeholders;[[27]](#footnote-28) and on the second anniversary, the Business Roundtable issued a similar statement that in the two years since the statement, its signatories “have strongly demonstrated a commitment to the Statement.”[[28]](#footnote-29) The World Economic Forum joined this consensus, endorsing certain “Stakeholder Principles in the COVID Era,” which included protection for employees, continuing relationships with suppliers, and sustainability.[[29]](#footnote-30)

In addition, many business leaders expressed their allegiance to stakeholderist principles or announced their companies’ commitment to protect stakeholders from risks created by the pandemic. For example, BlackRock CEO Larry Fink predicted that “in this Covid world… stakeholder capitalism is only going to become more important.”[[30]](#footnote-31) Salesforce CEO Marc Benioff declared that Salesforce “values stakeholders as much as shareholders.”[[31]](#footnote-32) The Business Roundtable built a dedicated website collecting its members’ pledges and efforts benefitting employees and communities as a demonstration of companies’ commitment to stakeholders.[[32]](#footnote-33) In a 2021 study, legal scholars Stavros Gadinis and Ameilia Miazad found that many large companies had embraced stakeholder governance as a “systematic framework… with specialized executive teams, direct oversight by the board, and external monitoring by investors and specialized professionals,”[[33]](#footnote-34) although the resulting decisions were not always in line with stakeholder interests.[[34]](#footnote-35)

Furthermore, many corporate advisers reported the increasing importance of stakeholders and stakeholder governance in corporate decisions. For example, David Katz and Laura McIntosh, of the law firm Wachtell Lipton Rosen & Katz, argued that “the COVID-19 crisis has accelerated the nascent shift toward stakeholder-oriented governance.”[[35]](#footnote-36) Erica Volini, Steve Hatfield, and Jeff Schwartz of the Deloitte consulting firm observed that the pandemic had “thrust workforce management to the forefront of board agendas” and had increased the board’s focus on the needs and expectations of internal and external stakeholders.

More generally, shortly before and during the pandemic, the topic of stakeholders became a pervasive one in corporate discourse. A search for the term “stakeholders” in the Factiva database finds only 1,389 PR Newswire press releases in the period between August 2000 and August 2002, compared to 17,350 press releases in the period between August 2019 and August 2021.[[36]](#footnote-37) If all these announcements, manifestos, and commentaries expressed genuine pro-stakeholder attitudes, the period of the pandemic would certainly be a uniquely ideal time to observe corporate decisions benefitting stakeholders. Thus, by examining transactions completed during this period, we seek to examine whether or not the conspicuous and pervasive stakeholder rhetoric is matched by actions.

### Vulnerable Stakeholders

The pandemic was an incredibly challenging time for many individuals, groups, businesses, and more, including some categories of corporate stakeholders. The public health crisis and economic disruption created by the coronavirus created significant short-term as well as long-term risks. Indeed, as of the time of this writing, nearly two years after the onset of the pandemic, risks and uncertainties for stakeholders still loom large. Among the short-term effects during the pandemic was that it was much more difficult for employees who lost their jobs to find new positions or occupations: the median duration of unemployment jumped from 9.2 weeks in the last quarter of 2019 to 18.2 weeks in the last quarter of 2020.[[37]](#footnote-38) Although the government provided substantial support to workers and other individuals (including, for example, funding for extended unemployment benefits, subsidized loans to small businesses, and stimulus payments),[[38]](#footnote-39) these programs were expected to be only temporary and, in fact, many of these programs had been essentially discontinued by the end of the period we examine.[[39]](#footnote-40)

Furthermore, due to the health and financial risks created by the pandemic, corporate decisions with respect to remote work, paid sick leave, bonuses and salary increases, flexible work schedules, health and safety measures, dependent care, and other COVID-related policies became critically important for employees’ physical and psychological health, as well as for their financial security.[[40]](#footnote-41) Finally, the emergency created the need for companies to repurpose their operations to produce masks and ventilators on a mass scale or to support their supply chains.[[41]](#footnote-42)

In the long term, the major disruption caused by the pandemic is expected to have long-lasting effects on workers and families. A Pew Research survey found that about half of non-retired U.S. adults believe that the economic consequences of the pandemic will make it harder for them to achieve their long-term financial goals,[[42]](#footnote-43) and many observers expect that the COVID pandemic will have long-lasting effects on the economy and society, including shocks to the supply side of the economy,[[43]](#footnote-44) long-term productivity reductions,[[44]](#footnote-45) and macro-economic consequences.[[45]](#footnote-46) When managers negotiating a major transaction with lasting effects for the surviving company are willing to acknowledge the company’s stakeholders’ needs and risks, they must then consider a sufficiently long-range time frame. In the context of the pandemic, this would inevitably account for the long-term risks stakeholders faced.

All pandemic-related short-term and long-term risks threatened the welfare of stakeholders in the period under study. One would expect that corporate leaders negotiating the sale of a company and committed to delivering value to stakeholders (not only to shareholders) would take these risks into account and would bargain for specific protections or mitigations in the interest of stakeholders.

### Fortunate Shareholders

While the pandemic period was traumatic in so many respects, it was not at all bad for shareholder values. The COVID pandemic hit the United States after a more than decade-long bull market: in the ten years from the end of 2009 to the end of 2019, the total shareholder return for the S&P 500 was 256%, equal to an annual return of 13.5%.[[46]](#footnote-47) Even during the pandemic, after an initial steep decline in stock prices during February and March 2020, when the S&P 500 lost about a third of its value (33%), the stock market rapidly bounced back to pre-pandemic levels and continued growing at an even faster rate than before. [[47]](#footnote-48) By August 10, 2020, the index had returned to the February 19 level, and by the end of the period under study, the S&P 500 had gained 37% relative to February 19, 2020, and 40% relative to the end of 2019.[[48]](#footnote-49)

In addition, low interest rates, high levels of liquidity, and valuation opportunities drove higher M&A activity.[[49]](#footnote-50) This trend was especially powerful during 2021, the first half of which saw the highest amount spent on mergers of U.S. companies ($1.74 trillion) in over four decades.[[50]](#footnote-51) There also was a surge in M&A megadeals (deals valued at more than $10 billion), six of which were announced during the first five months of 2021.[[51]](#footnote-52) And during the second quarter of 2021, deals worth $5 billion or more, totaling $734.4 billion in value, were announced—more than in any other quarter since 2006.[[52]](#footnote-53)

Such a long period of significant gains for shareholders created ideal conditions for stakeholderist action. Indeed, if stakeholder-oriented corporate leaders wanted to allocate part of the value created from an acquisition to employees and other stakeholders, they could easily have done so while still delivering huge value to shareholders.

### Economically Consequential Decisions

Finally, it is worth noting that our sample of corporate acquisitions represents a significant set of economically consequential decisions. Together, the deals in our sample have an aggregate value of more than $600 billion and affected more than 400,000 employees.

While we are interested in assessing the promise of stakeholderism in general, and we believe that this study provides insights that can be applied in other contexts, we also think that measuring the degree of stakeholder protections in such a significant sample of deals is valuable in itself, as it shows whether rhetoric is being matched by actions in some of the most relevant corporate deals signed by large public companies. Therefore, even if the stakeholderist assumptions were found to be invalid only and exclusively within this specific context, this would still serve as a major indictment of the efficacy of stakeholderism.

From a social standpoint, stakeholderism is relevant only if it has a sizeable and systematic impact on the economy, rather than an episodic effect on a small number of companies in circumstances of little economic significance. Therefore, if stakeholderism is unable to deliver in major transactions affecting billions of dollars of values and hundreds of thousands of employees, its relevance for society is likely to be negligible.

# The Universe Of Cases

## Data Collection

In this Part, we describe the construction of our dataset and the universe of deals we examined. We used the FactSet M&A database to gather a sample of all acquisitions of U.S. public companies announced between April 1, 2020 and November 30, 2021. Focusing on large deals due to the higher stakes for stakeholders, we excluded from our sample deals with a transaction value below $1 billion, leaving 147 acquisitions under study. The target companies of these acquisitions tend to employ more employees, to have thicker relationships with third parties, and to generate greater impact on communities. Accordingly, the risks that their sale posed to stakeholders were expected to be more significant.

Our sample period spans twenty months during the coronavirus pandemic. We focused on deals that were signed during the pandemic, as this period posed significant risks to stakeholders and was accompanied and preceded by very public pledges by numerous corporate leaders to deliver value to all stakeholders.

We, then, applied several exclusion criteria. First, we excluded 23 acquisitions in which the target had a shareholder who held 20 percent or more of the target’s equity prior to the acquisition, as such a shareholder could exercise effective control over the firm.[[53]](#footnote-54) When the target’s controller is also the acquirer, that controller has interests on both sides of the transaction and there is no arm’s-length bargaining. But even if the target has a controller who negotiates a deal with a third-party acquirer, this controller may act differently than a professional manager due to the controller’s large equity stake in the target.[[54]](#footnote-55)

Second, we excluded two agreements entered into by targets within the context of bankruptcy proceedings. Financially distressed companies do not have enough assets to cover all of their liabilities and are subject to pressures from creditors. Consequently, corporate leaders may not be able to secure protections for additional stakeholder groups when considering and negotiating a sale of a bankrupt company.

Third, we excluded five merger agreements that were terminated due to offers received from third parties following the signing date, which constituted superior proposals. In all of these cases, the subsequent merger agreements that were signed with the eventual acquirers were found and included in the final dataset.

Finally, we also excluded one deal for which we could not locate a merger agreement, and therefore we had no publicly available information on the detailed terms of the transaction.

Our final dataset includes 116 transactions, and it provides a representative coverage of the large deals that took place during the pandemic period. After constructing our sample of pandemic deals, we embarked on the more demanding task of manually collecting and analyzing publicly available materials about each of the deals in the sample.

Specifically, we reviewed a wide array of securities filings for each deal: the proxy statements filed with the Securities Exchange Commission (“SEC”) in connection with the shareholder vote on such transactions and the acquisition agreements attached to these proxy statements; the special reports (Form 8-K) and press releases filed by the parties at various points between the announcement and the closing of each deal; and the annual reports (Form 10-K) filed by the targets during the two years preceding the announcement of the deal. In addition, we also collected and analyzed media articles about each deal from national and local media outlets. Our detailed review of these materials enabled us to examine the bargaining process leading to the deal and its detailed terms with respect to the interests of shareholders, corporate leaders, and stakeholders, and to identify risks that the deals were perceived to pose for stakeholders at the time of the announcement.

Finally, we augmented our data with additional data from commercially available datasets. In particular, we collected data on the characteristics of the parties, the deal, and the deal protection provisions adopted by the parties from FactSet.

## Deals, Buyers, and Targets

### Economic Significance

Our sample focuses on large and very large deals, which presumably involve high stakes for stakeholders. The mean value of all transactions in our sample is $6.31 billion, and the median value is $4.07 billion. For 22 deals, the transaction value exceeds $10 billion, 28 deals are valued between $5 and $10 billion, and 66 deals are valued between $1 and $5 billion.

Together, the 116 deals included in our dataset were of large economic significance, with an aggregate deal value of $731.88 billion, equal to about 2.16% of the total U.S. market capitalization in 2019.[[55]](#footnote-56) The targets in our sample are also meaningful in terms of their operations and employees. At the end of 2019, they had aggregate annual revenues of about $169 billion and employed more than 4,000 employees on average and more than 450,000 employees in the aggregate.

### Deal Timing

The 116 acquisitions in our sample were announced during the twenty-month period between April 1, 2020 and November 30, 2021. Figure 1 reports the distribution of the transactions by month during the examined period. As the figure makes clear, a vast majority of the deals in our sample (91%) were announced after the discovery the vaccines for COVID-19 in November 2020, and about 56% after the first quarter of 2021, during which a substantial proportion of the U.S. population received vaccinations.[[56]](#footnote-57)

Figure 1. Transaction Announcements by Month

### Buyers

We used the FactSet M&A database to gather information on the buyers’ identities, and whether they were strategic or private equity buyers (as defined by FactSet).[[57]](#footnote-58) A substantial majority (79%) of the acquisitions in our sample were by strategic buyers. The remaining deals (21%) are acquisitions by private equity firms.

One could argue that different types of buyers might have different impacts on stakeholders due to their specific post-acquisition strategies and incentives. In particular, strategic buyers might focus on product or customer complementarity or other revenue synergies that do not necessarily involve cost-cutting, reduction of employment, or other costs or risks for stakeholders (although, as we will see, in many of the deals in the sample, such risks were clearly present at the time of announcement).

Private equity acquisitions, in contrast, often involve significant risks of adverse effects on stakeholders due to the strong incentives of private equity buyers to maximize financial returns. These strong incentives are usually generated by the heavy reliance on debt to finance the acquisition,[[58]](#footnote-59) as well as by the compensation structures of private equity managers and the managers of portfolio companies.[[59]](#footnote-60) The goal of maximizing financial return is often achieved through implementing cost-cutting strategies. Indeed, there is robust empirical evidence that private equity acquisitions result in employee terminations, thereby imposing costs on some employees.[[60]](#footnote-61)

Therefore, in theory, the presence of many strategic transactions, which constitute a majority of the deals in our sample, might imply better treatment of stakeholders. Arguably, corporate leaders seeking to use their power to protect stakeholders during the pandemic could more easily secure such protections when negotiating a sale to a strategic acquirer rather than to a private equity buyer. The difference in the type of acquirer enables us to examine this hypothesis and to identify whether stakeholders receive more protections in a particular type of acquisition.

### Targets

The 116 target companies in our sample represented 44 different industries out of the 129 industries classified by FactSet, including: real estate investment trusts (12 deals), packaged software (10 deals), biotechnology (8 deals), pharmaceuticals (7 deals), oil & gas production (5 deals), medical specialties (5 deals), and miscellaneous commercial services (5 deals). Thus, our sample has a broad representation of economic sectors.

The targets in our sample are also diverse in terms of their headquarters’ location, with target headquarters in 28 different states. The four states that served as home to the headquarters of more than five companies in our sample are California (26 deals), Texas (18 deals), Massachusetts (13 deals), and New Jersey (7 deals). Finally, in terms of state of incorporation, a substantial majority (77%, or 89 targets) were incorporated in Delaware, the dominant state for incorporation of U.S. companies. Other states where more than one company in our sample were incorporated include Maryland (11 deals) Michigan (2 deals), and Texas (2 deals).[[61]](#footnote-62)

### Largest Deals Subsample

Our sample contains eighteen acquisitions with a deal value higher than $10 billion. Table 1 below lists these companies and reports some of their key characteristics. Table A1 in the online appendix lists all the other companies in the sample and similarly reports their key characteristics.[[62]](#footnote-63)

As Table 1 shows, the deal value for the largest 22 deals had a mean of $17.16 billion, a median of $13.94 billion, and a total of $377.56 billion. With respect to employees, the companies in this Largest Deals Subsample had on average over 4,300 employees and in the aggregate more than 95,000 employees.

Table 1. Acquisitions Above $10B

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| *Target* | *Deal Value (Billions)* | *No. of*  *Employees in 2019* | *Industry* | *HQ Location* | *Buyer Type* |
| Alexion | $38.98 | 3,082 | Biotechnology | MA | Strategic |
| Xilinx | $33.79 | 4,891 | Semiconductors | CA | Strategic |
| Kansas City Southern | $29.69 | 7,040 | Railroads | MO | Strategic |
| Slack Technologies | $26.24 | 2,045 | Packaged Software | CA | Strategic |
| Maxim Integrated | $20.46 | 7,115 | Semiconductors | CA | Strategic |
| Immunomedics | $19.68 | 366 | Biotechnology | NJ | Strategic |
| Nuance | $17.39 | 7,100 | Packaged Software | MA | Strategic |
| VEREIT | $16.57 | 160 | REITs | AZ | Strategic |
| Varian | $16.20 | 10,062 | Medical Specialties | CA | Strategic |
| Livongo | $15.73 | 615 | Packaged Software | CA | Strategic |
| CyrusOne | $14.94 | 452 | REITs | TX | PE |
| Noble Energy | $12.93 | 2,282 | Integrated Oil | TX | Strategic |
| Concho Resources | $12.92 | 1,453 | Oil & Gas Production | TX | Strategic |
| Change Healthcare | $12.69 | 15,000 | Packaged Software | TN | Strategic |
| PRA Health Sciences | $11.73 | 17,500 | Misc. Commercial Services | NC | Strategic |
| Hill-Rom Holdings | $11.72 | 10,000 | Medical Specialties | IL | Strategic |
| GCI Liberty | $11.63 | 2,051 | Specialty Telecommunications | CO | Strategic |
| Dunkin' Brands | $11.49 | 1,114 | Food Retail | MA | PE |
| MyoKardia | $11.15 | 235 | Pharmaceuticals | CA | Strategic |
| MGM Growth | $10.83 | 4 | REITs | NV | Strategic |
| Acceleron | $10.40 | 312 | Biotechnology | MA | Strategic |
| Proofpoint | $10.37 | 3,368 | Data Processing Services | CA | PE |
| *Mean* | $17.16 | 4,375 | – | – | – |
| *Median* | $13.94 | 2,167 | – | – | – |
| *Total* | $377.56 | 96,247 | *–* | *–* | *–* |

Throughout this Article, when describing our empirical findings, we will use the companies in the Largest Deals Subsample for illustration. In particular, for each issue and dimension that we study, we will report the results for the overall sample as well as the individual results for each company in the Largest Deals Subsample. For completeness, the online Appendix will report the individual findings for each of the sample companies outside the Largest Deals Subsample.

## Bargaining

### The Process

Before considering the outcomes of the process leading to the deal, this Section examines the nature and character of this process. In particular, we examine the dimensions of the bargaining process that are likely to be associated with substantial negotiations over the terms of the deal. Table 2 reports our findings with respect to five such dimensions. Each column focuses on a different dimension of the process, which we discuss below.

*Length of Sale Process*. For each transaction, we identified the length of the sale process period (in days) from either the beginning of the target’s search for a sale or its first interaction with an interested party within the context eventually leading to the deal, up to the signing of the merger agreement. The longer this period lasted, the more time that was available for negotiations.

As Table 2 indicates, the deals in our sample were commonly negotiated over a substantial period of time. In the Largest Deals Subsample, the length of the period had a mean of 211 days and a median of 119 days. In the full sample, the length of time had a mean of 233 days and a median of 163 days.

*Discussions with Other Bidders*. For each transaction, we also identified whether potential buyers other than the final buyer expressed an interest in acquiring the company. The presence of potential rival buyers likely strengthens the target’s bargaining position. As Table 2 shows, discussions with other bidders were common, taking place in 59% of the largest 22 deals, and in 73% of the deals in the full sample.

*Offers by Other Bidders*. For each transaction, we also examined whether other potential buyers submitted an offer during the bargaining process. The presence of a competing offer strengthens the target’s bargaining position and enhances the ability of the target’s leaders to obtain favorable terms. As Table 2 indicates, rival bidders made an offer in 27% of the largest 22 deals, and in 46% of the deals in the full sample.

*Multiple Offers by the Buyer*. We also examined whether during the negotiations process the target company received more than one formal offer from the buyer with which the deal was ultimately concluded. The presence of multiple offers is likely to reflect a bargaining process in which target leaders seek to obtain improved terms. As Table 2 reports, buyers made multiple offers in 100% of the largest 22 deals and in 95% of the transactions in the full sample.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Table 2. Bargaining Process | | | | | |
| *Target* | *Length of Sale Process (Days)* | *Discussions with Other Bidders (Yes/No)* | *Offers by Other Bidders (Yes/No)* | *Multiple Offers by Buyer (Yes/No)* | *Negotiated Price Increase (Yes/No)* |
| Findings for Each of the Largest 22 Deals | | | | | |
| Alexion | 124 | Yes | Yes | Yes | Yes |
| Xilinx | 805 | Yes | No | Yes | Yes |
| Kansas City Southern | 413 | Yes | Yes | Yes | Yes |
| Slack Technologies | 91 | No | No | Yes | Yes |
| Maxim Integrated | 129 | Yes | No | Yes | Yes |
| Immunomedics | 90 | Yes | Yes | Yes | Yes |
| Nuance | 650 | Yes | No | Yes | Yes |
| VEREIT | 113 | No | No | Yes | Yes |
| Varian | 68 | Yes | Yes | Yes | Yes |
| Livongo | 53 | No | No | Yes | Yes |
| CyrusOne | 95 | Yes | Yes | Yes | Yes |
| Noble Energy | 227 | Yes | No | Yes | Yes |
| Concho Resources | 369 | Yes | No | Yes | Yes |
| Change Healthcare | 235 | No | No | Yes | Yes |
| PRA Health Sciences | 366 | No | No | Yes | Yes |
| Hill-Rom Holdings | 47 | No | No | Yes | Yes |
| GCI Liberty | 108 | No | No | Yes | Yes |
| Dunkin' Brands | 109 | No | No | Yes | Yes |
| MyoKardia | 136 | No | No | Yes | Yes |
| MGM Growth | 111 | Yes | Yes | Yes | Yes |
| Acceleron | 72 | No | Yes | Yes | Yes |
| Proofpoint | 241 | Yes | No | Yes | Yes |
| Results for the Largest Deals Subsample | | | | | |
| % of Yes | – | 59% | 27% | 100% | 100% |
| Mean | 211.45 | – | – | – | – |
| Median | 118.50 | – | – | – | – |
| Results for the Full Sample | | | | | |
| % of Yes | – | 73% | 46% | 95% | 93% |
| Mean | 233.10 | – | – | – | – |
| Median | 162.50 | – | – | – | – |

*Negotiated Price Increase.* Last, we examined whether the final price was higher than the one proposed in the initial offer by the same buyer.[[63]](#footnote-64) Such improvement is likely to reflect a successful negotiation on the part of the target’s leaders. As Table 2 indicates, target leaders were able to obtain a higher price in 100% of the largest 22 deals, and in 93% of the deals in our full sample. Our analysis of these five dimensions, both individually and in combination, indicates that the deals under study were largely the product of a long process in which the target companies sought to use their bargaining power to obtain improved terms.

### Deal Protection Provisions

To supplement our analysis of the five dimensions of the bargaining process, we also examined whether the final terms of the deal included deal protection provisions that protected the buyer in the event that the deal did not close.[[64]](#footnote-65) Deal protections are relevant for our study for two reasons. First, they are valuable for the buyer, as they provide the buyer with certain benefits in the event that the deal is not completed. Thus, target leaders agreeing to deal protection provisions were in a position to receive something in return. The question is what they bargained for.

Second, deal protections make it more difficult for another potential buyer with a similar valuation of the target company to make a superior offer. This increases the freedom of target corporate leaders to negotiate a deal that provides some benefits for employees and other stakeholders, which, in the absence of deal protections, would be more vulnerable to competing offers with a higher premium for shareholders. Therefore, target corporate leaders who negotiated deal protections were in a better position to bargain for benefits for stakeholders. Table 3 reports our findings regarding the deal protections that were commonly granted to acquirers in our sample.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Table 3. Deal Protection Provisions | | | | | |
| *Target* | *No-Shop (Yes/No)* | *No-Talk (Yes/No)* | *Obligation to Recommend (Yes/No)* | *Termination Fee (Yes/No)* | *Termination Fee (%)* |
| Findings for Each of the Largest 22 Deals | | | | | |
| Alexion | Yes | Yes | Yes | Yes | 3.06 |
| Xilinx | Yes | Yes | Yes | Yes | 2.87 |
| Kansas City Southern | N/A | N/A | N/A | N/A | N/A |
| Slack Technologies | Yes | Yes | Yes | Yes | 3.34 |
| Maxim Integrated | Yes | Yes | Yes | Yes | 3.45 |
| Immunomedics | Yes | Yes | Yes | Yes | 3.60 |
| Nuance | Yes | Yes | Yes | Yes | 3.21 |
| VEREIT | Yes | Yes | Yes | Yes | 3.29 |
| Varian | Yes | Yes | Yes | Yes | 2.76 |
| Livongo | Yes | Yes | Yes | Yes | 3.48 |
| CyrusOne | Yes | Yes | Yes | Yes | 2.76 |
| Noble Energy | Yes | Yes | Yes | Yes | 3.50 |
| Concho Resources | Yes | Yes | Yes | Yes | 3.10 |
| Change Healthcare | Yes | Yes | Yes | Yes | 3.80 |
| PRA Health Sciences | Yes | Yes | Yes | Yes | 2.57 |
| Hill-Rom Holdings | Yes | Yes | Yes | Yes | 3.57 |
| GCI Liberty | Yes | Yes | Yes | Yes | 2.76 |
| Dunkin' Brands | Yes | Yes | Yes | Yes | 3.05 |
| MyoKardia | Yes | Yes | Yes | Yes | 3.82 |
| MGM Growth | Yes | Yes | Yes | Yes | 6.50 |
| Acceleron | Yes | Yes | Yes | Yes | 3.13 |
| Proofpoint | No | Yes | No | Yes | 3.64 |
| Results for the Largest Deals Subsample | | | | | |
| % of Yes | 100% | 100% | 100% | 100% | 100% |
| Mean | – | – | – | – | 3.39 |
| Median | – | – | – | – | 3.29 |
| Results for the Full Sample | | | | | |
| % of Yes | 97% | 97% | 97% | 95% | 95% |
| Mean | – | – | – | – | 3.40 |
| Median | – | – | – | – | 3.41 |

As Table 3 reports, the deals in our sample display an abundance of deal protections offered to the buyer. No-shop and no-talk provisions, which limit the target’s ability to discuss the proposed transaction terms with third parties and to bargain for an improved deal, appeared in 100% of the deals in the Largest Deals Subsample, and in 97% of the deals in the full sample. “Force the vote” requirements, which require the target’s board to submit the proposed deal to a shareholder vote and therefore delay the closing of alternative deals, appeared in 100% of the deals in the Largest Deals Subsample, and in 97% of all the deals in the full sample. In addition, the merger agreement required the board to recommend the transaction to the target’s shareholders prior to the meeting in 100% of the Largest Deals Subsample, and in 97% of the full sample deals.

Shifting our view to contractual sanctions for the termination of the signed agreement, we find that in 100% of the Largest Deals Subsample and in 95% of the full sample, the target committed to pay either a termination fee or an expense reimbursement to the buyer in the event the deal was terminated under specified circumstances. The termination fees amounted, on average, to 3.4% of the purchase price for both the Largest Deals Subsample and the full sample.

The analysis above indicates that the deals in our sample involved significant deal protections that benefitted the buyer and impeded rival buyers. As explained above, target leaders’ agreement to grant such provisions enabled them to obtain some desired term from the buyer, and enhanced their flexibility to allocate some of the resulting benefit to stakeholders.

# Protecting the Interests of Shareholders and Corporate Leaders

In examining for whom corporate leaders bargained, we begin with shareholders (Section A), and then proceed to corporate leaders (Section B).

## Gains for Shareholders

The gains that shareholders obtain from the sale of the company amount to the premium paid by the acquirer over the pre-announcement stock price. To determine the premium, we used the “unaffected premium” reported by FactSet, which is defined as the premium compared to the unaffected stock price preceding the deal’s announcement. We also calculated the dollar amount of the premium for each deal, based on the transaction values reported by FactSet. Table 4 reports our findings.

As Table 4 indicates, shareholders obtained substantial monetary payoffs from the deals in our sample. In the Largest Deals Subsample, the premium had a mean of 30% and a median of 25%, valued at a mean of $4.0 billion and a median of $2.8. The aggregate monetary gains to shareholders totaled $87.9 billion in the Largest Deals Subsample.

In the full sample, the premium had a mean of 34% and a median of 26%, and the monetary gains to shareholders had a mean of $1.4 billion and a median $0.8 billion. Aggregate monetary gains to the shareholders of all targets in our sample was $161 billion.

|  |  |  |
| --- | --- | --- |
| Table 4. Gains to Shareholders | | |
| *Target* | *Premium (%)* | *Monetary Gain (Billions)* |
| Findings for Each of the Largest 22 Deals | | |
| Alexion | 44 | $11.9 |
| Xilinx | 34 | $8.6 |
| Kansas City Southern | 28 | $6.6 |
| Slack Technologies | 55 | $9.3 |
| Maxim Integrated | 22 | $3.7 |
| Immunomedics | 108 | $10.2 |
| Nuance | 23 | $3.3 |
| VEREIT | 17 | $2.4 |
| Varian | 24 | $3.1 |
| Livongo | 10 | $1.4 |
| CyrusOne | 25 | $3.0 |
| Noble Energy | 8 | $0.9 |
| Concho Resources | 12 | $1.4 |
| Change Healthcare | 41 | $3.7 |
| PRA Health Sciences | 30 | $2.7 |
| Hill-Rom Holdings | 26 | $2.4 |
| GCI Liberty | 23 | $2.2 |
| Dunkin' Brands | 20 | $1.9 |
| MyoKardia | 61 | $4.2 |
| MGM Growth | 11 | $1.1 |
| Acceleron | 13 | $1.2 |
| Proofpoint | 34 | $2.6 |
| Results for the Largest Deals Subsample | | |
| Mean | 30 | $4.0 |
| Median | 25 | $2.8 |
| Total | – | $87.9 |
| Results for the Full Sample | | |
| Mean | 34 | $1.4 |
| Median | 26 | $0.8 |
| Total | – | $161.0 |

## Gains for Corporate Leaders

### Executives

Table 5 below reports our findings regarding the benefits obtained by top executives. The columns in the table represent different sources of gains to executives, and we discuss each of them in turn below.

*Monetary Gain Qua Shareholders*. Executives usually have equity holdings in the companies they lead, and therefore obtain monetary gains from the sale in their capacity as shareholders We included in this category of gains both monetary gains that executives made on shares they owned prior to the transaction and gains they made on shares obtained through exercising their vested stock options.

We found that the gains obtained by top executives were generally of significant value. As Table 5 below indicates, the value of these gains had a mean of $320 million and a median of $62 million in the Largest Deals Subsample, and a mean of $112 million and a median of $33 million in the full sample.

*Payments Qua Executives.* This category of monetary gains includes additional payments received by executives in connection with the acquisition in their capacity as executives, not in their capacity as shareholders. Examples include severance payments, tax gross-up payments, and cashing out of unvested stock options or equity awards.

Some of these payments were triggered by pre-existing provisions placed in compensation agreements in anticipation of any future deal. However, a substantial portion of these payments resulted from amendments to existing compensation arrangements that were made in connection with the sale. In particular, our document review indicates that such amendments were made in connection with 41% of the deals in the Largest Deals Subsample and 49% of the deals in the full sample.

As Table 5 shows, corporate leaders received significant payments of this type. The aggregate payments to a company’s team of executives had a mean of $109 million and a median of $106 million for the largest 22 deals, and a mean of $57 million and a median of $45 million for the full sample.

In addition, we found that in many transactions, corporate leaders also negotiated for additional compensation-like payments, such as closing bonuses. In the Largest Deals Subsample, such payments were found in 45% of the deals, with a mean of $14 million and a median of $16 million. In the full sample, such payments appeared in 38% of the deals, and had a mean of $7 million and a median of $4 million.[[65]](#footnote-66)

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Table 5. Gains to Executives | | | | | | |
| *Target* | *Monetary Gain Qua Shareholders (Millions)[[66]](#footnote-67)* | *Payment Qua Executives (Millions)* | *Total Monetary Gain (Millions)* | *Commitment to Retain CEO (Yes/No)* | *Commitment to Retain Other Executives (Yes/No)* | *Announced Plan to Retain Additional Executives (Yes/No)* |
| Findings for Each of the Largest 22 Deals | | | | | |  |
| Alexion | $63 | $145 | $208 | No | No | Yes |
| Xilinx | $29 | $76 | $105 | Yes | No | No |
| Kansas City Southern | $68 | $123 | $192 | No | No | Yes |
| Slack Technologies | $1846 | $190 | $2036 | Yes | Yes (2) | No |
| Maxim Integrated | $93 | $59 | $152 | Yes | No | Yes |
| Immunomedics | $2371 | $108 | $2479 | No | No | Yes |
| Nuance | $64 | $239 | $305 | Yes | Yes (1) | No |
| VEREIT | $32 | $56 | $88 | No | No | Yes |
| Varian | $28 | $132 | $159 | No | No | Yes |
| Livongo | $922 | $329 | $1252 | No | No | No |
| CyrusOne | $24 | $31 | $56 | No | No | No |
| Noble Energy | $9 | $49 | $58 | No | No | Yes |
| Concho Resources | $40 | $68 | $108 | Yes | Yes (2) | Yes |
| Change Healthcare | $60 | $106 | $167 | Yes | Yes (5) | Yes |
| PRA Health Sciences | $19 | $23 | $42 | Yes | No | No |
| Hill-Rom Holdings | $13 | $113 | $126 | No | No | Yes |
| GCI Liberty | $709 | No | $709 | Yes | Yes (7) | Yes |
| Dunkin' Brands | $35 | $55 | $90 | No | No | Yes |
| MyoKardia | $431 | $214 | $645 | No | No | Yes |
| MGM Growth | $8 | $16 | $24 | No | No | No |
| Acceleron | $103 | $106 | $208 | No | No | Yes |
| Proofpoint | $66 | $152 | $218 | No | No | Yes |
| Results for the Largest Deals Subsample | | | | | |  |
| % of Yes | 100% | 95% | 100% | 36% | 23% | 68% |
| Mean | $320 | $109 | $428 | – | – | – |
| Median | $62 | $106 | $163 | – | – | – |
| Total | $7,035 | $2,390 | $9,425 | – | – | – |
| Results for the Full Sample | | | | | | |
| % of Yes | 100% | 98% | 100% | 32% | 23% | 49% |
| Mean | $112 | $57 | $163 | – | – | – |
| Median | $33 | $45 | $80 | – | – | – |
| Total | $12,523 | $6,438 | $18,960 | – | – | – |

*Total immediate monetary gains.* Combining the immediate monetary gains that top executives obtained as shareholders and as executives, Column 3 of Table 5 reports the total value of the immediate monetary gains that the deals we studied produced for executives. In the Largest Deals Subsample, the total immediate monetary gains had a mean of $428 million and a median of $163 million. In the full sample, these payments had a mean of $163 million and a median of $80 million. Thus, the immediate monetary gains were generally large, and they were further supplemented by future gains from continued employment by the buyer.

*Retention of Executives*. Another significant source of gains to executives is the prospect of their continued employment at the target after the sale, which would enable the executive to receive additional compensation in the future. In order to examine the prospect of receiving such a benefit, we examined whether deal proxy materials contained disclosures regarding the retention of the company’s CEO or other top executives by the buyer. As Table 5 indicates, in 36% of the largest 22 deals, and in 32% of all the deals in our sample, the buyer expressly committed to retain the target’s CEO following the acquisition. In addition, in 23% of both the Largest Deal Subsample and the full sample, the proxy statement contained an express commitment to retain additional top executives other than the CEO.

*Announced Plan to Retain Additional Executives*. Furthermore, our document review identified a significant number of transactions with “softer” commitments in which the proxy materials disclosed a plan to retain members of the company’s executive team that was not yet legally finalized.[[67]](#footnote-68) As Table 5 reports, such soft commitments were found in 68% of the Largest Deals Subsample and in 49% of all deals in the full sample. Although these plans were not legally binding, they are worth noting to provide a comprehensive account of the expected benefits to executives.

### Non-Executive Directors

Having considered the gains to executives, we now turn to examine the benefits that non-executive corporate directors obtained as a result of the transactions. Table 6 reports our findings, revealing that non-executive directors also obtained significant gains from the transactions.

|  |  |  |  |
| --- | --- | --- | --- |
| Table 6. Gains to Non-Executive Directors | | | |
| *Target* | *Monetary Gain Qua Shareholders (Millions)* | *Payment Qua Directors*  *(Millions)[[68]](#footnote-69)* | *Directors Retained (Yes/No)* |
| Findings for Each of the Largest 18 Deals | | | |
| Alexion | $21 | $5 | No |
| Xilinx | $12 | $3 | Yes (2) |
| Kansas City Southern | $43 | $0 | No |
| Slack Technologies | $508 | $6 | No |
| Maxim Integrated | $14 | $0 | Yes (2) |
| Immunomedics | $30 | $6 | No |
| Nuance | $27 | $5 | No |
| VEREIT | $8 | $0 | Yes (2) |
| Varian | $9 | $2 | No |
| Livongo | $33 | $15 | Yes (5) |
| CyrusOne | $12 | $1 | No |
| Noble Energy | $40 | $1 | No |
| Concho Resources | $30 | $2 | No |
| Change Healthcare | $15 | $2 | No |
| PRA Health Sciences | $5 | $1 | Yes (2) |
| Hill-Rom Holdings | $1 | $0 | No |
| GCI Liberty | $6 | $0 | Yes (2) |
| Dunkin' Brands | $49 | $12 | No |
| MyoKardia | $70 | $6 | No |
| MGM Growth | $11 | $5 | No |
| Acceleron | $36 | $5 | No |
| Proofpoint | $42 | $0 | No |
| Results for the Largest Deals Subsample | | | |
| *% of Yes* | 100% | 78% | 33% |
| *Mean* | $46 | $4 | – |
| *Median* | $24 | $3 | – |
| *Total* | $1,022 | $79 | – |
| Results for the Full Sample | | | |
| *% of Yes* | 100% | 80% | 31% |
| *Mean* | $53 | $3 | – |
| *Median* | $14 | $1 | – |
| *Total* | $5,893 | $263 | – |

As Table 6 reveals, non-executive directors also obtained meaningful gains from the transactions.

*Monetary Gains Qua Shareholders*. Much like the executive officers, directors typically own shares and/or vested options in the companies they lead, and therefore, in their capacity as shareholders, obtain monetary gains from the premium negotiated with the buyer. The aggregate monetary benefit to the team of non-executive directors from their equity holdings was considerable, with a mean of $46 million and a median of $24 million for the Largest Deals Subsample, and a mean of $53 million and a median of $14 million for the full sample.

*Payments Qua Directors*. In addition, we found that directors received additional payments qua directors in most of the cases, both in the Largest Deals Subsample and in the full sample. The aggregate value of such payments to the team of a target’s non-executive directors had a mean value of $4 million and a median of $3 million for the Largest Deals Subsample, with a mean of $3 million and a median of $1 million in the full sample.

*Retention of Directors.* Last, corporate leaders often negotiated for the retention not only of executives but also of non-executive directors. In particular, our document review found that the deal documents assigned post-closing board seats to non-executive directors of the target in nearly a third of the deals in both the Largest Deals Subsample and the full sample.

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4. *See* sources cited *infra* notes 9-10, 14-17. [↑](#footnote-ref-5)
5. *See* *infra* note 20, and accompanying text. [↑](#footnote-ref-6)
6. *See infra* note 22, and accompanying text. [↑](#footnote-ref-7)
7. *See* sources cited *infra* note 12. [↑](#footnote-ref-8)
8. *See* sources cited *infra* notes 14-17. [↑](#footnote-ref-9)
9. *See* sources cited *infra* note 18-19. [↑](#footnote-ref-10)
10. In an earlier study, using a sample of private equity acquisitions of publicly traded firms incorporated in states with constituency statutes during the past two decades, we already empirically investigated how some corporate leaders treated stakeholders when selling the company. See Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain* 93 S. Cal. L. Rev. (forthcoming 2021). Although, consistent with the agency critique of stakeholderism, we found little protection of stakeholders in that study, skeptics have questioned the significance and generalizability of our findings. In particular, discussants in conferences have argued: that our sample focused on private equity buyers and did not include strategic buyers; that, by focusing on targets incorporated in states with constituency statutes, it did not include targets incorporated in Delaware, the most important jurisdiction for corporate law; that it focused largely on deals concluded before the recent rise of support for stakeholderism; and that the deals we investigated were of limited overall economic significance.

    We therefore designed the current study to be robust to such objections. This design enables us to scrutinize the subject using a sample of deals with major economic significance that includes a large share of strategic buyers, Delaware targets, and deals taking place after support for stakeholderism among corporate leaders reached peak levels. This design, we believe, makes the evidence we present in this Article especially meaningful and relevant for the debate on stakeholder capitalism that we seek to inform. [↑](#footnote-ref-11)
11. For seminal articles often cited as early statements of competing views on the subject, *see* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145 (1932); Adolf A. Berle, *For Whom Are Corporate Managers Trustees: A Note*, 45 Harv. L. Rev. 1365 (1932). [↑](#footnote-ref-12)
12. *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005); Simon Deakin, *The Corporation as Commons: Rethinking Prop­erty Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEEN’S L.J. 339 (2012); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999). [↑](#footnote-ref-13)
13. *See, e.g.*, Colin Mayer, Prosperity (2018); Alex Edmans, Grow The Pie: Creating Profit For Investors And Value For Society (2020); Rebecca Henderson, Reimagining Capitalism In A World Of Fire (2020). [↑](#footnote-ref-14)
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20. *See, e.g.*, John C. Coffee, *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 Mich. L. Rev. 1, 108 (1986); Lynn A. Stout, *Do Antitakeover Defenses Decrease Shareholder Wealth - The Ex Post/Ex Ante Valuation Problem*, 55 Stan. L. Rev. 845 (2002). [↑](#footnote-ref-21)
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53. *See, e.g.*, *In re* Tesla Motors, Inc. S'holder Litig., No. 12711–VCS, 2018 WL 1560293, at \*2, \*19 (Del. Ch. Mar. 28, 2018) (concluding that it was “reasonably conceivable” that an owner of 22.1% of a company’s common stock was a controlling stockholder); Calesa Assocs., L.P. v. Am. Cap., Ltd., No. 10557–VCG, 2016 WL 770251, at \*10–12 (Del. Ch. Feb. 29, 2016) (concluding that a stockholder owning 26% of a company’s stock exercised “actual control”). [↑](#footnote-ref-54)
54. Later, when we analyzed the final contractual terms, we drew a clear distinction between shareholders and corporate leaders, who negotiate the deal terms on behalf of different constituencies, including shareholders. When the corporate leader is also a major shareholder, such distinction between the two groups does not exist. [↑](#footnote-ref-55)
55. According to the World Bank, in 2019, the market capitalization of listed domestic companies in the United States was $33.9 trillion. World Bank Open Data, <https://data.worldbank.org/indicator/CM.MKT.LCAP.CD?locations=US>. [↑](#footnote-ref-56)
56. In mid-November, 2020, both Pfizer and Moderna announced that their vaccines had been found to be 95% effective in preventing COVID-19, and a week later, Moderna revealed that its vaccine demonstrated nearly 95% protection. *See* https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-conclude-phase-3-study-covid-19-vaccine; https://www.bbc.com/news/health-54902908. [↑](#footnote-ref-57)
57. The FactSet M&A dataset defines a private equity acquisition as any acquisition by a private equity firm or by a buyer backed up by a private equity sponsor that owns an interest in the acquirer of at least twenty percent. *See* FactSet Res. Sys., M&A Database (last visited Aug. 18, 2021). [↑](#footnote-ref-58)
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61. Our dataset also includes two targets incorporated in Marshall Islands and Yukon. [↑](#footnote-ref-62)
62. Percentage values throughout the paper were rounded to the nearest whole number. [↑](#footnote-ref-63)
63. If the initial offer was reduced following due diligence, we examined whether the final price was higher than the first offer the buyer made after completing the due diligence. [↑](#footnote-ref-64)
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65. It might be argued that these payments are part of a package intended to retain target executives. However, the considered payments from the buyer were ones that executives were entitled to keep regardless of whether they would continue working at the acquired target. Indeed, according to the proxy disclosures, some of those payments were made by the buyer to executives who were not expected to remain after the sale. [↑](#footnote-ref-66)
66. Amounts were rounded to the nearest whole number. [↑](#footnote-ref-67)
67. Some representative examples of such disclosures are: (i) “Although no such agreement, arrangement or understanding exists to our knowledge as of the date of this proxy statement, certain of our other executive officers may, prior to the completion of the Merger, enter into new arrangements with UnitedHealth Group or its subsidiaries regarding employment following the consummation of the Merger” (Change Healthcare, Inc.); (ii) “Although it is possible that the Company, Parent or the Surviving Corporation may enter into such employment agreements or other employment or consultancy arrangements with the Company’s executive officers and certain other key employees, as of the date of this Schedule 14D-9, there are no such agreements, arrangements or understandings” (Michaels Cos., Inc.). [↑](#footnote-ref-68)
68. This column represents the value of unvested equity subject to accelerated vesting upon closing of the merger (“Single Trigger”) or possible termination of the director’s employment (“Double Trigger”). [↑](#footnote-ref-69)