

ENDNOTES:

¹*Cineplex v. Cineworld*, 2021 ONSC 8016 (Can-LII). Both parties appealed the decision to the Ontario Court of Appeal (ONCA). However, as a result of Cineworld's bankruptcy proceeding in the United States, proceedings before the ONCA have been stayed.

²J. Chan and M. Petrin, "Lost Synergies and M&A Damages: Considering *Cineplex v Cineworld*" (2022) 100 *Canadian Bar Review* 275 ["Chan & Petrin"] at p. 276.

³Chan & Petrin at p. 291.

⁴Chan & Petrin at p. 304. *See also* p. 277.

⁵*See Luigi Crispo v. Elon R. Musk et al*, C.A. No. 2022-0666-KSJM (Del. Ch., Oct. 11, 2022).

⁶The court also stated: "If the parties had wanted to appoint Cineplex as the shareholders' agent to enforce their rights on Cineworld's failure to close, they could have done so."

USAGE OF SECTION 280G GROSS UPS IN RECENT M&A DEALS (2022)

By Matthew Friestedt and Julia Paranyuk

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In 2008, Institutional Shareholder Services ("ISS") began its attack on Section 280G excise tax gross ups.¹ As a result of this policy and other pressures, we have seen a significant decrease in the prevalence of 280G gross ups. Prior to 2005, over 50% of the biggest public companies had 280G gross ups in place, but over the last two decades, gross ups have substantially declined in prevalence.² A 2020 study found that only 5% of surveyed companies provided a 280G gross up,³ and a 2017 change in control survey similarly found that it was uncommon for companies to add new gross up provisions due to the likely opposi-

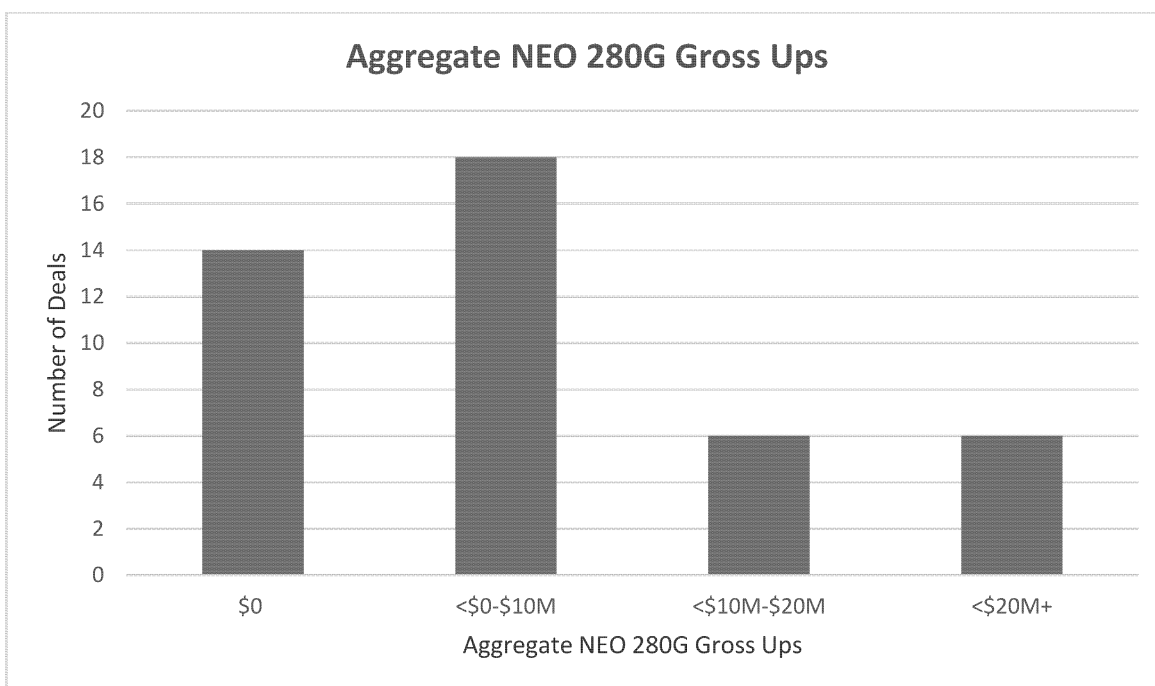
tion from investors and proxy advisors.⁴ Despite their disfavor with ISS, a number of companies in recent years have agreed, in connection with signing up merger agreements, to gross up their executives for any golden parachute excise taxes.⁵ For example, a 2022 study that reviewed 900 companies undergoing transactions identified that 6% of companies that did not have excise tax gross up provisions prior to undergoing a change in control opted to add one or more such entitlements in connection with the closing of the transaction.⁶ This article catalogs the existing and discretionary 280G gross ups that were triggered by agreed transactions and analyzes the impact on "say-on-golden-parachute" votes and merger votes. We focused on deals valued⁷ at \$1 billion or more that were signed up between September 1, 2017 and August 1, 2022.⁸ Based on our review, the addition of a 280G gross up will likely result in a low or failed Say-on-Golden Parachute Vote but should not meaningfully impact shareholders' approval of the transaction.

The Transactions. We identified 44 transactions that had or added a 280G gross up for one or more named executive officers ("NEOs"). The number of transactions that include gross ups has marginally increased in each year, with six in 2018, seven in 2019, nine in 2020 and 12 in 2021 (based on the transaction closing date). These 44 transactions ranged in size from \$1 billion to \$89 billion, with 28 of the 44 transactions (64%) valued at less than \$10 billion.

The Gross Ups. The 280G gross ups in 16 of the 44 transactions (36%) were provided to the entire NEO population, whereas only a subset of NEOs was provided 280G gross ups in the remaining transactions (64%). The aggregate value of the 280G gross ups for the target company's NEOs, as estimated in accordance with Securities and Exchange Commission ("SEC") proxy rules, varied, both on an absolute basis and relative to transaction value. The aggregate estimated value of the added NEO 280G gross ups

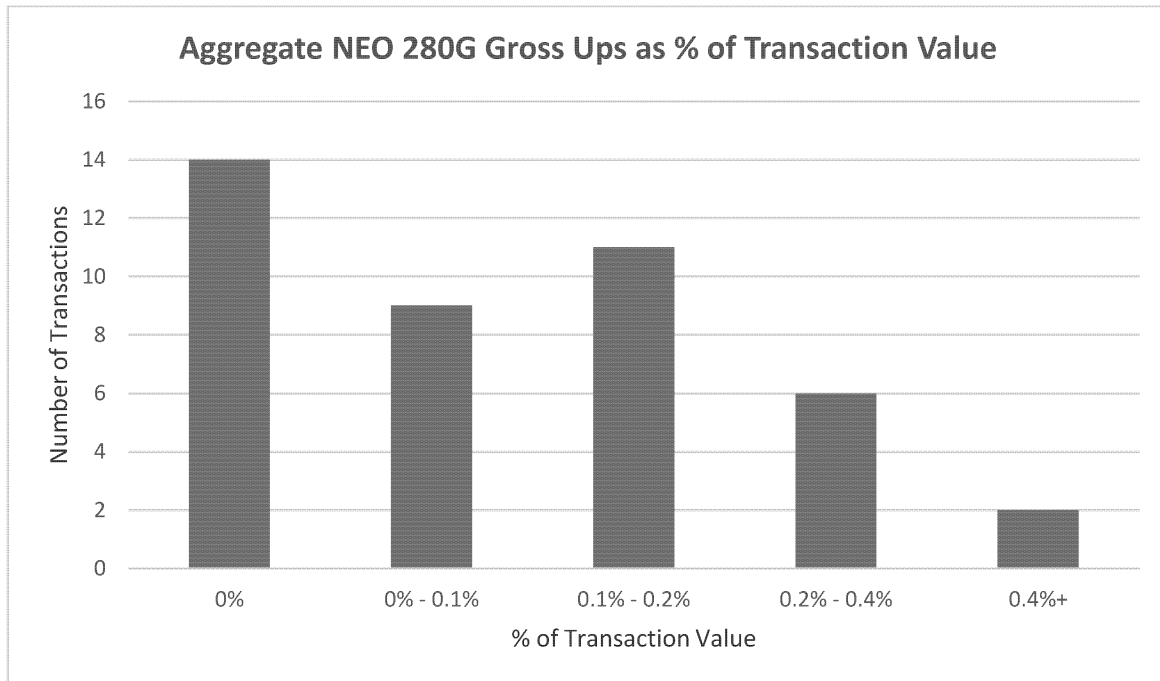
ranged from \$0 million to \$61 million, as shown in more detail in the chart below. The two deals with the highest aggregate gross up values were the Anadarko/Occidental transaction, in which the gross up totaled \$61 million (0.11% of deal value) and the Varian/Siemens transaction, in which the gross up totaled \$42 million (0.26% of deal value). There were eight deals for which the aggregate NEO 280G gross up

data was not provided, which are included in the below chart as deals with gross ups equal to \$0. Notably, 15 of the 44 transactions (34%) included an aggregate cap on the value of the gross ups. Additionally, several gross ups were provided in exchange for a non-compete or the expansion of the scope of an existing non-compete.



The chart on the following page shows the percentage of transaction value represented by the aggregate NEO 280G gross ups disclosed in the transaction

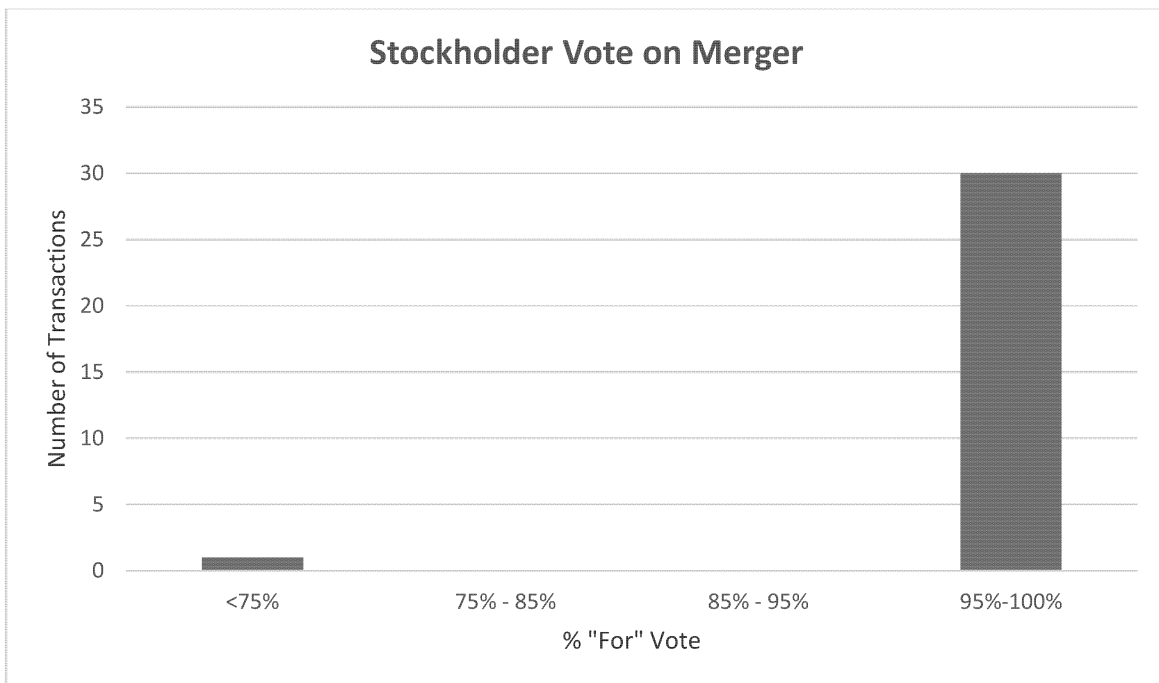
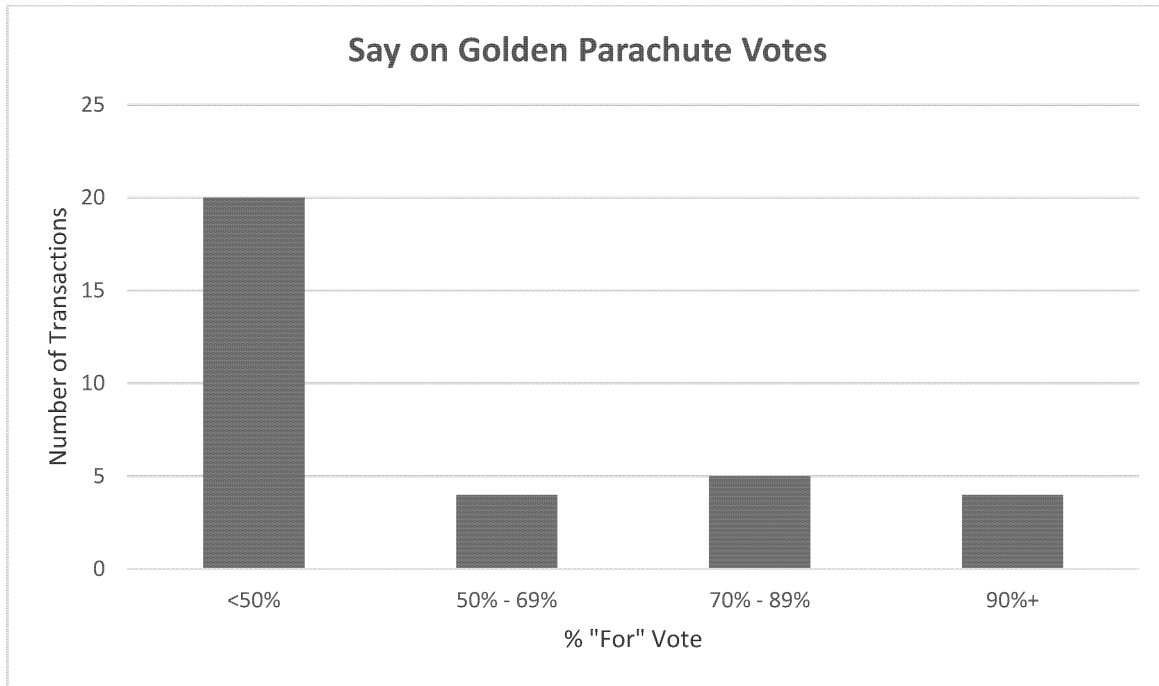
proxies, which ranged from 0% to 0.78% (the two transactions at 0.69% and 0.78% were in the \$1-\$2 billion deal range).



*Two out of the 44 transactions reviewed for which the aggregate deal value was not provided are excluded from this table.

Impact on Shareholder Votes. 11 of the 44 transactions (25%) did not require a Say-on-Golden Parachute Vote.⁹ Of the remaining transactions, only four (9%) received more than 90% support for the Say-on-Golden Parachute Vote (including Duke Realty/Prologis, which had a \$24 million gross up).¹⁰ 14 of these transactions provided in their proxy disclosure that no 280G gross up would be required. Notwith-

standing the Say-on-Golden Parachute Vote results, 97% of transactions in which a shareholder vote to approve the transaction was held and disclosed in SEC filings¹¹ received over 95% shareholder support, with only one transaction in which a shareholder vote to approve the transaction was held receiving 65% shareholder support (this was the Extended Stay America/Blackstone deal).



A summary of the transactions identified with a deal value of over \$1 billion is included in Annex 1 to this article.

Existing and New 280G Gross Ups. Annex 1 includes information for transactions in which the target NEOs either had a preexisting contractual right to a 280G gross up, or were granted such a right in connection with the transaction. The data for those transactions suggest that preexisting and new 280G gross ups are similarly likely to negatively impact Say-on-Golden Parachute Votes but not transaction votes.

Ultimately, the findings in this article illustrate the

continued use of 280G gross ups in certain transactions. Although the use of such gross ups is disfavored by shareholders, this has not had an effect on the overall success and completion of transactions, which continue to be approved by shareholders by overwhelming majorities, notwithstanding the inclusion of a 280G gross up. Moreover, as underscored by the marginal increase in transactions with 280G gross ups over the last several years, while gross ups were certainly more common in the 1990s and early 2000s, today, gross ups are not a remnant of the past, but rather continue to serve as a viable option for companies and executives in transactions taking place in today's market.

Annex 1
280G Gross Ups
Signed September 1, 2017—August 1, 2022, Deal Value > \$1B¹

| Target & Industry | Acquirer | Signing Date & Closing Date | Enterprise Deal Value & Deal Premium ² | New or Existing Gross Up | NEOs Entitled to 280G Gross Ups | Aggregate 280G Gross Ups & % of Deal Value | SOGP Vote ^{3, 4} & Merger Vote ⁴ | Notes |
|------------------------------------|----------------------|-----------------------------|---|--------------------------|-------------------------------------|--|--|--|
| Bankrate | Red Ventures | 7/2/2017 | \$1.4B | Existing | All 5 | \$9.6M | For: 66% | |
| Application Software | | 11/8/2017 | 12% | | | .69% | For: 99% | |
| C.R. Board | Becton, Dickinson | 4/23/2017 | \$24B | Existing | All 5 | \$26.8M | For: 46% | |
| Health Care Equipment | | 12/29/2017 | 25% | | | .11% | For: 99% | |
| Juno Therapeutics | Celgene | 1/21/2018 | \$9.0B | New | All 5 | \$15.7M | No vote (TO) | Gross up for two other executives was \$8.1M. |
| Biotechnology | | 3/6/2018 | 91% | | | 18% | | |
| Education Realty Trust | Greystar Real Estate | 6/25/2018 | \$4.1B | New | All 5 | \$0.7M | For: 34% | |
| Residential REITs | | 9/20/2018 | 14% | | | .02% | For: 100% | |
| Web.com | Siris Capital | 6/20/2018 | \$2.0B | Existing & New | CEO (Existing) 1 other NEO (New) | \$0.5M | For: 45% | For existing gross ups, aggregate \$1M cap. |
| Internet Services & Infrastructure | | 10/11/2018 | 21% | | | .03% | For: 100% | For new gross ups for CFO/CRO, aggregate \$0.6M cap. |

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|--------------------------|----------------------|-----------------------------|---|--------------------------|---|--|--|--|
| Energen | Diamondback Energy | 8/14/2018 | \$9.2B | New | All 5 | \$0 | For: 24% | Gross up was in return for the expanded geographic scope of the non-compete. |
| Oil & Gas | | 11/29/2018 | 16% | | | 0% | For: 100% | |
| Express Scripts | Cigna | 3/8/2018 | \$68B | New | CEO | \$0 | For: 43% | |
| Health Care Services | | 12/20/2018 | 31% | | | 0% | For: 99% | |
| Endocyte | Novartis | 10/17/2018 | \$1.7B | New | 4 NEOs | \$3.9M | For: 79% | |
| Pharmaceuticals | | 12/21/2018 | 54% | | | .23% | For: 100% | |
| Newfield Exploration | Encana | 10/31/2018 | \$7.7B | Existing | All 5 | \$0 | For: 46% | |
| Oil & Gas | | 2/13/2019 | 35% | | | 0% | For: 98% | |
| Tier REIT | Cousins Properties | 3/25/2019 | \$2.3B | New | All 5 | \$0 | For: 45% | Aggregate \$5.5M cap. |
| Office REITs | | 6/14/2019 | 16% | | | 0% | For: 99% | |
| Array Bio-pharma | Pfizer | 6/14/2019 | \$10.4B | New & Existing | CEO (Existing) | \$10.7M | No vote (TO) | Aggregate \$15.5M cap. |
| Biotechnology | | 7/30/2019 | 62% | | 3 other NEOs (New) | .10% | | |
| Anadarko Petroleum | Occidental Petroleum | 5/9/2019 | \$55.5B | New & Existing | All 6 | \$61.0M | For: 29% | |
| Oil & Gas | | 8/8/2019 | 62% | | | .11% | For: 99% | |
| Alder Biopharmaceuticals | H. Lundbeck | 9/16/2019 | \$1.5B | New | CEO | \$0 | No vote (TO) | Gross up was in return for an enhanced non-compete. |
| Biotechnology | | 10/22/2019 | 79% | | | 0% | | |
| Celgene | Bristol Myers-Squibb | 1/2/2019 | \$89.4B | New | 2 NEOs | \$5.6M | For: 40% | Gross up was in return for a 1-year non-compete. |
| Biotechnology | | 11/20/2019 | 54% | | | .01% | For: 98% | Additional estimated \$6.4M gross up for non-NEOs. |
| Cambrex | Permira Funds | 8/7/2019 | \$2.5B | New & Existing | CFO (Existing) CEO and 2 other NEOs (New) | \$0 | For: 47% | Aggregate \$1M cap. |
| Life Sciences | | 12/4/2019 | 47% | | | 0% | For: 100% | |

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|-------------------------|-----------------------------|-----------------------------|---|--------------------------|---------------------------------|--|--|--|
| Audentes Therapeutics | | 12/2/2019 | \$2.4B | | | \$0.2M | | |
| | Astellas | | | Existing | All 5 | | No vote (TO) | |
| Biotechnology | | 1/15/2020 | 110% | | | .01% | | |
| Synthorx | | 12/7/2019 | \$2.0B | | | \$0 | | |
| | Sanofi | | | New | CEO 2 other NEOs | | No vote (TO) | Aggregate \$35M cap. |
| Biotechnology | | 1/23/2020 | 172% | | | 0% | | |
| Aircastle | | 11/5/2019 | \$7.4B | | | \$0 | For: 66% | |
| | Marubeni and Mizuho Leasing | | | New | Not provided | | | Aggregate \$5M cap. |
| Trading | | 3/27/2020 | 34% | | | 0% | For: 100% | |
| Portola Pharmaceuticals | | 5/5/2020 | \$1.3B | | | \$4.3M | | |
| | Alexion Pharmaceuticals | | | New | CEO 1 other NEO | | No vote (TO) | Aggregate \$6M cap. |
| Biotechnology | | 7/2/2020 | 132% | | | .34% | | |
| Principia Biopharma | | 8/16/2020 | \$3.0B | | | \$0 | | |
| | Sanofi | | | New | Not provided | | No vote (TO) | Aggregate \$10M cap. |
| Biotechnology | | 9/28/2020 | 35% | | | 0% | | |
| E*TRADE Financial | | 2/20/2020 | \$13.0B | | | \$22.0M | For: 25% | |
| | Morgan Stanley | | | New | CEO 3 other NEOs | | | |
| Brokerage | | 10/2/2020 | 31% | | | .17% | For: 99% | |
| Immunomedics | | 9/13/2020 | \$20.3B | | | \$5.6M | For: 95% | |
| | Gilead Sciences | | | New | 4 NEOs | | | Estimated aggregate \$4M cap for non-NEOs. |
| Biotechnology | | 10/23/2020 | 108% | | | .03% | For: 97% | |
| Torotel | | 9/17/2020 | Not provided | | | \$2.5M | For: 95% | |
| | TT Electronics | | | New | CEO 2 other NEOs | | | Board adopted 3 transaction bonus plans to partially mitigate 280G excise taxes. |
| Electrical & Equipment | | 11/10/2020 | Not provided | | | Not provided | For: 97% | |
| MyoKardia | | 10/5/2020 | \$11.9B | | | \$19.8M | | Estimated aggregate \$2.2M cap for non-NEOs. |
| | Bristol-Myers Squibb | | | New | All 5 | | No vote (TO) | |
| Pharmaceuticals | | 11/17/2020 | 61% | | | .17% | | Each executive subject to 280G must enter into a 1-year non-compete, but this requirement was not expected to apply to NEOs. |
| Viala Bio | | 2/1/2021 | \$2.9B | | | \$0.6M | | Aggregate \$3.0M cap. |
| | Horizon Therapeutics | | | New | 1 NEO | | No vote (TO) | |
| Biotechnology | | 3/15/2021 | 53% | | | .02% | | Additional \$0.7M gross up for non-NEOs. |

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|--------------------------------|----------------------|-----------------------------|---|--------------------------|---------------------------------|--|--|--|
| Varian Medical Systems | | 8/2/2020 | \$16.1B | | | \$42.3M | For: 14% | |
| | Siemens Healthineers | | | New | CEO 3 other NEOs | | | |
| Health Care Equipment | | 4/15/2021 | 24% | | | .26% | For: 97% | |
| Five Prime Therapeutics | | 3/4/2021 | \$1.5B | | | \$0 | | |
| | Amgen | | | New | Not provided | | No vote (TO) | If an executive has a 280G issue, then the company has a right to make a gross up. |
| Biotechnology | | 4/16/2021 | 79% | | | 0% | | |
| Perspecta | | 1/27/2021 | \$4.0B | | | \$0 | For: 88% | |
| | Peraton | | | New | All 5 | | | |
| IT Consulting & Other Services | | 5/6/2021 | 50% | | | 0% | For: 100% | |
| Cantel Medical | | 1/12/2021 | \$4.3B | | | \$9.2M | For: 52% | |
| | Steris Plc | | | New | CEO 3 other NEOs | | | |
| Health Care Equipment | | 6/2/2021 | 0% | | | .21% | For: 100% | |
| Extended Stay America | | 3/15/2021 | \$6.4B | | | \$8.9M | For: 46% | |
| | Blackstone | | | New | All 5 | | | |
| Hotels & Resorts | | 6/16/2021 | 21% | | | .14% | For: 65% | |
| W.R. Grace & Co. | | 11/9/2020 | \$6.4B | | | \$8.0M | For: 55% | |
| | Standard Industries | | | Existing | 4 NEOs | | | |
| Specialty Chemicals | | 9/22/2021 | 59% | | | .13% | For: 100% | |
| Cornerstone OnDemand | | 8/5/2021 | \$4.8B | | | \$13.5M | For: 50% | |
| | Clearlake Capital | | | Existing | CEO 3 other NEOs | | | Individual \$7M cap for each NEO's gross up. |
| Application Software | | 10/12/2021 | 31% | | | .28% | For: 100% | |
| Accelaron Pharma | | 9/29/2021 | \$10.3B | | | \$18.0M | | |
| | Merck & Co. | | | Existing | CEO 3 other NEOs | | No vote (TO) | |
| Biotechnology | | 11/19/2021 | 13% | | | .17% | | |
| Covanta | | 7/14/2021 | \$5.2B | | | \$8.3M | For: 43% | |
| | EQT Partners | | | New | All 5 | | | |
| Environmental Services | | 11/30/2021 | 36% | | | .20% | For: 98% | |
| Hill-Rom | | 9/2/2021 | \$11.7B | | | \$19.8M | For: 43% | |
| | Baxter International | | | New | All 5 | | | |
| Health Care Equipment | | 12/13/2021 | 26% | | | .17% | For: 98% | |

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|----------------------------------|---------------------------------|-----------------------------|---|--------------------------|---------------------------------|--|--|--|
| Kansas City Southern | | 9/15/2021 | \$31.2B | | | \$21.0M | For: 27% | The gross up was in exchange for a 1-year non-compete. |
| Railroads | Canadian Pacific Railway | 12/14/2021 | 34% | New | CEO 3 other NEOs | .07% | For: 100% | Estimated aggregate \$8.1M cap for non-NEOs. |
| Arena Pharmaceuticals | | 12/12/2021 | \$5.4B | | | \$0 | For: 70% | |
| Biotechnology | Pfizer | 3/11/2022 | 100% | New | All 5 | 0% | For: 100% | |
| Nielsen Holdings | | 3/28/2022 | \$15.5B | | | \$0 | For: 78% | |
| | Brookfield | | | New | 4 NEOs | | | Clawback on gross up if the executive resigns without good reason or is terminated for cause during the 2 years following closing. |
| Research and Consulting Services | | 10/11/2022 | 60% | | | 0% | For: 99% | |
| Clinigence Holdings | | 11/23/2021 | Not provided | | | \$4.7M | For: 92% | |
| Health Technology | Nutex Health | 4/1/2022 | Not provided | New | CEO | Not provided | For: 100% | |
| Intersect ENT | | 8/6/2021 | \$1.0B | | | \$7.7M | For: 41% | |
| Health Care Equipment | Medtronic | 5/13/2022 | 103% | New | CEO 2 other NEOs | .78% | For: 100% | |
| PS Business Parks | | 4/24/2022 | \$5.2B | | | \$3.8M | For: 41% | |
| Commercial Property | Blackstone Real Estate Advisors | 7/20/2022 | 12% | New | CEO 1 other NEO | .07% | For: 100% | |
| Rogers | | 11/1/2021 | \$5.0B | | | \$2.4M | For: 19% | |
| Electronic Components | DuPont de Nemours | Withdrawn 11/01/2022 | 33% | New | 2 NEOs | .05% | For: 100% | |
| Duke Realty | | 6/11/2022 | \$25.2B | | | \$24.4M | For: 90% | |
| Industrial Real Estate | Prologis | 10/3/2022 | 17% | New | All 5 | .10% | For: 100% | Aggregate \$30M cap. |
| Terminix Global | | 12/13/2021 | \$7.5B | | | \$0 | For: 99% | |
| Specialized Consumer Services | Rentokil Initial | 10/12/2022 | 49% | New | All 5 | 0% | For: 100% | Aggregate \$10M cap. |

¹Since 2018, 3 other deals valued < \$1B provided excise tax gross ups at the time of the deal (Ventas' 2021 acquisition of New Senior Investment Group; Alexion Pharmaceuticals' 2020 acquisition of Achillion Pharmaceuticals; and Keane Group's 2019 acquisition of C&J Energy Services).

²Deal value obtained from "DealPointData."

³A SOGP vote is not required for Tender Offers ("TOs") or Foreign Private Issuers ("FPIs").

⁴Reflects percentage of votes cast in the proposal, including abstentions and broker non-votes, as applicable, and calculated by including the "for," "against," "abstain" and "broker-non votes" in the denominator and the larger of the "for" or "against" vote in the numerator.

ENDNOTES:

¹Section 280G of the Internal Revenue Code denies a corporate tax deduction for, and Section 4999 imposes a nondeductible 20% excise tax on the recipients of, payments to executives in connection with a change in control that exceed a statutory threshold. For a discussion of the structure and operation of Section 280G, and mitigation strategies, see Matthew M. Friestedt and J. Michael Snypes, Jr., *Section 280G: The Law and Lore of the Golden Parachute Excise Tax, Part I: The Structure and Operation of Section 280G* and *Section 280G: The Law and Lore of the Golden Parachute Excise Tax, Part II: Mitigating Section 280G*, which were published in the Journal of Compensation and Benefits in the July/August 2017 and September/October 2017 editions, respectively. For an analysis of deals signed up between January 1, 2014 and September 10, 2017, see Matthew Friestedt, Jeannette Bander, and Precious Nwankwo, *Prevalence of Section 280G Gross Ups in Recent M&A Deals*, *The M&A Lawyer* (February 2018).

²According to a study conducted by Frederick W. Cook & Co. (FW Cook) in 2005, 51% of the top 50 companies listed on each of the New York Stock Exchange and NASDAQ stock market agreed to provide their Chief Executive Officer a 280G gross up. *2005 Change-in-Control Report*, Frederic W. Cook & Co., Inc. (March 2016), <https://www.fwcook.com/content/Documents/Publications/cicreport.pdf>.

³Donald Kalfen, *Meridian Compensation Partners, LLC Releases 2020 Comprehensive Study on Executive Change-in-Control Arrangements*, Meridian (December 22, 2020), <https://www.meridiancp.com/insights/meridian-compensation-partners-llc-releases-comprehensive-study-on-executive-change-in-control-arrangements> (noting that "77% of companies address the potential imposition of the golden parachute excise tax through a 'best net' provision, while only 5% of companies address this issue through an excise tax gross-up provision" but indicating that "some companies revisit the use of an excise tax provision during an actual CIC"). See also *Executive Severance and Change-in-Control Practices*, Frederic

W. Cook & Co., Inc. (March 2016), <https://www.fwcook.com/content/Documents/Publications/ExecutiveSeveranceandChange-in-ControlPractices.pdf>. Amongst Fortune 50 companies, the number of companies that provide a gross up of any kind may be even lower. Margaret Black & Jane Park, *Think the Tax Gross-Up Is Obsolete? Not Necessarily*, Pearl Meyer (July 2018), <https://www.pearlmeier.com/think-tax-gross-obsolete-not-necessarily.pdf>.

⁴See Meridian Compensation Partners (May 30, 2019), <https://www.meridiancp.com/insights/the-reval-of-excise-tax-gross-ups>.

⁵It appears that added 280G gross ups are more common in the healthcare/biotech space, possibly due to the higher transaction premiums that are not uncommon in this sector.

⁶Margaret Black & Daniel Wetzel, *A Fresh Look at the Much Debated "Last-Minute" Excise Tax Gross-Up*, Pearl Meyer (September 2022), <https://www.pearlmeier.com/knowledge-share/article/a-fresh-look-at-the-much-debated-last-minute-excise-tax-gross-up>.

⁷For purposes of this analysis, we used transaction size values reported by DealPointData at <https://www.dealpointdata.com>.

⁸For an analysis of deals signed up between January 1, 2014 and September 10, 2017, see Friestedt, Bander & Nwankwo, *supra* note 1.

⁹Say-on-Golden Parachute Votes are not required in acquisitions implemented through a tender offer or where the target is a foreign private issuer.

¹⁰Votes were calculated for purposes of this article based on all votes cast in the proposal, including abstentions and broker non-votes, as applicable, and calculated by including the "for," "against," "abstain" and "broker-non votes" in the denominator and the "for" vote in the numerator.

¹¹A shareholder vote is not required to consummate an acquisition implemented through a tender offer.