Working Draft 1/2022  
Comments Welcome

STAKEHOLDER CAPITALISM IN THE TIME OF COVID

Lucian A. Bebchuk,[[1]](#footnote-2)\* Kobi Kastiel,[[2]](#footnote-3)† & Roberto Tallarita[[3]](#footnote-4)‡

Abstract

This Article investigates critical corporate decisions regarding the treatment of stakeholders made during the first eighteen months of the Covid pandemic. This period, which posed heightened risks for stakeholders, followed and was accompanied by peak corporate support for stakeholder capitalism (“stakeholderism”). This period thus provides a good setting for testing whether corporate leaders are matching their stakeholderist rhetoric with action.

Some supporters 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. Other supporters argue that corporate leaders considering a sale of the company should and do seek to benefit stakeholders, because fulfilling implicit promises to do so serves the ex-ante interest of shareholders in inducing the stakeholder cooperation that is 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 – more than 100 acquisitions with an aggregate consideration exceeding $700 billion – that were announced during the Covid period. We find that deal terms provided large gains for the shareholders of target companies, as well as substantial private benefits for corporate leaders themselves. However, although many transactions were viewed at the time of the deal as posing significant post-deal risks for employees, corporate leaders largely did not negotiate for any protections for employees, including any payments to employees in the event of post-deal termination. Similarly, we find, corporate leaders 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 be driven by other factors, we conclude that it is likely to be driven by corporate leaders’ incentives not to benefit stakeholders beyond what would serve shareholders. 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 those concerned about climate change should not harbor illusory hopes that corporate leaders would on their own address climate risk, and they should concentrate efforts on obtaining government regulations that would 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

JEL Classification: D21, G32, G34, G38, K22

Table of Contents

[I. Introduction 1](#_Toc93918377)

[II. Testing Stakeholder Capitalism 5](#_Toc93918378)

[A. Stakeholderism and Its Implications for Acquisitions 5](#_Toc93918379)

[B. The Time of Covid 8](#_Toc93918380)

[1. Record Support for Stakeholder Capitalism 9](#_Toc93918381)

[2. Vulnerable Stakeholders 11](#_Toc93918382)

[3. Fortunate Shareholders 12](#_Toc93918383)

[4. Economically Consequential Decisions 14](#_Toc93918384)

[III. The Universe Of Cases 14](#_Toc93918385)

[A. Data Collection 14](#_Toc93918386)

[B. Deals, Buyers, and Targets 16](#_Toc93918387)

[1. Economic Significance 16](#_Toc93918388)

[2. Deal Timing 16](#_Toc93918389)

[3. Buyers 17](#_Toc93918390)

[4. Targets 19](#_Toc93918391)

[5. Largest Deals Subsample 19](#_Toc93918392)

[C. Bargaining 20](#_Toc93918393)

[1. The Process 20](#_Toc93918394)

[2. Deal-Protection Provisions 23](#_Toc93918395)

[IV. Protecting the Interests of Shareholders and Corporate Leaders 25](#_Toc93918396)

[A. Gains for Shareholders 25](#_Toc93918397)

[B. Gains for Corporate Leaders 27](#_Toc93918398)

[1. Executives 27](#_Toc93918399)

[2. Non-Executive Directors 30](#_Toc93918400)

[V. Protecting Stakeholder Interests? 32](#_Toc93918401)

[A. The Stakes for Stakeholders 32](#_Toc93918402)

[3. Risk of Cost Cutting 33](#_Toc93918403)

[4. Risks to Employees 37](#_Toc93918404)

[5. Risks to Communities 41](#_Toc93918405)

[B. Employees 45](#_Toc93918406)

[C. Suppliers, Creditors, Customers 52](#_Toc93918407)

[D. Local Communities, the Environment, and Other Stakeholders 54](#_Toc93918408)

[VI. Further Empirical Analysis 57](#_Toc93918409)

[A. Deals without Distress 58](#_Toc93918410)

[B. Deals on the Way to Normalcy 59](#_Toc93918411)

[C. Deals with Broad Shareholder Support 60](#_Toc93918412)

[D. Deals without a Revlon Shadow 62](#_Toc93918413)

[E. Deals with a Stakeholderist Counsel 63](#_Toc93918414)

[F. Deals Governed by Constituency Statutes 64](#_Toc93918415)

[G. Sales of Targets with High ESG Ratings 65](#_Toc93918416)

[H. Sales to Buyers with Poor ESG Ratings 67](#_Toc93918417)

[I. Deals During the Year Preceding the Pandemic 69](#_Toc93918418)

[VII. Implications and Objections 70](#_Toc93918419)

[A. Implications: What Corporate Leaders Can Be Expected to Do 70](#_Toc93918420)

[B. Objections 71](#_Toc93918421)

[1. Acquired Companies Are Different? 71](#_Toc93918422)

[2. Prohibitive Costs of Contractual Protections? 71](#_Toc93918423)

[3. Stakeholders Were Still Made Better Off by the Acquisition? 72](#_Toc93918424)

[4. Stakeholders Protected by Their Own Contracts? 73](#_Toc93918425)

[5. Design Conventions and Inertia? 74](#_Toc93918426)

[6. End-Period Exceptionalism? 75](#_Toc93918427)

[VIII. Conclusion 76](#_Toc93918428)

List of Tables

[Table 1. Acquisitions Above $10B 19](#_Toc93918429)

[Table 2. Bargaining Process 21](#_Toc93918430)

[Table 3. Deal-Protection Provisions 23](#_Toc93918431)

[Table 4. Gains to Shareholders 26](#_Toc93918432)

[Table 5. Gains to Executives 28](#_Toc93918433)

[Table 6. Gains to Non-Executive Directors 30](#_Toc93918434)

[Table 7. Risks of Cost-Cutting 33](#_Toc93918435)

[Table 8. Risks to Employees 38](#_Toc93918436)

[Table 9. Risks To Communities from Relocations 42](#_Toc93918437)

[Table 10. Employment Protections for Employees 45](#_Toc93918438)

[Table 11. Transition Period for Compensation & Benefits 49](#_Toc93918439)

[Table 12. Bonus Payments to Employees 51](#_Toc93918440)

[Table 13.  Protections for Customers, Suppliers & Creditors 53](#_Toc93918441)

[Table 14. Protections for Communities, Environment & Other Stakeholders 55](#_Toc93918442)

# Introduction

This Article seeks to contribute to the fundamental and heated debate on stakeholder capitalism (“stakeholderism”). Stakeholderism refers to the increasingly influential view according to which corporate directors and top executives (“corporate leaders”) should be encouraged and relied on 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 committed to deliver value to all stakeholders and not only shareholders.[[5]](#footnote-6) In a subsequent manifesto, the World Economic Forum urged companies to abandon shareholder primacy and embrace stakeholder capitalism.[[6]](#footnote-7)

But can corporate leaders be counted on 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, which followed and was accompanied by peak support for stakeholder capitalism. In the time of Covid, we find, 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) On this view, corporate leaders with such a sense of purpose should and do pay attention to securing that stakeholders share in the larger pie produced by the sale of the company.

Another relevant and important version of stakeholderism was put forward 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) On this view, corporate leaders should look after 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 goes, 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 versions of stakeholderism thus hold that corporate leaders should and do look after the interests of stakeholders when selling the firm. By contrast, the agency critique of stakeholder capitalism argues that corporate leaders have incentives not to look after stakeholder interests beyond what would serve the interests of shareholders.[[9]](#footnote-10) On this view, regardless of how desirable it would be for corporate leaders to protect the interests of stakeholders when selling the company, corporate leaders should not be expected to do so.

Part II also explains why the Covid pandemic provides a good setting for testing such alternative predictions regarding the behavior of corporate leaders selling their company. First, stakeholderism was recently embraced by many CEOs of large companies and prominent business groups, and it became pervasive in the business discourse. Second, the Covid pandemic heightened concerns and uncertainties for employees and other stakeholders, thus increasing their need for protection. Third, shareholders, after an initial shock, enjoyed a soaring stock market and significant acquisition premiums, and therefore would 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 as a result economically quite consequential.[[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. For each of the covered deals, we hand-collected and examined securities filings and other materials to study in detail the deal and the terms produced by it.

Part III also 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 whom 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, and in many cases also negotiated for continued positions after the sale.

Part V turns to the heart of our inquiry by examining whether, and to what extent, corporate leaders also bargained for stakeholder benefits and protections. To begin, we examine whether, at the time the deals were concluded, stakeholders faced clear post-deal risks. 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, however, that despite the 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 looked after 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 have found could be driven by factors that might have led stakeholder-oriented corporate leaders to agree to the terms we have documented despite their stakeholder orientation. To examine each alternative potential factor, we identify a subset of our sample in which this factor was not present, and we examine whether this subset of deals exhibits substantial stakeholder protections.

In particular, we examine subsamples based on: (i) deals not driven by economic distress: (ii) deals in later stages of the pandemic in which economic activity was on its way to normalcy; (iii) deals that received shareholder support by a big margin so that reducing premiums somewhat to secure some stakeholder protections would not have threatened the obtaining of 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 that had 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 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 one already characterized by high stakeholderist rhetoric. We find a pattern of lack of stakeholder protections similar to that documented for the deals during the pandemic period, which suggests 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 product of inertia among deal designers. We also discuss the argument that stakeholder protections were unnecessary because stakeholders received sufficient protection through soft pledges, through the selection of a stakeholder-friendly buyer, or through 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 we 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 on 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 particular context of climate change, our findings indicate that those concerned about climate change should not harbor illusory hopes that corporate leaders would on their own address climate risk, and they should focus their efforts on obtaining government interventions (such as a carbon tax) that would meet this challenge. The failure of stakeholder capitalism during the time of Covid 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 good 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 setting for testing whether corporate leaders can be expected to act as stakeholderists predict. Indeed, this period was unusually favorable period to implement stakeholderist decisions, since stakeholders faced more severe risks, shareholders enjoyed a booming stock market, and stakeholderism dominated the business discourse.

## Stakeholderism and Its Implications for Acquisitions

The core claim 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 been increasingly widespread and influential. Support for stakeholderism comes from legal scholars,[[12]](#footnote-13) as well as 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) On this account, the role of corporate leaders is not to maximize the wealth of shareholders but to weigh and balance the interests of a plurality of constituencies. Thus, in particular, 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 would produce.

Advocates of purpose-based stakeholderism believe not only that corporate leaders should attach weight to stakeholder interests as an element of corporate purpose but that corporate leaders in fact behave in this way. On their view, business and social norms, reputational incentives, or intrinsic motivation, lead corporate leaders to pursue such a broad 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.

According to another version of stakeholderism, corporate leaders should and do deliver value to stakeholders because doing so maximizes shareholder value *ex ante*, even if in specific situations it may reduce shareholder value *ex post*, by inducing ex ante investments by stakeholders. For example, when negotiating the sale of the company, corporate leaders might want to protect the interests of local employees and therefore might 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 decision would reduce shareholder value *ex post*, corporate leaders promised to give weight to the interests of employees in this kind of situations 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 put forward in influential studies by economists Andrei Shleifer and Larry Summers,[[17]](#footnote-18) by prominent legal scholar Jack Coffee,[[18]](#footnote-19) and by 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. Such cooperation and investments will be encouraged, with substantial benefits for the corporation’s development, if stakeholders can expect that corporate leaders will treat them well down the road.

In particular, on this view, corporate value will be enhanced, which in turn will also be reflected in the value that will be captured in the event of an acquisition, if stakeholders can expect that corporate leaders will look after their interests in the event of an acquisition. Accordingly, so the argument goes, shareholders will prosper if corporate leaders can be relied on to fulfill “implicit promises” to treat stakeholders in this way, and corporate leaders indeed act in this way. Indeed, the scholars developing this view argued that it justifies providing corporate leaders with substantial power over acquisitions so that they can look after the interests of stakeholders and not be forced to go along with whatever maximizes value for shareholders ex post.[[20]](#footnote-21)

The predictions of the above versions of stakeholderism, however, are not universally shared. The agency critique of stakeholderism argues that the behavior of corporate leaders expected by such stakeholderists is not consistent with the incentives such leaders have.[[21]](#footnote-22) In particular, corporate leaders have an array of incentives to attach weight to shareholder interests and little incentive to attach such weight to stakeholder interests.[[22]](#footnote-23) On this alternative account, 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 predictions is correct—whether the predictions 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 a good setting for our empirical analysis. We identify and discuss in turn four reasons. First, this period was preceded and accompanied by peak support for stakeholderism in the business discourse. Second, the public health and economic crisis triggered by the pandemic heightened risks for stakeholders. Third, shareholders enjoyed a booming stock market and therefore would have been especially inclined to accept a reallocation of surplus to stakeholders. Fourth, the deals in this period were of great economic significance.

### Record Support for Stakeholder Capitalism

In the period immediately preceding the Covid pandemic, stakeholderist rhetoric reached an inflection point. Many prominent companies and institutions explicitly embraced such approach, and many 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 CEOs of leading companies, members of the Business Roundtable, 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) Such statement was welcomed by the press as an historical change and a revolutionary moment for U.S. corporate governance.[[24]](#footnote-25) A few months later, the World Economic Forum issued a manifesto advocating a move away from shareholder primacy and towards 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 groups continued to profess their support for stakeholderism and expressed confidence that companies were paying attention to the wellbeing of stakeholders in the midst of such a global crisis. For example, in the first anniversary of the Business Roundtable statement, the President of the Business Roundtable, Joshua Bolten, stated that the signatory companies had lived up to the commitment to deliver value to all stakeholders;[[27]](#footnote-28) and in the second anniversary, the Business Roundtable issued a similar statement, saying that in the two years since the statement, its signatories “have strongly demonstrated a commitment to the Statement.”[[28]](#footnote-29) Furthermore, the World Economic Forum endorsed certain “Stakeholder Principles in the COVID Era,” which included protection for employees, continuing relationships with suppliers, and sustainability.[[29]](#footnote-30)

Furthermore, many business leaders expressed their allegiance to stakeholderist principles or announced their companies’ commitment to protect stakeholders from the risks created by the pandemic. For example, BlackRock CEO Larry Fink stated 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 in favor of 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 have 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 are 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 consulting firm Deloitte, 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, stakeholders became a pervasive topic in the 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 and 17,350 press releases in the period between August 2019 and August 2021.[[36]](#footnote-37) If such announcements, manifestos, and commentaries expressed genuine pro-stakeholder attitudes, the pandemic would be a uniquely ideal time to observe corporate decisions in favor of stakeholders. Thus, by examining transactions signed during this period, we seek to examine whether or not such outsized use of stakeholder rhetoric is being matched by actions.

### Vulnerable Stakeholders

The pandemic was an incredibly challenging time for many people, including some categories of corporate stakeholders. The public health crisis and economic disruption created by the Coronavirus created significant risks not only in the short run, but also in the long term. Indeed, as of the time of this writing, despite we are almost two years after the beginning of the pandemic, risks and uncertainties for stakeholders still loom large. Among the short-term effects, during the pandemic it was much more difficult for employees who lost their job to find a new occupation: 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 were largely 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 extremely important for the physical and psychological health of employees, as well as for their financial security.[[40]](#footnote-41) Finally, the emergency created the need for companies to repurpose their operations in order to produce masks and ventilators for the entire community, or to support their supply chain.[[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 believe that the Covid pandemic will have expect long-lasting effects on the economy and society, including shocks to the supply side of the economy,[[43]](#footnote-44) long-term loss of productivity,[[44]](#footnote-45) and macro-economic consequences.[[45]](#footnote-46) When managers negotiate a major transaction with lasting effects for the surviving company, and they are willing to consider the needs and risks for the company’s stakeholders, they must inevitably take into account a sufficiently long time horizon and, therefore, the long-term risks for stakeholders created by the pandemic.

All such short-term and long-term risks threatened the welfare of stakeholders in the period under consideration. One would expect that corporate leaders who negotiated the sale of the company and wished to deliver 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 a troubling time in many respects, it was not at all bad for shareholders. The Covid pandemic hit the United States after more than a decade of 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, the stock market rapidly bounced back to pre-pandemic levels and continued growing at an even faster rate than before. [[47]](#footnote-48) The S&P 500 lost about a third of its value (33%) between February 19 and March 23, 2020, but then it quickly regained such loss. By August 10, 2020, the index was back to the level of February 19, and by the end of the period we examined the S&P 500 had gained 37% relative to February 19, 2020, and 40% relative to the end of 2019.[[48]](#footnote-49)

Furthermore, low interest rates, high levels of liquidity and valuation opportunities drove higher M&A activity.[[49]](#footnote-50) This trend was especially potent 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 has also been 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) Additionally, during the second quarter of 2021, the announcement of deals worth $5 billion or more totaled $734.4 billion in value—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 with the acquisition to employees and other stakeholders, they could have easily done so while delivering huge value to shareholders at the same time.

### Economically Consequential Decisions

Finally, it is worth noting that our sample of corporate acquisitions represents a significant set of economically consequential decisions. Taken 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 predictions were found to be invalid only and exclusively within this specific context, it would still be a major indictment of the efficacy of stakeholderism.

From a social standpoint, stakeholderism is relevant as long as 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 not able 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. We excluded deals with a transaction value below $1 billion from our sample and focused on large deals due to the higher stakes for stakeholders and were left with 147 acquisitions. The target companies of these acquisitions tend to employ more employees, to have thicker relationships with third parties and greater impact on communities. Accordingly, the risks that their sale pose to stakeholders are 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 concerns about stakeholders and was accompanied and preceded by pledges by numerous corporate leaders to deliver value to all stakeholders.

We, then, apply 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 shareholder could exercise effective control over the firm.[[53]](#footnote-54) When the target’s controller is also the acquirer, such controller stands 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, such 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. In this situation, corporate leaders may not be able to secure protections for additional stakeholder groups when considering and negotiating a sale of the 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 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. 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 for each deal a wide array of securities filings: 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 both national and local media outlets. Our detailed review of these materials enabled us to examine the bargaining process leading to the deal and the detailed terms of the deal 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 form commercially available datasets. In particular, we collected from FactSet data on the characteristics of the parties, the deal, and the deal-protection provisions adopted by the parties.

## 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.

Taken together, the 116 deals included in our dataset were of large economic significance. They had 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% came after the first quarter of 2021 in which a substantial fraction of the U.S. population got vaccinated.[[56]](#footnote-57)

Figure 1. Transaction Announcements by Month

### Buyers

We used the FactSet M&A database to gather information on the identity of the buyers, 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 are by strategic buyers. The remaining deals (21%) are acquisitions by private equity firms.

One could argue that different types of buyers might have, on average, different impact 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 (though, 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 structure of both private equity managers and the managers of portfolio companies.[[59]](#footnote-60) The goal of maximizing financial return is often achieved through implementation of cost-cutting strategies. Indeed, there is robust empirical evidence that private equity acquisitions result in employee terminations and thus impose 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. 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 a private equity buyer. The variance in the type of acquirer enables us to examine such hypothesis, and to identify whether stakeholders receive more protections in one of the types of acquisitions.

### Targets

The 116 target companies in our sample were in 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 the geographic location of their headquarters. Targets in the sample had 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 that serve as the incorporation venue of more than one company in our sample 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 the key characteristics of these companies.[[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. As 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, in 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 SubsampleLargest Deals Subsample. For completeness, the online Appendix will report the individual findings for each of the sample companies outside the Largest Deals SubsampleLargest Deals Subsample.

## Bargaining

### The Process

Before considering the outcome 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 period (in days) from either the beginning of the target's exploration for a sale or its first interaction with an interested party within the context which eventually led to the deal, to the signing of the merger agreement. The longer this period lasted, the more time 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 whole 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 other potential buyers other than the final buyer expressed an interest in acquiring the company. The presence of potential rival buyers likely enhances the target's bargaining position. As Table 2 shows, discussions with other bidders were common. They took place in 59% of the largest 22 deals, and in 73% of the deals in the entire 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 reinforces the target's bargaining position and strengthens 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 entire 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 entire 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 Entire Sample | | | | | |
| % of Yes | – | 73% | 46% | 95% | 93% |
| Mean | 233.10 | – | – | – | – |
| Median | 162.50 | – | – | – | – |

*Negotiated Price Increase.* Lastly, 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 entire 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 does 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 does not close. 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 Entire 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 entire 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 whole 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 entire 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 entire sample, the target committed to pay either a termination fee or an expense reimbursement to the buyer in the event the deal is 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 entire 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, as well as enhanced their flexibility to allocate some of the produced surplus 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 consist in 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. For each deal, we also calculated the dollar amount of the premium, 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%, for a dollar amount with 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 entire 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 Entire 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 that 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 that they made on shares obtained through exercising their vested stock options.

We found that the gains generally obtained by top executives were of significant value. As Table 5 below indicates, the amount 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 entire 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 a future deal. However, a substantial fraction 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 entire 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 entire 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 and had a mean of $14 million (and a median of $16 million). In the entire 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 Entire 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 made 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 entire 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 comes from 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 benefits, 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 entire 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 entire 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. As Table 6 below reveals, 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 Entire Sample | | | |
| *% of Yes* | 100% | 80% | 31% |
| *Mean* | $53 | $3 | – |
| *Median* | $14 | $1 | – |
| *Total* | $5,893 | $263 | – |

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

*Monetary Gains Qua Shareholders*. Similarly to the executive officers, directors typically own shares and/or vested options in the companies they lead, and therefore obtain in their capacity as shareholders 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 (a median of $24 million) for the Largest Deals Subsample, and a mean of $53 million (a median of $14 million) for the entire 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 entire sample. The aggregate value of such payments to the team of a target’s non-executive directors had a mean value of $4 million (a median of $3 million) for the Largest Deals Subsample, and a mean of $3 million (with a median of $1 million) in the entire sample.

*Retention of Directors.* Lastly, 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 entire sample.

# Protecting Stakeholder Interests?

The preceding Part has shown that both shareholders and corporate leaders benefitted substantially from the negotiated terms of the deals that we have studied. In this Part we turn to the heart of our inquiry: examining whether, and to what extent, corporate leaders obtained benefits for stakeholders as well.

Section V.A begins by documenting that corporate leaders often recognized that the deal posed significant risks for stakeholders. The subsequent three sections focus on the extent to which the deal terms provided protections or benefits to employees (Section V.B), suppliers, customers, and creditors (Section V.C), and local communities, the environment, and other stakeholders (Section V.D). Overall, we find that, even though corporate leaders obtained substantial benefits for shareholders and for themselves, they obtained little or no protections to employees or other stakeholders.

## The Stakes for Stakeholders

Before analyzing the terms of the deals, we first examine whether corporate leaders were aware of risks that the deal posed for stakeholders when the deals were designed and negotiated. To this end, we manually collected and analyzed a significant amount of data from multiple sources. We first reviewed various corporate filings made by both the targets and acquirers with the SEC during the periods preceding and following the announcement of each deal. To complement our review of securities filings, we surveyed media coverage on each of the deals, examining articles from both national news outlets and local publications from cities where the target’s headquarters were located.

In a large number of cases, we identified statements by the company or its corporate leaders, or media commentary, at the time when the deal was being negotiated, expressing the belief that the deal would pose significant risks to employees or other stakeholders. Below we discuss in turn statements indicating the recognition of the three types of risks: (1) cost cutting; (2) employee lay-offs; and (3) relocation of headquarters or facilities. Because our data collection process might have missed some statements regarding these risks, our conclusions likely underestimate the incidence of cases in which such risks were present and recognized.

### Risk of Cost Cutting

Corporate acquisitions are often motivated or justified by potential cost synergies, which can produce efficiency gains and increase profits, and announcements of mergers are often accompanied with an estimation of the expected cost savings. This type of potential synergies, however, can also be viewed as a risk for stakeholders, because they often come at the expense of some stakeholders. In general, for each dollar saved through a synergy, payments to stakeholders decline by a dollar. For example, a reduction in labor costs would correspond to lower payments to employees, and a reduction in the costs of supplies would mean lower payments to suppliers.

We therefore sought to identify whether there were deals in which cost cutting was noted by the parties as a motivation for the deal or an expected result of it. As Table 7 reports, among the deals in the Largest Deals Subsample, about 60% of the deals (14 deals) were accompanied by corporate statements expecting significant cost cutting. The Table provides examples of such statements for each of these 14 deals. Similarly, the corresponding Table A7 in the Appendix displays a similar pattern among the other deals in our sample.

To illustrate, when Xilinx Inc. agreed to acquire Advanced Micro Devices, Inc., an investor presentation made by Xilinx indicated its expectation to realize “$300M COGS and opex synergies within 18 months of closing.” Similarly, in a public statement made in connection with the acquisition of Alexion Pharmaceuticals, Inc., AstraZeneca noted that “[t]he Board expects the Transaction to realise recurring run-rate pre-tax cost synergies of approximately US$500 million per annum" and that "[t]hese synergies are expected to be primarily achieved by… integrating common corporate functions, … and sharing of resources in commercial and R&D.”

|  |  |  |
| --- | --- | --- |
| Table 7. Risks of Cost-Cutting | | |
| Findings for Each of the Largest 22 Deals | | |
| *Target* | *Excerpt* | |
| Alexion | | “The Board expects the Transaction to realise recurring run-rate pre-tax **cost synergies of approximately US$500 million per annum**. […] These synergies are expected to be primarily achieved by… **integrating common corporate functions**, … and **sharing of resources in commercial and R&D**... the remaining synergies will come from optimisation of facilities and capabilities within corporate functions, R&D, commercial and operations.”  [AstraZeneca Circular to Shareholders and Notice of General Meeting]  “On the cost synergy side, **there will be obviously a reduction of common infrastructure**. We don’t need two offices in countries. We don’t need two distribution centers. So we will reorganize every potential infrastruction where the two companies can benefit from each other”.  [AstraZeneca Transcript of Presentation to Investors and Analysts]  “AstraZeneca reckons **it can add $500 million merger of synergies, most of which are cost savings**”.  [*Reuters*] |
| Xilinx | | “**AMD said the deal would generate** **$300m in cost savings** within 18 months”.  [*Financial Times*, Chip dealmaking ramps up with AMD’s $35bn takeover of Xilinx]  “**$300M COGS and opex synergies** within 18 months of closing”.  [Xilinx Investor Presentation] |
| Kansas City Southern | | “The combined company is expected to create annualized **synergies of approximately $1 billion over three years**.”  [Canadian Pacific & Kansas City Southern Joint Press Release]  “$180 million cost and efficiency improvements: - Driven by a combination of improved fuel efficiency, lower G&A costs, equipment rents as well as facilities, IT spend and licensing; - CPKC to utilize best practices to support increased operating efficiencies.”  [Canadian Pacific & Kansas City Southern Investor Presentation] |
| Maxim Integrated | | “This transaction is expected to be accretive to adjusted EPS in 18 months subsequent to closing with **$275 million of cost synergies** by the end of year two, **driven primarily by lower operating expenses** and cost of goods sold. **Additional cost synergies from manufacturing optimization are expected to be realized by the end of year three subsequent to closing**.”  [Analog Devices & Maxim Integrated Joint Press Release]  “[T]hat $275 million of synergies is split 50-50 between cost of goods and OpEx. OpEx, think heavily weighted towards SG&A… On the SG&A side, think public company expenses and other duplicative costs. For cost of goods, there’s an efficiency in the economies from scale and purchasing power… **the synergies, obviously, will be nicely accretive to our margins and our free cash flow over time**.”  [Maxim Integrated Edited Transcript of Investor Presentation]  “[A] **significant portion of the operating spending reductions would be in SG&A** (e.g., eliminating public company expenses and other duplicative costs).”  [Maxim/ADI Merger FAQ] |
| Vereit | | “[W]e do expect our shareholders to benefit from the **elimination of duplicative corporate expenses** and improved economies of scale.”  [Realty Income Transcript of Conference Call for Investors]  “The combined company expects to achieve **$45 million to $55 million in cost savings**.”  [*The San Diego Union Tribune*]  “[O]ur goal is to try to figure out if we can rationalize some of the various different offices that VEREIT has. We are certainly keeping the Phoenix office, which is their primary office space. But there are 5 other offices that spot of this... **So those are going to help drive that 100% synergies that we've outlined for you**, and that takes time.”  [Realty Income Transcript of Conference Call for Investors] |
| Varian | | “**We expect** **there will be cost savings** especially as Varian will benefit from our larger organization. These are expected to be, for example, based on integration considerations in back-office sales processes in headquarters, regional functions and obviously also in procurement as well as savings due to the delisting of Varian. […] **[W]hen you look at back-office functions and so on and so on, we definitely see scale synergies.**”  [Siemens Q3 2020 Earnings Call]  “Siemens Healthineers can deliver on a promised 300 million-euro ($353 million) profit boost from the deal… **about one-third of it comes from cost savings**.”  [*The Washington Post*] |
| Livongo | | “As a result of efficiencies, **the combined company is expected to achieve** **cost synergies of $60 million** by the end of the second year following the close.”  [Teladoc Health & Livongo Joint Press Release]  “We also see opportunities for cost synergies. Those are the – in the areas of vendor consolidation, back office, there is – **these are 2 public companies, there is definitely some rationalization and efficiencies that we can go at**. […] We expect cost synergies of $60 million… primarily related to activities such as vendor consolidation, streamlining corporate functions and **eliminating redundancies**, enabling us the flexibility to drive the bottom line and invest in growth.”  [Edited Transcript of Teladoc Livongo Merger Conference Call] |
| Noble Energy | | “The transaction is expected to achieve run-rate operating and other **cost synergies of $300 million** before-tax within a year of closing... the **synergies will be partially headcount-related as we’ve got some redundancies in – primarily in corporate functions**.”  [Chevron Press Release]  “Buying the company would […] yield **potential annual cost savings of $300 million**, according to Chevron.”  [*The Wall Street Journal*] |
| Concho Resources | | “The companies announced that together **they expect to capture $500 million of annual cost and capital savings by 2022**. The identified savings will come from **lower general and administrative costs** and a reduction in ConocoPhillips’ future global new ventures exploration program”.  [ConchoPhillips Press Release]  “We will see a **$100 million of direct reductions** associated with the merger from **elimination of duplicate G&A costs** and Board positions, offices, and corporate costs”.  [Concho Resources Transcript of Investor Presentation]  “ConocoPhillips said it expects to **save about $1 billion annually** from the Concho buy, compared with its previous forecast of $750 million and double the $500 million estimated when the deal was announced in October.”  [*Reuters*] |
| Pra Health Sciences | | “The transaction is anticipated to be highly accretive delivering double-digit accretion in the first full year and growing to 20%+ thereafter, driven by growth momentum, **estimated annual run-rate** **cost synergies of $150 million**, and the combined effective tax rate decreasing to 14%, both to be realised in approximately 4 years.”  [ICON Press Release]  “[W]e are targeting annualized **cost synergies to be in the range of $150 million**, realized in approximately 4 years. And these will come from a number of areas, including optimizing business processes, and IT infrastructure, facility-related savings, corporate costs and leveraging of our support service centers of excellence.”  [PRA Health Sciences IR Conference Call Transcript]  “**Combining the companies would allow for** **$150 million of cost cuts**, Icon said.”  [*The Wall Street Journal*] |
| Hill-Rom Holdings | | “Baxter expects the combination to result in approximately **$250 million** of annual pre-tax **cost synergies** by the end of year three.”  [Baxter & Hillrom Joint Press Release]  “Cost Synergies: - Back-office optimization & other G&A savings; - Manufacturing & supply chain infrastructure. ~$250M Cost Synergies by Year 3 post close With additional opportunities thereafter.”  [Baxter & Hillrom Investor Presentation]  “These cost synergies will be generated primarily from back office optimization, manufacturing and supply chain infrastructure and certain other G&A savings such as eliminating redundant company costs.”  [Transcript of a conference call held by Baxter] |
| GCI Liberty | | “Liberty Broadband's management estimated **$3.0 million to $5.0 million of corporate cost synergies** to be realized as a result of the combination […]. These estimates were based on numerous variables and assumptions regarding reductions in corporate-level general and administrative expenses (anticipated to decrease due to the **elimination of potentially redundant tasks** from 10% to 50%.”  [GCI Liberty Proxy Statement]  “The benefits to the combined company that could result from the combination, including […] **reduction of administrative and management complexity, the potential to** **realize certain cost savings** and operational synergies (including savings in respect of public company and overhead costs).  [GCI Liberty Proxy Statement]  “According to the companies, **the combination will allow the two to save on overhead costs, simplify its management and administrative structure**, reduce trading discounts to its equities, and improve flexibility for future acquisitions.”  [*Multichannel News*] |
| MGM Growth Properties | | “**$10MM of expected G&A synergies** associated with the pending MGP acquisition.”  [VICI Investor Presentation] |
| Acceleron Pharma | | “SVB Leerink analyst Daina Graybosch says (…) "We also expect Merck could realize **significant cost synergies** with this transaction, as it **absorbs the program teams and cuts overhead**.".”  [*Investor’s Business Daily*] |

### Risks to Employees

Costs cutting can be produced by laying off some of the employees of the acquired company after the acquisition. In the case of an acquisition by a strategic buyer, for example, costs may be reduced by eliminating duplications or combining various business functions. Our document review therefore sought to identify whether corporate leaders negotiating the deals and outside observers recognized the presence of post-deal risks to employment.

As Table 8 below reports, we identified statements recognizing such risks in 14 of the largest 22 deals, which represent 64% of this subsample. The Table provides examples of such statements for each of these 14 deals. The corresponding Table A8 in the Appendix displays a similar pattern for our entire sample.

In some cases, corporate leaders presented the expected reduction in employee headcount as part of the motivation and a driver of the gains from the deal. For example, in the Noble Energy, Inc. acquisition, the acquirer's CEO stated that “[t]he synergies in part would be related to cutting the workforce.” Furthermore, media coverage of this deal reported that “[J]ob cuts at Noble will reduce the total workforce by roughly another 570 positions” and that “Chevron is laying off about 25 percent of onetime Noble Energy employees.”

In some cases, corporate statements noted the presence of post-deal risks to employees but sought to downplay the risks by not disclosing the specifics of the expected reduction in employment or stating that they will be determined later on. For example, in the Nuance Communications, Inc., the “Employee FAQ” noted that the parties intended to “align roles to changing priorities and joint strategies,” and “[they would] continually evaluate [their] resources.” Similarly, PRA Health Sciences told its employees that “[de]cisions around the combined office footprint [would] be considered during the integration process.”

|  |  |
| --- | --- |
| Table 8. Risks to Employees | |
| Findings for Each of the Largest 22 Deals | |
| *Target* | *Excerpt* |
| Alexion | “There will be limited **duplications**, obviously in various functions more in the **administrative side**.”  [AstraZeneca Transcript of Presentation to Investors and Analysts]  “In some cases, AstraZeneca will provide dedicated support to Alexion, and **in some areas, functions will align to the business as a whole**.”  [AstraZeneca Transition Planning Update]  **“Synergies from the deal** […] **would partly come from headcount reduction in general administrative functions**.”  [*Financial Times*] |
| Xilinx | “We expect that the **net reductions in the workforce** will be fairly modest, for a transaction of this size, given the substantial growth opportunities afforded by the combined company’s growth profile at scale. After transaction close, we will identify cost synergies, deployment opportunities, and through that process**, we may identify a small number of redundant positions which will be eliminated**”.  [FAQ for Xilinx Employees]  “[U]ltimately, there will be **some positions that are redundant**.”  [Transcript of townhall meeting for Xilinx employees] |
| Kansas City Southern | “**$180 million cost and efficiency improvements**: - Driven by a combination of improved fuel efficiency, **lower G&A costs**, equipment rents as well as facilities, IT spend and licensing; - CPKC to utilize best practices to support increased operating efficiencies.”  [Canadian Pacific & Kansas City Southern Investor Presentation]  “Obviously, we’re not targeting any job cuts. We’re not targeting shutting down yards. We have none of those thoughts in our heads. What we see is an immediate opportunity in that space. **There’s some G&A expense. Obviously, we’ve got duplicate IT groups.** We’ve got a headquarters building here in Kansas City, which we’re very, very happy that KCS owns. Contrary to CP, we’re in downtown Minneapolis, where our operation center is located and John’s offices and our IT folks are. (…) We’re going to get more efficient with fuel. **We’re going to have some G&A., those are modest numbers.**”  [Canadian Pacific Railway Presentation]  “"There is no overlap," Mr. Ottensmeyer said. "Our focus really here is on growth rather than cost-cutting and operating efficiencies. **It's hard to say there aren't going to be some layoffs**, but we think this is going to create jobs".”  [*The Globe and Mail*] |
| Maxim Integrated | “**[T]here’s clearly some overlap**, which is built into the synergy assumption we have out there. **We expect that’s going to be focused** **in the SG&A area**”.  [Maxim Integrated Edited Transcript of Investor Presentation]  “If Maxim conducts any reduction-in-force actions between now and the closing of the transaction, **impacted employees will be notified in the ordinary course.** Any terminated employees will be covered by the Change in Control employee severance plan if they experience a covered termination of employment under the plan. Decisions have not been made regarding positions that may be eliminated in connection with the transaction. Any such decisions will be communicated as soon as practicable, and such employees will also be covered by the Change in Control employee severance plan if they experience a covered termination of employment under the plan.”  [August One Maxim Meeting Q&A] |
| Nuance | “Naturally, **we will want to** **align roles to changing priorities and joint strategies,** but we have lots of work to do before we get there. […] That is something we will review and consider as we start to move through the planning process. […] As part of the business planning and integration process, we will **continually evaluate our resources** to ensure we have the right resources mapped to strategic priorities.”  [Nuance Employee FAQs] |
| Vereit | “[W]e do expect our shareholders to benefit from the **elimination of duplicative corporate expenses** and improved economies of scale.”  [Realty Income Transcript of Conference Call for Investors] |
| Varian | “[W]hen you look at **back-office functions** and so on and so on, we definitely see scale synergies.”  [Siemens Q3 2020 Earnings Call] |
| CyrusOne | “Becoming a privately-owned company will have **little or no effect on most employees**’ day-to-day responsibilities, and we expect to conduct our business as usual. KKR and GIP are investing in CyrusOne because they believe in our vision, our strategy and most importantly, our team.”  [CyrusOne Letter to the Team] |
| Noble Energy | “The synergies in part would be related to **cutting the workforce**, Wirth said this summer during a conference call with investors.”  [*Natural Gas Intel*]  “The consolidation… **also means fewer jobs in Houston** as the California oil major **looks to cut redundant corporate positions** and reduces spending on consultants, office buildings, technology and insurance.”  [*Houston Chronicle*]  “Chevron is **laying off about 25 percent of onetime Noble Energy employees** after the California giant acquired the Houston company this month. […] ‘We expect Chevron’s new organizational design to retain approximately 75 percent of Noble’s positions’, Chevron spokeswoman Veronica Flores-Paniagua said in an email. ‘The number will vary in each business segment and function. We are also confident the Noble employees who are selected will play an important role in helping Chevron complete in any business environment.’”  [*Houston Chronicle*]  “**Chevron’s 10%-15% cuts would imply a reduction of between 4,500 and 6,750 jobs, while job cuts at Noble will reduce the total workforce by roughly another 570 positions**. […] About 700 employees will lose jobs in Houston starting this month, according to a filing with the Texas state.”  [*Reuters*] |
| Concho Resources | “That combination of closing exploration programs and exiting these assets will impact all of our exploration staff in Houston, and that is in the range of 80 to 90 people. I would **expect these** **positions to be eliminated** starting late in the first quarter of 2021.”  [ESOI Employee Town Hall: Impact of Concho Acquisition]  “[W]e expect to find savings from this acquisition that will require some reductions in Midland staff. […] Roper said […] there is a transition planning team actively analyzing synergies that will result in general and administrative and capital reductions. ‘It’s very early on, but **we do expect to find duplicative positions that will result in** **job losses from both companies**.’”  [*MRT*]  “[W]e expect to find savings from this acquisition that will require some reductions in Midland staff.” |
| Hill-Rom Holdings | “Cost Synergies: - **Back-office optimization** & other **G&A savings**; - Manufacturing & supply chain infrastructure.”  [Baxter & Hillrom Investor Presentation]  “These cost synergies will be generated primarily from back office optimization, manufacturing and supply chain infrastructure and certain other **G&A savings such as eliminating redundant company costs**.”  [Transcript of a conference call held by Baxter]  “Is Baxter planning any layoffs?(…) While **there are always some changes resulting from a transaction like this, often including elimination of redundant positions**, our combination with Baxter is about growth and accelerating our shared vision. As we move forward, we aim to be open and transparent about the integration, our plans to bring the companies together, and any impacts from organization design plans. (…) Baxter has been clear that their intent is to preserve and accelerate both businesses going forward and our integration plans will set out to do that. **As with any large transaction, however, we anticipate some cost synergies**. One of the most immediate areas of savings will come from Hillrom no longer being an independent, publicly traded company. Other areas include streamlining the combined company’s supply chain to lower our cost of goods, and even in highly complementary combinations like this one, **it’s common for companies to eliminate redundant positions**.”  [Email sent to employees of Hill-Rom Holdings] |
| GCI Liberty | “Liberty Broadband's management estimated $3.0 million to $5.0 million of corporate cost synergies to be realized as a result of the combination […]. These estimates were based on numerous variables and assumptions regarding reductions in corporate-level general and administrative expenses (anticipated to decrease due to the **elimination of potentially redundant tasks from 10% to 50%**.)”  [https://www.sec.gov/Archives/edgar/data/0000808461/00010474692 0005364/a2242592zdefm14a.htm]  “The benefits to the combined company that could result from the combination, including […] **reduction of administrative and management complexity**, the potential to realize certain cost savings and operational synergies (including savings in respect of public company and overhead costs).”  [https://www.sec.gov/Archives/edgar/data/0000808461/00010474692 0005364/a2242592zdefm14a.htm]  “According to the companies, the combination will allow the two to save on overhead costs, **simplify its management and administrative structure**, reduce trading discounts to its equities, and improve flexibility for future acquisitions.”  [https://www.nexttv.com/news/liberty-broadband-gci-liberty-to-merge] |
| PRA Health Sciences | “Once the deal closes, **the combined organization will embark on a thoughtful integration planning process… Decisions around the combined office footprint will be considered during the integration process**. In cities where both companies have a presence, there may be opportunities to consolidate or co-locate facilities.”  [Communication by PRA to Employees] |
| Acceleron Pharma | “**Will we keep our jobs?** When will we know for sure? **We’re still in the process of finalizing the details with Merck** and as soon as we have information to share with you, we will. If we do lose our jobs, will we receive severance pay? How much notice will we have? We adopted a severance plan for non-executive employees (the “Severance Plan”).”  [Acceleron Employee Q&A] |

### Risks to Communities

Lastly, we turn to examine the risks that the contemplated mergers were expected to pose to local communities. When it results in the relocation of the target's headquarters or facilities, a deal likely imposes costs not only on the employees residing in those locations but also to other local residents who benefit from the presence of corporate facilities and their employees.

As Table 9 reports, our document review identified risks to communities of this sort in 13 out of the 22 deals in the Largest Deals Subsample (59% of the subsample). The Table provides examples of such statements for each of these 13 deals. The corresponding Table A9 in the Appendix provides such information with respect to other deals in our entire sample.

For example, in the acquisition of PRA Health Sciences, Inc., the buyer ICON plc stated that “[t]he combined company will be headquartered in Dublin, Ireland [where ICON’s headquarters was].” In some cases, corporate statements acknowledged the risks of relocations but sought to downplay it by indicating that the specifics are yet to be determined. For example, in the Varian Medical Systems, Inc. deal, the target circulated an “Employee FAQ” to its employees that addressed the question of “[w]at will happen to Varian’s headquarters and facilities?.” In response, Varian stated “During the integration planning process, we will be working on how to best bring both companies together and capitalize on the strengths and talent across each organization after closing. At this point, we don’t yet have all the specifics.”

|  |  |
| --- | --- |
| Table 9. Risks To Communities from Relocations | |
| Findings for Each of the Largest 22 Deals | |
| *Target* | *Excerpt* |
| Xilinx | “Following the close of the transaction, the combined company will **maintain AMD’s name and headquarters** in Santa Clara, CA.”  [Email from Xilinx CEO to Xilinx Employees] |
| Kansas City Southern | “The combined entity will be named Canadian Pacific Kansas City (“CPKC”). **Calgary will be the global headquarters of CPKC, and Kansas City, Missouri will be the U.S. headquarters**. The Mexico headquarters will remain in Mexico City and Monterrey. CP’s current U.S. headquarters in Minneapolis-St. Paul will remain an important base of operations.”  [Canadian Pacific & Kansas City Southern Joint Press Release]  “There’s some G&A expense. Obviously, we’ve got duplicate IT groups. We’ve got a headquarters building here in Kansas City, which we’re very, very happy that KCS owns. Contrary to CP, we’re in downtown Minneapolis, where our operation center is located and John’s offices and our IT folks are. We lease that space. We were actually facing a decision in 2025, and that lease runs out to build our own facility, on our own property in St. Paul. Now we don’t have to do that again. So **there’s going to be some shift, some pluses and minuses there**. But at the end of the day, when you’re focused on growth and the revenue that’s going to come, the people that want to work are going to have an opportunity to work. Minneapolis, St. Paul is a major work location for the CP network.”  [Canadian Pacific Railway Presentation]  “"Canadian Pacific Railway recently outlined the fate of its U.S. headquarters and workers in downtown Minneapolis as it seeks regulatory approval to merge with Kansas City Southern. (…) **Many of its downtown Minneapolis workers will be offered a chance to move to the combined company’s new headquarters in Kansas City**. Company officials say the exit will unfold in phases, repeatedly emphasizing throughout the more than 4,000-page filing an ongoing commitment to, and presence in, the Twin Cities. **Over the course of three years, 135 headquarters jobs and 72 local dispatcher and clerical jobs in its Soo Line division will shift from Minneapolis to Kansas City**.”  [*Star Tribune*] |
| Slack Technologies | “‘Our office happens to be just across the way from Salesforce’s office in San Francisco. We can see each other’s headquarters. **If there was no integration at all, then this whole thing wouldn’t make sense.** On the other hand, it’s not to save money on real estate. It’s to accelerate this vision for the future of work….It’s only at that time … that the finer points of any integration process will start to be ironed out.”  [*Independent*] |
| Maxim Integrated | “We don’t know for sure at this time what integration decisions will be made; however, **even if some facilities may ultimately be combined post-closing**, employees should not assume there will no longer be an employment opportunity for them at a combined facility.”  [August One Maxim Meeting Q&A] |
| Nuance | “There are still **many details that need to be worked out** as part of integration with Microsoft, **including decisions around real estate and facilities**.”  [Nuance Employee FAQs] |
| Vereit | “[O]ur goal is to try to **figure out if we can rationalize some of the various different offices** that VEREIT has”.  [Realty Income Transcript of Conference Call for Investors]  “The combined company **will be headquartered in San Diego**, with Roy as President and Chief Executive. VEREIT’s Phoenix office would remain”.  [*The San Diego Union Tribune*]  “The announcement on Thursday morning means **Arizona will lose one of its larger, locally headquartered public corporations** as a result, though the combined entity will retain Vereit's current office at 2325 E. Camelback Rd.”  [*Azcentral*] |
| Varian | “What will happen to Varian’s headquarters and facilities? […] During the integration planning process, we will be working on how to best bring both companies together and capitalize on the strengths and talent across each organization after closing. At this point, we don’t yet have all the specifics”.  [Varian Employee FAQ] |
| Livongo | “The combined company **will be headquartered in Purchase, NY, the location of Teladoc Health’s headquarters**, and will continue to support substantial operations in our home state of California.”  [Livongo & Teladoc Combination—Frequently Asked Questions]  “The newly combined company will be called Teladoc Health and **will be based in Purchase, N.Y., where Teladoc has its headquarters**.”  [*The Wall Street Journal*] |
| CyrusOne | “**DataBank is to acquire four data centers in the Houston, Texas, metro area from CyrusOne** for $670 million. (…) **The data centers represent CyrusOne’s entire Houston footprint**. The company retains eight Texan data centers across Austin, Dallas, and San Antonio. In November 2021 CyrusOne was acquired by investment firm KKR and Global Infrastructure Partners for $15 billion in the most expensive data center acquisition ever.”  [*Datacenter Dynamics*] |
| Noble Energy | “Will we continue to be headquartered in Houston? What about Noble Energy’s other locations? Will I have to relocate? We expect to move quickly building an integration planning team comprising leaders of both Noble Energy and Chevron to determine how to best bring our companies together following the close of the transaction. In the near-term, all employees will continue in their same work locations.”  [Noble Energy Employee FAQ]  “The consolidation gives Chevron coveted assets in the Permian Basin of West Texas and in the eastern Mediterranean Sea, but also means fewer jobs in Houston as **the California oil major looks to cut redundant corporate positions** and reduces spending on consultants, office buildings, technology and insurance.”  [*Houston Chronicle*] |
| Hill-Rom Holdings | “Will Hillrom be keeping all of its current plants, offices and field service centers? Can we expectsome combination of Hillrom and Baxter locations? What about our headquarters? **This is an important area that our companies’ integration planning team will look at carefully** to make the best decision for the combined company. For the time being, there are no changes to work locations.”  [Hillrom Employees FAQ]  “Since Baxter’s headquarters are in Deerfield, Illinois, will the Hillrom Chicago office remain open? Similarly, will the Cary, NC, office be required to move to the Baxter office in Marion/North Cove? **It is too early to speculate about any impact to company locations**, but this is an important area that our companies’ integration planning team will look at carefully to make the best decision for the combined company.”  [Email sent to employees of Hill-Rom Holdings] |
| PRA Health Sciences | “**PRA’s headquarters**, which have been in Raleigh since 2008, **will move to Dublin** as part of the combined company, according to a news release.”  [*The News & Observer*]  “The combined company **will be headquartered in Dublin**, Ireland.”  [ICON Press Release] |
| Acceleron Pharma | “What will happen with Acceleron/our office and lab space? **We’re still in the process of discussing the details with Merck**. Once we have information to share with you, we will.”  [Acceleron Employee Q&A] |

Thus, our findings in this Section indicate that the deals in our study took place amid recognition of posed significant potential post-deal risks to stakeholders. We will now turn to investigate whether, and to what extent, corporate leaders addressed these risks by negotiating for stakeholder protections that mitigate them.

## Employees

Employees are widely recognized as a key stakeholder group whose interests should be of primary concern to corporate leaders. As such, they are explicitly mentioned in the constituency statutes of 31 states,[[69]](#footnote-70) the U.K. Companies Act,[[70]](#footnote-71) the BRT statement and the 2020 Davos Manifesto, published by the World Economic Forum to encourage a shift from shareholder primacy to stakeholder capitalism.[[71]](#footnote-72)

We therefore begin our analysis of stakeholder protections with employees, examining first whether corporate leaders managed to protect the most prominent interest of this stakeholder group: their continued employment at the target company. Table 10 reports our findings.

|  |  |  |
| --- | --- | --- |
| Table 10. Employment Protections for Employees | | |
| *Target* | *Limits on Firing (Yes/No)* | *Payment to Fired Employees (Yes/No)* |
| Findings for Each of the Largest 22 Deals | | |
| Alexion | No | No |
| Xilinx | No | No |
| Kansas City Southern | No | No |
| Slack Technologies | No | No |
| Maxim Integrated | No | No |
| Immunomedics | No | No |
| Nuance | No | No |
| VEREIT | No | No |
| Varian | No | No |
| Livongo | No | No |
| CyrusOne | No | No |
| Noble Energy | No | No |
| Concho Resources | No | No |
| Change Healthcare | No | No |
| PRA Health Sciences | No | No |
| Hill-Rom Holdings | No | No |
| GCI Liberty | No | No |
| Dunkin' Brands | No | No |
| MyoKardia | No | No |
| MGM Growth | No | No |
| Acceleron | No | No |
| Proofpoint | No | No |
| Results for the Largest Deals Subsample | | |
| % of Yes | 0% | 0% |
| Mean | – | – |
| Median | – | – |
| Results for the Entire Sample | | |
| % of Yes | 4% | 0% |
| Mean | – | – |
| Median | – | – |

Corporate leaders willing to protect employees from the decision of the buyer to cut jobs could obtain from the buyer either a commitment to avoid layoffs or an obligation to pay laid-off employees a cash compensation to mitigate the adverse effects of losing the job. Even buyers who are reluctant to accept constraints to their freedom to lay off employees should be willing to commit to pay extra severance compensation to laid-off employees, as long as the relevant expected cost is deducted from the premium paid to shareholders. However, as Table 10 shows, none of the deals under study contained job protections of any sort.

The several exceptions to this are the Pluralsight,[[72]](#footnote-73) Monmouth Real Estate,[[73]](#footnote-74) Investors Bancorp[[74]](#footnote-75) Medallia,[[75]](#footnote-76) and Oasis Midstream Partners acquisitions,[[76]](#footnote-77) in which the buyer committed to continue the employment of target's employees as of the closing date (directly or through one of its subsidiaries), or to formally offer them such continued employment. However, in all cases, these commitments were immediately negated by adjacent provisions stipulating that they (as all other provisions of the section dealing with employee benefits) are not enforceable.[[77]](#footnote-78) Additionally, the merger agreement in the People's United[[78]](#footnote-79) acquisition contained an "intention" (rather than a commitment) of the buyer to retain "as many employees of the Company […] as feasible", and "to remain one of the leading employers" in the area at which the target's headquarters was located prior to the merger. Similarly, in the merger agreement of the TriState Capital Holdings acquisition, the acquirer stated that it "does not intend to discharge or terminate any employee or officer of the Company".[[79]](#footnote-80)

Furthermore, in no deal we found a commitment to compensate laid-off employees with a cash payment. In particular, we looked for compensation elements that go beyond the standard severance compensation, representing an active effort by the parties to address the risk of reduced employment that arises from the anticipated transaction. Such mechanism, of course, would not prevent acquisitions motivated in part by reducing redundant workforce– but would alter the allocation of the deal surplus between the different stakeholder groups. As table 10 shows, protections of this sort were not utilized in any of the deals in our sample. We see that in the overwhelming majority of the cases, the employees' crucial interest of continued employment is left unattended, and that corporate leaders consistently fail to address the risk of reduced employment.

As to whether employees' other interests were secured in a meaningful manner, Table 11 reports our findings regarding protections granted to employees with respect to their compensation and benefits as possible future employees of the combined company.

*Pay Protection for Retained Employees*. One sort of provision that is found frequently in the data concerns the compensation of continuing employees. This standard provision stipulates that the levels of compensation or benefits of such employees will be maintained for a limited period of time. Provisions securing the employees' compensation levels (with or without a similar protection of benefit levels) for a year following the merger were found in 82% of the largest 22 deals and in 84% of all transactions in our sample. Employees were not granted an extended continuation period beyond the first year in any of the largest 22 deals. Such extended periods were only granted in 8% of the entire sample.

These provisions, however common, are of limited practical significance for three reasons. First, the transition period specified in such provisions is generally not long, with a mean of 11.5 months for the Largest Deals Subsample and 11.2 for the entire sample, and a median of 12 for both samples, with the buyer left free to reduce compensation and benefits after this short transition period ends. Secondly, provisions are often limited in scope, as many of them specifically exclude certain elements, such as equity awards, long-term compensation opportunities[[80]](#footnote-81) and severance-related benefits.[[81]](#footnote-82) Lastly, as the rightmost column in Table 11 shows, in none of the merger agreements were employees granted the right to enforce these provisions (or any other commitments given in their favor).

|  |  |  |  |
| --- | --- | --- | --- |
| Table 11. Transition Period for Compensation & Benefits | | | |
| *Target* | *Pay Protection for Retained Employees for 1st Year (Yes/No)[[82]](#footnote-83)* | *Pay Protection for Retained Employees beyond 1st Year (Yes/No)* | *Commitments Enforceable by Beneficiaries? (Yes/No)* |
| Findings for Each of the Largest 22 Deals | | |  |
| Alexion | Yes | No | No |
| Xilinx | Yes | No | No |
| Kansas City Southern | Yes | No | No |
| Slack Technologies | Yes | No | No |
| Maxim Integrated | No | No | No |
| Immunomedics | Yes | No | No |
| Nuance | Yes | No | No |
| VEREIT | No | No | No |
| Varian | Yes | No | No |
| Livongo | Yes | No | No |
| CyrusOne | Yes | No | No |
| Noble Energy | Yes | No | No |
| Concho Resources | Yes | No | No |
| Change Healthcare | Yes | No | No |
| PRA Health Sciences | No | No | No |
| Hill-Rom Holdings | Yes | No | No |
| GCI Liberty | No | No | No |
| Dunkin' Brands | Yes | No | No |
| MyoKardia | Yes | No | No |
| MGM Growth | Yes | No | No |
| Acceleron | Yes | No | No |
| Proofpoint | Yes | No | No |
| Results for the Largest Deals Subsample | | | |
| % of Yes | 82% | 0% | 0% |
| Mean | – | – | – |
| Median | – | – | – |
| Results for the Entire Sample | | | |
| % of Yes | 84% | 8% | 0% |
| Mean | – | – | – |
| Median | – | – | – |

We next turn to examine the direct monetary gains that employees derived from the transactions. Our findings with respect to each of these categories are reported in Table 12 below.

As Table 12 shows, bonus payments were made in 32% of the top-22 transactions and in 23% of the entire sample. These payments were very modest in amount compared to the gains obtained by corporate leaders or shareholders. The average aggregate amount of such payments for the Largest Deals Subsample and for the entire sample are $11 million and $3 million, respectively, which represent, on average, 0.4% of the gains to shareholders and 10% of the gains to executives for the Largest Deals Subsample and 0.3% of the gains to shareholders and 3.2% of the gains to executives for the entire sample.

The payments reported in Table 12 are of two distinctive types. The first type is Retention Payments, which are intended to incentivize employees to remain at the combined company following the acquisition. This rationale shapes the structure of these payments, which are often divided into several installments or conditioned upon the retention of the employee until a certain date.[[83]](#footnote-84) Due to their purpose and forward-looking, contingent nature, these payments could reasonably be perceived as an instrument used by the acquirer, rather than a reward dedicated solely for the benefit of employees. This is the more common type of bonus payments to employees, recorded in 23% of the top-22 transactions and in 16% of the entire sample.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Table 12. Bonus Payments to Employees | | | | | |
| *Target* | *Payment Amount[[84]](#footnote-85)*  *(Millions)* | *Payment Amount (% of SH Gain)* | *Payment Amount (% of Ex Gains)* | *Certain Payment (Yes/No)* | *Payment shared with executives (Yes/No)* |
| Findings for Each of the Largest 22 deals | | | | | |
| Alexion | 90 | 0.8 | 43.4 | No | Yes |
| Xilinx | 41 | 0.5 | 39.2 | No | Yes |
| Kansas City Southern | – | – | – | – | – |
| Slack Technologies | – | – | – | – | – |
| Maxim Integrated | – | – | – | – | – |
| Immunomedics | – | – | – | – | – |
| Nuance | 25 | 0.8 | 8.2 | No | Yes |
| VEREIT | – | – | – | – | – |
| Varian | – | – | – | – | – |
| Livongo | – | – | – | – | – |
| CyrusOne | N/A | N/A | N/A | No | Yes |
| Noble Energy | $24.5 | 2.7 | 33.3 | Yes | No |
| Concho Resources | $33.5 | 2.5 | 26.3 | No | No |
| Change Healthcare | – | – | – | – | – |
| PRA Health Sciences | $25 | 0.9 | 59.1 | No | No |
| Hill-Rom Holdings | – | – | – | – | – |
| GCI Liberty | – | – | – | – | – |
| Dunkin' Brands | – | – | – | – | – |
| MyoKardia | – | – | – | – | – |
| MGM Growth | – | – | – | – | – |
| Acceleron | – | – | – | – | – |
| Proofpoint | – | – | – | – | – |
| Results for the Largest Deals Subsample | | | | | |
| % of Yes | 32% | – | – | 5% | 18% |
| Mean | $11 | 0.4 | 10.0 | – | – |
| Median | $0 | 0.0 | 0.0 | – | – |
| Total | $239 | – | – | – | – |
| Results for the Entire Sample | | | | | |
| % of Yes | 23% | – | – | 7% | 16% |
| Mean | $3 | 0.3 | 3.2 | – | – |
| Median | $0 | 0.0 | 0.0 | – | – |
| Total | $346 | – | – | – | – |

The second type of payment is a *Transaction Bonus*. Payments of this type represent a past-looking reward and are sometimes expressly described in proxy statements as linked to the efforts or contribution of certain individuals in the to the acquisition.[[85]](#footnote-86) Payments of this type were found to be relatively sparse in our sample, appearing in 9% of the largest 22 deals and in 4% of the entire sample.

The payment of the bonuses of both types was rarely expressed as a positive commitment. While only in 5% of the largest 22 deals and 7% of the deals in the entire sample containing such commitments, in most of the cases, the proxy statements merely stated that the target "may" or is "allowed to" establish a retention pool or program.[[86]](#footnote-87) In addition, in 18% of the Largest Deals Subsample and 16% of the entire sample, the bonus payments are shared between the target's executive officers and other employees, with the exact amount to be allocated exclusively to the employees left unspecified.[[87]](#footnote-88)

## Suppliers, Creditors, Customers

We reach the next stakeholder groups of suppliers, creditors, and customers. These groups are external to the target company, but their close and frequent relationship with it make them vulnerable to changes in its policies and operation, which could justify the expectation that their interests be taken into consideration by corporate leaders.

Indeed, customers and suppliers were explicitly mentioned in the August 2019 BRT statement and the Davos Manifesto 2020 and were noted – along with creditors – in numerous constituency statutes. We therefore set to investigate the protections secured for each of these stakeholder groups. Our findings, which are reported in Table 13, indicate that corporate leaders failed to negotiate for post-deal constraints on the buyers with respect to any decisions affecting these stakeholder groups.

|  |  |  |  |
| --- | --- | --- | --- |
| Table 13.  Protections for Customers, Suppliers & Creditors | | | |
| *Target* | *Customers (Yes/*No*)* | *Suppliers (Yes/*No*)* | *Creditors (Yes/*No*)* |
| Findings for Each of the Largest 22 Deals | | | |
| Alexion | No | No | No |
| Xilinx | No | No | No |
| Kansas City Southern | No | No | No |
| Slack Technologies | No | No | No |
| Maxim Integrated | No | No | No |
| Immunomedics | No | No | No |
| Nuance | No | No | No |
| VEREIT | No | No | No |
| Varian | No | No | No |
| Livongo | No | No | No |
| CyrusOne | No | No | No |
| Noble Energy | No | No | No |
| Concho Resources | No | No | No |
| Change Healthcare | No | No | No |
| PRA Health Sciences | No | No | No |
| Hill-Rom Holdings | No | No | No |
| GCI Liberty | No | No | No |
| Dunkin' Brands | No | No | No |
| MyoKardia | No | No | No |
| MGM Growth | No | No | No |
| Acceleron | No | No | No |
| Proofpoint | No | No | No |
| Results for the Largest Deals Subsample | | | |
| % of Yes | 0% | 0% | 0% |
| Mean | – | – | – |
| Median | – | – | – |
| Results for the Entire Sample | | | |
| % of Yes | 0% | 0% | 0% |
| Mean | – | – | – |
| Median | – | – | – |

It could be argued that acquirers might have an interest in treating customers, suppliers, and creditors well post-deal even in the absence of any negotiated constraints. However, in many cases, the buyer might conclude post-deal that it would be profit-maximizing to pursue strategies, such as switching suppliers, raising leverage, or raising the prices of goods and services, that could have adverse effects on customers, suppliers, or creditors. Indeed, concerns about the potential adverse effects of acquisitions on these groups were the reason why they were explicitly referenced in so many of the constituency statutes. Our findings indicate that, notwithstanding the concerns motivating such statutes, corporate leaders did not use their power to negotiate any protections for customers, suppliers, or creditors.

## Local Communities, the Environment, and Other Stakeholders

Lastly, we turn to examine the benefits and protections that were secured by corporate leaders for stakeholders that are less tightly connected with the company, including local communities and the society at large, the environment, and other stakeholders. Local communities were recognized as a stakeholder group by the BRT statement, the Davos Manifesto and were explicitly mentioned in 22 constituency statutes. The protection of the environment is also mentioned in the BRT statement and has been receiving increasing attention over the past decade. The “society at large” or the “economy” is also recognized as a protected group in both the BRT statement and the Davos Manifesto, and eight constituency statutes included a “catch-all” clause that allowed corporate leaders to add any stakeholder group they chose into their consideration.

Table 14 below illustrates our findings regarding these stakeholder groups. We will discuss each of them below in turn.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Table 14. Protections for Communities, Environment & Other Stakeholders | | | | | |
| *Target* | *Pledge to Retain HQ Location (Yes/No)* | *Pledge to Continue Local Investments / Philanthropy (Yes/No)* | *Environment / Climate (Yes/No)* | *Other (Yes/No)* | *Pledges*  *Enforceable? (Yes/No)* |
| Findings for Each of the Largest 22 Deals | | | | | |
| Alexion | Yes | No | No | No | No |
| Xilinx | No | No | No | No | No |
| Kansas City Southern | Yes | No | No | No | No |
| Slack Technologies | No | No | No | No | No |
| Maxim Integrated | No | No | No | No | No |
| Immunomedics | No | No | No | No | No |
| Nuance | No | No | No | No | No |
| VEREIT | Yes | No | No | No | No |
| Varian | No | No | No | No | No |
| Livongo | No | No | No | No | No |
| CyrusOne | No | No | No | No | No |
| Noble Energy | No | No | No | No | No |
| Concho Resources | No | No | No | No | No |
| Change Healthcare | No | No | No | No | No |
| PRA Health Sciences | No | No | No | No | No |
| Hill-Rom Holdings | No | No | No | No | No |
| GCI Liberty | No | No | No | No | No |
| Dunkin' Brands | No | No | No | No | No |
| MyoKardia | No | No | No | No | No |
| MGM Growth | No | No | No | No | No |
| Acceleron | No | No | No | No | No |
| Proofpoint | No | No | No | No | No |
| Results for the Largest Deals Subsample | | | | | |
| % of Yes | 14% | 0% | 0% | 0% | 0% |
| Mean | – | – | – | – | – |
| Median | – | – | – | – | – |
| Results for the Entire Sample | | | | | |
| % of Yes | 9% | 5% | 0% | 0% | 0% |
| Mean | – | – | – | – | – |
| Median | – | – | – | – | – |

*Pledge to Retain HQ Location*. One of the two types of protections for local communities that were found in the data is pledges to retain the location of the company’s headquarters. As Table 14 indicates, these pledges were found in 14% of the Largest Deals Subsample and in 9% of all transactions in our sample. These pledges vary in scope, duration and in the purported use of the target's headquarters. While some of them provide that the current target's headquarters will serve as the headquarters of the combined company,[[88]](#footnote-89) most of them provide that it will be retained as a base for regional operation,[[89]](#footnote-90) or as headquarters for a certain division or business unit of the combined company.[[90]](#footnote-91)

Additionally, pledges related to the retention of the target's headquarters were often short, vague, and underspecified. In particular, the language of these pledges did not specify what assets, employees, or operations would have to be retained in order to satisfy the pledge.

*Pledge to Continue Local Investments / Philanthropy*. Another type of protection for local community or society in general that was found in the data is pledges to invest or to retain existing investments in local communities, philanthropic activities or charitable organizations. As evident from Table 14, these pledges were not found in any of the largest 18 deals and were only found in 5% of the deals in the entire sample.

*Pledges Enforceable?* Lastly, we find that in all of transactions in the sample – including those offering protection of some sort to certain stakeholder groups – the agreement chose to explicitly deny third-party beneficiaries any right to enforce any provisions using a "No Third-Party Beneficiaries" clause. Such clause denies any potential beneficiaries the ability to enforce the pledges given in their favor. It should be noted that in many of the cases, the merger agreements expressly exclude shareholders and corporate leaders from these clauses, enabling them to enforce their right to receive merger consideration and indemnification, respectively.

*Environment*. As Table 14 shows, corporate leaders did not negotiate for any post-deal constraints on the buyer’s choices that would affect the environment or the climate. Apparently, notwithstanding the substantial discussion of environmental effects by business leaders and their advisors during the past couple of years, corporate leaders disregarded these concerns when negotiating sales of their companies.

*Other Stakeholder Groups*. We also looked for protections for any other stakeholder group, whose interests could be taken into account, including “society” and the “economy". However, we found no negotiated protections for any stakeholder not already discussed above. The evidence clearly indicates that the corporate leaders elected not to identify and protect additional stakeholder groups.

# Further Empirical Analysis

In Part V, we documented a general lack of stakeholder protections in our large sample of deals in the time of Covid. These findings are consistent with our view that corporate leaders have incentives not to benefit stakeholders beyond what is instrumentally useful to increase shareholder value. However, before concluding that this pattern is due to corporate leaders’ incentives, we would like to consider several other potential explanations for these findings.

Below we conduct additional empirical investigations to examine nine potential alternative explanations for why, despite their stakeholderist orientation, corporate leaders would have chosen not to include stakeholder protections in the merger agreements. In Sections A-H, we examine the validity of potential explanations that the patterns we identified are driven by other factors than corporate leaders incentives not to serve stakeholders beyond what would serve shareholder value, and we do so by identifying and examining, in turn, subsets of our sample in which the suggested explanation could not have been applicable. In Section I, we extend our analysis beyond the sample analyzed thus far to explore deals during the year preceding the pandemic and to examine whether there was something special about the pandemic period that precluded corporate leaders from following pro-stakeholder inclinations, but can be expected to influence them in non-pandemic circumstances.

Our findings indicate that none of these explanations could have driven the general pattern of lack of stakeholder protections that we documented in Part V.

## Deals without Distress

One alternative explanation might be that corporate leaders might have been unable to negotiate for stakeholder protections because, due to the pandemic, their companies were in financial distress. On this view, with their back to the wall, the corporate leaders of target companies were in no position to negotiate for stakeholder protections; however, in regular times, and without financial distress, they could be relied on to deliver value to stakeholders.

With respect to this argument, it is worth pointing out that the corporate leaders in our sample, notwithstanding any pressures they were facing, were able to obtain large gains for their shareholders as well as for themselves. Therefore, they could also have obtained some protections for stakeholders, for example by accepting a somewhat lower premium in return for some financial payoffs to employees that lose their positions post-deal.

In any event, to further test this argument, we identified a subset of companies in our sample that clearly were in a position to bargain at the time of the deal. In particular, we identified two subsamples of our universe of deals in which corporate leaders seemed to be free from financial distress, hence possessing an unimpaired bargaining power that would have enabled them to effectively bargain for stakeholder protections.

First, we identified public companies that had publicly traded bonds that at the time of announcing the transaction had yields of less than 5%,   
which suggests that the market did not view these companies as facing financial distress.[[91]](#footnote-92) The data is collected from the TRACE database, which enables real-time access to bond price information, and is based on information provided by the Financial Industry Regulatory Authority (FINRA). We identified 21 companies that met such criteria, out of 24 transactions for which we were able to obtain data on bond yields.[[92]](#footnote-93) We term this subsample as the "low-yield subsample."

Second, we identified a subsample of companies that had seen a significant increase in stock price between the pre-pandemic date of January 1, 2020 and the sale of the company. Such increase in the target's market cap might also indicate that the company was perceived as financially sound by the market. In particular, we identified 31 companies whose unaffected share price prior to the announcement of the acquisition exceeded their stock price as of January 1, 2020 by at least 20%.[[93]](#footnote-94) We term this subsample as the "increased share price subsample."

We found that also in these subsamples, stakeholder protections were generally lacking. In particular, focusing on employee protections, we find that in both subsamples the vast majority of the deals did not limit the acquirer's ability to terminate target's employees following the acquisition, with only 6% of the increased share price subsample and 5% of the low-yield subsample containing limitations of this sort.

Additionally, we find that employees benefitted from transition periods for one year following the merger in 84% of the increased share price subsample and in 90% of the low-yield subsample. However, none of the increased share price transactions and only 10% of the low-yield transactions included a longer transition period. Lastly, our analysis shows that the target's employees received direct payments in 19% of the increased share price transactions and in 29% of the low-yield subset, with a modest average amount of $2.5 million and $8.7 million, respectively. These amounts represent only 0.2% and 0.4% of the gain to shareholders, and 1.4% and 6.8% of the gain to executives, respectively.

Turning to examine the treatment of other stakeholder groups, we find that none of the transactions in the examined subsamples contained any substantial commitment in favor of customers, suppliers, creditors or the environment. Commitments to retain the location of the target's headquarters following the merger were only found in 6% of the increased share price subsample and in 19% of the low-yield transactions. However, none of the increased share price transactions and only 5% of the low-yield transactions included further protections to local communities, such as local investment or philanthropic activities.

The pattern we found in the subsample of companies not facing financial distress is inconsistent with the hypothesis that the lack of stakeholder protection identified in the preceding Part is driven by companies whose bargaining position was especially weak due to distress.

## Deals on the Way to Normalcy

Another alternative explanation might be that, even when corporate leaders did not face economic or financial distress, they were under unusual pressure due to the radical uncertainty caused by the pandemic. On this view, the uncertainty caused by the pandemic induced corporate leaders to “play it safe” and therefore secure the deal without too much negotiation.

It is worth noting that this explanation is also in tension with the fact that corporate leaders in our sample obtained large gains for shareholders and for themselves. Given that the uncertainty caused by pandemic did not preclude corporate leaders to obtain significant value from the buyer, it is unclear why part of this value could not be allocated to stakeholders.

In any event, to test this argument empirically, we examined the subset of deals that were signed after April 2021, when the majority of the US population got vaccinated removing the threat of an unstoppable catastrophe. We identified a subset of 45 transactions that were announced between May 1, 2021 and November 30, 2021. We found that stakeholder protections were generally lacking in this subsample.

In particular, with regard to employee protections, we found that only two of the deals imposed (cosmetic) limitations on the acquirer's ability to layoff target's employees following the acquisition. In only 9% of the deals, the transition period granted to employees was longer than a year. Additionally, we found that the target's employees received direct payments in 27% of the transactions in this subset. The average amount paid to employees was $1 million, representing only 0.2% of the gain to shareholders and 1% of the gain to executives.

With regard to protections obtained for other stakeholder groups, we found that none of the recent transactions contained any substantial commitment in favor of customers, suppliers, creditors or the environment. Commitments to retain the location of the target's headquarters following the merger were documented in only 7% of the transactions, and only 4% of the transactions included additional pledges in favor of local communities or society at large.

The pattern we found in the subsample of companies is thus inconsistent with the hypothesis that our general findings are driven by deals concluded under conditions of radical uncertainty.

## Deals with Broad Shareholder Support

We next consider the potential argument that our general findings of the absence of stakeholder protections were driven by the need for shareholder approval. In particular, it might be argued that our findings are driven by corporate leaders' belief that shareholders would not have approved the purposed transaction if the leaders had bargained for any meaningful stakeholder protections and a somewhat lower deal premium. According to this alternative explanation, even if corporate leaders were interested in obtaining benefits for stakeholders, they were prevented from doing so by the need to obtain shareholder approval for the deal.

To test this argument, we examine a subset of deals in which the votes to approve the transaction exceeded the required threshold by a wide margin. In these cases, it was likely that corporate leaders would have been able to shift some of the surplus generated by the transaction to corporate stakeholders without jeopardizing the chances of obtaining shareholder approval.

To conduct this inquiry, we collected data on the outcome of shareholder votes related to mergers from the ISS Voting Analytics Database.[[94]](#footnote-95) We supplemented this data with voting results reported in 8-K forms that were filed with the SEC following the approval of the merger agreements by the shareholders of the target companies. We were able to obtain such data on 81 transactions, which constitute about 70% of the transactions in the entire sample.[[95]](#footnote-96) We then focused on a subset of 59 transactions in which the deal obtained support from more than 70% of the outstanding shares entitled to vote, examining whether corporate leaders managed to obtain some meaningful protections for stakeholders in such deals.

Consistent with the hypothesis that corporate leaders do not have incentives to serve stakeholders, we find that stakeholder protections were generally lacking in this subsample. Beginning our examination with employee protections, we find that the overwhelming majority of the deals widely-supported by shareholders did not impose any limitation on the acquirer's ability to layoff target's employees following the acquisition, with only 3% of the deals containing limitations of this sort, which were, in fact, cosmetic in nature.

We also find that continuing employees were offered pay protection for the first year following the merger in 81% of the transactions, whereas only in 7% of the transactions included a longer transition period. Focusing on direct payment to employees, we find that the target's employees received direct payments in 31% of the transactions in this subset. However, the average amount paid to employees was $5.6 million, representing only 0.4% of the gain to shareholders and 5.9% of the gain to executives.

Shifting our view to other stakeholders, we find that none of the widely-supported transactions contained any substantial commitment in favor of customers, suppliers, creditors or the environment. Additionally, commitments to retain the location of the target's headquarters following the merger were documented in 15% of the transactions, and only 5% the deals included further protections to local communities, such as local investment or philanthropic activities.

This pattern is inconsistent with the hypothesis that our general findings were driven by the need for shareholder approval.

## Deals without a Revlon Shadow

It might be argued that corporate leaders were deterred from seeking stakeholder protections by the concern that a court might review their decision under the Delaware Revlon doctrine. Under this doctrine, once a decision to sell the company has been reached, corporate leaders are obligated to obtain the highest price for shareholders. Note that this argument does not sit well with the pattern we document in the data, showing that corporate leaders obtained not only premiums for shareholders, but also significant benefits for the corporate leaders themselves.

In any event, for completeness, we set out to test this argument as well, by examining the subset of cases in which the Revlon doctrine could not apply. Consistent with existing literature, we used two parameters to deter-mine which transactions were subject to Revlon. First, the target company must have been incorporated in a state that had adopted Revlon. Second, the consideration paid in the transaction must have consisted of at least 50% cash.

Based on these criteria, we built a subset dataset consists of 42 deals: (1) four deals to acquire targets incorporated in states in which Revlon was explicitly rejected by judicial decisions (Indiana, Nevada, Pennsylvania and Ohio); and (2) 38 deals to acquire targets incorporated in Delaware, Maryland, and Michigan, which had all adopted Revlon, with the merger consideration consisting of less than 50% cash. The non-Revlon deals totaled about $356 billion, which constitute about 49% of the entire sample in value. These deals, thus, constitute an important part of our study.

Absent the prospect that the Revlon doctrine would be applied, it could be reasonably assumed that these corporate leaders will have more leeway to bargain for stakeholder protections, even if they come at the expense of shareholder gains. Nonetheless, the levels of protection offered to different corporate stakeholders in the Non-Revlon subsample are extremely limited.

Focusing on employee protections, we find that the overwhelming majority of the non-Revlon deals allowed the acquirer's to terminate the employment of the target's employees following the acquisition, with only 2% of the deals containing some sort of commitment to retain the target's employees following the merger.

Additionally, while 76% of the non-Revlon transactions offered the tar-get's continuing employees retained compensation for the first year, only 7% of the transactions extended this transition period beyond the first year following the merger. Lastly, we find that although target's employees received direct payments in 24% of the Non-Revlon transactions, the average amount paid to employees is very modest – $6 million, representing 0.3% of the gain to shareholders and 6.3% of the gain to executives.

Shifting our view to other stakeholders, we learn that none of the non-Revlon transactions contained any substantial commitment in favor of customers, suppliers, creditors or the environment. Additionally, commitments to retain the location of the target's headquarters following the merger were documented in 21% of the Non-Revlon transactions, and only 12% the Non-Revlon deals included further protections to local communities, such as local investment or philanthropic activities. We also find that none of the non-Revlon transactions allowed potential beneficiaries to enforce the commitments given in their favor.

This pattern is inconsistent with the hypothesis that our general findings were driven by the Revlon doctrine.

## Deals with a Stakeholderist Counsel

Next we would like to consider the possibility that, even though corporate leaders were interested in stakeholder protections, they were dissuaded from doing so by the advice of their legal counsel. On this view, corporate leaders might have been discouraged from seeking stakeholder protections if their counsel advised them that focusing on shareholder interests would be required by their duties or at least suggested by caution or good sense.

To explore whether this argument could drive our findings in the preceding Part, we examine a subset of deals in which the target was advised by a law firm widely known for its support for stakeholderism – Wachtell, Lipton, Rosen & Katz ("WLRK"). WLRK has long been associated with the use of stakeholder protection. The founder of the law firm, Martin Lipton, has proposed a “New Paradigm,” advocating a “director-centric stakeholder governance,” and has produced a substantial body of writing that supports managerial discretion and independence from shareholder pressure as a way to protect stakeholder interests. WLRK has also played a role in the World Economic Forum’s moving in this direction. Furthermore, they have stated clearly that in their view state corporate law, and in particular Delaware law, enables corporate leaders to give significant weight to stakeholders. There-fore, one might expect that targets advised by WLRK would become especially attentive to the possibility of protecting stakeholder interests.

We identified 17 deals in which WLRK was counsel. Whereas these deals were only 15% of the sample, they are significantly larger in value compared to the whole sample. WLKR deals have an aggregate acquisition consideration exceeding $190 billion and representing about 26% of the total acquisition prices of the sample as a whole. We then examined whether, given the presence of a stakeholder-oriented counsel, corporate leaders were much more willing to seek stakeholder protections.

As evident from the findings the levels of protections offered to corporate stakeholders in deals with WLRK representation, are extremely limited, and do not deviate significantly from the patterns we observed for the entire sample. None of the WLRK transactions introduced any limitation on the acquirer's ability to terminate the employment of the target's employees following the acquisition. Additionally, although 76% of the WLRK transactions contained the target's continuing employees retained compensation for the first year, in none of the transactions was this transition period extended beyond the first year following the merger. Lastly, we find that the target's employees received direct payments in four of the WLRK transactions, which constitute 24% of the subsample. However, the average amount paid to employees is only $6 million, which represents 0.1% of the gain to shareholders and 2.9% of the gain to executives.

With respect to other stakeholders, none of the WLRK transactions contained any substantial commitment in favor of customers, suppliers, creditors or the environment. Additionally, while commitments to retain the location of the target's headquarters following the merger were documented in 29% of the WLRK transactions, only one of the WLRK deals included further protections to local communities, such as local investment or philanthropic activities. Here, as well, we find that none of the transactions allowed potential beneficiaries to enforce the commitments given in their favor.

This pattern is inconsistent with the hypothesis that corporate leaders dissuaded from obtaining stakeholder protections by the advice of their le-gal counsel.

## Deals Governed by Constituency Statutes

It might be argued that, regardless of the identity of the target’s counsel, as long as the target is incorporated in Delaware, its corporate leaders might be influenced by the shareholder-focused approach of Delaware law. On this view, because a majority of the targets in our sample were incorporated in Delaware, Delaware’s pro-shareholders approach, or at least the perception that it has such an approach, could be the driver of our findings in the previous Part.

It is worth noting that, to the extent that Delaware incorporation provides such an impediment to stakeholder-favoring choices, that would by itself imply that stakeholderism cannot be relied on to produce substantial benefits to stakeholders of U.S. companies as supporters of stakeholderism argue. This is because a majority of U.S. public companies are currently incorporated in Delaware.

In any event, to explore whether this argument could drive our general findings, we looked at the subset of companies that were incorporated in states with constituency statutes. By adopting such statutes, these states made it patently clear that companies incorporated in these states are not subject to whatever pro-shareholder approach characterizes Delaware law. We were able to identify 12 transactions that were governed by constituency statutes.

Our findings show that stakeholder interests received no better treatment in deals that were subject to constituency statutes than in other subsets of our sample. Examining employee protections, we find that none of the deals imposed any limitations on the acquirer's ability to layoff target's employees following the acquisition. Continuing employees were granted a transition period that was longer than a year following the merger in only 17% of the transactions. Additionally, we find that the target's employees received direct payments in 33% of the transactions in this subset, with an average amount of only $2 million. This amount represents 0.3% of the gain to shareholders and 2.6% of the gain to executives.

Examining protections secured for other stakeholder groups, we find that none of the transactions subject to constituency statutes contained any substantial commitment in favor of customers, suppliers, creditors or the environment. Only of the transactions included a pledge in favor of local communities or society.

The pattern arising from our findings for this subset stands in tension with the hypothesis that our general findings are driven by deals negotiated under the influence of the shareholder-focused approach of Delaware law.

## Sales of Targets with High ESG Ratings

It might be argued that the lack of stakeholder protections might be due to the targets in our sample being ones that were largely less stakeholder-oriented than other public companies in general are. Such pattern could have been caused by the reluctance of companies that are stakeholder-oriented to be acquired, especially during the pandemic. According to this view, stakeholder-oriented companies were disproportionately absent from our sample of target firms, and this factor drove the lack of stakeholder protections.

There are good reasons, however, not to expect that the targets in our sample are, by and large, the ones with low ESG ratings. It might make sense, even for corporate leaders who are stakeholder oriented, to accept an acquisition offer that includes a large premium over the target share price. In such scenario, corporate leaders are expected to agree to the sale of the target, despite the lack of significant protections to stakeholders.

In any event, to test this argument, we identified a subset of companies in our sample that had high ESG ratings. The data is collected from three different databases: the JUST Capital database,[[96]](#footnote-97) Sustainalytics,[[97]](#footnote-98) and Employment Impact Data.[[98]](#footnote-99) We were able to match 75% of the targets in our sample with one of the databases described above. We, then, assigned each of these matched companies to their respective industry, based on each data set categorization. Finally, we identified target companies within our universe of deals that had high levels of stakeholder protection on one or more of the following four categories: employees, customers, communities, and environment (“stakeholder categories”). We considered a company as having a high performance on a given stakeholder category if the score for that category was higher than the industry average (i.e., the average score on the same category of the companies operating in the same industry) for the same category.

The separate ratings for each of the four stakeholder categories enabled us to conduct a granular analysis which takes into account the strengths of each of the analyzed set of target companies. In particular, transactions involving target companies that were found to perform above industry average in each category were inspected in search for protections covering the relevant stakeholder groups. Overall, 41% of the matched transactions involved targets with higher than the industry average score on employees; 7% of the matched transactions involved targets with above-average score for performance vis-à-vis communities; 9% of the matched transactions involving target companies with above-average score on customers; and 3% of the transactions involved target companies with above-average score for environmental aspects of their operation.

Commencing our analysis with employee protections, we find that only one of the employee-oriented subsample of transactions included some sort of limitation on the acquirer's ability to layoff target's employees following the acquisition. Only 11% of the transactions in this subsample offered continuing employees a pay protection for a transition period longer than a year (which is the typical transaction period). Lastly, we find that although the target's employees received direct payments in 19% of the transactions in this subsample, the average amount paid to employees was $2 million, representing only 0.27% of the gain to shareholders and 3.63% of the gain to executives.

Shifting our view to the other stakeholder subsamples, we find that *none* of the transactions included commitments in favor of local communities or society at large, any substantial protections for customers, or any significant environmental pledges. Here as well, it is worth noting that none of the deals included in any of the subsamples conferred upon any of the stakeholder groups the right to enforce these minimal pledges given in their favor.

This pattern stands in tension with the hypothesis that our general findings are driven by the absence of transactions involving stakeholder-inclined target companies.

## Sales to Buyers with Poor ESG Ratings

It might also be argued that the lack of stakeholder protections was due to corporate leaders selecting in the first place stakeholder-oriented buyers. Therefore, the argument proceeds, this choice of buyers assured corporate leaders, at the time of negotiating the agreement, that target stakeholders would not face risks following the consummation of the transaction, and thus made securing stakeholder protections unnecessary.

There are good reasons, however, not to expect that the buyers in our sample are, by and large, the ones with high ESG ratings. Even if corporate leaders are stakeholder oriented, that does not mean they should generally sell to buyers with high ESG ratings. Sometimes a buyer with low ESG rating might generate the highest synergy and surplus following the transaction, and thus might be willing to pay a large price to the target shareholders. In such scenario, corporate leaders are expected to agree to the sale of the target, albeit the potential risks to stakeholders.

In any event, to test this argument, we identified a subset of transactions in our sample that involved buyers with poor ESG ratings. In such transactions, the record of the buyers with regards to their poor treatment of corporate stakeholders should not eliminate concerns regarding potential risks to employees or other stakeholder groups, hence highlighting the importance of bargaining for stakeholder protections. To gather this information, we used a similar methodology to that described above in Section V.G.

We were able to match 59% of the acquirers in our sample to datasets that provide ESG rating.[[99]](#footnote-100) Of those matched acquirers, 51% performed below the industry average on one or more of the four stakeholder categories. In particular, 28% of the matched transactions involved acquirers with lower than the industry-average score on employees (we term this subsample as the “employee-hazardous subsample”); 25% of the matched transactions involved acquirers with below-average score for performance vis-à-vis communities (we term this subsample as the “communities-hazardous subsample”); 29% of the matched transactions involving target companies with above-average score on customers; and 30% of the matched transactions involving acquirers with below-average score for environmental aspects of their operation.

Similar to the analysis described above in section V.G, our current analysis was segmented by stakeholder categories. Thus, transactions involving acquirer companies that were found to perform below industry average in one or more of the categories were inspected for protections covering the relevant stakeholder groups.

Examining employee protections first, we find that none of the employee-hazardous transactions included substantial limitations on the acquirer's ability to layoff target's employees following the acquisition. An exception to this was the People's United acquisition, which contained an "intention" (rather than a commitment) of the buyer to retain "as many employees of the Company […] as feasible". We also find that only 11% the acquirers in this subsample offered continuing employees a pay protection for a transition period that is longer than a year. Lastly, we find that the target's employees received direct payments in only 16% of the transactions in this subset. These payments were of a modest average amount of $1 million, which amounts to 0.2% of the gain to shareholders and 1.7% of the gain to executives.

Focusing on communities, we find that commitments to retain the location of the target's headquarters following the merger were documented in 12% of the communities-hazardous transactions, with only one of the transactions including a commitment by the acquirer to contribute funds to a charitable foundation aimed at supporting "community development and reinvestment". Turning to examine protections for customers or the environment, we find that none of the transactions in these subsets contained any relevant protections for these stakeholders.

Overall, this pattern stands in tension with the hypothesis that our general findings are driven by transactions involving stakeholder-inclined acquirers, which made securing stakeholder protections unnecessary.

## Deals During the Year Preceding the Pandemic

Finally, it might be argued that the pandemic is an exceptional period that creates significant business uncertainty, and increases the risk of financial instability and distress. During this period, corporate leaders were in no position to negotiate for stakeholder protections; however, in regular times, they could be relied on to deliver value to stakeholders.

As we noted in Section VI.A., notwithstanding any financial pressures and uncertainty that corporate leaders faced during the pandemic, they were able to obtain large gains for their shareholders as well as for themselves. Therefore, they could also have obtained some protections for stakeholders.

In any event, to further test this argument, we looked at a sample of large deals that were announced during the year prior the pandemic. During this period, stakeholder interests already received large support from issuers and investors and the Business Roundtable statement came out.[[100]](#footnote-101) We were able to identify a subset of 17 transactions valued above $10 billion that were announced between January 1, 2019 and February 1, 2020 (the "Pre-Covid Deals"). Our findings suggest that stakeholder protections were not offered in abundance during this period as well.

Beginning with employee protections, we found that none of the Pre-Covid Deals included any limitations on the acquirer's ability to layoff target's employees following the acquisition. Additionally, we found that although the target's employees received direct payments in 41% of the Pre-Covid Deals, the amount paid to employees had a mean of $9 million, representing only 0.2% of the gain to shareholders and 2% of the gain to executives.

Turning to examine protections secured for other stakeholder groups, we find that none of the Pre-Covid Deals contained any substantial commitment in favor of customers, suppliers, creditors or the environment. Commitments to retain the location of the target's headquarters following the merger were only documented in one of the transactions. Similarly, only one of the transactions included additional pledges in favor of local communities or society at large.

Whether the results for the Pre-Covid Deals are compared to our entire sample or to the Largest Deal Subsample, they present a pattern that is consistent with the post-Covid deals. This undermines the argument that our findings are driven by the special conditions induced by the pandemic.

More broadly, our findings indicate that none of the nine potential explanations mentioned in this Part could have driven the general pattern of no stakeholder protections that we documented in the preceding Parts. It is thus more likely that the trends identified in our study are attributable to corporate leaders' lack of incentives to serve the interests of stakeholders beyond the overlapping zone with the interests of shareholders.

# Implications and Objections

In this Part we examine the implications of our findings, and we address several potential objections to our conclusions. The main implication of our study, we argue, is that we should not rely on the use of managerial discretion to mitigate corporate externalities. We also discuss several objections regarding characteristics of our sample or alternative justifications for the decisions made by corporate leaders, and we explain why we believe that these objections do not succeed in challenging our main conclusions.

## Implications: What Corporate Leaders Can Be Expected to Do

Having ruled out, in Part VI, several potential alternative explanations, we concluded that the most likely driver of our findings is that corporate leaders lack incentives to deliver value to stakeholders at the expense of shareholders. In fact, given the design of their compensation arrangements, the structure of the labor market and the corporate control market, and the other incentives they face, corporate leaders have incentives not to deliver value to stakeholders beyond what is instrumentally useful to increase shareholder value. This fact conflicts with the belief of stakeholderism advocates, who expect corporate leaders to give weight to the interests and welfare of stakeholders, either because doing so is part of the purpose of the corporation (purpose-based theory) or because they implicitly promised to do so in order to induce stakeholders to invest their skills into the company (implicit promise and team production theories).

The main implication of this fact is that we should not expect corporate leaders to use their discretion to reduce corporate externalities. A central claim of stakeholderism is that corporate social responsibility can be an effective tool to address pressing social problems, such as climate change, economic inequality, or discrimination of minorities. For example, a large number of major companies have been issuing pledges and statements in which they commit to reduce their carbon emissions to zero within a certain timeframe, and some experts believe that such private-ordering solutions to climate change are more promising than climate regulation.

Yet, if corporate leaders choose not to protect the environment, employees, or other stakeholders in a moment when stakeholders needed extraordinary protection and shareholders enjoyed a booming market, we cannot expect them to protect stakeholders in normal times. Thus, our findings warn policymakers and concerned citizens not to rely on the discretion of corporate leaders and to pursue instead, with a renewed sense of urgency, regulatory solution to climate change and other pressing social problems.

## Objections

We now turn to examine several potential objections to our conclusions above. Some of these objections question the characteristics of our sample, others provide justifications for our findings that do not imply the general unreliability of managerial discretion to benefit stakeholders. However, none of these objections, we argue, refute our main conclusions.

### Acquired Companies Are Different?

It might be argued that stakeholder-oriented corporate leaders would simply reject acquisition offers and would instead retain long-term independence precisely because an independent company is a more favorable scenario for employees, local communities, local suppliers, and other stakeholders. According to this view, our sample, which consists of affirmative decisions to sell the company, will be disproportionately composed by corporate leaders with little regard for stakeholders. This theory suggests that our finding cannot be generalized to all corporate leaders and therefore we cannot conclude that corporate leaders are not stakeholder-oriented, because the vast majority of stakeholder-oriented corporate leaders can be found outside our sample, among those who choose not to sell their companies.

However, this theory does not persuasively explain why stakeholder-oriented corporate leaders would refuse to sign a deal that produces a significant surplus and keep the company independent rather than sell the company and distribute part of that surplus to stakeholders. Indeed, whenever a sale entails a large surplus, like in most of the deals in our sample, it is plausibly in the best interests of stakeholders to complete the sale and allocate to them part of the surplus rather than to keep the company independent and forgo any surplus.

Thus, if many corporate leaders were stakeholder-oriented, as this theory suggests, one would expect to find many completed sales producing significant surplus and providing, at the same time, significant protections to stakeholders. The fact that we largely do not find such deals is strong evidence against such alternative hypothesis.

### Prohibitive Costs of Contractual Protections?

It might be argued that including stakeholder protections in the merger agreement is prohibitively costly and therefore the absence of such protections does not imply that corporate leaders do not deliver other, less expensive, benefits to stakeholders. This argument is based, in particular, on the observation that a prohibition to lay-off employees or to relocate the company headquarters create constraints that may potentially have huge efficiency losses in the future. Therefore, the cost of obtaining such protections from a buyer is exceedingly large.

In this hypothesis, stakeholderism is perhaps unable to provide contractual protections in an acquisition but could nonetheless provide many other forms of protections in the ordinary course of business. According to this view, the conclusions of our study cannot be generalized beyond the specific context of corporate acquisitions.

The objection is unconvincing. To begin with, as explained in Section II.B.4, the transactions examined in our study are of significance economic relevance, and therefore even if our conclusions were not generalizable, our findings would still be a serious indictment for stakeholderism.

Furthermore, the assertion that contractual protections for stakeholders are exceedingly costly is unsubstantiated. Protections for some stakeholders—for example, employees—may be provided in ways that do not limit the buyer’s freedom to make efficient business decisions, but rather impose pre-determined costs. For example, instead of a prohibition to layoff employees, corporate leaders could have bargained for a cash payment to be paid to each laid-off employee. The absence of these kinds of protections with predictable, pre-quantified costs suggest that the above argument is not a relevant factor driving our findings.

### Stakeholders Were Still Made Better Off by the Acquisition?

It might be argued that, despite the absence of contractual provisions in favor of stakeholders, stakeholders were still made better off by the acquisition, either through soft pledges that cannot be observed in the transaction documents or through the selection of a stakeholder-friendly buyer.

* 1. Soft Pledges

One version of this theory is that corporate leaders might have negotiated informal commitments in favor of stakeholders. On this view, contractual protections are hard to specify, and therefore stakeholder-oriented corporate leaders decide to protect stakeholders through unobservable soft pledges.

It is not clear, though, why corporate leaders are able to design formal contractual protections for shareholders, directors, and executives but not for employees and other stakeholders. For example, an extraordinary severance payment for laid-off employees is relatively easy to specify and formalize, and there is no plausible reason why corporate leaders would prefer a “soft pledge” to such a simple and effective protection, other than the reluctance to reallocate value from shareholders to employees.

Furthermore, even if corporate leaders did obtain soft pledges from the buyer, it is debatable whether stakeholders would receive any meaningful benefits from them. Typically, soft pledges are so vague that holding someone accountable for them is extremely difficult. Also, even if the scope of the pledge were sufficiently defined, there is no enforcement mechanism that can ensure that stakeholders receive the promised benefit. In particular, in addition to the absence of formal enforcement mechanisms, the individuals who have negotiated the soft pledges might have well left the company by the time the pledge must be enforced. These obvious problems are probably the reason why corporate leaders typically make sure that their own benefits and rights are documented in formal agreements.

* 1. Stakeholder-Friendly Buyer

Another version of this theory is that corporate leaders might benefit stakeholders through the choice of a stakeholder-friendly buyer and the rejection of potential buyers that would be hostile to stakeholders. On this account, stakeholder-oriented corporate leaders accepted the offers of buyers that would not pose major risks to stakeholders and rejected (or would have rejected) the offers of alternative, less stakeholder-friendly bidders, even if such alternative offers included a higher premium. Since we only observe the offers that have been accepted, we cannot identify all the cases in which corporate leaders, in order to protect stakeholders, rejected acquisition offers favorable to shareholders, our study cannot rule out the possibility that corporate leaders did in fact deliver significant value to stakeholders.

However, this objection ignores the simple fact that corporate leaders can negotiate stakeholder protections at no additional cost for the buyer, but in exchange for a reduced premium. Therefore, there is no systematic reason why corporate leaders, in order to protect stakeholders, should reject a high-premium deal that creates risks for stakeholders rather than negotiating explicit protections for stakeholders for a somewhat lower premium.

Furthermore, as we documented in Section V.A., in many of the deals in our sample, corporate leaders were aware, at the time of entering into the deal, that the merger would produce adverse consequences for stakeholders. In all those cases, the hypothesis of a stakeholder-friendly buyer cannot explain the lack of explicit protections.

### Stakeholders Protected by Their Own Contracts?

It might be argued that explicit stakeholder protections are unnecessary because stakeholders are sufficiently protected by the terms of their own contracts with the company. Employees, for example, might not need job protections because of severance payments included in their contracts. Therefore, the reason why we do not find stakeholder protections is not because corporate leaders do not give weight to stakeholder interests but because these protections are already included in the regular contracts with stakeholders.

This argument, however, is hardly persuasive. To begin with, employees of U.S. companies enjoy an unusually limited set of statutory protections, compared to other OECD countries.[[101]](#footnote-102) For example, unlike in most other developed economies, severance pay in case of individual dismissals or mass layoffs is not mandated by the law, and therefore is a matter of individual agreements between employers and employees.[[102]](#footnote-103) Furthermore, the vast majority of U.S. workers do not belong to a labor union and do not have an employment contract, and therefore they are typically not entitled to any severance payments.[[103]](#footnote-104) Finally, even those employees who do receive a severance payment typically receive a quite limited sum, between one and two weeks for each year of service.[[104]](#footnote-105)

Most importantly, one of the central rationales for stakeholderism is precisely that contractual protections do not sufficiently address stakeholder risks. Indeed, the argument that stakeholders can take care of themselves through their contracts with the company is the standard argument used by contractarians and laissez-faire advocates to argue against stakeholderism, not in favor of it.[[105]](#footnote-106) If stakeholderism does not deliver benefits to stakeholders in addition to their contractual protections, it means that it has failed to deliver on one of its central promises.

### Design Conventions and Inertia?

A further possible objection is that stakeholder protections in merger agreements are simply unconventional and against market practice, and therefore even corporate leaders who give substantial weight to stakeholder interests find it difficult to change the way things are usually done. On this view, much of M&A contractual practice is driven by conventions and standardized models, and stakeholder protections would be a radical innovation, therefore difficult to implement.

However, this objection seems to ignore the sophistication of the actors involved. The deals in our samples were designed by highly skilled, highly paid experts who are perfectly capable to devise and implement contractual innovations. In fact, they often do so to adapt standard terms to deal-specific circumstances or to respond to legal or business changes.[[106]](#footnote-107)

Therefore, if corporate leaders (perhaps as a consequence of the alleged move away from shareholder primacy towards stakeholderism) truly had incentives to provide protections for stakeholders, their skilled advisors would certainly find a way to design adequate contractual solutions to that end.

### End-Period Exceptionalism?

A final possible objection to our conclusions is that our findings are valid only with respect to end-period decisions, such as the sale of the company, but non with respect to ongoing business decisions. On this view, the decisions made by corporate leaders when selling the company are different from other kinds of decisions made during the regular life of the company, because after the sale the company ceases to exist as an independent entity and corporate leaders leave their position and are no longer in the same relationship with shareholders and stakeholders.

Although it is true that end-period decisions present peculiar characteristics and may systematically differ from ongoing business decisions, acquisitions are corporate transactions of huge economic value, and therefore even if our findings were valid solely within this context, they would still reveal a major failure of stakeholderism. Furthermore, it is not clear why corporate leaders should be expected to be less stakeholder-friendly in end-period decisions than in ongoing business decisions. Indeed, during the regular life of the company, corporate leaders need to be more, not less, responsive to the interests of shareholders, as they have to win their favor for subsequent reelections. In fact, in the corporate governance literature, end-period decisions are considered to be at risk of being less aligned with shareholder interests.

Therefore, one could plausibly argue that corporate leaders willing to benefit stakeholders enjoy more freedom to do so in an end period, such as the sale of the company, precisely because they can sacrifice shareholder value with less fear of consequences. On this alternative view, our findings are even more telling, since stakeholder-oriented corporate leaders should be expected to be more, not less, inclined to bargain for stakeholder protections in a merger agreement rather than in an ongoing business agreement.

# Conclusion

Focusing on the large wave of corporate deals that took place during the Covid pandemic, this Article investigated the extent to which corporate choices delivered value to stakeholders. The time of Covid was a period that was accompanied by peak support for stakeholderism from corporate leaders, heightened concerns about the plight of stakeholders, and propensity for shareholders generated by booming stock markets. Nonetheless, we find that, although corporate leaders negotiated for substantial gains for shareholders and for themselves, they did little to negotiate for protections for employees or any other stakeholder groups. Stakeholder capitalism failed to deliver in the time of Covid.

Our findings support the view that corporate leaders have incentives not to serve the interests of stakeholders beyond what would be good for shareholders, not to attach independent weight to such interests as element of corporate purpose, and not to act in ways that reflect alleged implicit promises to treat stakeholder well in an acquisition. These findings have implications for the ongoing debate on stakeholderism, and they caution against accepting or relying on the claims made by its supporters.

Corporate leaders, our findings suggest, should not be expected to deliver value to stakeholders even if and when they employ stakeholderist rhetoric. Those who take stakeholder concerns seriously, as we do, should thus seek not rely on corporate leaders, but rather focus on seeking governmental reforms that would protect stakeholders in a wide range of areas. In particular, those concerned about climate change risks should recognize that corporate rhetoric on the subject cannot be expected to contribute meaningfully to addressing such risks and should focus on facilitating the major governmental actions (such as carbon taxes) that would be essential to meeting the challenges posed by climate risks.

1. \* James Barr Ames Professor of Law, Economics, and Finance, and Director of the Program on Corporate Governance, Harvard Law School. [↑](#footnote-ref-2)
2. † Assistant Professor, Tel Aviv University Faculty of Law; Senior Research Fellow and Lecturer on Law, Harvard Law School. [↑](#footnote-ref-3)
3. ‡ Lecturer on Law, Terence M. Considine Senior Fellow in Law and Economics, and Associate Director of the Program on Corporate Governance, Harvard Law School.

   We would like to thank Alec Johnson, Ariella Kahan, Peter Morgan, and Anna Toniolo for their excellent research assistance. We are especially grateful to Roee Amir for his invaluable research assistance throughout our work on this Article. We have also benefited from the suggestions of John Coates, Alma Cohen, Jared Ellias, Jesse Fried, Scott Hirst, Mark Roe, and event participants in three Harvard Law School workshops, the LBS-FT virtual debate on stakeholder capitalism, and a Columbia Law School conference. The Harvard Law School Program on Corporate Governance and the John M. Olin Center for Law, Economics and Business provided financial support.

   This Article is part of the research project on stakeholder capitalism of the Harvard Law School Program on Corporate Governance. Companion articles written as part of the project are Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. 91 (2020); Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain* 93 S. Cal. L. Rev. (forthcoming 2021); and Lucian A. Bebchuk and Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?* 75 Vand. L. Rev. (forthcoming 2022). [↑](#footnote-ref-4)
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 have 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 in this study we found little protection of stakeholders, consistent with the agency critique of stakeholderism, skeptics have questioned the significance and generalizability of our findings. In particular, it was argued by discussants of our work in conferences 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 on deals largely concluded before the recent rise of support for stakeholderism; and that the deals we investigated were overall of limited economic significance.

    We therefore designed the current study to be robust to such objections. This design enables us to study the subject using a sample of deals with major economic significance that includes a large incidence 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 put together 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)
14. *See* Business Roundtable, *Statement on the Purpose of Corporation* (Aug. 19, 2019), [https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCor­porationOctober2020.pdf](https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf); *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, World Econ. F. (Dec. 2, 2019), https://www.weforum.org/ agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company­in-the-fourth-industrial-revolution/. [↑](#footnote-ref-15)
15. *See generally* Mayer, Prosperity, *supra* note 10; Colin Mayer & Bruno Roche, *Introduction*, in Putting Purpose Into Practice: The Economics of Mutuality (Colin Mayer & Bruno Roche eds. 2021), at 11; Robert G. Eccles & Tim Youmans, *Materiality in Corporate Governance: The Statement of Significant Audiences and Materiality*, 28 J. Applied Corp. Fin. 39 (2016); Enacting Purpose Initiative, Enacting Purpose Within the Modern Corporation: A Framework for Boards of Directors (2020), <https://enactingpurpose.org/assets/enacting-purpose-initiative---eu-report-august-2020.pdf>. [↑](#footnote-ref-16)
16. For a discussion of the view that “intrinsic motivation” drives directors to “do a good job,” see, for example, John Armour, Jeffrey Gordon, & Geeyoung Min, *Taking Compliance Seriously*, 37 Yale J. Reg. 1, 36-37. [↑](#footnote-ref-17)
17. Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, *in* Corporate Takeovers: Causes and Consequences 33 (Alan J. Auerbach ed., 1988). [↑](#footnote-ref-18)
18. John C. Coffee, Jr., *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 Wis. L. Rev. 435. [↑](#footnote-ref-19)
19. Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247 (1999). [↑](#footnote-ref-20)
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)
21. Two of us have developed such critique in Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. 91 (2020). Other scholars who have drawn attention to the incentive problem of stakeholderism are Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*,118 Harv. L. Rev. 833, 908–13 (2005);Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*,93 Va. L. Rev. 675, 729–32(2007); Robert C. Clark, *Harmony or Dissonance? The Good Governance Ideas of Academics and Worldly Players*,70 Bus. Law. 321, 338 (2015);Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 Wake Forest L. Rev. 761, 768 (2015); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?* 99 Texas L. Rev. 1309 (2021). [↑](#footnote-ref-22)
22. For a detailed analysis of corporate leaders’ incentives, see Bebchuk & Tallarita, *supra* note 18, at 140-155. [↑](#footnote-ref-23)
23. Business Roundtable Redefines the Purpose of a Corporation to Promote ‘an Economy that Serves All Americans’, Bus. Roundtable (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [↑](#footnote-ref-24)
24. *See* Bebchuk & Tallarita, *supra* note 18, at 124-127. [↑](#footnote-ref-25)
25. Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, World Econ. F. (Dec. 2, 2019) <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution>. [↑](#footnote-ref-26)
26. Martin Lipton, Steven A. Rosenblum & Karessa L. Cain, *Thoughts for Boards of Directors in 2020*, Harv. L. Sch. F. on Corp. Governance (Dec. 10, 2019), <https://corpgov.law.harvard.edu/2019/12/10/thoughts-for-boards-of-directors-in-2020>. [↑](#footnote-ref-27)
27. Joshua Bolten, *A Good Year for Stakeholder Capitalism*, Wall St. J., Aug. 18, 2020, <https://www.wsj.com/articles/a-good-year-for-stakeholder-capitalism-11597792536>. [↑](#footnote-ref-28)
28. Business Roundtable, *Business Roundtable Marks Second Anniversary of Statement on the Purpose of a Corporation*, Aug. 19, 2021, <https://www.businessroundtable.org/business-roundtable-marks-second-anniversary-of-statement-on-the-purpose-of-a-corporation>. [↑](#footnote-ref-29)
29. World Economic Forum, Stakeholder Principles in the Covid Era (April 2021), <http://www3.weforum.org/docs/WEF_Stakeholder_Principles_COVID_Era.pdf>. [↑](#footnote-ref-30)
30. Pippa Stevens, *Stakeholder Capitalism Set To Become ‘More And More Important,’ Says Blackrock’s Fink*, CNBC.com, <https://www.cnbc.com/2020/07/17/stakeholder-capitalism-set-to-become-more-and-more-important-says-blackrocks-fink.html>. [↑](#footnote-ref-31)
31. Salesforce, *Stakeholder Capitalism*, Saleforce.com, <https://www.salesforce.com/company/stakeholder-capitalism/>. [↑](#footnote-ref-32)
32. Business Roundtable, *Our Commitment to Our Employees and Communities*, <https://opportunity.businessroundtable.org/>. [↑](#footnote-ref-33)
33. *See generally,* Stavros Gadinis & Amelia Miazad, A Test of Stakeholder Capitalism, J. Corp. L. (forthcoming 2021), <https://ssrn.com/abstract=3869176>.  [↑](#footnote-ref-34)
34. *Id*., manuscript at 40-48. [↑](#footnote-ref-35)
35. David Katz & Laura A. McIntosh, *Corporate Governance Update: EESG and the COVID-19 Crisis*, Harv. L. Sch. F. On Corp. Governance (May 31, 2020), <https://corpgov.law.harvard.edu/2020/05/31/corporate-governance-update-eesg-and-the-covid-19-crisis/>. [↑](#footnote-ref-36)
36. We searched the Factiva database for the text “stakeholders,” region “United States,” and news filter subject “Press Releases” for the period between January 1, 2000 to August 31, 2021. [↑](#footnote-ref-37)
37. U.S. Bureau of Labor Statistics, Labor Force Statistics for the Current Population Survey, Unemployed Persons by Duration of Unemployment, <https://www.bls.gov/web/empsit/cpsee_e10.htm>. [↑](#footnote-ref-38)
38. *See* U.S. Department of Treasury, *Covid-19 Economic Relief*, Treasury.gov, <https://home.treasury.gov/policy-issues/coronavirus>. [↑](#footnote-ref-39)
39. *See, e.g.*, Alicia Adamczyk, *Pandemic Unemployment Benefits End in September and States Aren’t Extending Them*, CNBC.com, Aug. 31, 2021, https://www.cnbc.com/2021/08/31/federal-unemployment-benefits-end-in-a-week-states-wont-extend-them.html. [↑](#footnote-ref-40)
40. For a discussion of some potential corporate responses to Covid for the benefit of employees, see Just Capital, Covid-19 Resource Center, <https://justcapital.com/covid-19/>. [↑](#footnote-ref-41)
41. *See* Alexander Cheema-Fox, Bridget Realmuto LaPerla, George Serafeim, & Hui Wang, *Corporate Resilience and Response to Covid-19*, 33 J. Applied Corporate Fin., Spring 2021, 25-26. [↑](#footnote-ref-42)
42. Pew Research Center, *A Year into the Pandemic, Long-Term Financial Impact Weighs Heavily on Many Americans*, Mar. 5, 2021, <https://www.pewresearch.org/social-trends/2021/03/05/a-year-into-the-pandemic-long-term-financial-impact-weighs-heavily-on-many-americans/>. [↑](#footnote-ref-43)
43. Natalia Martín Fuentes & Isabella Moder, *The Scarring Effects of Covid-19 on the Global Economy*, Voxeu, Feb. 5, 2021, https://voxeu.org/article/scarring-effects-covid-19-global-economy. [↑](#footnote-ref-44)
44. Luke Bartholomew & Paul Diggle, *The Lasting Impact of The Covid Crisis on Economic Potential*, Voxeu, Sep. 21, 2021, <https://voxeu.org/article/lasting-impact-covid-crisis-economic-potential>. [↑](#footnote-ref-45)
45. Eduardo Levy Yeyati & Federico Filippini, *Social and Economic Impact of Covid-19*, Brookings Global Working Paper No. 158 (June 2021), <https://www.brookings.edu/research/social-and-economic-impact-of-covid-19/>. [↑](#footnote-ref-46)
46. Data collected from FactSet. Total return assumes the reinvestment of all dividends. [↑](#footnote-ref-47)
47. Patti Domm, *How the Pandemic Drove Massive Stock Market Gains, and What Happens Next*, CNBC.com (Dec. 30, 2020), <https://www.cnbc.com/2020/12/30/how-the-pandemic-drove-massive-stock-market-gains-and-what-happens-next.html>. [↑](#footnote-ref-48)
48. Data collected from FactSet. [↑](#footnote-ref-49)
49. Jennifer F. Fitchen and Brent M. Steele, *Energizing the M&A Market Post-Crisis*, Harv. L. Sch. F. on Corp. Governance (Mar. 30, 2021), <https://corpgov.law.harvard.edu/2021/03/30/energizing-the-ma-market-post-crisis>. [↑](#footnote-ref-50)
50. *See* Nina Trentmann, *Cash-Laden Companies Are on a Mergers and Acquisitions Spree*, Wall St. J. (Jul. 3, 2021, 10:00 AM), <https://www.wsj.com/articles/cash-laden-companies-are-on-a-mergers-and-acquisitions-spree-11625320800>. [↑](#footnote-ref-51)
51. Luisa Beltran, *Megadeals Are Making a Roaring Comeback. Why They Lead the M&A Market*, Barron's (Jun. 4, 2021, 2:13 PM), <https://www.barrons.com/articles/megadeals-mergers-acquisitions-51622830372>. [↑](#footnote-ref-52)
52. Darragh Byrne, Marc Petitier & Guy Potel, *Surging M&A megadeals top records in Q2,* White & Case M&A Explorer (Jul. 26, 2021), [https://mergers.whitecase.com/highlights/surging-ma-megadeals-top-records-in-q2#](https://mergers.whitecase.com/highlights/surging-ma-megadeals-top-records-in-q2)!. [↑](#footnote-ref-53)
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 analyze the final contractual terms, we draw 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 the middle of November, 2020, both Pfizer and Moderna announced that their vaccines were found to be 95% effective in preventing COVID-19, and a week later Moderna reveales that its vaccine shows 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)
58. *See* Steven N. Kaplan & Per Strömberg, *Leveraged Buyouts and Private Equity*, 23 J. Econ. Persps. 121, 124 (2009) (stating that private equity acquisitions are typically financed with sixty to ninety percent debt). [↑](#footnote-ref-59)
59. *See* Josh Lerner et al., Venture Capital & Private Equity: A Casebook 69–75 (3d ed. 2005) (discussing trends in the compensation structure of private equity funds); Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. Rev. 1, 5–7 (2008) (discussing the organizational structure and compensation practices of private equity funds); Robert J. Jackson, Jr., *Private Equity and Executive Compensation*, 60 UCLA L. Rev. 638, 640 (2013) (analyzing how executive compensation in companies owned by private equity firms differs from executive compensation in public companies, and concluding that “private equity investors tie CEO pay much more closely to performance than do the boards of directors of otherwise similar public companies”); Kaplan & Strömberg, *supra* note 55, at 130–31 (“[P]rivate equity firms pay careful attention to management incentives in their portfolio companies. They typically give the management team a large equity upside through stock and options . . . . Private equity firms also require management to make a meaningful investment in the company, so that management not only has a significant upside, but a significant downside as well.”). [↑](#footnote-ref-60)
60. See, e.g., Steven J. Davis, John Haltiwanger, Kyle Handley, Ben Lipsius, Josh Lerner & Javier Miranda, *The (Heterogenous) Economic Effects of Private Equity Buyouts* 1 (NBER, Working Paper No. w26371, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3469398 [<https://perma.cc/22CF-888V>] (examining thousands of U.S. private equity buyouts from 1980 to 2013 and finding that employment at target firms shrinks 13 percent over 2 years in buyouts of publicly listed firms relative to control firms, and that average earnings per worker fall by 1.7 percent at target firms after buyouts, largely erasing a pre-buyout wage premium relative to control group). [↑](#footnote-ref-61)
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)
64. For an analysis of how deal terms affect outcomes, see Fernán Restrepo & Guhan Subramanian, *The New Look of Deal Protection*, 69 Stan. L. Rev. 1013 (2017). [↑](#footnote-ref-65)
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)
69. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance* 106 Cornell L. Rev. 91, 117 (2020). [↑](#footnote-ref-70)
70. Companies Act, 2006, c. 46, §172 (Eng.). [↑](#footnote-ref-71)
71. Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, World Econ. F. (Dec. 2, 2019) [hereinafter *Davos Manifesto 2020*], https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution [<https://perma.cc/P8VW-XSTU>]; *see also* Klaus Schwab, *Why We Need the ‘Davos Manifesto’ for a Better Kind of Capitalism*, World Econ. F. (Dec. 1, 2019), https://www.weforum.org/agenda/2019/12/why-we-need-the-davos-manifesto-for-better-kind-of-capitalism [<https://perma.cc/62J6-89ME>]. [↑](#footnote-ref-72)
72. Schedule 14D-9 from Pluralsight, Inc. (Mar. 12, 2021), available at https://www.sec.gov/Archives/edgar/data/0001725579/000119312521079883/d135182dsc14d9.htm. [↑](#footnote-ref-73)
73. Schedule 14A from Monmouth Real Estate Investment Corporation (Jul. 23, 2021), available at https://www.sec.gov/Archives/edgar/data/0000067625/000114036121025517/nt10026422x6\_defm14a.htm) [↑](#footnote-ref-74)
74. Form 8-K from Investors Bancorp, Inc. (Jul. 28, 2021), available at https://www.sec.gov/Archives/edgar/data/0001594012/000119312521231662/d164917d425.htm [↑](#footnote-ref-75)
75. Form 8-K from Medallia, Inc., (Jul. 25, 2021), available at https://www.sec.gov/Archives/edgar/data/0001540184/000119312521225815/d148042ddefa14a.htm [↑](#footnote-ref-76)
76. Schedule 14A from Oasis Midstream Partners LP (Dec. 30, 2021), available at https://www.sec.gov/Archives/edgar/data/1652133/000119312521370683/d213316ddefm14a.htm [↑](#footnote-ref-77)
77. Representative examples: (i) "nothing in this Section 6.11 shall obligate the Surviving Entities and their respective Subsidiaries to continue the employment of any Continuing Employee for any specific period" (Pluralsight, Inc.); (ii) "neither this Section 6.11 nor any provisions of this Agreement relating to Company Benefit Plans will be deemed to (i) guarantee employment for any period of time for, or preclude the ability of Parent, the Surviving Corporation or any of their respective Subsidiaries to terminate any Continuing Employee for any reason; […] (iii) create any third party beneficiary rights in any Person;" (Medallia, Inc.). [↑](#footnote-ref-78)
78. Schedule 14A from People’s United Financial, Inc. (Apr. 23, 2021), available at https://www.sec.gov/Archives/edgar/data/1378946/000119312521129023/d154318ddefm14a.htm [↑](#footnote-ref-79)
79. Form 8-K from Tristate Capital Holdings, Inc. (Oct. 20, 2021), available at https://www.sec.gov/Archives/edgar/data/0001594012/000119312521231662/d164917d425.htm [↑](#footnote-ref-80)
80. Merger agreement of At Home Group Inc: "[…] excluding any equity award or other long-term compensation opportunities". [↑](#footnote-ref-81)
81. Merger agreement of Weingarten Realty Investors: "[…] and (iii) health and welfare benefits (other than severance benefits) that are substantially similar"; Merger agreement of Flagstar Bancorp: "employee benefits (other than severance) that are no less favorable […]". [↑](#footnote-ref-82)
82. We have recognized 5 common options for this dimension: 1) Retention of compensation & benefits; 2) Retention of compensation; 3) Retention of benefits; 4) Service Credit / Waiver of benefit plan conditions; 5) None. Only the first option was considered as "Yes". [↑](#footnote-ref-83)
83. The SEACOR Holdings Inc. acquisition: "Unless otherwise determined by the parties, any retention payments will be paid 50% upon closing of the Merger and 50% in December of 2021, in each case, subject to the employee’s continued employment through Closing or December 30, 2021, as applicable". https://www.sec.gov/Archives/edgar/data/0000859598/000143774920025596/seah20201215\_sc14d9.htm [↑](#footnote-ref-84)
84. The threshold for "YES" here was set **very** broadly in order to provide a sense of the language commonly found in the existing materials. [↑](#footnote-ref-85)
85. The Monmouth Real Estate Investment Corp. acquisition: "The transaction bonus program is intended to reward certain executives and employees of MNR for the focus and resources they provided with respect to the merger". [↑](#footnote-ref-86)
86. The Concho Resources acquisition: "may establish a cash-based retention program in the aggregate amount of approximately $53 million to promote retention and to incentivize efforts to consummate the merger and to ensure a successful and efficient integration process"; the PNM Resources acquisition: "The merger agreement permits PNMR to establish a cash-based retention program in an aggregate amount not to exceed $4 million to promote retention and to incentivize efforts to complete the merger"; The Immunomedics acquisition: "Under the terms of the merger agreement, we may grant special cash bonuses to employees (including our executive officers) in an aggregate amount of up to $25 million and enter into agreements to provide for such bonuses. As of the date of this proxy statement, no such bonuses have been granted". [↑](#footnote-ref-87)
87. The MNR acquisition: "The transaction bonus program is intended to reward certain executives and employees"; The ORBCOMM Acquisition: "Although no individual retention awards have been determined, the Company’s executive officers are eligible to receive a retention payment under the retention pool"; The Cardtronics acquisition: "The Company or any subsidiary thereof may grant cash bonuses in respect of the transaction up to an aggregate amount of $500,000, payable on the Effective Date, some of which may be paid to the Company’s executive officers other than named executive officers". [↑](#footnote-ref-88)
88. Kansas City Southern Acquisition: "Parent shall recognize Kansas City, Missouri as the location of the headquarters of Parent’s United States business and operations". [↑](#footnote-ref-89)
89. People's United Financial, Inc. Acquisition: "Bridgeport, Connecticut will become M&T’s New England regional headquarters". [↑](#footnote-ref-90)
90. First Midwest Bancorp Acquisition: "the Commercial Banking operations of Old National Bank and the Consumer Banking operations of Old National Bank shall be headquartered in Chicago, Illinois"; Alexion acquisition: "(b) Parent intends to establish, as promptly as reasonably practicable after the Closing, a global rare diseases business unit initially comprising the "rare disease" activities of Parent, the Surviving Company and their respective Subsidiaries and for such unit to be initially headquartered in Boston, MA". [↑](#footnote-ref-91)
91. Yields reflect values as of the most recent transaction as of the trading day prior to the announcement date of the deal. For companies in the sample that have multiple publicly traded corporate bonds, yields are provided for the bond with the largest outstanding issuance. [↑](#footnote-ref-92)
92. The TRACE program provides data on bond transactions for all broker-dealers that are FINRA member firms. The database consolidates transaction data for public and private corporate bonds, agency debt, and securitized products, including asset-backed securities and mortgage-backed securities. [↑](#footnote-ref-93)
93. Unaffected share prices were obtained from the FactSet database. Information on stock prices on January 1, 2020 were obtained from the CRSP database. [↑](#footnote-ref-94)
94. This database is accessible at https://www.issgovernance.com/esg/governance-data/voting-analytics/. [↑](#footnote-ref-95)
95. The transactions for which we were unable to obtain data on the voting outcome were mostly tender offers or recent transactions, for which a shareholder meetings have not yet occurred. [↑](#footnote-ref-96)
96. The JUST Capital database polls Americans on their priorities for capitalism and just business behavior and, based on such priorities, tracks, analyzes, and ranks companies across different stakeholder groups. For the most recent version of the dataset methodology, see <https://justcapital.com/data/>. The data collected from Just Capital is as of 2021. [↑](#footnote-ref-97)
97. Sustainalytics’ ESG Ratings measure how well companies proactively manage the environmental, social and governance issues that are the most material to their business. For the most recent version of the dataset methodology, see SUSTAINALYTICS, ESG RISK RATINGS--METHODOLOGY ABSTRACT: VERSION 2.1 (2021), <https://connect.sustainalytics.com/hubfs/INV/Methodology/Sustainalytics_ESG%20Ratings_Methodology%20Abstract.pdf>. The data collected from Sustainalytics is as of 2017-2020. [↑](#footnote-ref-98)
98. Employment Impact Data is a proprietary dataset created by the Impact-Weighted Accounts Project at Harvard Business School that measures employment impact for a large sample of public U.S. firms. The dataset attaches a dollar value to employment impact based on numerous dimensions (diversity, opportunity, wage quality, etc.). The data collected from Employment Impact Data is as of 2017-2020. We are grateful to Ethan Rouen for providing us with access to this dataset. [↑](#footnote-ref-99)
99. Similarly to the process described in the previous Section, our matching was done with at least one of the following datasets: the JUST Capital database, Sustainalytics, or Employment Impact Data. *See supra* notes 93-95. [↑](#footnote-ref-100)
100. *See* *supra* note 20, and accompanying text. [↑](#footnote-ref-101)
101. *See* generally OECD, OECD Employment Outlook 2020: Worker Security and the COVID-19 Crisis 179-181 (2020). [↑](#footnote-ref-102)
102. *Id.* at 180. [↑](#footnote-ref-103)
103. Drew Desilver, *10 Facts About American Workers*, PewResearch.org, Aug. 29, 2019, <https://www.pewresearch.org/fact-tank/2019/08/29/facts-about-american-workers/>. [↑](#footnote-ref-104)
104. Deborah Acosta, *Severance Pay: What It Is and Why You Should Negotiate a Package Before Accepting a Job*, Wall St. J., Apr. 2, 2021, <https://www.wsj.com/articles/severance-pay-what-it-is-and-why-you-should-negotiate-a-package-before-accepting-a-job-11608152200>. [↑](#footnote-ref-105)
105. For a well-known early work taking this view, see FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 37 (1991). [↑](#footnote-ref-106)
106. *See, e.g.*, John C. Coates IV, *M&A Contracts: Purposes, Types, Regulation, and Patterns of Practice*, in Research Handbook on Mergers and Acquisitions 35 (Claire A. Hill & Steven Davidoff Solomon eds. 2016) (arguing that a small, but positive, fraction of a M&A contract consists of “truly unique terms that could not be found in another contract” and that market practice “changes over time in response to legal and business shocks”). [↑](#footnote-ref-107)