# Further Empirical Analysis

Part V documented a general lack of stakeholder protections in our large sample of deals in the time of Covid. These findings are consistent with the view that corporate leaders have incentives not to protect stakeholders beyond what would serve shareholder value. However, before concluding that our findings are produced by such incentives, we conduct in this Part a range of additional empirical tests to consider whether our findings might be driven by some other factors.

In particular, we discuss below eight potential factors that could arguably bring about lack of stakeholder protections. In Sections A-H, we examine in turn whether our findings could be driven by each of these factors by identifying subsets of our sample in which the considered factor was not present and examine whether they were characterized by more stakeholder protections. Our empirical analysis indicates that our findings could not be driven by any of the eight considered factors.

In Section I, we extend our analysis beyond the sample of deals during the pandemic Covid. We do so 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.

## Deals without Distress

It might be argued 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 backs to the wall, corporate leaders of target companies were in no position to bargain for stakeholder protections; however, in regular times and without financial distress, corporate leaders could be expected to protect stakeholders.

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

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

First, we identified public companies with publicly traded bonds that at the time of announcing the deal had yields of less than 5%,
which reflected the market’s not viewing these companies as facing financial distress.[[1]](#footnote-2) Using data from the TRACE database,[[2]](#footnote-3) we identified 21 companies that met this criterion. We refer to these companies as the "the Low-Yield Subsample."

Second, we identified companies that had enjoyed a significant increase in stock price between the pre-pandemic date of January 1, 2020 and the day preceding the announcement of the deal. Such increase in the target's market cap could be viewed as reflecting the market’s viewing the target as not being overall adversely affected by the pandemic. In particular, we identified 31 companies whose unaffected share price prior to the deal’s announcement exceeded their stock price as of January 1, 2020 by at least 20%.[[3]](#footnote-4) We refer to these companies as the "Increased Market Cap Subsample."

 We found that, in each of these two subsamples, stakeholder protections were generally lacking. In particular, focusing on employee protections, we found that the vast majority of the deals in each of the subsamples did not include any provisions that protect employees in any way from the risk of layoffs.

 Similarly, with respect to the treatment of other stakeholder groups, we found that none of the deals in the examined subsamples contained any materials provisions in favor of customers, suppliers, creditors or the environment. (Soft) pledges to retain the location of the target's headquarters post-deal were found only in 6% of the deals of the Increased Market Cap Subsample and in 19% of the deals of the Low-Yield Subsample. Also, (soft) pledges local investment or philanthropic activities were found in 5% of the deals of the Low-Yield Subsample and in none of the deals of the Increased Market Cap Subsamples.

Thus, the pattern we found in the two subsamples does not support the argument that the lack of stakeholder protection identified in the preceding was driven by companies whose bargaining position was undermined by financial distress.

## Deals on the Way to Normalcy

It also might be argued 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 rush into securing a deal without much bargaining.

This argument is also in tension with the fact that corporate leaders in our sample negotiated for and obtained large gains for shareholders and for themselves. Given that whatever uncertainty caused by pandemic did not preclude corporate leaders from obtaining significant value from the buyer, they should have been able to allocate part of this gain to stakeholders.

In any event, to test this argument empirically, we examined the subset of deals that were signed after April 2021, when the broad vaccination among U.S. adults removed the threat of an unstoppable catastrophe. We identified a subset of 45 transactions that were announced during the seven-month period of May 1, 2021 - November 30, 2021. We refer to this subsamples of companies as “On Route to Normalcy Subsample."

We found that stakeholder protections were generally lacking in this subsample. In particular, with regard to employee protections, we found that only XXX of the deals adopted any provisions to protect employees from the risk of layoffs – either by constraining post-deal layoffs of by providing any compensation to laid off employees.

With regard to protections obtained for other stakeholder groups, we found that none of the deals in the considered subsample had any material provisions in favor of customers, suppliers, creditors or the environment. Furthermore, (soft) pledges to retain the location of the target's headquarters post-deal, and (soft) pledges in favor of local communities or society at large, were found in only 7% and 4%, respectively, of the subsample’s deals.

Overall, the pattern we found in the On Route to Normalcy Subsample is 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 findings regarding the general lack of stakeholder protections were driven by the need to obtain shareholder approval for the deal. In particular, it might be argued that our findings are driven by corporate leaders' belief that shareholders would not have approved the proposed transaction had the leaders bargained for any meaningful stakeholder protections and a somewhat lower deal premium. On this view, even if corporate leaders were interested in obtaining benefits for stakeholders, they were prevented from doing so by the need to obtain shareholder approval.

To test this argument empirically, we identified a subset of deals in which the shareholder vote to approve the transaction exceeded the required threshold by a wide margin. In such 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 risking the prospect of shareholder approval.

To carry out this analysis, we collected data on the outcome of shareholder votes on mergers from the ISS Voting Analytics Database.[[4]](#footnote-5) 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.[[5]](#footnote-6) We were able to identify 59 transactions in which the deal obtained support from more than 70% of the outstanding shares entitled to vote. We refer to these companies as the “High-Shareholder-Support Subsample.”

Although corporate leaders were able to reduce premiums somewhat to shift surplus to stakeholders, we found a general lack of stakeholder protections in this subsample. In particular, XXX% of the companies in this subsample did not include any provision that constrain post-deal layoffs or provide any compensation to employees laid off after the deal.

As to other stakeholder groups, we found that none of the deals in the High-Shareholder-Support Subsample involved any provisions in favor of customers, suppliers, creditors or the environment. In addition, (soft) pledges to retain the location of the target's headquarters were found in only 15% of the transactions, and (soft) pledges in connection with local investment or philanthropic activities were found in only 5% of the deals.

Thus, the data does not provide support to the view that the lack of stakeholder protections we documented was due to the need to obtain shareholder approval of the deals.

## Deals without a Revlon Shadow

We next turn to the potential argument that corporate leaders might have been deterred from seeking stakeholder protections by the concern that a court might review their decision under the Delaware *Revlon* doctrine.[[6]](#footnote-7) Under this doctrine, once a decision to sell the company has been reached, corporate leaders are required to seek to obtain the highest price for shareholders.[[7]](#footnote-8)

We set out to test empirically this argument as well, and we do so by examining the subset of cases in which the Revlon doctrine could not apply. Following earlier work on the effects of the Revlon doctrine,[[8]](#footnote-9) we identified a set of companies (“the Non-Revlon Subsample”) whose acquisition could not have been subject to Revlon for one of two reasons: (a) the company was incorporated in a state whose courts explicitly rejected the Revlon decision (Indiana, Nevada, Pennsylvania, or Ohio), or (b) the consideration paid for the company was more than 50% in stock. The Non-Revlon Subsample we put together includes 42 deals with an aggregate consideration exceeding $350 billion.

In the deals of the Non-Revlon Subsample, the prospect of judicial intervention based on the Revlon doctrine could not have deterred corporate leaders from allocating to stakeholders some of the surplus produced by the transaction. Thus, this subsample provides a good setting for testing the argument that our findings in Part V were driven by the threat of Revlon. We find that the evidence is inconsistent with this argument: deals in the Non-Revlon Subsample did not offer stakeholder materially stronger protections than other deals in our sample.

With respect to employee protections, we found the vast majority of the deals in the Non-Revlon Subsample offer employees no protections to mitigate the risk of layoffs, either by providing some compensation in the event of layoffs or some limits on the scale or pace of layoffs. Only one of the 42 deals provided any such protection.

We also found that none of the transactions in the non-Revlon Subsample included any provisions in favor of customers, suppliers, creditors or the environment. Additionally, only a small minority of the deals in this subsample offered (soft) pledges to retain the location of the target's headquarters post-deal (XXX deals) or to retain some investment or philanthropic activities that benefit local communities (XXX) deals. Overall, the evidence does not support the argument that our findings in Part V were driven by corporate leaders that were interested in benefitting stakeholders but discouraged from doing so by the Revlon doctrine.

## Deals with a Stakeholderist Counsel

Next we would like to consider the argument that the lack of stakeholder protections was due to the discouraging input that corporate leaders received from counsel. On this view, even though corporate leaders were interested in benefitting stakeholders and accepting a somewhat lower premium for that purpose, they were discouraged by legal counsel advising them or at least cautioning them against doing so.

To explore whether this argument could drive our findings in the Part V, we examine a set deals in which the target was advised by a law firm strongly identified with advocacy for stakeholderism: Wachtell, Lipton, Rosen & Katz ("WLRK"). WLRK’s founding partner and other senior partners have written extensively in support for stakeholderism,[[9]](#footnote-10) developed for the WORLD Economic Forum a “New Paradigm” of “director-centric stakeholder governance;”[[10]](#footnote-11) issued a vast number of firm memos advocated for stakeholderism;[[11]](#footnote-12) and stated in such memos that state corporate law, and in particular Delaware law, enables corporate leaders to give significant weight to stakeholders.[[12]](#footnote-13) Therefore, it is reasonable to expect that corporate leaders advised by WLRK were not discouraged from seeking stakeholder protections.

We identified 17 deals in which WLRK served as counsel to the acquired company (“the WLRK Subsample”). Whereas these deals constituted about 15% of the sample, they were on average significantly larger and had an aggregate acquisition consideration exceeding $190 billion and representing about 26% of the total acquisition consideration of our sample. We then examined whether, given the presence of a stakeholder-oriented counsel, corporate leaders were more likely to negotiate for and include stakeholder protections in the deals of the WLRK Subsample.

 The analysis indicates that the deals in the WLRK Subsample do not exhibit substantial incidence of stakeholder protections. None of the deals in the WLRK Subsample included any protections to employees vis-à-vis the risk of layoffs. Similarly, none of the deals in this Subsample contained provisions in favor of customers, suppliers, creditors or the environment. And the majority of the deals in the WLRK Subsample did not even include (soft) pledges to retain, at least for some specified time, investments or philanthropic activities in local communities or the location of the company’s headquarters. Overall, the evidence does not support the argument that our findings in Part V were driven by the influence of counsel.

## Deals Governed by Constituency Statutes

It might be argued that, as long as the target is incorporated in Delaware, and regardless of the identity of the target’s counsel, the target’s corporate leaders might be influenced by Delaware’s shareholder-focused approach. 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 by corporate leaders that is has such an approach, could drive our findings in Part V.

It is worth noting that, to the extent that Delaware incorporation provides a substantial impediment to stakeholder-favoring choices, that would by itself imply that stakeholderism cannot currently be relied on to produce substantial benefits to stakeholders of most U.S. companies. To the extent that Delaware incorporations can be expected to preclude corporate leaders from serving stakeholder interests, because a majority of U.S. public companies are currently incorporated in Delaware, the leaders of these companies should not be expected to make the kind of choices on which stakeholderists rely.

In any event, to explore empirically the argument that Delaware incorporations drive Part V’s findings, we examined the subset of companies that were incorporated in states with constituency statutes. By adopting such statutes, these states made it patently clear to corporate leaders that they do not share whatever shareholder-centric approach characterizes Delaware law. We identified in our sample 12 acquisitions of companies incorporated in states with constituency statutes (“the Constituency-Statutes Subsample”).

To the extent that Delaware incorporations drove Part V’s findings, we should expect stakeholders to receive more protections in the Constituency-Statutes Subsample than in our entire sample. We found, however, that stakeholder interests were not more protected in deals in the Constituency Statutes Subsample than in other subsets of our sample.

In particular, we found that none of the deals in the Constituency-Statutes Subsample did not provide employees with any protection against the risk of reduced employment; no deal included either provisions that provide some compensation to laid-off employees or provisions that limit the scale, timing, or pace of layoffs. In addition, none of the deals in the considered subsample included any protections for customers, suppliers, creditors or the environment. And only one of the deals included a (soft) pledge in favor of local communities. Thus, the evidence does not support the view that Part V’s general findings were driven by the large number of Delaware companies.

## Sales of Targets with High ESG Ratings

Another potential argument that we wish to consider is that Part V’s findings might have been due to targets in our sample being mostly companies that were much less stakeholder-oriented than other public companies. On this view, companies that are stakeholder-oriented should be expected to remain independent and be reluctant to be acquired, especially during a pandemic. Accordingly, due to self-selection, stakeholder-oriented companies were disproportionately absent from our sample, which consequently was not representative of the stakeholderist inclinations of companies in general, and this factor drove our findings regarding the lack of stakeholder protections.

There are good reasons, however, not to expect companies that are stakeholder-oriented not to be generally unwilling to be acquired. When a sale of a company would produce substantial surplus, stakeholder-oriented corporate leaders should still be expected to agree to an acquisition; such leaders should just seek to ensure that, by adding adequate stakeholder protections, the division of surplus would be such that stakeholders share in the gains increase, or at least would not be made worse off.

In any event, to test the considered argument empirically, we identified a set of companies in our sample that had relatively high ESG ratings. To this end, we collected from three different sources of ESG ratings -- the JUST Capital database,[[13]](#footnote-14) Sustainalytics,[[14]](#footnote-15) and Employment Impact Data.[[15]](#footnote-16) Our data provides metrics with respect to each company’s treatment of several stakeholder groups, and we have been able to find metrics with respect to the treatment of employees for a majority of the companies in our sample. Using this data, we calculated for each company whether its rating with respect to the treatment of employees was above-average or below-average in its industry.

Under the considered hypothesis, deals to acquire targets with above-average ratings with respect to employees should be expected to involve higher incidence of employee protections in their deal terms. Our analysis, however, indicates that this hypothesis is not supported by the data. In particular, in subsample of deals to acquire companies with above-average ratings with respect to employees that we have in our sample, deal terms still did not include provisions that protect employees against the risk of layoffs. Thus, the evidence does not support the view that Part V’s findings are driven by the substantial under-representation of stakeholder-oriented companies in our sample.

## Sales to Buyers with Poor ESG Ratings

Yet another potential argument is that the stakeholder orientation of corporate leaders might have been reflected in their choosing stakeholder-oriented buyers in the first place. On this view, this selection of buyers made stakeholder protections completely unnecessary as the target’s corporate leaders had good basis for expecting stakeholders to fare well after the deal.

At the level of theory, however, there are good reasons not to expect stakeholder-oriented corporate leaders to sell only to buyers that are so stakeholder-oriented as to make stakeholder protections completely unnecessary. Sometimes a sale of a company to a given buyer that is not stakeholder-oriented could be expected to generate an especially large surplus, and in such a case stakeholderist corporate leaders should still be willing to sell the company. In such a case, the corporate leaders should just ensure, by including adequate stakeholder protection in the deal, that the division of the large surplus would be such that stakeholders would also be made better off or at least not worse off.

Indeed, the evidence in Section IV.A indicates that, in the deals in our sample, the choice of buyers was not by itself sufficient to exclude concerns that the deal would have significant adverse effect on stakeholders. Recall that the analysis in that Section documented that, based on communications by the acquired company and outside observers, many deals with the buyer chosen by corporate leaders were expected to pose substantial post-deal risks for employees and other stakeholders.

In any event, to test the considered argument further empirically, we used the data we obtained with respect to company ratings regarding their treatment of employees, and we identified a subset of transactions in our sample that involved sales to buyers with below-average rating regarding employees. In such transactions, the buyer’s poor stakeholder record provided no basis for confidence that the deal would not pose substantial risks to stakeholders. Therefore, to the extent that Part V’s findings were driven by expectations that the chosen buyer would protect stakeholders on its own, the transactions in this subsample should be expected to include more protections for employees.

Our examination of this subsample of sales to buyers with below-average rating for their employee treatment, however, does not support this hypothesis. We find that deals in this sample generally lacked employee protections against the risk of layoffs, either provisions to provide compensation to laid off employees or to constrain the scale, timing, or pace of such layoffs. The data is thus inconsistent with the view that Part V’s findings are driven by corporate leaders’ selecting such stakeholder-oriented buyers so as to make any stakeholder protections unnecessary.

## Deals during the Year Preceding the Pandemic

In Sections A and B above we discussed the general lack of stakeholder protections in deals during the pandemic that did not involve firms in financial or economic distress or that occurred during the later period in which the economy was on its way to normalcy. It might be argued, however, that the Covid period had some other special aspects that precluded corporate leaders from serving stakeholders, and that behavior during the pandemic period is thus not informative with respect to behavior in other times.

Therefore, to explore the argument that our findings are due to some factor that was special to the pandemic period, we extend the analysis in this Section by examining a sample of large deals that were announced during the year preceding the pandemic. During this period, stakeholder interests already received large support from corporate leaders and the Business Roundtable statement came out, and corporate decisions were not made against the background of a pandemic.[[16]](#footnote-17) We were able to identify a set of 17 transactions valued above $10 billion that were announced between January 1, 2019 and February 1, 2020 (the "Pre-Covid Sample"). The aggregate value of the deals in this sample exceeds $XXX.

Our analysis of the Pre-Covid Sample deals yields findings similar to the patterns found for the sample of deals during the pandemic. To begin, with respect to employee protections, we found that none of the deals in the Pre-Covid Sample included any provisions that provided employees with any protection against the risk of being laid off. In particular, we found no provisions providing compensation to laid off employees or provisions limiting in some way layoffs or their pace.

With respect to other stakeholder groups, we found that none of the deals in the Pre-Covid Sample included any provisions that protect customers, suppliers, creditors, or the environment. And we found a (soft) pledge to retain the location of the target's headquarters in only one of the seventeen deals, and a (soft) pledge in favor of local communities in only one deal.

Overall, whether the results for the deals in the Pre-Covid Sample are compared to our entire sample or to the Largest Deal Subsample, these results are consistent with the findings we documented in detail in our analysis of our analysis of deals in the time of Covid. The results of this Section are thus inconsistent with the argument that our findings are driven by some special factors of conditions induced by the pandemic. Rather, they are consistent with the view that, notwithstanding the peak support of stakeholderism expressed by corporate leaders in the last three years, corporate leaders have incentives, and thus should be expected, not to serve the interests of stakeholders beyond what would benefit shareholders.

1. 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-2)
2. 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-3)
3. 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-4)
4. This database is accessible at https://www.issgovernance.com/esg/governance-data/voting-analytics/. [↑](#footnote-ref-5)
5. We were able to obtain such data on 81 transactions, which constitute about 70% of the transactions in the entire sample.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-6)
6. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986). [↑](#footnote-ref-7)
7. *Id.*, at 182. [↑](#footnote-ref-8)
8. Matthew D. Cain, Stephen B. McKeon & Steven Davidoff Solomon, *Do Takeover Laws Matter? Evidence from Five Decades of Hostile Takeovers*, 124 J. Fin. Econ. 464, 469–70 tbl.2 (2017). [↑](#footnote-ref-9)
9. XXX SEE, E.G., ONE ARTICLE XXX; [↑](#footnote-ref-10)
10. XXX SEE XXX; [↑](#footnote-ref-11)
11. XXX SEE E.G., GIVE ONE EXAMPLE XXX [↑](#footnote-ref-12)
12. XXX FT SEE , E.G., XXX [↑](#footnote-ref-13)
13. 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 for the period of XXX as of 2021. [↑](#footnote-ref-14)
14. 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. XXX KOBI, DATA IS AS OF WHEN YOU VISITED THE DATASET. THE DATA IS FOR THE PERIOD 2017-2020. XXX [↑](#footnote-ref-15)
15. 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. XXX SAME AS IN PRIOR FOOTNOTE XXX [↑](#footnote-ref-16)
16. *See* *supra* note 20, and accompanying text. [↑](#footnote-ref-17)