

on preferred equity (when compared with interest payments on debt) will be a key consideration of any issuer or financial sponsor when structuring an acquisition financing transaction. This issue has been significantly affected by the recent U.S. tax reform legislation, which includes new limitations on the deductibility of interest payments on debt. In particular, deductions for net interest expense will be capped at 30% of EBITDA from the 2018 tax year (and at 30% of EBIT from the 2021 tax year), although disallowed deductions may be carried forward in certain circumstances. Pass-through issuers may also realize a tax benefit from preferred equity that is effectively equivalent to an interest deduction that is not subject to the new limitations. Accordingly, highly-levered sponsors that would have interest deductions capped by the new rule may consider structuring an issuance as preferred equity of a pass-through issuer instead of debt (although that might not always be practicable). In any event, even corporate issuers that expect to have their interest deductions capped by the new rule may be more likely to consider issuing preferred equity than previously, given that their cost of capital for debt will no longer benefit from as significant a tax subsidy as it previously did.

2018 and Beyond

Preferred equity is emerging as a key financing tool for financial sponsors, and its role can be expected to continue to grow as financial sponsors and private credit providers see the benefits that can result from including a preferred equity tranche in capital structures. Furthermore, the tax treatment of preferred equity relative to debt can be significantly more favorable for certain investors, and recent changes to interest deductibility resulting from U.S. tax reform will likely increase

the attractiveness of preferred equity to financial sponsors, particularly in the case of highly levered issuers. The ultimate benefit of preferred equity is that it allows financial sponsors to increase effective leverage in a non-dilutive fashion without impacting the credit profile or regulatory treatment of the senior debt being used to finance an acquisition. However, given that the use of preferred equity in acquisition financing is still a relatively recent development, transaction participants, particularly preferred equity providers, should take care to fully understand the risks associated with any transaction involving preferred equity and make sure to have a clear picture of the ways in which these risks differ from those that would arise from using a debt instrument.

PREVALENCE OF SECTION 280G GROSS UPS IN RECENT M&A DEALS

By Matthew Friestedt, Jeannette Bander and Precious Nwankwo

Matthew Friestedt is a partner, and Jeannette Bander and Precious Nwankwo are associates in the Executive Compensation and Benefits group of Sullivan & Cromwell LLP. Contact: friestedtm@sullcrom.com, banderj@sullcrom.com or nwankwop@sullcrom.com.

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 today less than 10% do.² Despite their disfavor with ISS, a number of companies in recent years have agreed, in connection with signing up merger agreements, to

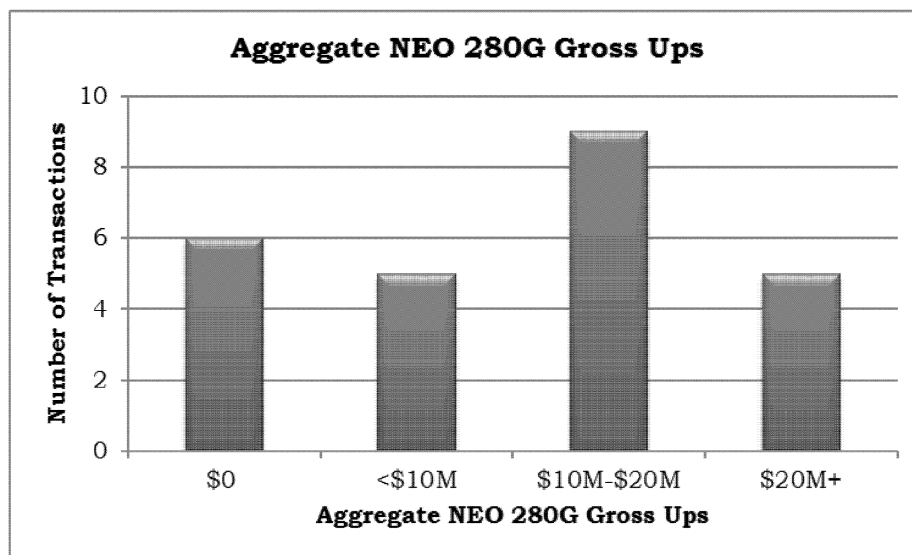
gross-up their executives for any golden parachute excise taxes.³

This article catalogs these discretionary 280G gross ups and analyzes the impact on “say-on-golden-parachute” votes and merger votes. We focused on deals valued at \$1 billion⁴ or more that were signed up between January 1, 2014 and September 10, 2017. 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. Twenty-five transactions out of the 373 transactions we reviewed (7%) added a 280G gross up for one or more NEOs. The number of such transactions in each year remained fairly consistent: five in 2014, eight in

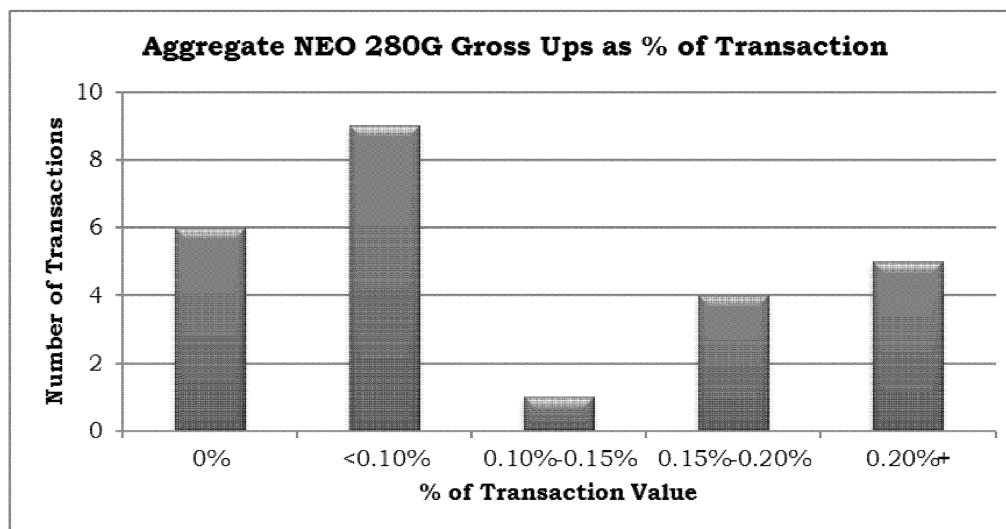
2015, five in 2016 and seven in 2017. These 25 transactions ranged in size from \$1.7 billion to \$55 billion, with 15 of the 25 transactions (60%) valued at less than \$10 billion in size.

The Gross Ups. The 280G gross ups in 14 of the 25 transactions (56%) were offered to the entire NEO population, whereas only a subset of NEOs was provided 280G gross ups in the remaining transactions (44%). 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 \$39 million, as shown in more detail in the chart below.



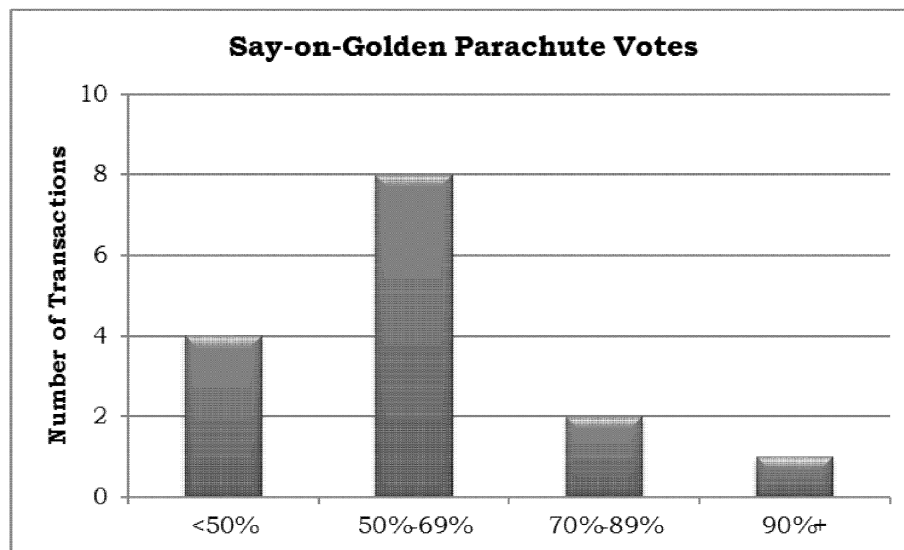
The chart on the following page shows the percentage of transaction value represented by the aggregate NEO 280G gross ups disclosed in the

transaction proxies, which ranged from 0% to 0.92%.



Impact on Shareholder Votes. Ten of the 25 transactions (40%) did not require a Say-on-Golden Parachute Vote.⁵ Of the remaining 15 transactions, only three (20%) received more than 70% support for the Say-on-Golden Parachute Vote.⁶ Two of those three transactions estimated in their proxy disclosure that no 280G

gross up would be required. Notwithstanding the Say-on-Golden Parachute Vote results, all of the transactions in which a shareholder vote to approve the transaction was held and disclosed in SEC filings⁷ received more than 88% support for the transaction from shareholders.



A summary of the transactions reviewed is included in Annex 1 to this article.

Existing 280G Gross Ups. Annex 2 includes information for transactions in which the target NEOs had a preexisting contractual right to a 280G gross up, representing 58 transactions out

of the 373 transactions reviewed (approximately 16%). The data for those transactions suggest that preexisting 280G gross ups are similarly likely to negatively impact Say-on-Golden Parachute Votes but not transaction votes.

NEW 280G Gross ups
Signed 1/1/2014 – 9/10/2017, Deal Value > \$1B Annex 1

Target	Acquirer	Signing Date	Closing Date	Enterprise Deal Value (Billions) ^{1,2}	Stated Deal Price Premium	NEOs Who Received New 280G Gross Ups	402(t) Aggregate 280G Gross Ups (Millions)	280G Gross Ups as % of Deal Value	SOGP Vote ³	Merger Vote ⁴	Notes
Kite Pharma	Gilead Sciences	8/28/2017	10/3/2017	\$11.2	29% premium over previous closing share price	All NEOs	\$12.4	0.11%	No vote (TO)	No vote (TO)	An additional \$2.2M of gross ups were made to two other executive officers
Monogram Residential	Investment Group (led by Greystar Real Estate)	7/4/2017	9/19/2017	\$3.0	22% premium over previous closing share price	All NEOs	\$0.0	0.00%	Against: 62%	For: 98.8%	Aggregate gross up capped at \$3M for all executive officers
Staples	Sycamore	6/28/2017	9/12/2017		20% premium over unaffected share price	CEO, CFO, CLO	\$13.0	0.19%	Against: 66%	For: 95.3%	Aggregate gross up capped at \$20.7M for up to eight executive officers
VWR	Avantor	5/5/2017	11/21/2017		20% premium over 30-day volume weighted average price	CFO, SVP/ Pres - Americas Lab, GC	\$4.8	0.08%	For: 51%	For: 93.5%	Additionally, the CEO had a pre-existing right to an excise tax gross up
AdvancePierre Foods	Tyson Foods	4/25/2017	7/7/2017		32% over unaffected share price; 42% over 60-day volume weighted average price	All NEOs	\$0.0	0.00%	No vote (TO)	No vote (TO)	Aggregate gross up capped at \$12.5M for all executive officers. Additionally, the former CEO had a pre-existing right to an excise tax gross up
Zellic Aesthetics	Allergan	2/13/2017	4/28/2017		14% premium over previous closing share price	CFO, GC, Pres - Int'l, SVP - Global HR	\$2.1	0.08%	50%	For: 96.9%	

Target	Acquirer	Signing Date	Closing Date	Enterprise Deal Value (\$Bil- lions) ¹	Stated Deal Price	NEOs Who Received New 280G Gross Ups	402(i) Aggregate 280G Gross Ups (Millions)	280G Gross Ups as % of Deal Value	SOGP Vote ³⁴	Merger Vote ⁴	Notes
Mead Johnson Nutrition	Reckitt Benckiser	2/10/2017	6/15/2017	\$17.9	30% premium over closing share price prior to announcement of advanced merger talks	All NEOs	\$11.5	0.06%	Against: 64%	For: 97.1%	An additional \$0.6M of gross ups were made to three other executive officers
Harman International	Samsung Electronics	11/14/2016	3/11/2017	\$8.0	28% premium over previous closing share price; 37% premium over 30-day volume weighted average price	CFO, EVP/ Pres - Connected Car Div.	\$0.0	0.00%	Against: 71%	For: 94.9%	Additionally, the CEO had a pre-existing right to an excise tax gross up
Tobira Therapeutics	Allergan	9/20/2016	11/1/2016	\$1.7	951% premium over previous closing share price	All NEOs	\$12.7	0.75%	No vote (TO)	No vote (TO)	
Medivation	Pfizer	8/22/2016	9/28/2016	\$14.0	21% premium over previous closing share price	CFO, COO, GC, SVP - Pharmaceutical Ops	\$5.8	0.04%	No vote (TO)	No vote (TO)	An additional \$1.1M of gross ups were made to one other executive officer
St. Jude Medical	Abbott Laboratories	4/28/2016	1/4/2017	\$33.1	37% premium over previous closing share price	All NEOs	\$13.9	0.04%	For: 52%	For: 88.5%	An additional \$7.6M of gross ups were made to several other executive officers
Baxalta	Shire	1/11/2016	6/3/2016	\$32.0	38% premium over closing share price before Shire's initial approach	All NEOs	\$25.4	0.08%	For: 60%	For: 98.9%	An additional \$6.3M of gross ups were made to six other executive officers
Media General	Nexstar Broadcasting	9/28/2015	1/17/2017	\$4.6	54% premium over previous closing share price	CFO, GC, CAO	\$2.5	0.05%	For: 57%	For: 99.5%	
Target	Acquirer	Signing Date	Closing Date	Enterprise Deal Value (\$Bil- lions) ¹	Stated Deal Price	NEOs Who Received New 280G Gross Ups	402(i) Aggregate 280G Gross Ups (Millions)	280G Gross Ups as % of Deal Value	SOGP Vote ³⁴	Merger Vote ⁴	Notes
Thoratec	St. Jude Medical	7/22/2015	10/8/2015	\$3.3	10% premium over previous closing share price and 40% over 30-day volume weighted average price	CFO, CFO, Pres - N. America, SVP - Tech Ops	\$30.4	0.92%	50%	For: 99.7%	Additionally, the GC had a pre-existing right to an excise tax gross up
Receptos	Celgene	7/14/2015	8/27/2015	\$7.	12% premium over previous closing share price	All NEOs	\$25.9	0.36%	No vote (TO)	No vote (TO)	

Target	Acquirer	Signing Date	Closing Date	Enterprise Deal Value (Billions) ¹	Stated Deal Price Premium	NEOs Who Received New 280G Gross Ups	402(i) Aggregate 280G Gross Ups (Millions)	280G Gross Ups as % of Deal Value	SOGP Vote ³⁴	Merger Vote ⁴	Notes
Auspex Pharmaceuticals	Teva Pharmaceuticals	3/30/2015	5/5/2015	\$3.2	42% premium over previous closing share price	All NEOs	\$12.2	0.38%	No vote (TO)	No vote (TO)	An additional \$2.5M of gross ups were made to three other executive officers
Kraft Foods	3G Capital/H.J. Heinz	3/25/2015	7/2/2015	\$55.0	9% premium over previous closing share price	CEO, GC	\$14.2	0.03%	For: 90%	For: 98.8%	Aggregate gross up capped at \$16.2M for all executive officers
Pharmacylis	AbbVie	3/4/2015	5/26/2015	\$21.0	13% premium over previous closing share price; 39% premium over unaffected share price	COO, CFO, CCO, Chief Quality & Tech Ops	\$38.7	0.18%	No vote (TO)	No vote (TO)	
Hospira	Pfizer	2/5/2015	9/3/2015	\$17.0	39% premium over previous closing share price	All NEOs	\$31.2	0.18%	Against: 67%	For: 99.4%	An additional \$14.4M of gross ups were made to eight other executive officers
City National	Royal Bank of Canada	1/22/2015	11/2/2015	\$5.0	26% premium over previous closing share price	CEO	\$0.0	0.00%	For: 88%	For: 99.6%	Additionally, executive officer had a pre-existing right to an excise tax gross up
Tim Hortons	Burger King	8/26/2014	12/12/2014	\$11.0	30% premium over previous closing share price	All NEOs	\$0.0	0.00%	No vote (FPI)	For: 99.2%	Aggregate gross up for all executive officers capped at \$2.5M without the consent of Burger King
tw telecom	Level 3 Communications	6/16/2014	10/31/2014	\$7.3	12% premium over previous closing share price	All NEOs	\$0.0	0.00%	For: 87%	For: 98.7%	Aggregate gross up for all employees capped at \$3M
Hillshire Brands	Tyson Foods	5/29/2014	8/28/2014	\$8.6	70% premium over previous closing share price	All NEOs	\$16.3	0.19%	No vote (TO)	No vote (TO)	
Forest Laboratories	Actavis	2/18/2014	7/1/2014	\$25.0	25% premium over previous closing share price	CEO	\$10.1	0.04%	For: 61%	For: 98.9%	
Avanir Pharmaceuticals	Otsuka Pharmaceutical	2/2/2014	1/13/2015	\$3.5	13% premium over previous closing share price	All NEOs	\$7.9	0.23%	No vote (TO)	No vote (TO)	

¹ Since 2014, three other deals valued < \$1B provided excise tax gross ups at the time of the deal: Vitae/Allergan - 9/14/2016; Rapitor/Horizon - 9/12/2016; Durata/Activis - 10/6/2014.

² Deal value obtained from "The Deal," <http://pipeline.thedeal.com>.

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

⁴ Reflects percentage of votes cast in the proposal, including abstentions and broker non-votes, as applicable.

PREEXISTING 280G Gross ups
Signed 1/1/2014 – 9/10/2017, Deal Value > \$1B Annex 2

Target	Acquirer	Signing Date	Closing Date	Enterprise Deal Value (Billions) ¹	Stated Deal Price Premium	NEOs Who Received New 280G Gross Ups	402(i) Aggregate 280G Gross Ups (Millions)	280G Gross Ups as % of Deal Value	SOGP Vote ³	Merger Vote ³	Notes
WebMD Health	Internet Brands	7/24/2017	9/15/2017	\$2.8	21% premium over previous closing share price	Chairman of the Board	\$0.0	0.00%	No vote (TO)	No vote (TO)	
Bankrate	Red Ventures	7/3/2017	11/8/2017	\$1.4	31% premium over 3-month average closing share price	All NEOs	\$9.6	0.69%	For: 66%	For: 99.4%	Additionally, certain executive officers were given new excise tax gross ups
VWR	Avantor	5/5/2017	11/21/2017	\$6.4	20% premium over 30-day volume weighted average price	CEO	\$5.6	0.09%	For: 51%	For: 93.5%	Aggregate gross up capped at \$12.5M for all executive officers. Additionally, certain executive officers were given new excise tax gross ups
AdvancePierre Foods	Tyson Foods	4/25/2017	7/7/2017	\$4.3	32% over unaffected share price; 42% over 60-day volume weighted average price	Former CEO	\$0.0	0.00%	No vote (TO)	No vote (TO)	
Felcor Lodging	RLJ Lodging	4/24/2017	9/1/2017	\$1.2	17% premium over previous closing share price	COO, CFO, GC	\$3.7	0.31%	Against: 54%	For: 97.8%	

Target	Acquirer	Signing Date	Closing Date	Enterprise Deal Value (Billions) ¹	Stated Deal Price Premium	NEOs Who Received New 280G Gross Ups	402(i) Aggregate 280G Gross Ups (Millions)	280G Gross Ups as % of Deal Value	SOGP Vote ²³	Merger Vote ²⁴	Notes
C.R. Bard	Becton, Dickinson and Co.	4/23/2017	Pending	\$24.0	25% premium over previous closing share price	All NEOs	\$26.8	0.11%	Against: 54%	For: 98.7%	
Astoria Financial	Sterling Bancorp	3/7/2017	Pending	\$2.2	19% premium over previous closing share price	All NEO	\$7.6	0.34%	Against: 77%	For: 96.7%	
WGL Holdings	AltaGas	1/25/2017	Pending	\$6.4	12% premium over previous closing share price and 28% premium over closing share price prior to reports of a potential acquisition	All NEOs	\$0.0	0.00%	For: 90%	For: 96.2%	
Clarcor	Parker-Hannifin	12/1/2016	2/28/2017	\$4.3	18% premium over previous closing share price and 29% premium over 90-day volume weighted average price	CEO, CFO, GC, Chief Admin. Officer	\$4.4	0.10%	For: 57%	For: 99.1%	
Harman International	Samsung Electronics	11/14/2016	3/11/2017	\$8.0	28% premium over previous closing share price and 37% premium over 30-day volume weighted average price	CEO	\$0.0	0.00%	Against: 71%	For: 94.9%	Additionally, certain executive officers were given new exercise tax gross ups

Baker Hughes	General Electric	10/31/2016	7/3/2017	\$7.4	\$17.50/share cash dividend and 37.5% ownership of new company, representing a 30-40% premium for Baker Hughes investors	CEO, Pres - Global Ops, CIO, Chief Comm. Officer	\$10.7	0.14%	Against: 54%	For: 99.4%	An additional \$9.2M of gross ups were made to six other executive officers
Team Health	Investor Group (including Blackstone)	10/31/2016	2/6/2017	\$6.1	18% premium over previous closing share price	Exec. Chairman	\$0.0	0.00%	50%	For: 85.4%	
Reynolds American	British American Tobacco	10/21/2016	7/25/2017	\$49.4	26% premium over previous closing share price	CFO, GC	\$5.8	0.01%	For: 68%	For: 99.3%	
Target	Acquirer	Signing Date	Closing Date	Enterprise Deal Value (Billions)¹	Stated Deal Price Premium	NEOs Who Received New 280G Gross Ups	402(t) Aggregate 280G Gross Ups (Millions)	280G Gross Ups as % of Deal Value	SOGP Vote^{2,3}	Merger Vote³	Notes
EverBank Financial	TIAA	8/8/2016	6/12/2017	\$2.5	26% premium over unaffected closing share price	CEO, Pres/COO	\$0.0	0.00%	For: 68%	For: 99.8%	
NetSuite	Oracle	7/28/2016	11/7/2016	\$9.3	19% premium over previous closing share price	CEO, CTO, COO	\$0.0	0.00%	No vote (TO)	No vote (TO)	
Linear Technology	Analog Devices	7/26/2016	3/10/2017	\$14.4	24% premium over previous closing share price	Exec. Chairman	\$0.0	0.00%	For: 58%	For: 98.8%	
Nortek	Melrose Industries	7/6/2016	8/31/2016	\$1.4	38% premium over previous closing share price	GC	\$0.0	0.00%	No vote (TO)	No vote (TO)	

PrivateBancorp	Canadian Imperial Bank of Commerce	6/29/2016	6/23/2017	\$5.0	31% premium over market value at time of deal announcement	All NEOs	\$15.7	0.31%	For: 71%	For: 66.1%	
Valspar	Sherwin-Williams	3/20/2016	6/1/2017	\$11.3	35% premium over previous closing share price	CEO, GC, EVP/Pres - Global Coaching	\$1.2	0.01%	For: 89%	For: 98.2%	
Empire District Electric	Algonquin Power and Utilities	2/9/2016	1/1/2017	\$2.4	21% premium over previous closing share price	All NEOs	\$10.8	0.45%	Against: 63%	For: 95.5%	
Alere	Abbott Laboratories	2/1/2016	10/3/2017	\$7.2	21% premium over previous closing share price	All NEOs	\$0.0	0.00%	For: 82%(7/7/2017) For: 55% (10/21/2016)	For: 99.6% (7/7/2017) For: 98.4% (10/21/2016)	
Target	Acquirer	Signing Date	Closing Date	Enterprise Deal Value (in Billions)	Stated Deal Price Premium	NEOs Entitled to Proceeding 280G Gross Ups	402(d) Aggregate Gross Ups (in Millions)	280G Gross Ups as % of Deal Value	SOGP Vote^{2,3}	Merger Vote³	Notes
Talmer Bancorp	Chemical Financial	1/26/2016	8/31/2016	\$1.6	zero premium transaction	CEO, CFO, COO, Chairman	\$0.0	0.00%	Against: 56%	For: 99.2%	Executives entered into agreements at the time of merger that preserved their right to exercise tax payments under their existing employment agreements
TECO Energy	Emera	9/4/2015	7/1/2016	\$10.4	48% premium over unaffected share price	CEO, GC, Pres—Tampa Electric	\$15.3	0.15%	For: 55%	For: 97.5%	
Cameron International	Schlumberger	8/26/2015	4/1/2016	\$12.7	56% premium over previous closing share price	CFO, GC	\$5.0	0.04%	For: 54%	For: 99.1%	

Target	Acquirer	Signing Date	Closing Date	Enterprise Deal Value (in Billions) ¹	Stated Deal Price Premium	NEOs Entitled to Preexisting 280G Gross Ups	402(0) Aggregate 280G Gross Ups (in Millions)	280G Gross Ups as % of Deal Value	SOGP Vote ^{2,3}	Merger Vote ³	Notes
National Penn Bancshares	BB&T	8/17/2015	4/1/2016	\$1.8	19% premium over previous closing share price	CEO	\$0.0	0.00%	50%	For: 96.2%	CEO's employment agreement granted him a right to an excise tax gross up, but he opted to waive these rights for a \$2.5M lump-sum cash payment by National Penn at the time of the merger
IPC Healthcare	Team Health	8/4/2015	11/23/2015	\$1.6	37% premium over previous closing share price	CEO, COO, Chief Dev't Officer	\$0.9	0.06%	For: 70%	For: 99.9%	
Cytec Industries	Solvay	7/29/2015	12/9/2015	\$5.5	29% premium over previous closing share price	CEO, GC, Pres-Aerospace Materials, VP-Corp & Bus. Dev't	\$15.1	0.27%	Against: 63%	For: 99.2%	
Thoratec	St. Jude Medical	7/22/2015	10/8/2015	\$3.3	10% premium over previous closing share price and 40% over 30-day volume weighted average price	GC	\$0.0	0.00%	For: 50.0%	For: 99.7%	Additionally, certain executive officers were given new excise tax gross ups
Health Net	Centene	7/2/2015	3/24/2016	\$6.0	21% premium over previous closing share price	CEO, CFO/COO	\$0.0	0.00%	For: 91%	For: 97.4%	
Chubb	ACE	7/1/2015	1/14/2016	\$29.5	30% premium over previous closing share price	CEO	\$23.4	0.08%	Against: 61%	For: 97.4%	
Dealtrack Technologies	Cox Automotive	6/15/2015	10/1/2015	\$4.0	59% premium over previous closing share price	CEO, CFO, CIO, Co-Pres	\$0.0	0.00%	No vote (TO)	No vote (TO)	
OM Group	Apollo Global Management	6/1/2015	10/28/2015	\$1.0	28% premium over previous closing share price	CEO, GC	\$3.8	0.37%	For: 57%	For: 89.6%	
Broadcom	Avago Technologies	5/28/2015	2/1/2016	\$37.0	28% premium over previous closing share price	CEO, CFO, EVP/GM	\$0.0	0.00%	For: 97%	For: 99.4%	

Target	Acquirer	Signing Date	Closing Date	Enterprise Deal Value (in Billions)	Stated Deal Price Premium	NEOs Entitled to Preexisting 280G Gross Ups	402(i) Aggregate 280G Gross Ups (in Millions)	280G Gross Ups as % of Deal Value	SOGP Vote ^{2,3}	Merger Vote ³	Notes
ANN	Ascena Retail	5/18/2015	8/21/2015	\$2.2	21% premium over previous closing share price	CEO, CFO/COO, Pres - ANV, Pres - Ann Taylor	\$4.1	0.19%	Against: 51%	For: 99.3%	
Hyperion Therapeutics	Horizon Pharma	3/20/2015	5/7/2015	\$1.1	35% premium over 60-day volume weight average share price	CEO	\$2.0	0.18%	No vote (TO)	No vote (TO)	
Kofax	Lexmark International	3/24/2015	5/21/2015	\$1.0	47% premium over previous closing share price	CEO, GC	\$3.5	0.35%	No vote (FPI)	No vote (FPI)	
RTI International Metals	Alcoa	3/9/2015	7/23/2015	\$1.5	50% premium over previous closing share price	CEO, CFO, GC	\$7.7	0.51%	For: 90%	For: 94.1%	
Freescall Semiconductor	NXP Semiconductors	3/2/2015	12/7/2015	\$16.7	5% premium over pre-announcement closing share price	GM - Digital Networking	\$3.2	0.02%	For: 78%	For: 99.5%	
UIL	Iberdrola USA	2/25/2015	12/16/2015	\$3.0	25% premium over previous closing share price and 19% premium over 30-day average closing price	CEO, CFO, GC	\$0.0	0.00%	For: 95%	For: 97.3%	
Orbitz Worldwide	Expedia	2/12/2015	9/17/2015	\$1.6	25% premium over previous closing share price	CEO	\$0.0	0.00%	For: 77%	For: 88.3%	
MeadWestvaco	Rock-Tenn	1/26/2015	7/1/2015	\$8.2	9% premium based on previous closing share price	CEO, CFO, GC, EVP	\$0.0	0.00%	For: 96%	For: 97.7%	The transaction did not constitute a CJT under 280G so no executive officers received a gross up
City National	Royal Bank of Canada	1/22/2015	11/2/2015	\$5.0	26% premium over previous closing share price	CFO, GC, EVP/Pres, Credit Officer, EYP - Corp. Admin & Risk Group, Chairman Emeritus	\$6.7	0.13%	For: 88%	For: 99.6%	Additionally, the CEO was given a new excise tax gross up
Foundation Medicine	Roche	1/12/2015	4/7/2015	\$1.0	109% premium over previous closing share price	CEO	\$0.7	0.07%	No vote (TO)	No vote (TO)	

NPS Pharmaceuticals	Shire	1/11/2015	2/21/2015	\$5.2	10% premium over previous closing share price; 31% premium over unaffiliated share price	CEO	\$0.0	0.00%	No vote (TO)	No vote (TO)	
Platinum Underwriters	Renaissance	11/24/2014	3/2/2015	\$1.9	24% premium over previous closing share price	All NEOs	\$0.0	0.00%	For: 91%	For: 98.6%	
Target	Acquirer	Signing Date	Closing Date	Enterprise Deal Value (in Billions)	Stated Deal Price Premium	NEOs Entitled to Preexisting 280G Gross Ups	402(i) Aggregate 280G Gross Ups (in Millions)	280G Gross Ups as % of Deal Value	SOGP Vote ^{2,3}	Merger Vote ³	Notes
Dresser-Rand Group	Siemens	9/21/2014	6/30/2015	\$7.8	37% premium over closing share price prior to publication of acquisition talks	CEO	\$0.0	0.00%	For: 93%	For: 98.9%	
Glimcher Realty	Washington Prime	9/16/2014	1/15/2015	\$4.3	34% premium over previous closing share price	All NEOs	\$22.1	0.51%	50%	For: 99.5%	
TRW Automotive	ZF Friedrichshafen	9/15/2014	5/15/2015	\$12.4	16% premium over previous closing share price	CEO	\$0.0	0.00%	Against: 70%	For: 97.7%	
Conversant	Alliance Data Systems	9/11/2014	12/10/2014	\$2.3	31% premium over previous closing share price	CFO, CTO, GC	\$0.0	0.00%	For: 93%	For: 99.5%	
InterMune	Klee Acquisition	8/24/2014	9/29/2014	\$8.8	38% premium over previous closing share price	CEO	\$6.4	0.07%	No vote (TO)	No vote (TO)	
International Rectifier	Infinion Technologies	8/20/2014	1/13/2015	\$3.0	51% premium over previous closing share price	CEO, CFO, EVP - Gen Tech., SVP - Global Sales	\$22.9	0.76%	For: 48%	For: 99.5%	An additional \$1.9M or gross ups was made to one other executive officer. Gross ups for each executive officer (other than CEO) capped at \$3M
Rockwood Holdings	Albemarle	7/15/2014	1/12/2015	\$6.2	13% premium over previous closing share price	CFO, SVP - Law/Secretary	\$9.7	0.16%	For: 66%	For: 91.0%	

Target	Acquirer	Signing Date	Closing Date	Enterprise Deal Value (in Billions) ¹	Stated Deal Price Premium	NEOs Identified to Existing 280G Gross Ups	402(i) Aggregate 280G Gross Ups (in Millions)	280G Gross Ups as % of Deal Value	SOGP Vote ^{2,3}	Merger Vote ³	Notes
UKS	AECOM Technology	7/13/2014	10/17/2014	\$6.0	19% premium over 30-day average closing share price	GC	\$0.0	0.00%	For: 86%	For: 96.5%	GC, who was not an NEO on file-402(i) table, was entitled to a gross up, but was not expected to receive a payment
Protective Life	Dai-ichi Life Insurance	6/3/2014	2/1/2015	\$5.7	34% premium over previous closing share price	All NEOs	\$52.6	0.92%	Against: 64%	For: 98.6%	
Susser	Energy Transfer Partners	4/28/2014	8/29/2014	\$1.8	41% premium over previous closing share price	All NEOs	\$4.6	0.26%	For: 64%	For: 99.0%	
ArthroCare	Smith & Nephew	2/3/2014	5/29/2014	\$1.7	6% premium over previous closing share price	GC, CFO, CTO/SVP - R&D, SVP - Global Markets & Sales Ops	\$3.1	0.18%	For: 67%	For: 97.7%	
Texas Industries	Martin Marietta Materials	1/28/2014	7/2/2014	\$2.7	23% premium over undereferenced closing share price	All NEOs	\$3.1	0.11%	For: 88%	For: 98.8%	
Foster Wheeler	Amecc	1/13/2014	11/13/2014	\$3.3	13% premium over closing price prior to bid reports	CFO, Group Pres/CEO, EVP - HR, VP/Controller	\$0.0	0.00%	No vote (TO)	No vote (TO)	

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.

²According to a study conducted by Frederic 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>. A subsequent study by FW Cook in 2016 concluded that only 6% of large-cap companies provide a 280G gross up of any kind. *Executive Severance and Change-in-Control Practices*, Frederic W. Cook & Co., Inc. (March 2016), https://www.fwcook.com/content/Documents/Publications/Executive_Severance_and_Change-in-Control_Practices.pdf.

³It 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.

⁴For purposes of this analysis, we used transaction size values reported by The Deal at <http://pipeline.thedeal.com> and generally included the value of any contingent consideration.

⁵Say-on-Golden Parachute Votes are not required in acquisitions implemented through a tender offer or where the target is a foreign private issuer.

⁶Votes were calculated for purposes of this

article based on the percentage of votes cast, including abstentions and broker non-votes, which were counted as “no” votes.

⁷A shareholder vote is not required to consummate an acquisition implemented through a tender offer.

THE IMPACT OF TAX REFORM ON PRIVATE EQUITY AND M&A TRANSACTIONS

By Alejandro Ruiz, Jay M. Singer, Gary C. Karch and Alan J. Schwartz

Alejandro Ruiz is a partner in the Silicon Valley office, Jay M. Singer is a partner in the Washington DC office, Gary C. Karch is a partner in the Chicago office and Alan J. Schwartz is a partner in the New York office of McDermott Will & Emery LLP. Contact: aruiz@mwe.com or jsinger@mwe.com or gakarch@mwe.com or aschwartz@mwe.com.

Now that the 2017 tax reform act is law, private equity and M&A professionals must grapple with its sweeping changes and reconcile the new provisions with how they do business.

The 2017 tax reform act, entitled “An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018” (“the Act”), is now law, leaving private equity and M&A professionals to digest these significant changes and reconcile the new provisions with how they do business. The following is a summary of important features of the Act that will affect private equity and M&A transactions going forward.

21% Corporate Tax Rate

Effective for taxable years beginning after December 31, 2017, the Act provides for a per-