Too Many Mergers? The Golden Parachute as a Driver of M&A Activity in the 21st Century

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Introduction

Mergers and acquisitions activity ("M&A") is one of the pivotal features of the modern capitalist economy. Well executed M&A can exploit economies of scale and scope to transform linear growth at the firm level to exponential growth. M&A at the firm level accordingly raises the "growth frontier" of an economy of such firms. M&A also often entails investment in large amounts based on flawed assumptions about "synergies" and thus can destroy value. M&A undercuts the idea that a particular corporation ought to hold to its "purpose" (at least not without significant sacrifice of value). The canonical example is the Kraft takeover of Cadbury, the UK confectionery. Cadbury's "purpose" may have been the on-going production of sweets beloved in the UK but its value to Kraft was in the global distribution network it had created in emerging markets that could be additionally purposed to the distribution of Kraft's extensive array of snack food brands. M&A transformed Cadbury's "purpose." M&A can also serve as the vehicle through which a firm scoops up rivals and thus grabs a share of scale and scope economies beyond the competitive optimum.

Because M&A enables firms to pursue scale and scope economies faster than would be possible with "organic" growth (the development of capacity within the own firm), "adjustment costs," meaning the obsoleting of employee skills ("human capital"), layoffs, and disruptions of previous supply and customer networks, will recur more frequently and extensively throughout the economy. Even if M&A facilitates growth overall, the gains will be distributed differently than under previous arrangements and unevenly.

The history of the corporation as an organizational form usually focuses on the permanence of its committed capital (including the transferability of ownership interests),[1] the "partitioning" of the assets and liabilities of the corporation from those of its owners and

[1] Giuseppe Dari-Mattiacci, Oscar Gelderbloom, Joost Jonker & Enrico C. Perotti, *The Emergence of the Corporate Form*, J. LAW, ECON. & ORG. (2017); Margaret Blair, Locking in Capital: What Corporation Law Achieved for Business Organizers in Nineteenth Century America, 51 ULA L. Rev 387 (2003)

officers,[2] and the centralization of operational control over the corporation in a board of directors.[3] These elements of organizational law got the corporation up and running as the dominant business form.[4] One missing piece to this story has been the changes in organizational law that empowered corporations to engage in M&A, which in turn enabled the corporation rapidly to increase the scale and scope of its business to take advantage of changes in transportation, communication, and technology to pursue exponential growth. In the United States, these are changes to enabling statutes that permitted corporations to own stock in other corporations, to buy assets using own stock as consideration, and the establishment of "merger" and "consolidation" as the formal means to expand the size of the firm.[5,6]

More directly put, corporate law and corporate governance has played a critical role in the M&A story in the United States and vice versa. Changes to corporate law at the turn of the 20th century facilitated the creation of national firms in the United States through M&A. The early state-level corporate chartering competition was focused on the facilitation of M&A, not the fashioning of the optimum shareholder/management balance that figures centrally in current corporate governance debates.[7] As corporations took on national economic footprints, there was broad consensus that national enterprise required national regulation. The right regulatory match was not between the national corporation and any particular state, whose interests necessarily would be parochial, but between the national corporation and the *State*, thus a national charter. As Camden Hutchison shows, the first national chartering movement failed precisely because of

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[2] Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L. J. 387 (2000); Henry Hansmann & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1225 (2006).

[3] Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Northwestern L. Rev. 547 (2002); __ *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006).

[4] See generally John Armour et al, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (3d ed. 2017).

[5] The most prominent example, which set the model for other jurisdictions, was the revision of New Jersey corporate law over the 1880-1910 period, especially the general revision of 1896. See GENERAL CORPORATION ACT OF NEW JERSEY, James B. Dill, compiler and annotator (1910 edition); Edward Q. Keasbey, *New Jersey and the Great Corporations*, 13 Harv. L. Rev. 198 (1899-1900). These statutory innovations are usually framed in terms of the chartering competition initiated by New Jersey to provide a legal safe haven for combinations in the late 19th century that has been jury-rigged under existing law as "trusts." See, e.g., Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910,* 32 J. Corp. L. 323 (2007); Camden Hutchison, *Corporate Law Federalism in Historical Context: Comparing Canada and the United States*, 64 McGill L. J. (109) (2018). See *generally* Herbert Hovenkamp, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991), at 241-267.

[6] An important complement to the organizational law changes that permit expansion through mergers and acquisitions are those changes that facilitate exit and re-deployment of capital and capacities, such authorization of stock repurchases, demergers through spin-offs and split-offs, and exit through tender offers.

[7] See Camden Hutchison, *Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement*, 2017 Colum. Bus. L. Rev 1018 (2017); Sarath Sanga, *The Origins of the Market for Corporate Law*, available at https://ssrn.com/abstract=3503628 (2021 rev.) Ofer Eldar & Gabriel Rauterberg, *Is Corporate Law Non-Partisan?*, U. Wisc. L. Rev (forthcoming 2023).

disagreement over the scope of permitted M&A activity.[8] The absence of a national legislative consensus to constrain M&A through restrictive corporate governance (or to embrace it subject to a national regulatory regime) meant a default to the permissive state regimes of New Jersey and then Delaware.

The claim of this paper is that the prevailing corporate governance regime in the United States has produced a level of mergers and acquisition activity that is greater than the social optimum. In broad strokes the argument is that the "waves" that characterized M&A activity in the late 19th through the 20th century reflected adaptations to the changing external environment, whether the efficient production frontier, the regulatory constraints, or capital market developments. Economically-motivated parties saw the opportunities in changing the boundaries of the firm; successful first-movers spawned imitators, hence a wave, which eventually subsided. The 21st century is different. There is a persistently high level of M&A. Yes, there are fluctuations but not "waves." This pattern, I argue, can be explained at least in part by the introduction of an internal driver of M&A activity, the "golden parachute," a super-bonus payoff to a target CEO in an M&A transaction. Golden parachutes were introduced as a corporate governance innovation in the 1980s as a complement to the directors' then-weak monitoring capacity over the CEO's frequently negative response to an unsolicited premium bid. The governance goal was to provide an incentive that would make a CEO neutral or perhaps mildly favorable when confronted with such a bid. Golden parachutes have become increasingly lucrative over time, especially as compensation has shifted towards stock-based performance pay. Indeed, it might be more accurate to describe them as "platinum parachutes." The function has changed: it now works to offer a high-powered M&A incentive to become a target CEO. The golden parachute now compensates the target CEO somewhat like a deal-hunting investment banker and has changed the pattern of M&A activity.

This institutional change has negative implications both from a shareholder and a social point of view. This new incentive structure for CEOs will distort how the firm is managed and the projects that the firm pursues. The CEO many guide the firm to pick projects that could generate complements (increase synergies) or substitutes (to invite killer acquisitions) through M&A rather than projects of highest long term expected value of an independent firm. It will also distort the pattern of CEO succession: why groom a successor when the absence of such a successor can be invoked as a reason to pursue an M&A transaction? From a broader perspective, since M&A transactions are commonly associated with layoffs, employees bear an additional level of risk for which compensation is unlikely. Moreover, such layoffs undermine social connectivity and peer-based reality testing associated with the workplace. At a time when "bowling alone" is an increasingly prominent feature of American life, excess M&A activity may further degrade social cohesion and, on the analogy of certain trade impacts, may generate socio-political effects that spill over into electoral politics.

To be clear: this claim is not inconsistent with a view that M&A activity in general facilitates adaptation at the firm level to a changing external environment and can be a powerful

[8] See Camden Hutchison, *Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement,* 2017 Colum. Bus. L. Rev 1018 (2017).

engine of economic performance. Rather, it captures a theme that has run through sober reflection on the implications of a high level of M&A over the past several decades.[9] The reallocation of resources and control rights associated with M&A intensifies the adjustment costs of economic change. Growth or shrinkage can happen organically, which extends the time frame of adjustment, or through M&A, which can dramatically enhance the rate of change. The argument that I will develop is that golden parachutes add excess energy to this system. They provide asymmetric payoffs to target CEOs and impose systemic costs. This is an area ripe for regulatory action but the present corporate governance structure also gives tools to shareholders to curb the excesses of the golden parachute regime.

There is a separate concern that this paper does not address: whether "excess" M&A raises independent antitrust concerns, perhaps from a belief that M&A inexorably promotes concentration which in turn will increase producer power and producer rents. In general I think antitrust analysis requires a market-specific focus. But someone who was concerned about overall concentration levels might contemplate law reform or bully pulpit use focusing on golden parachutes as an adjunct to antitrust policy. As noted below, golden parachute payoffs are generally increasing in the target company's size and can vary by industry sector. These elements might add additional dimensions to antitrust policy consideration.

This paper proceeds as follows: Part I describes the US M&A waves of the late 19th and 20th century and compares these waves to the persistent high level of US M&A activity in the 21st century. The 20th century waves can be linked to changes in the external economic environment, including regulatory constraints, that impel adaptation effectuated through M&A. The 21st century pattern is different, persistently high, even after a potential source of external change, inward-bound M&A from globalization, is subtracted.

Part II describes the rise of golden parachutes, a kind of special severance pay for C-suite executives (especially the CEO) first introduced in the 1980s and 1990s to overcome managerial resistance to unsolicited premium bids. Golden parachutes illustrate a characteristic feature of the "modern" corporate law period: that devices introduced to address the rise of hostile bids take on a separate life and become transformative. In this particular case the increasing independence of directors and the growing institutionalization of stock ownership eliminated the corporate governance need for golden parachutes. But the parachutes survived as a "market" term of executive compensation. As CEO compensation escalated over the course of the 1990s and that compensation increasingly consisted of stock-based components, the CEOs parachute payoff from being "taken over" became increasingly lucrative. A target CEO could move from wealthy to rich. Part II presents fresh evidence on the extent of the riches. Over the eleven-year period 2011-22, for transactions over $10 billion, large and consequential, the average parachute payout was approximately $48 million. Smaller but still consequential transactions produced multi-million dollar parachute payouts as well. It seems obvious that these payouts would

[9] See, e.g., Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 Colum. L. Rev. 1931, 1971-1982 (1991).

increase the CEO's incentive to become a promoter of target-side M&A.[10] We can't both believe a general incentives-based theory of compensation and disbelieve that these powerful incentives will have their effect.

Parts III and IV discuss the consequences from a shareholder perspective and social perspective of "excess" mergers because of the golden parachute. Part III argues that the major adverse effects from the shareholder perspective will be the distortion of project choice and the distortion of CEO succession planning, which itself will distort project choice. A CEO who is preparing for a merger exit is likely to pick/avoid projects with objectives and time horizon consistent with that goal. A CEO looking for a merger will be reluctant to groom a successor because the failure of an obvious successor enhances the CEO's optionality. The advent of high parachute payouts coincides with a shift in the average target CEO age over the 1989-2007 period. Early in the period, impending retirement is not a strong predictor of a transaction.[11] Later in the period, the likelihood of a becoming a target escalates as the CEO approaches 65.[12] In a framing drawn from behavioral corporate finance,[13] rich parachutes have helped establish exit-through-merger as part of a "good" CEO career, as opposed to "left the company in capable next-generation hands." Yes, shareholder approve the merger, but there is not counterfactual alternative developmental path over which they have choice. Some start-ups in tech and pharma self-consciously are targeted towards M&A and compensation is structured accordingly[14] but the golden parachutes that are virtually universal among significant public companies hardly seemed tailored for discrete strategic reasons. The issue is not that project choice is shaped by short-termism vs. long-termism but is distorted as a consequence of this special kind of managerial agency cost.

Part IV addresses the particular concern of excess M&A: the additional level of employee layoffs because of the on-average significant loss of human capital resulting in lower pay and diminished career prospects. The net employment effects of M&A is debated in the labor economics literature,[15] but many types of M&A, horizontal mergers, for example, or "take private" transactions initiated by private equity firms, commonly entail significant layoffs. Over the 2004-2019 period, outplacement consultants Challenger, Gray & Christmas, report annual M&A-linked layoffs that vary between 123,000 and 15,000.[16] An extensive economic literature documents the losses in future income by displaced workers.[17] Although M&A generally

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[10] It is well understood that "CEOs play a key role in their firm's decisions leading up to a bid (e.g., the decision to seek out a buyer or to initiate merger talks)…" Dirk Jenter & Katharina Lewellen, CEO Preferences and Acquisitions, 700 J. Fin. 2813, 2813 (Dec. 2015).

[11] See John C. Coates IV & Reinier Krakkman, The Link between Acquisitions and the Market for CEOs, (Jan 2011), available at https://ssrn.com/abstract=1760154.

[12] Dirk Jenter & Katharina Lewellen, CEO Preferences and Acquisitions, 70 J. Fin. 2813 (2015).

[13] Malcom Baker & Jeffrey Wurgler,Behavioral Corporate Finance: A Current Survey, in 2 Handbook of the Economics of Finance, George Constantinides, Milton Harris, & Rene Stulz, eds. (2012).

[14] See Ronald J. Gilson, Locating Innovation: The Endogeneity of Technology, Organizational Structure, and Financial Contracting, 110 Colum. L. Rev. 885 (2010).

[15] See infra

[16] Compilation of Challenger, Gray & Christmas Inc. Annual Reports.

[17] See infra.

produces net social gains, what a welfare economist would call a Kaldor-Hicks improvement, the U.S. record in assuring that losing parties are made whole is generally inadequate[18] and certainly in these cases. Even if layoffs associated with M&A might be thought of as an inevitable consequence of a dynamic economy, and we would rapidly be worse off without that dynamism, there is no reason to build in high-powered managerial incentives that promote M&A, particularly where the benefits are so skewed in favor of the individual CEO. That is likely to produce socially costly distortion.

Moreover, the evidence is that golden parachutes are significantly larger in a "take private" transaction with a financial sponsor as an acquirer than with a "strategic" acquirer, $10.5 million on average vs. $6.1 million. But those are precisely the kind of private equity-fueled transactions that are associated with significant layoffs and reduction in employment.[19] A simple theory of incentives would see golden parachutes as inclining CEO's to favor the transactions where significant gains come from employment downsizing.

The mixture of M&A, layoffs, and golden parachutes may have particular socio-political consequences. At a time when many social bonds are fraying, when many adults are "bowling alone"[20] the workplace is a place of common enterprise and attachment and perhaps even the cultivation of civic virtue.[21] The forced sociability and interaction of the workplace is a counterweight to the echo chamber of individual narrow-casting and (imperfectly) helps people steer clear of rabbit holes. Thus the disruption of an established workplace has costs beyond the economic.

But one element stands out: even if there is pain among those who are laid off when the firm is sold and layoffs occur, there is plainly one winner: the CEO with a golden parachute. The historian Robert Schneider claims that ours is an age in which "resentment" has returned again as a "political emotion."[22] This mismatch of fates, layoffs on the one hand, a golden parachute on the other, could readily generate such feelings.

The literature on trade impact suggests that such resentment has political valence, including a shift of partisan voting behavior. An emerging literature connects economic shocks to shifts in political sentiment, in particular increases in polarization and especially with a tilt

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[18] See Alex Raskolnikov, Distributional Arguments, In Reverse, 105 Minn. L. Rev. 1583 (2021).
[19] Steven Davis, John Haltiwanger, Kyle Handley, Josh Lerner, Ron Jarmin & Javier Miranda, Private Equity, Jobs, and Productivity, 104 Am. Econ. Rev. 3956 (Dec. 2014); Davis et al, The (Heterogenous) Economic Effects of Private Equity Buyouts, NBER WP No. 26371 (rev. July 2021, The (Heterogenous) Economic Effects of Private Equity Buyouts | NBER.
[20] Robert Putnam, THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).
[21] See generally Cynthia Estlund, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003).; Michael Sandel, *What Liberals Get Wrong About Work*, The Atlantic (Sept. 20, 2020). For a more pessimistic view about the possibilities of the current workplace 20 years later, See Cynthia Estlund, *Coming Apart: How Union Decline and Workplace Disintegration Imperil Democracy* in Angela B. Cornell & Mark Barenberg, eds., THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY (2020).
[22] Robert A. Schneider, THE RETURN OF RESENTMENT: THE RISE AND DECLINE AND RISE AGAIN OF A POLITICAL EMOTION (2023) (esp. ch. 8 and the conclusion).

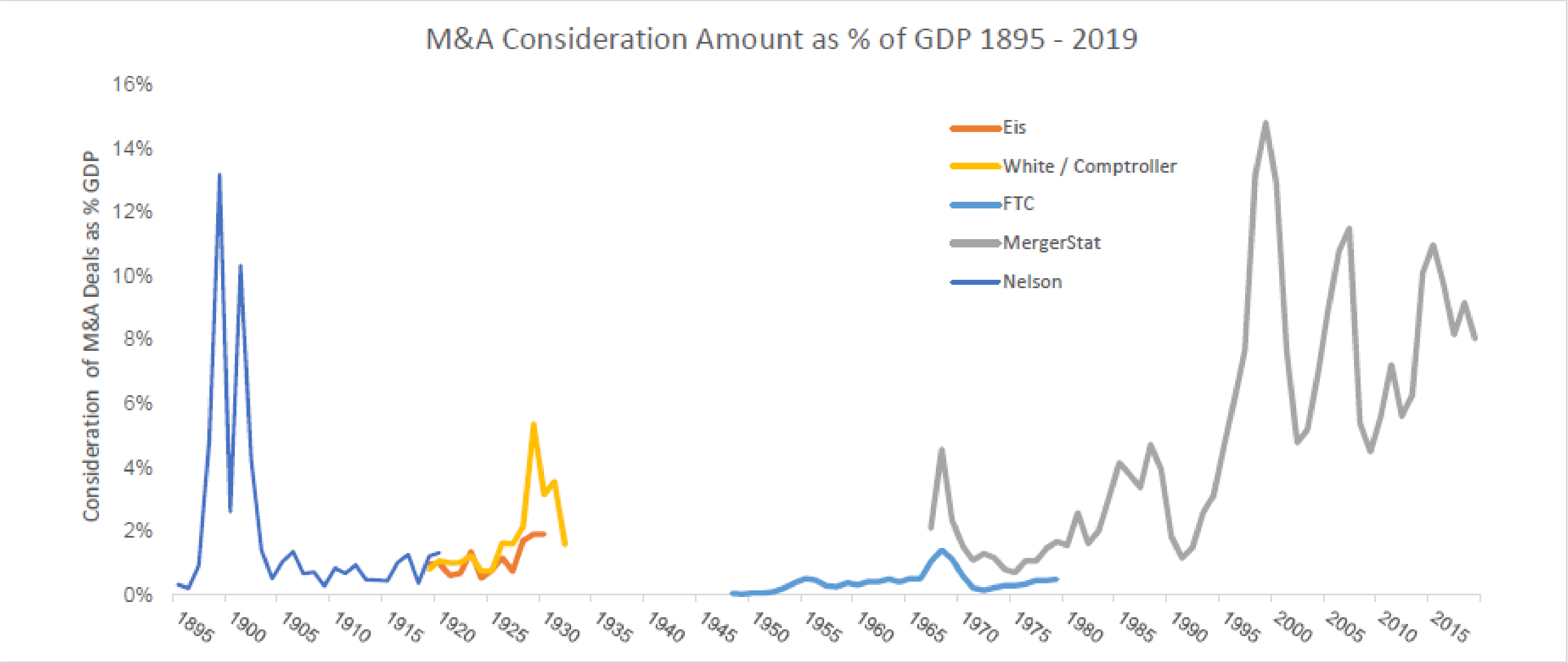
towards populism.[23] This literature has been motivated by the desire to understand the impact of expanded foreign trade, especially the “China shock” – the rapid influx of Chinese manufactured goods after China’s accession to the WTO in 2001 -- but there are also indications that the political effects can be triggered by other economic shocks in which there are salient winners as well as losers.[24] This fits with models that include behavioral primitives, like social-identity, in more conventional models of responses to economic shocks.[25]

The outcomes mismatch of golden parachutes and layoffs may activate some of the same behavioral responses associated with other economic shocks. This is “inequality with privity,” not the generalized inequality which thus far has not had much electoral effect, as demonstrated by the easy recharacterization of the estate tax as a “death tax,” the long-standing slide of the labor share of economic rents (Gordon, 1997) and the secular shift in favor of shareholders (Goshen, 2022). Perhaps this is because the purported villains, the shareholders are diffuse and many employees seem themselves as beneficiaries through their retirement savings, whether or not that is the case. The case of golden parachutes is stark in an important set of cases: layoffs for thee, riches for me. The response to this inequality is energized by loss aversion of the adversely affected parties.

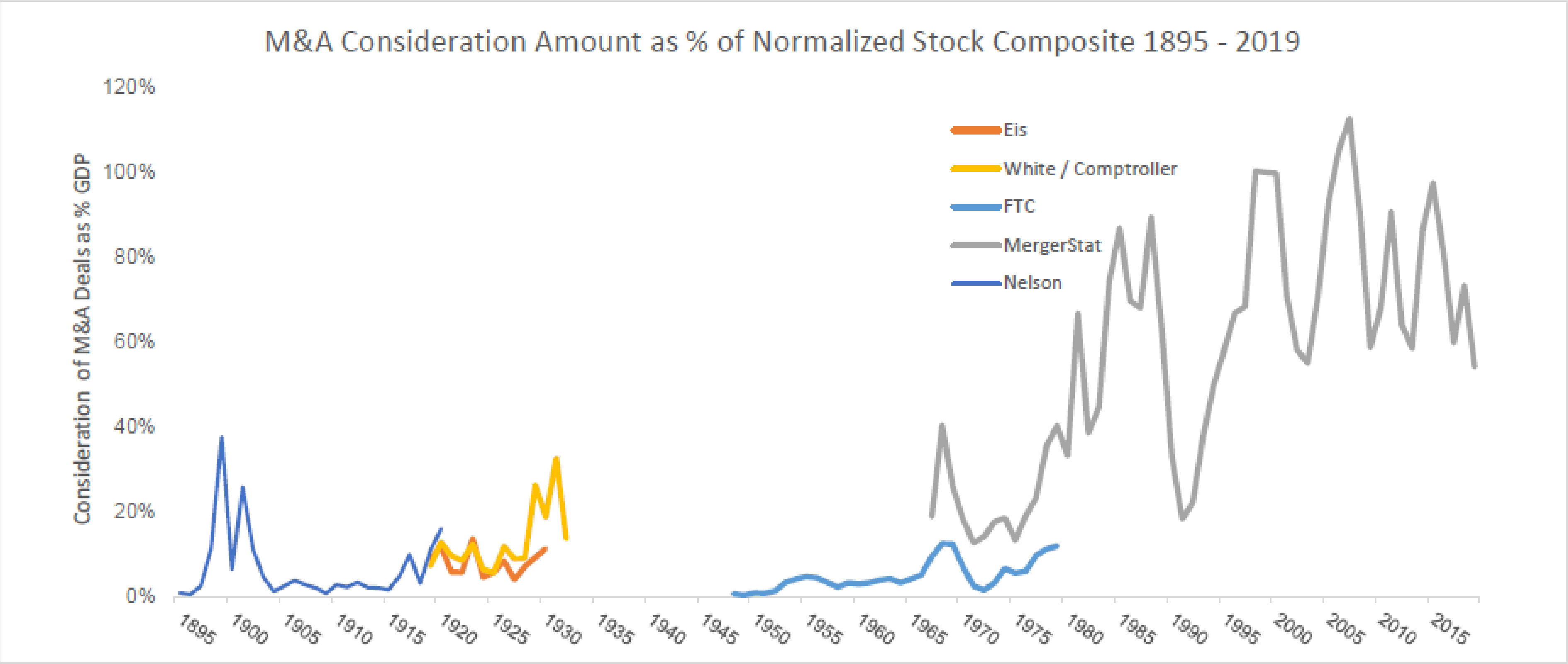
Thus the golden parachute role in “too many mergers” is not just the distortion of investment decision making at the firm level or the pecuniary losses experienced by laid-off employees but the potential socio-political impact with systemic implications.

[23] Notable contributions are David Autor, David Dorn, Gordon Hanson & Kaveh Majlesi, Importing Political Polarization? The Electoral Consequences of Rising Trade Exposure, 110 Am Econ. Rev. 3139 (2020); Yotam Margalit, Costly Jobs: Trade Related Layoff, Government Compensation, and Voting in U.S. Elections, 105 Am Poli. Sci. Rev. 166 (2011).
[24] See David Autor, David Dorn, Gordon Hanson & Kaveh Majlesi, Political Polarization? The Electoral Consequences of Rising Trade Exposure, NBER W.P. 22637 (Dec. 2017), at p. 41 et seq.
[25] See, e.g., Giampaolo Bonomi, Nicola Genaille & Guido Tabellini, Identity, Beliefs, and Political Conflict, 136 QJE 2371 (Nov 2021).

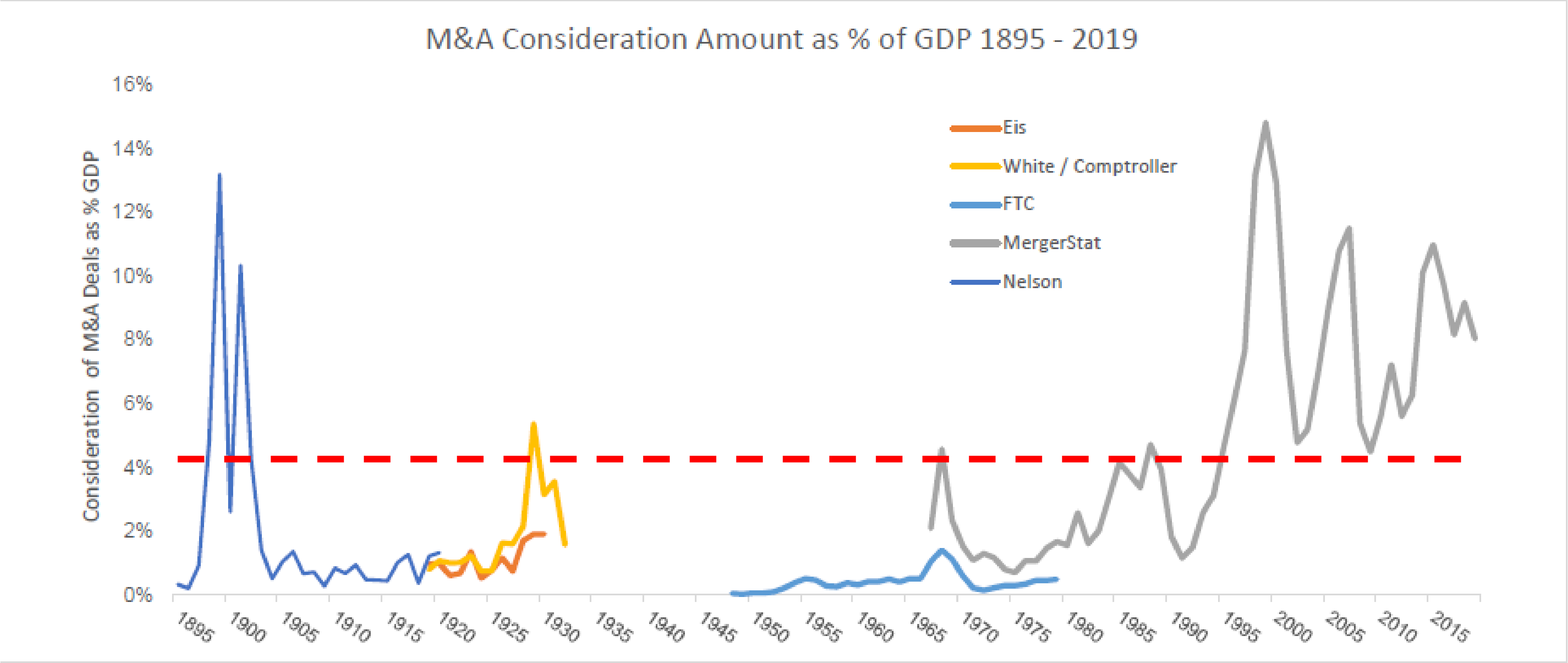
Merger Waves, 1895-2019, % GDP



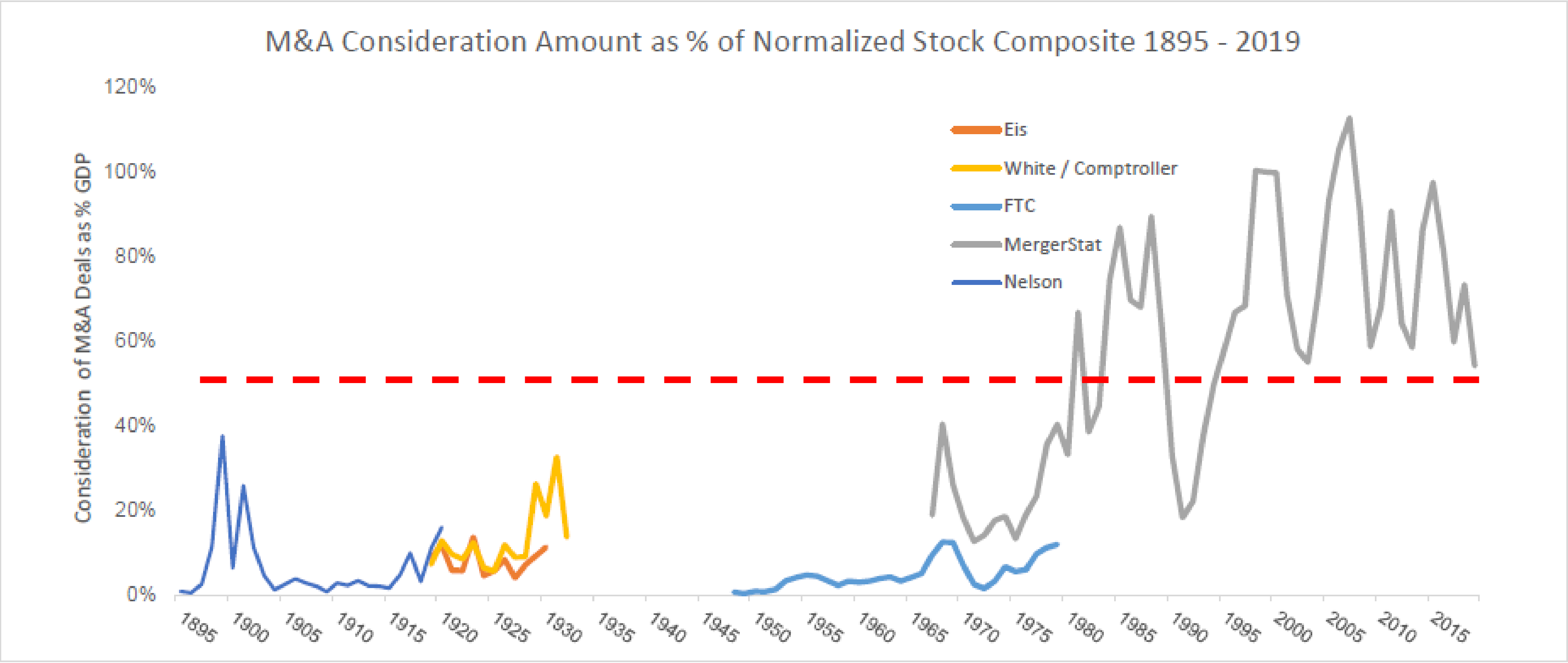
Merger Waves, 1895-2019, % Stock Market Capitalization



21st Century: A High Level of M&A + Waves



21st Century: A High Level of M&A + Waves



Part II -- The Transformation of Golden Parachutes from Insurance to Incentive

A "golden parachute" is an element of CEO compensation that pays out if the CEO's firm becomes subject to a "change in control" transaction after which the CEO is formally asked to leave or otherwise ends his/her employment with the ongoing entity (other than for cause). Golden parachutes came into increasing use in CEO compensation during the 1980s, as hostile takeovers became increasingly common.[26] The "parachutes" have been rationalized on two different grounds, familiar in the executive compensation literature. The first was an insurance rationale, a form of "efficient (or "optimal") contracting": CEOs make large firm-specific investments. If the firm is taken over, those investments are written down and it is likely that the CEOs next best job will be at much lower compensation. Although employees who are laid off in a merger may suffer similar losses (and don't get such insurance), the market for CEOs is much tighter. The alternative to such insurance would be much higher compensation on an annual basis, a form of CEO self-insurance.[27]

The second ground was a managerial agency cost rationale. At the time parachutes were inaugurated, CEOs had considerable power to resist an unsolicited bid. This stemmed from their relationship with the directors, most of whom (at the time) were selected by the CEO and the costly uncertainty (to the acquiror) associated with an uncooperative CEO.[28] Moreover, over the course of the 1980s, the Delaware courts validated many far-reaching target defensive measures, culminating in judicial approval of the poison pill and the "just say no" defense. Charitably, the parachute was an "incentive alignment" mechanism of the interests of the CEO and the shareholders. Less charitably, the pill could be styled as the shareholder buyback of the takeover resistance endowment granted to managers by the Delaware courts, which were concerned that a more rigorous approach might trigger an exodus from Delaware to a more protective jurisdiction.[29]

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[26] See, e.g., Craig E. Lefanowicz, John R. Robinson & Reed Smith, Golden Parachutes and Managerial Incentives in Corporate Acquisitions: Evidence from the 1980s and 1990s, 6 J. Corp. Fin. 215, 217 (2000) ("Although less than 20% of the managers of target firms had GPs in the early 1980s, almost 86% of the managers of target firms had GP contracts in 1995.")
Rather remarkably, until the 1980s CEOs of most major corporations served "at will." YLJ note (1985), 909 n. 5 (citing sources). This institutional fact, a testament to the fact of an Imperial CEO, is a baseline for measuring the shock of the hostile deal era that followed.

[27] In the early 1980s a different rationale was current: that the golden parachutes were a kind of settling up for prior periods of under-compensation, a deferred compensation payment. This was a rationale explicitly rejected in the Conference Committee Report associated with the legislation that effectively capped golden parachute payments. See Conf Comm Report H.R. REP. No. 861, 98th Cong., 2d Sess at 852, https://www.finance.senate.gov/imo/media/doc/Conf-98-861.pdf
Joint Tax Committee (1984) developed an efficiency based rationale against parachutes.

[28] See, eg, YLJ note (1985), writing as if the choice of whether to resist was the CEO's, not the board.

[29] Lipton quote.

Rather remarkably, the golden parachute initially was categorized as a management "entrenchment" device, included in the well-known corporate governance "G-index" of Gompers-Ishii-Metrick (2003), and surviving a sophisticated lawyers' cut in the "E-index" of Bebchuk-Cohen-Ferrell (2008).[30] An extensive empirical literature debated whether adoption of golden parachute increased or decreased the value of the firm.[31] The literature now seems to have resolved in favor of the view that the presence of a golden parachute increases the likelihood of a takeover in a way that is economically measurable and statistically significant.[32]

Analysis of the impact of the golden parachute on M&A begins with the observation that the "golden parachute" of the 1980s is quite different in substance and rationale from the "golden parachute" of the 2000s.[33] The payoff of the original GP's was styled as a multiple of current salary (and expected bonus). The parachute contract also called for the acceleration of unvested stock options, but since stock options were then such a minor part of compensation,[34] the parachute payment was framed almost entirely in terms of prior cash compensation. After public reaction to some large parachute payments,[35] Congress placed a soft cap of "less than 3x" prior compensation, prescribing that excess payments would not be deductible to the corporation and would be subject to a 20 percent excise tax on the recipient executive. Though "excess" payouts

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[30] I think there was some mingling of "entrenchment," which suggests augmentation of managerial power to resist a bid, and corporate governance "quality," which could include "slack" that doesn't impede a determined bidder.

[31] Eg, Mogavero and Toyne (1995) find significantly negative abnormal returns associated with the announcement of parachute adoption. Daley & Subramanian (1985); Singh & Harianto (1989), Wade *et al* (1990) – entrenched managers adopt GPs to thwart takeovers. [Note – early GPs; mostly only salary multiple but other restrictive terms) But see --

[32] See Jonathan M. Karpoff, Robert Schonlau & Eric Wehrly, Which Takeover Provisions Deter Takeovers?, 75 J. Corp. Fin 102218 (2022), at Tables 4, 7 & 8 Many researchers find that takeover likelihood is positively related to the use of golden parachutes, including Agrawal and Knoeber (1998), Machlin, Choe, and Miles (1993), Sokolyk (2011), Goktan and Kieschick (2012), Mansi, Wald, and Zhang (2016), Bebchuk, Cohen and Wang (2014), and Goktan, Kieschnick, and Moussawi (2018). This itself reflects the different function that GPs have come to play, as discussed below.

[33] This is true of many devices fashioned as an anti-takeover devices. The poison pill, for example, adds the friction of needing to package a proxy contest threat alongside a cash tender offer, but in the absence of a classified board, see *Air Products/Air Gas*, will be insufficient to block a hostile bid. Instead, the poison pill now serves to give management control over the sale process in friendly transactions, preventing contending bidders from gun-jumping the company's structured auction process with cash tender offers. Managements are trying to repurpose the poison pill to fend off shareholder activists, a context quite different from the "boot-strapping bust-ups" of the 1980s that spurred their creation. Compare; Eldar; Goshen, Gordon.

[34] Murphy (2013)

[35] See Peer C. Fiss, Mark T. Kennedy & Gerald F. Davis, How Golden Parachutes Unfolded: Diffusion and Variation of a Controversial Practice, 23 Organization Sci 1077, 1079-1080 (2012); Murphy, Executive Compensation: Where We Are, and How We Got There, Handbook of the Economics of Finance (2013), Ch. 4, at 269 (Golden parachute for William Agee following the 1982 Bendix takeover fight).

were legal, if more costly, the statutory provision became the conventional payout.[36] The early empirical literature on golden parachutes used a 2.9x payout as the benchmark (and largely ignored option exercises).[37]

Two important changes occurred over the 1990s that transformed the nature of golden parachutes. First, the composition of executive compensation became increasingly dominated by stock-based pay -- stock options and restricted stock.[38] Executives entered into multi-year contracts with a large option/restricted stock component that vested over time, the vesting often performance-based. Such compensation was promoted as better aligning management's interests with the shareholders, both in the response to an unsolicited offer but more generally in the operation of the firm. This would ameliorate agency cost problems. The heavy use of stock options was also seen as competitively necessary to hold onto executives who otherwise would defect to the newly emerging "dotcom" companies, which were offering stupendous option grants since they were cash-poor.[39] Stock options also received favored regulatory treatment: As a tax matter, stock option-based compensation was regarded as "performance based" and thus not subject to the $1 million deductibility limit on cash compensation set in in 1993.[40] As an accounting matter, stock options could be issued without any charge to reported earnings until a rule change in 2006.[41]

Second, paradoxically, golden parachutes became more entrenched over the 1990s despite the increasingly diminished capacity of managements to resist an unsolicited premium bid. The reduction in managerial prerogative resulted from corporate governance changes as well as the increasing reconcentration of share ownership in institutional investor hands. Directors became increasingly independent in fact.[42] In part this was spurred by doctrinal developments in Delaware law. Courts tied a target's entitlement to employ defensive tactics, including the "just say no" version of the poison pill, to approval by independent directors.

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[36] Some objected that the 3x cap now set a baseline which in many cases increased the payout that would otherwise have obtained (much like other excess compensation thresholds have set floors). See 162(m) articles. Walker (2012) Indeed Kevin Murphy reports that adoption of the golden parachute tax provisions triggered proliferation of golden parachute agreements. In the 1984-1987 period, prevalence increased from "rare" to 41% of the 1000 largest corporations. Id. at 270. Of course the hostile takeover market was booming in the period, so that might have driven adoptions.

[37] See David Offenberg & Micah Officer, The Totality of Change-in-Control Payments (2014) (existing literature "is almost exclusively focused on traditional golden parachutes paid to departing CEOs (cash awards, usually as a fixed multiple of the CEO's final salary and bonus), ignoring other potentially important forms of change-in-control payments.).

[38] Murphy (2013). Brian J. Hall & Jeffrey B. Liebman, Are CEOs Really Paid Like Bureacrats?, 113 QJE 653, 655, 662, 679-680 (1998)

[39] Murphy (2013)_

[40] See Kevin J. Murphy & Michael C. Jensen, The Politics of Pay: The Unintended Consequences of Regulating Executive Compensation (April 2018) (discussing impact of section 162(m) of the Internal Revenue Code.)

[41] See Financial Accounting Standards Board SFAS 123(R) (2006).

[42] Traced in more detail in Gordon (2007), 1520-23, 1531-33, 1539-40.

"Independence" that had to withstand scrutiny militated for greater distance from the CEO and thus less amenable to reflexive CEO objections to a premium offer. Such independence-in-fact was also enhanced by the rise of institutional investor ownership of public companies.[43] Such investors held individual stocks as part of a diversified portfolio of equity securities. Firm-specific monitoring was not economically rational for these investors. So their focus turned to directors: independence and quality. Better director monitoring of management would directly serve shareholders' interest at low cost. Corporate governance information intermediaries – the proxy advisors like Institutional Shareholder Services – supplied a form of substituted monitoring of management and director performance.

The combination of ownership reconcentration and greater director independence-in-fact would make it much harder for the CEO to turn down an unsolicited premium bid. The shareholders were watching. The directors were watching and knew the shareholders were watching. In short, changes in the underlying corporate governance environment reduced managerial agency costs when it came to unsolicited offers. Hostile bids were not prominent in the 1990s, unlike the 1980s, in significant part because of a change in the underlying governance structure.[44] "Unsolicited bids" in the 1990s almost invariably became "friendly deals."

The shift to stock-based pay both substantially ameliorated the concern that a target CEO would be undercompensated in a merger transaction and closely aligned management and shareholder interests in responding to an unsolicited offer. Moreover, enhanced monitoring by independent directors buttressed by observant institutional shareholders with clout dramatically reduced a CEO's capacity to thwart a premium bid. The incentive alignment and the enhanced monitoring should have substantially eliminated the risk that the CEO would (or could) thwart an unsolicited premium bid.

Yet golden parachutes persisted and, as demonstrated by evidence discussed below, became increasingly rich over the course of the 2000s and 2010s. "Persistence" ("survivals," per Holmes[45]) is not an uncommon feature, perhaps, of complex relationships. A term, like a parachute provision, becomes part of the "market" contract, so to eliminate it even if it provides a gratuitous benefit can be taken as a negative signal of enthusiasm as a board seeks to hire a new CEO. And to some extent the parachute became richer almost mechanically. Executive compensation, especially stock-based pay, ballooned over the period.[46] Since the parachute provided for the acceleration of unvested stock-based pay, as such grants increased, a change in control would quite commonly produce a large payout based on the immediate realization of stock-based claims.[47]

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[43] See Gilson & Gordon (2013).
[44] See Andrade, Mitchell Stafford (4% hostility 14% in the 1980s)
[45] Oliver Wendell Holmes, Law In Science and Science in Law, 12 Harv. L. Rev. 443, 452 (1899).
[46] Mishel & Kandra, 2021.
[47] This is borne out in Table 1, infra, which shows as parachute payout increases, so does the fraction accounted for by the equity-based component.

Moreover, the parachute payout was further inflated by another change over the period: an increase in the "pay slice" of the CEO: the CEO's share of the total compensation received by the top five senior executives.[48] It was not only that management's compensation grew substantially over the 1990s, but that the CEO obtained an increasing fraction. Since compensation over the 1990s increasingly consisted of stock-based pay, the growing CEO slice, in interaction with the acceleration of unvested stock-based grants, would also contribute almost mechanically to a large parachute payout.

The incentive structure of parachutes became more "high powered" as well over the 2000s and 2010s. The 2006 accounting change facilitated a change in stock option grants from plain vanilla "at the money" options (meaning: exercise price at the prevailing market price) to options with exercise grants that were "out of the money."[49] This added an extra performance element to stock option value. But it also increased the risk that options would expire out of the money.[50] Pursuit/acceptance of a premium bid would resolve that risk in a high payout way.

Parachutes consciously became richer as well. The large payouts triggered the tax penalties of the 1984 golden parachute provisions. Yet firms absorbed the non-deductibility of the parachute payments. And in many cases parachute provisions were amended to provide recipients with additional compensation to cover the 20 percent excise tax on "excess" parachute payments, and yet additional compensation to cover the taxes owing on additional subsidy, a "gross-up."[51] Moreover, as shown by Choi *et al*. (2020), high-end parachute payments came to set the norm for "quasi-chute" compensation upon a change in control. Meaning: that in cases where a particular CEO's originally contracted-for parachute payment would not achieve a deemed "market" level (perhaps because the transaction came late in the stock-based vesting period, leaving not so many stock-claims to accelerate), the parachute agreement would be amended in this final period to produce a better outcome.

The general increase in CEO compensation, especially in stock-based pay, and the accelerated vesting provisions produced this result: a transaction that triggered a parachute would transform many a CEO from the merely wealthy to the quite rich. Thus, it seems obvious that golden parachutes would come to have a different function. The original function was to induce an incumbent CEO to stand aside in favor of a premium unsolicited bid or perhaps to be a fair

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[48] See Lucian Bebchuk & Yaniv Grinstein, The Growth in Executive Pay, 21 Oxford Rev. of Econ. Policy 283 (2005); Lucian Bebchuk, K.J. Martijn Cremders, Urs C. Peyer, The CEO Pay Slice, 103 J. Fin. Econ 199 (2011).

[49] See J. Carr Bettis, John Bizjak, Jeffrey Coles & Swaminathan Kalpathy, Performance-vesting Provisions in Executive Compensation, 66 J. Accounting & Econ. 194, 196 (2018).

[50] Mishe & Kandar (2021)

[51] IRC §4999 imposes the excise tax on an "excess" golden parachute payment. The availability of gross-ups are increasing in deal size, which is not surprising since the value of the appreciated accelerated stock in large deals will commonly exceed the 2.99x salary/bonus threshold. See Mark Siciliano, Analyzing Change-in-Control Payments Since the Enactment of Say-on-Pay, 50 Compensation & Benefits Review 82, 87 (2018) (fig. 3).

evaluator of the bid, debiased by the possibility of a parachute payment. By the 2000s the magnitude and structure of parachutes stood for something different in the CEO's attitude and role. High payoff golden parachutes engender not just the CEO's willingness to consider a merger proposal, but also provide inducement to pursue merger prospects in which the CEO's firm is the target. Indeed, this is reflected in the empirical work on GPs; the recent work shows that parachutes are positively associated with the likelihood of becoming a target.[52] By contrast, the empirical work of the 1980s and early 1990s was focused on different questions: whether GPs resolved or exacerbated managerial agency problems.[53] And, as noted previously, the governance index literature initially marked parachutes as an entrenchment device. More recent empirical work is to a different conclusion: that parachute adoption is a good thing for shareholders, apparently through the channel of making a premium takeover more likely.[54] The pivot in the empirical work is not because we have collectively become smarter in understanding how parachutes work; rather, the parachute of today is just different.

The extent of the difference is reflected in a recent article on golden parachutes, Choi *et al*. (2020),[55] which, in the context of showing the lack of bite of a shareholder advisory vote on golden parachutes added in 2010 by post-financial crisis legislation, provides a detailed account of the increasing size and leverage of prospective parachute payments over the 2006-2016 period. The article also documents how high golden parachute payouts have become a kind of target CEO success fee in connection with a merger.

Choi *et al* (2020) exploits two different data sources. The first is the compilation by Execucomp, of data on Russell 3000 firms that became available beginning in from newly-required SEC compensation disclosure, "Compensation Disclosure and Analysis" (CD&A")[56] Among the categories of required disclosure are the terms of golden parachute arrangements. The second source is detailed disclosure about realized golden parachute payments in connection with an actual merger transaction. This requirement was added by post-financial crisis legislation, the Dodd Frank Act of 2010[57] that required a target shareholder advisory vote on the golden parachute payments to be made in connection with a merger, so-called "Say on Golden

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[54] This is also reflected in a sea change in shareholder proposals regarding golden parachutes. Once a favorite target of shareholder proposals calling for repeal, by 2009-10 such proposals had dramatically dwindled, only 11. See Karpoff *et al* at --.

[55] Albert Choi, Andrew Lund & Robert Schonlau, *Golden Parachutes and the Limits of Shareholder Voting* 73 Vand. L. Rev. 223 (2020).

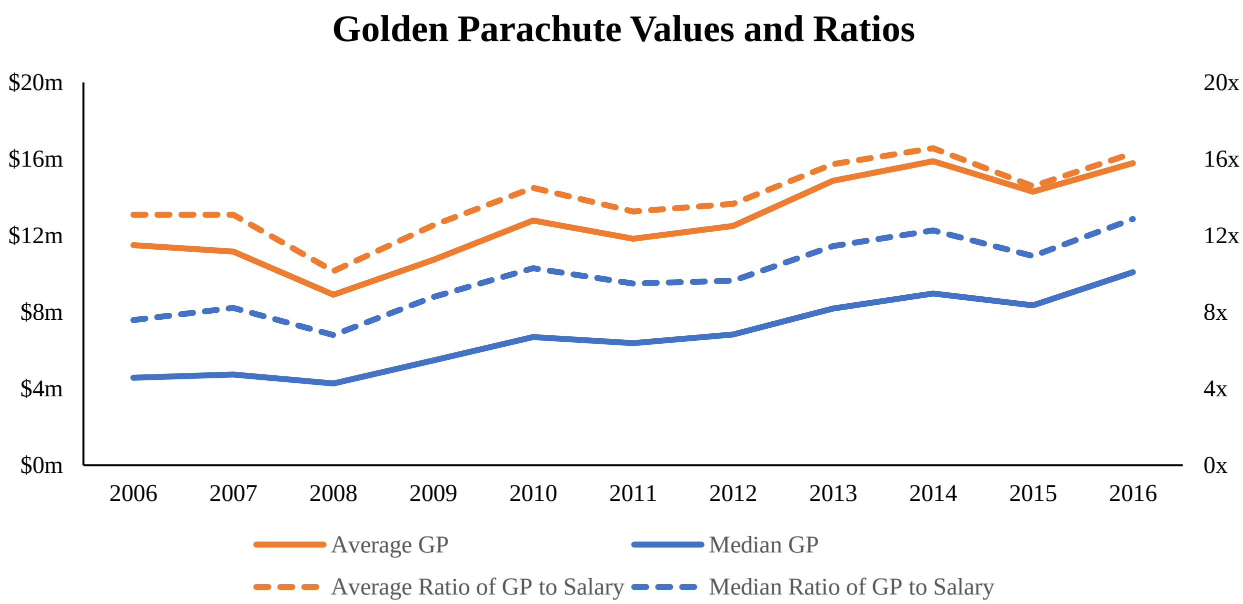
[56] [Cite CD& Regulation] See Jeffrey N. Gordon, *Executive Compensation: If There is a Problem, What's the Remedy? The Case for "Compensation Discussion and Analysis"*, 30 J. CORP. L. 675 (2005).

[57] More formally the Dodd-Frank Wall Streeet Reform and Consumer Protection Act., Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 15 U.S.C. (2012)).

Parachute, ("SOGP").[58] So Choi *et al* uses data on "pro forma" parachute values over the 2006-2016 period and "realized" parachute values over the 2011-2016 period.

The steady increase in the pro forma value of parachutes over the ten year period 2006-2016 is reflected in Figure 1 (based on data from Choi *et al*.). The average (mean) parachute value increases from $12 million to $18 million over the period. Also of significance is that average multiple of parachute payment to salary increases from 14x to 18x (remembering that the initial triggering threshold for the adverse tax result was 3x).

Fig. 1



Adapted from Albert Choi, Andrew C.W. Lund, Robert Schonlau, *Golden Parachutes and the Limits of Shareholder Voting*, 73 VAND. L. REV. 224, 257. Table 1, Fig. 1 (2020)

[58] Id. §951. The implementing regulation is Shareholder Approval of Executive Compensation and Golden Parachute Compensation, 76 Fed. Reg. 6010, 6027 (Feb. 2, 2011) (codified at 17 C.F.R. pts. 229, 240, 249).

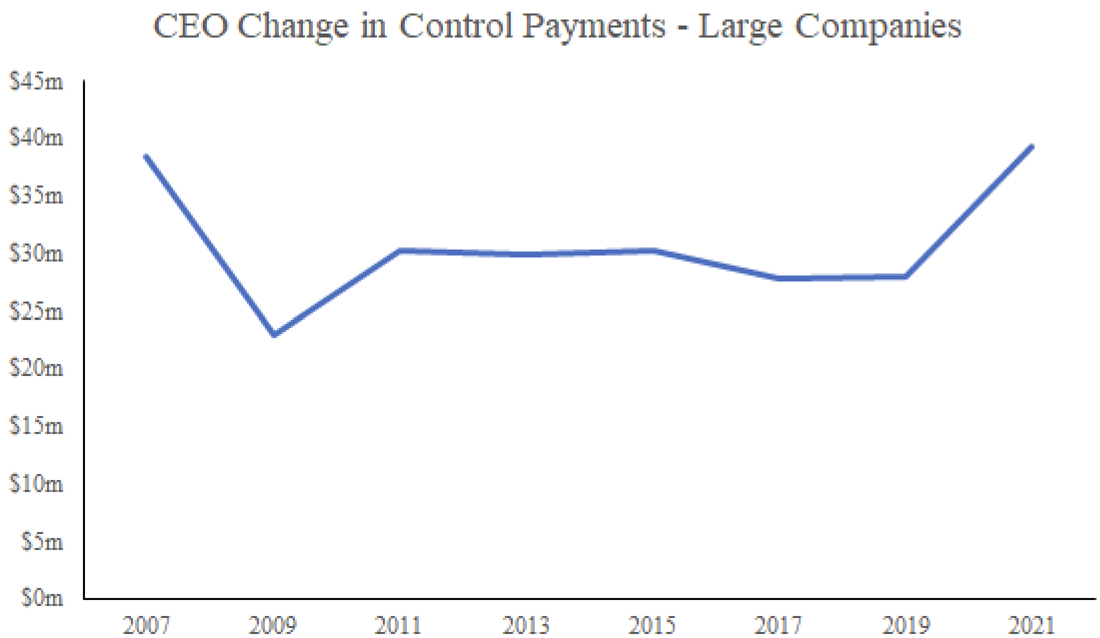
The laws and regulations include (i) Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1899 (2010) (codified at 15 U.S.C. § 78n-l(b) (2012)) (amending the Securities Exchange Act of 1934 by adding new Section 14A), which requires U.S. public companies to conduct a non-binding shareholder advisory vote on chute payouts in connection with mergers and other significant corporate transactions that are presented to the shareholders for approval, and (ii) Item 402(t) of Regulation S-K, 17 C.F.R. § 229.402(t) (2014), which requires disclosure of any agreement or understanding (written or unwritten) between the target or acquirer and named executive officers of each concerning any type of compensation (current, deferred, or contingent) based on or otherwise relating to the transaction.

The reported "pro forma" parachute value from the CD&A data understates a target CEOs expectation in two respects. First, for firms that became targets, Choi *et al*. uses the SGOP data to show that the *realized* parachute value was on average (mean) 16.9 percent higher than the earlier reported *pro forma* amount, probably reflecting the deal premium on the target stock in the stock-based pay package.[59] Second, Choi *et al*. also discover that nearly half the firms that entered into merger agreements in the post-2011 period (after adoption of SOGP), are firms with below average pro forma parachutes.[60] The firms amended their parachutes to bring them up at least to the value of non-amending firms; indeed, for the median firm, exceeding that value by 8 percent.[61] This suggests that there is such a strong market expectation of a target CEO's reward for a successful merger that, despite the absence of a contractual obligation, the target board enriches the CEO's parachute payout.[62]

Compensation consultant Alvarez and Marsal has produced biannual studies of golden parachutes since the advent of the CD&A, but limits the studies to the top twenty firms in ten different business sectors, 200 in all. The average pro forma parachute is much higher than for the broader set of firms covered in Choi *et al.*, more than twice as large. The parachute payment/salary ratio is approximately 11x, slightly lower than for the broader sample, but the absolute value of the parachute is considerably larger, as shown through a comparison of Figures 1 and 2. The Avarez and Marsal data show that that the size of the pro forma parachutes for the largest companies has remained high throughout the post-financial crisis/post-Dodd-Frank SOGP reform era, trending higher at the end, as the M&A market heated up.

[59] Choi et al., at 249.
[60] Id. at 261 Table 8 (279 targets over the 2011-16 period; the 138 targets that amended their golden parachute ("GP") had Benchmark Year -1 average GPs that were less than the equivalent year GP of the 141 targets that did not amend).
[61] Id.
[62] Similar observations have been made by public reports of compensation professionals. For example, a recent Alvarez & Marsal study of healthcare industry mergers in the 2013-2017 period showed that 16 of 107 (15 percent) amended golden parachute agreements in the course of merger negotiations to add tax gross-ups, and they were more structured to be more costly than the unamended version. See Alvarez & Marsal, 2017/2018 Executive Change in Control Report at 5.

Fig. 2



Data source: Alvarez & Marsal biannual surveys, 2007-2021, own calculations

Choi *et al*. also present evidence that takeover likelihood is increasing with the size of the target CEOs golden parachute. For firms that became targets in the post-2011 period, the CEO pro forma parachute was significantly higher than the non-target.[63] This is consistent with other recent empirical literature that finds a positive influence of parachutes on takeover probability.

The transformation in the golden parachute from its modest origins in the 1980s is perhaps best demonstrated through a close examination of the composition of golden parachutes and tracking the very large differences in parachute payments conditional on the size of the m&a transaction. I obtained access to a database of public filings pursuant to the SOGP requirement of the Dodd-Frank Act.[64] The database provides detailed information on realized golden parachutes over the 2011-2022 period, a total of 2163 transactions. Analysis of the data reveals some striking facts. (See the figure below, Golden Parachutes by Deal Size, Figure 3.) First, the size of parachute payments varies directly with the size of the transaction, ranging from $4.0 million (mean) for transactions under $1 billion to $51.4 million (mean) for transactions of $30 billion or

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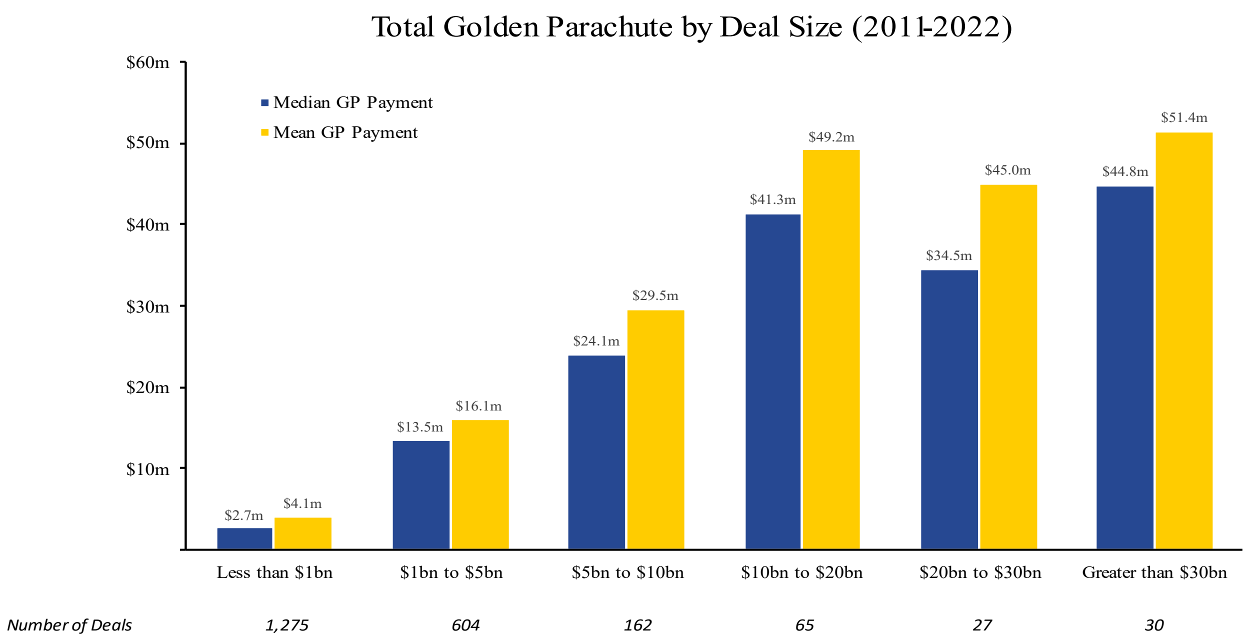
[63] Id. at 249. The target proforma was $16.44 million (mean)/$11.53 million (median); for the non-targets, $12.67 million (mean); $6.59 million (median).
[64] The database is maintained by Mark Siciliano of the University of Alabama Culverhouse College of Business. See supra n. 22.

greater. Second, although means are higher than medians, the gap is relatively narrow, meaning that the means generally characterize the group rather than being driven by a few outliers.

Transactions under $1 billion (n = 1275) comprise 59 percent of all covered transactions in the period. For this group of transactions, golden parachutes were relatively modest, $4.1 million (mean). As transactions crossed the $1 billion threshold, the parachutes became meaningfully larger. For transactions $1 billion to $5 billion (n=604), average payouts were $16.1 million (mean); for transactions $5 billion to $10 billion (n= 162), the average payouts nearly doubled, $29.5 million (mean). Transactions $10 billion and above (n=122) seemed to be in a special class, with average payouts of approximately $48 million (mean).

Fig. 3



Source: Database maintained by Prof. Mark Siciliano, Golden Parachutes actually paid, 2011-2022

Another way to assess the incentive effects is to look at variation within the parachute payments directly. This is made vivid by the next table, which shows the distribution of parachute payments by decile. The top 10 percent (90^{th} decile) of parachutes (meaning, for 210 transactions) had payouts in the $29 million to $289 million range. For these largest payouts, the parachute included gross-ups (meaning: extra compensation to cover the excise tax associated with “excess” parachute payments) in 25% of the transactions. The next decile (80^{th}-90^{th}

percentile) of parachutes, reflecting another 210 transactions, had payouts in the $18 million to $29 million range. The table underscores the economically material extent of parachute payments for a significant number of transactions. Our theory of incentives would be embarrassed by the claim that payouts of this magnitude had no effect on CEO behavior. Hall and Liebman once wondered if CEOs were paid like bureaucrats.[65] Today's question is, aren't (many) CEOs paid like investment bankers (or better!) and what do we make of that.

Table 1

Decile	Value Range	Median Equity-to-Cash Ratio	Average Equity -to-Cash Ratio	Percent Receiving Gross-Up	Median Gross-Up
1st Decile (Bottom 10%)	$58 to $769,575	0.0x	0.3x	0.9%	$101,397
2nd Decile (10-20%)	$769,575 to $1,534,500	0.2x	0.4x	0.5%	$14,214
3rd Decile (20-30%)	$1,534,500 to $2,603,654	0.5x	0.6x	3.2%	$550,000
4th Decile (30-40%)	$2,603,654 to $4,051,750	0.7x	0.8x	5.1%	$714,007
5th Decile (40-50%)	$4,051,750 to $5,969,534	1.2x	1.4x	8.3%	$1,303,201
6th Decile (50-60%)	$5,969,534 to $8,590,003	1.3x	1.3x	7.9%	$1,308,979
7th Decile (60-70%)	$8,590,003 to $12,524,458	1.7x	1.7x	12.4%	$2,354,213
8th Decile (70-80%)	$12,524,458 to $18,033,439	1.9x	2.0x	17.1%	$3,442,366
9th Decile (80-90%)	$18,033,439 to $28,691,406	2.7x	2.6x	10.6%	$4,360,831
10th Decile (Top 10%)	$28,691,406 to $288,685,335	4.6x	4.3x	25.0%	$10,091,631

[65] Brian J. Hall & Jeffrey B. Liebman, Are CEOs Really Paid Like Bureacrats?, 113 QJE 653. (1998).

As figure 4 illustrates, golden parachutes generally became larger over the post-2011 period, a steady increase especially beginning in 2017. Particularly striking is the source of this general increase in parachute size: the smaller deals, under $5 billion. As figure 5 shows, the average (mean) of parachutes in such deals doubled over the period, from approximately $6 million to approximately $12 million. Thus throughout the post-Global Financial Crisis period, throughout the Covid era, golden parachutes were getting larger, especially for non-mega-deals

Fig. 4

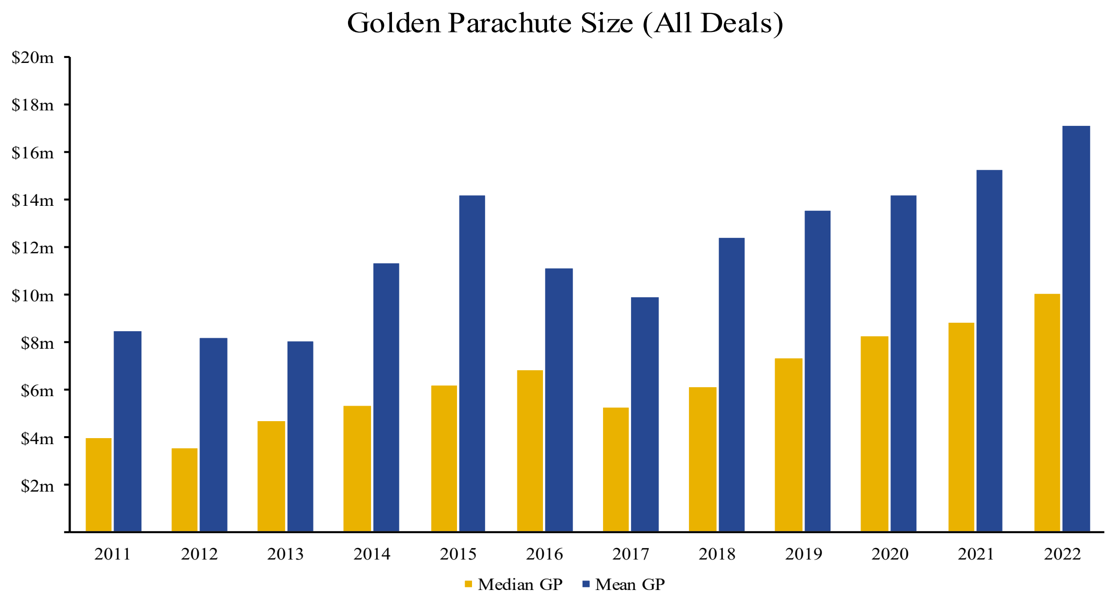
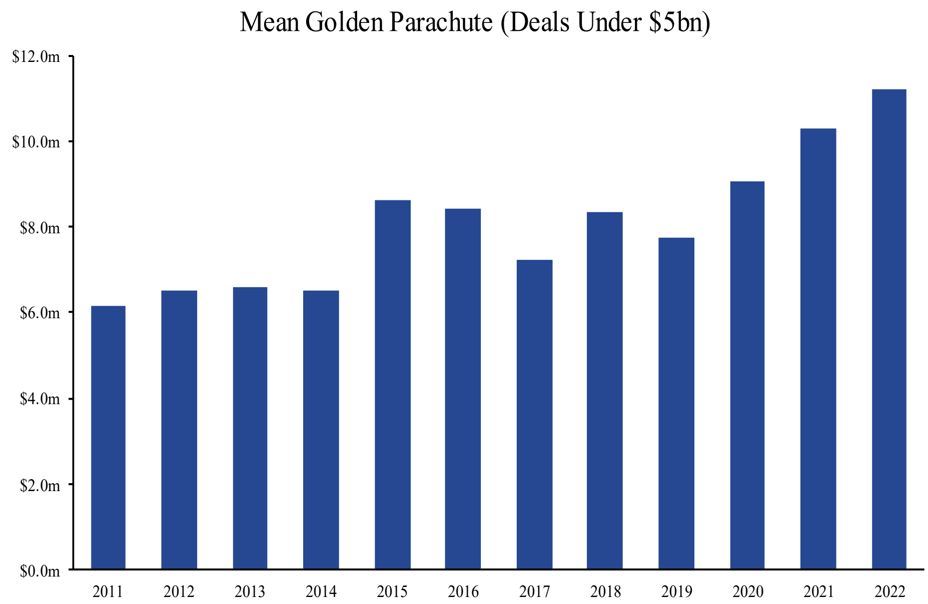


Fig. 5



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The argument thus far has been that the function of golden parachutes as an internal governance device has transformed itself over the forty years since its introduction. The incentives now on offer have converted target-side CEOs from foot-draggers to promoters of M&A and this in turn helps explain the historically unprecedented persistence of a high-level of M&A in the post-2000 period. But why is this a concern? Target shareholders receive a substantial premium (generally 30 percent or more) and overwhelmingly vote in favor of the proposed transactions, well over 90 percent on average. Yes, the approval percentage for the golden parachute (SOGP) is sometimes less, in the 80s percent range, and the approving percentage may drop further, based on objection to particular provisions, like gross-ups,[66] but those are objections to CEO excess rather than to the transaction that the CEO has promoted.

We turn now to assess the harm to shareholders through the distortion of project choice and a fall-out in CEO efforts to prepare a successor. We also consider the harm to laid-off employees. More speculatively, we consider the outcomes mismatch between laid-off employees and the golden parachute-receiving CEO as generating a particular kind of socio-political harm that may even have electoral consequences.

[66] See Siciliano, id., at 88, Fig. 4 (showing differential SOGP approval rates).

Transformed Golden Parachutes Are Costly to Shareholders

Assume that golden parachutes give CEOs incentives to seek out M&A transactions in which their firm becomes a target: Why is that undesirable from a shareholder perspective? The statutory structure of decision rights that requires a target shareholder vote almost invariably results in a premium for target shareholders. Legal limits on target management's ability to "lock up" a friendly deal provide at least a basic market check on the consideration offered.[67] Where the CEO is looking to exit with a golden parachute rather than to stay as part of the acquiror's senior management, the CEO wants the same thing as the shareholders: "more." Target shareholders must vote in favor of a merger, which gives them veto rights over a transaction they regard as undesirable. So how can they be harmed by an incentive device that generates a transaction for their consideration, that provides them with a put option on favorable terms?

The answer is that a CEO incentivized from the get-go to be on the lookout for an M&A exit will manage the firm differently and less optimally from a shareholder point of view. This manifests itself in two ways: the choice of projects to pursue and the priority of succession planning. In some industries, pharma and tech, for example, the optimal shareholder value path may entail pursuing projects that will have greatest value through complementarities from subsequent M&A. It makes sense for an established firm in those industries to outsource important aspects of the innovation process and then to acquire successful innovators through M&A.[68] Sometimes the critical element is a lack of fit between a high risk/high reward compensation structure best-suited for certain kinds of R&D and the on-going compensation pattern within the established firm. Sometimes uncertainty over the technology path means it's best to have multiple players competing, the winner becoming an acquisition target of the established firm. There are many other cases in which a company can, as a first best strategy, take on projects that can foreseeably create synergy gains in a merger.[69]

But the success fee of a golden parachute, which pays off if and only if the firm becomes a target, can also negatively distort project choice. The CEO might avoid projects that have highest expected value for the own-firm but which would be much harder to fit into the business model of another firm. Rather than a home run for shareholders, and a parachute that never pays off, the CEO may prefer a strategy that results in singles or doubles for the shareholders but a home run for the CEO because the parachute will pay off. The issue is not that project choice is shaped by short-termism vs. long-termism but is simply distorted in consequence of this special kind of managerial agency cost. The shareholder veto over the proposed transaction is no check over this agency cost. The inherent information asymmetry in project choice makes on-going

[67] Revlon; QVC; Unitrin

[68] See generally Ronald J. Gilson, Locating Innovation: The Endogeneity of Technology, Organizational Structure, and Financial Contracting, 110 Colum. L. Rev. 885 (2010).

[69] Recent antitrust literature has suggested that this strategic M&A exit planning may also serve anti-competitive effects, see, e,g., Colleen Cuningham, Florian Ederer & Song Ma, Killer Acquisitions, 129 J. Pol. Econ. 649 (2021).

monitoring difficult as well. If markets have trouble in valuing projects that are undertaken, the impounding of information about forsaken real options seems highly improbable.[70]

Another distortion that arises from the golden parachute M&A success fee is the fall-off in succession planning. One way that a CEO can sell an M&A transaction to the board is with a credible claim that there is no appropriate successor, so that the safest way of avoiding a precipitous decline in shareholder value is to become a target. Shareholders might have been better off with a strong succession plan, but given these circumstances, board and shareholder approval of the proposed transaction will be best. Because of the leadership gap, a merger is now optimal. While it is difficult to show distorted project choice, there is evidence in favor of the parallel claim: that M&A timing has become increasingly tied to the CEO's retirement over the same period that the enriched golden parachute, the platinum parachute, has taken hold.

Coates & Kraakman study the CEO turnover for CEOs over the 1992-2004 period, whether by firing, retirement, or exit through a deal.[71] Their initial conjecture was that "CEOs verging on retirement are exceptionally likely to search out deals in order to liquidate their personal holdings or extract a cash premium."[72] But they find, to their surprise, a *lack* of evidence indicating that "CEOs approaching retirement make *more* use of deals than young CEOs [below median age of 56]. In fact, as mandatory retirement age approaches, the ratio of deals to retirements falls, suggesting that impending retirement is not a primary driver of deals."[73]

By contrast is evidence from Jenter & Lewellen that goes deeper into the post-2000 period and finds a pronounced effect upon the CEO's impending retirement, an "age-65 effect" that is associated with a 32% increase in the chances of a becoming a target.[74] They point out that this effect is not uniform across this period: it disappeared in the merger wave of the late 1990s.[75] But this is precisely the point: in response to a real economic shock – the advent of the internet – we see a wave of M&A to rearrange organizations and achieve scale and strategic

[70] Profs. Sepe and Whitehead have a different intuition about the effect of golden parachutes, which they see as encouraging managers to make "specific innovations in innovation whose value may not be realized for some time – but which are essential to sustaining long term performance." Thus "granting chutes tends to increase the value of innovative firms." Simone M. Sepe and Charles K. Whitehead, Rethinking Chutes: Incentives, Investment, and Innovation, 95 B.U. L. Rev. 2027 (2015). This seems an unlikely defense of golden parachutes in the contemporary setting, given 1) the general shift to stock-based pay particularly in innovation-focused firms, 2) the uniquely highly benefits to the CEO from golden parachutes vs. other key employees, and 3) the fact that golden parachutes are now almost invariably triggered in "friendly" deals rather than the rare hostile takeover.
[71] See John C. Coates IV & Reinier Krakkman, The Link between Acquisitions and the Market for CEOs, (Jan 2011), available at https://ssrn.com/abstract=1760154. Because the way they have coded the data, the deals they count in their turnover statistics occurred predominantly in the 1990s. Id. at 11. Their focus is on "manager" CEOs vs "owner" CEOs, defined in terms of whether the CEO owns 1 percent or more of the company's stock. See p. 15, Table 1.
[72] Id. at p. 24.
[73] Id at p. 29
[74] Dirk Jenter & Katharina Lewellen, CEO Preferences and Acquisitions, 70 J. Fin. 2813 (2015).
[75] 70 J. Fin. at 2829 (Panel A vs. Panel B).

advantage. A special target CEO incentive like the golden parachute is not pre-eminent. It's after the assimilation of the external shock that the CEO incentive has particular effect. The "wave" passes but the level of M&A activity persists.

What is the point of a golden parachute for a retiring CEO? The "optimal contracting" view was that the golden parachute protected the CEO's firm specific investment, a kind of insurance for an on-going compensation. But on the pattern revealed by Jenter & Lewellen, this insurance-based rationale has dissipated by the time of the transaction. The CEO could simply relinquish their job at retirement, which would mean preparing a successor. Alternatively, the CEO can sell the firm and collect on the insurance; surely this reduces the incentives for succession planning. The retiring CEO outfitted with a golden parachute is in the position of a home-owner occupying a well-insured house who, it turns out, cannot sell the house when they move to Florida on retirement. The only way to realize value on the house, then, is to burn it down and collect the insurance. This purple metaphor shows the distortive potential of the golden parachute: the CEO will pick projects and otherwise "dress up" the firm that are timed to the CEO's intentional exit and will avoid a successor in the wings who will lobby for continuation.[76] This distortive dynamic is evidenced by a showing by Jenter & Lewellen that most of the retirement age effect dissipates in the case of firms with strong governance;[77] this shows the golden parachute's effect in isolation.

The golden parachute changes the narrative of the CEO career. Old story: "after a successful tenure as CEO, they left the company in the well-prepared hands of a successor." New story: "after a successful tenure as CEO they arranged for a sale of the company at a great premium and received a well-deserved golden parachute." This new conception is highly likely to affect project choice – which real options to exercise amidst an array of possible investment requirements and time horizons. One of the contributions of behavioral finance is to show how these considerations play into economic decision-making.[78] This is not to say that the retiring CEO only circumstance in which the golden parachute can influence M&A. Rather, it's a straightforward example how this incentive can distort ex ante decision-making so that at the time of the proposed transaction, the merger looks great for shareholders.

The impact of golden parachutes on M&A is also suggested by the interaction between the sharp increase in private equity M&A activity in the post-Global Financial Crisis period and the notable increase in the golden parachute size for smaller transactions, under $5 billion.[79] Gompers, Kaplan & Mukharlyamov (2023) document a surge in private equity transactions in

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[76] Jenter & Lewellen treat a "succession problem" as an independent motivator of becoming a target, 70 J. Fin. at 2841, but of course an adequate successor is frequently endogenous.
[77] Jenter & Lewellen create an index consisting of significant stockholdings by the CEO, directors, and blockholders; small boards, independent directors, and CEO/chair duality and show its impact. See 70 J. Fin. at 2830-2833.
[78] Malcom Baker & Jeffrey Wurgler,Behavioral Corporate Finance: A Current Survey, in 2 Handbook of the Economics of Finance, George Constantinides, Milton Harris, & Rene Stulz, eds. (2012).
[79] See Figure 5 in the GP section.

the post-2010 period that includes smaller size public companies.[80] They show that in most cases the incumbent CEO is customarily terminated. For a take-private of a public company, this invariably means the triggering of the CEOs golden parachute. The secular increase in golden parachute payments for small and mid-cap deals over the period seems to reflect a conscious alignment of the CEO utility function. The increase in golden parachutes for such targets is evidence that this exit option has become feature of the CEO's operational planning.

Obviously the incentives of a golden parachute don't invariably lead to M&A but the potency can produce M&A persistence even after the "wave" of economic drivers passes. The cost to shareholders is distortion in project choice to make the firm a more appealing target and a reduction in succession planning that can make "merger" the optimal decision to fill a leadership gap. Both of these reduce the value of the firm from a shareholder point of view in ways that may be hard to measure. Designed to control a set of agency costs, the golden parachute itself creates a new set of them.

[80] Paul A. Gompers, Steven A. Kaplan & Vladimir Mukharlyamov, The Market for CEOs: Evidence from Private Equity, NBER WP 30899, available at http://www.nber.org/papers/w30899. See especially Table I, Panel A.