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Golden Parachutes and the Limits of Shareholder Value

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ESSAY

Golden Parachutes and the Limits of Shareholder Voting

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With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, Congress attempted to constrain change-in-control payments (also known as "golden parachutes") by giving shareholders the right to approve or disapprove such payments on an advisory basis. This Essay is the first to empirically examine the experience with the Say-on-Golden-Parachute ("SOGP") vote. We find that unlike shareholder votes on proposed mergers, there is a significant amount of variation with respect to votes on golden parachutes. Notwithstanding the variation, however, the SOGP voting regime is likely ineffective in controlling golden parachute ("GP") compensation. First, proxy advisors seem more likely to adopt a one-size-fits-all approach to recommendations on SOGP votes. Second, shareholders are more likely to adhere to advisor recommendations. Finally, the size of golden parachutes appears to be increasing in the years since the adoption of the Dodd-Frank Act in 2010, and the golden parachutes that are amended immediately prior to

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SOGP votes tend to grow rather than shrink. These findings contrast with the research that has examined Say on Pay ("SOP"), and we suggest that the differences between the two regimes lie in the absence of second-stage, market-based discipline for SOGP votes. We offer potential avenues for improving SOGP's ability to shape change-in-control compensation practices, such as making SOGP votes (partially) binding, and making the GP payment and SOGP voting information more readily available to shareholders of corporations where the target directors also serve as directors of acquiring corporations.

INTRODUCTION

Since executive compensation became a highly salient political issue in the 1980s, the federal government has repeatedly attempted to influence pay setting for top managers at public companies. From tax nudges[1] to mandatory clawbacks[2] to enhanced disclosure requirements,[3] the regulatory interventions have been steady but of uncertain impact.[4] In more recent times, Congress and the Securities and Exchange Commission ("SEC") have tried a new mechanism, amplifying the voice of public company shareholders on executive compensation by requiring advisory shareholder votes. The two interventions that move in this direction, known as "Say on Pay" and "Say on Golden Parachute," were promulgated under the Dodd-Frank Wall Street Reform and Consumer Protection Act and promised to focus shareholder outrage over problematic pay practices. Say on Pay ("SOP") asks shareholders to vote on the previous year's executive pay practices in their entirety, while Say on Golden Parachute ("SOGP") asks shareholders to vote on merger-related severance payments that would become payable to executives when the change in control takes place.

SOP in the United States and its cousins around the world have received a good deal of attention from both practitioners and scholars.[5] To the surprise of some, a series of recent papers found that SOP, though advisory, influences corporate behavior to respond to negative

1. I.R.C. § 162(m)(4)(C) (2012) (amended 2017) (removing the exception to the deduction cap for executive compensation of $1 million for performance-based pay, as part of the 2017 corporate tax overhaul); I.R.C. § 280G(a) (2012) (excluding compensation deductions for excess golden parachutes); I.R.C. § 4999(a) (2012) (imposing an excise tax for excess golden parachute payments); *see also* Joy Sabino Mullane, *Incidence and Accidents: Regulation of Executive Compensation Through the Tax Code*, 13 LEWIS & CLARK L. REV. 485, 514 (2009).

2. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 954, 15 U.S.C. § 78j-4 (2012) ("The Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that does not comply with the requirements of this section."). The SEC has issued a Proposed Rule. *See* Listing Standards for Recovery of Erroneously Awarded Compensation, 80 Fed. Reg. 41,144 (proposed July 14, 2015) (codified at 17 C.F.R. pts. 229, 240, 249, 274) (proposing to amend § 954 of the Dodd-Frank Act of 2010).

3. *See, e.g.*, 17 C.F.R. § 229.402 (2019); Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53,158 (Sept. 8, 2006) (codified at 17 C.F.R. pts. 228, 229, 232, 239, 240, 245, 249, 274) (stating that the disclosure amendments would be effective November 7, 2006).

4. *See, e.g.*, Kevin J. Murphy, *The Politics of Pay: A Legislative History of Executive Compensation*, *in* RESEARCH HANDBOOK ON EXECUTIVE PAY 11, 11 (Randall S. Thomas & Jennifer G. Hill eds., 2012) ("The emerging conclusion is that attempts to regulate CEO pay [including tax interventions] have been mostly unblemished by success.").

5. *See, e.g.*, Yonca Ertimur, Fabrizio Ferri & David Oesch, *Shareholder Votes and Proxy Advisors: Evidence from Say on Pay*, 51 J. ACCT. RES. 951 (2013); Fabrizio Ferri & David Maber, *Say on Pay Votes and CEO Compensation: Evidence from the UK*, 17 REV. FIN. 527 (2013); Jill Fisch, Darius Palia & Steven Davidoff Solomon, *Is Say on Pay All About Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101 (2018); Jeffrey N. Gordon, *"Say on Pay": Cautionary Notes on the U.K. Experience and the Case for Shareholder Opt-In*, 46 HARV. J. ON LEGIS. 323 (2009) (expressing concern that Say on Pay may cause a wealth-decreasing homogenization of pay practices); Stephen Davis, Does "Say on Pay" Work? Lessons on Making CEO Compensation Accountable (2007) (unpublished manuscript), https://millstein.law.columbia.edu/sites/default/files/content/docs/Policy%20Briefing%20No%201%20'Say%20on%20Pay'.pdf [https://perma.cc/SD6Z-4T9B].

shareholder votes.[6] At least some of the studies also present a sanguine picture of proxy advisor recommendations as well as shareholder voting itself.[7] In short, SOP appears to be influencing executive annual pay practices (at least partially) in line with the hopes of those who advocated for its adoption.

In this paper, we look at the other "Say on" compensation provision in Dodd-Frank. Utilizing hand-collected data on golden parachutes ("GPs"), we analyze the first six years of experience with SOGP votes to answer questions surrounding this expansion of shareholder power: how proxy advisors have responded to the new vote, how shareholders utilize this new power, and how effective the law has been in influencing pay practices. Our central finding is that SOGP does not function like SOP and, in fact, may be substantially less effective. On the surface, this is surprising since both voting rules share strikingly similar characteristics. Both were enacted via the same legislation and rulemaking process.[8] Both rely on advisory voting by the same groups of shareholders, who are advised by the same proxy advisors.[9] Both cover highly public and controversial matters of executive pay.

Yet important differences separate the two. Because SOP is an advisory vote,[10] its impact necessarily relies on indirect pressures placed on corporate directors. Most commonly, this entails an implicit or explicit threat to subsequently remove directors or discipline

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6. *See, e.g.*, Fisch et al., *supra* note 5, at 126–28 (discussing the influence of SOP on corporate boards and concerns that it may cause boards to focus on short-term metrics to the detriment of long-term value).

7. *See, e.g.*, Ertimur et al., *supra* note 5, at 952–56 (describing the study on shareholder voting, finding that the resulting data were "[c]ontrary to critics' concerns," and suggesting that the proxy advisors do not seem to be making one-size-fits-all recommendations and the shareholders do not seem to be just rubber-stamping the recommendations); *see also* Randall S. Thomas, Alan R. Palmiter & James F. Cotter, *Dodd-Frank's Say on Pay: Will It Lead to a Greater Role for Shareholders in Corporate Governance?*, 97 CORNELL L. REV. 1213 (2012) (evaluating pre-Dodd-Frank experiments on SOP).

8. Dodd-Frank Wall Street 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)).

9. There are a small number of proxy advisor firms, which, among others, make recommendations to institutional shareholders (such as BlackRock, Vanguard, and Fidelity) on how they should exercise their voting rights. The firms include Institutional Shareholder Services ("ISS"), Glass Lewis, Egan Jones, and Proxy Governance. ISS is known to have the largest market share and the most influence. *See* Stephen Choi, Jill Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869, 906 (2010) (finding that ISS has the most influence "partially due to the fact that ISS (to a greater extent than other advisors) bases its recommendations on factors that shareholders consider important").

10. *See* Shareholder Approval of Executive Compensation and Golden Parachute Compensation, 76 Fed. Reg. 6010 (Feb. 2, 2011) (codified at 17 C.F.R. pts. 229, 240, 249) ("In addition to their non-binding status, none of the shareholder votes required pursuant to Section 14A is to be construed 'as overruling a decision by such issuer or board of directors.' ")).

executives who fail to respond to shareholder disapproval. That is, given that the same set of directors will likely be up for reelection the subsequent year and that the same set of executives remains in charge, the shareholders can presumably impose discipline at the subsequent shareholder meeting if those managers were unresponsive to the earlier negative shareholder reaction.[11] Executives are likely to balance their desire for more compensation with the need to safeguard their relationship with shareholders who will exert influence over the firm going forward.

The potential for future discipline of managers is more limited in the SOGP context. Directors, including the ones who approved the executives' golden parachutes, will not be up for reelection by the same SOGP shareholders since the takeover triggering the golden parachute usually spells the end of the directors' service at the firm and marks the advent of a vastly different shareholder base.[12] Furthermore, executives who might be asked to renegotiate golden parachutes in the face of shareholder pressure may have little incentive to appease shareholders since their employment with the firm is usually ending as well.[13] In the absence of any explicit or implicit disciplinary mechanism, directors and executives may have little or no incentive to eschew outsized change-in-control severance payments.[14] In short, there are good reasons to believe that SOGP may not prove as effective as SOP in putting downward pressure on compensation.[15]

Theory thus suggests that the effectiveness of an SOGP regime in constraining GPs may be compromised compared to SOP's ability to constrain compensation more broadly. If so, we would expect to observe relatively little effect on golden parachute incidence and sizes after the

11. In fact, Dodd-Frank requires companies to disclose detailed information on how they have responded to the previous year's shareholder SOP votes in the next year's proxy. *See id.* at 6015 (amending Item 402(b) to disclose how a company "considered the results of previous shareholder [say-on-pay] votes"). Although this is largely for informational purposes, to the extent that shareholders could exert indirect pressure, the information disclosure can be quite useful.

12. The fact that Dodd-Frank's drafters thought it unnecessary to add an informational provision about management's response to an SOGP vote (as they did for the response to an SOP vote) demonstrates the point.

13. Also, to the extent that the burden of paying severance payments is borne, at least partially, by the buyer, target shareholders may be less sensitive to the size of the payment.

14. Although the primary focus of this Essay is on change-in-control severance payments, an interesting comparison could be made to severance payments made to executives in a non-takeover context, for example, when an executive's employment has been voluntarily or involuntarily terminated by the board in the absence of a takeover. In such a setting, the implicit pressure on the directors is presumably still in place, and empirical examination is needed to determine whether the presence of such indirect pressure can moderate non-change-in-control severance pay to the top executives. We intend to follow up on this line of research.

15. Indeed, every deal lawyer with whom we have spoken claims to operate as though the votes have no impact at all.

onset of SOGP. We would expect few, if any, last-minute amendments ahead of an SOGP vote aimed at mollifying shareholders about to vote on golden parachutes. Also, we would expect to observe a number of other dissimilarities with the SOP experience. To the extent that their institutional shareholder clients care less about the issue, proxy advisors' recommendations may be more likely to rely on simple, one-size-fits-all criteria so as to economize their resources. Relatedly, actual SOGP votes may be more highly correlated with proxy advisor recommendations if shareholders are less willing to expend their own resources to sort through the merits of SOGP votes.[16] Finally, there may be less SOGP dissent than SOP dissent overall if shareholders perceive little chance of effecting a change in golden parachutes.

This Essay empirically assesses these hypotheses in order to shed light on the experience with SOGP. Specifically, we aim to assess the basic question of SOGP's consequentiality for golden parachute pay practices. In doing so, this Essay adds to the literature evaluating advisory votes at public companies[17] and the behavior and influence of proxy advisory firms.[18] Our empirical assessment can be divided into three questions. First, we examine which factors are related to (or possibly influence) proxy advisor recommendations. We have collected data on recommendations since the inception of SOGP from Institutional Shareholder Services ("ISS"), the dominant proxy advisory firm, and we find that several attributes are correlated with ISS's SOGP recommendations.[19] For instance, we find that the size of a golden parachute is significantly related to ISS's "against" recommendations. Since 2013, ISS has explicitly stated that it looks for problematic provisions in golden parachutes—tax gross-ups, single triggers, and cash awards that are three or more times larger than annual pay[20]—when making its recommendation decisions. Although the data are not readily available on whether components of the golden parachute are single or double triggers, we are able to at least corroborate that the presence of a tax gross-up provision is significantly and positively related to ISS's "against" recommendations, consistent with ISS's stated policy.

16. Comparing the degrees of correlation with other studies is not an easy task given that the empirical specifications and the questions posed may differ substantially. Hence, we do not intend to make an absolute claim here.

17. *See, e.g.*, Ertimur et al., *supra* note 5.

18. *See, e.g.*, Stephen J. Choi, Jill E. Fisch & Marcel Kahan, *Director Elections and the Role of Proxy Advisors*, 82 S. CAL. L. REV. 649 (2009); Choi et al., *supra* note 9; Ertimur et al., *supra* note 5.

19. *See* Choi et al., *supra* note 9.

20. See *infra* Part I for a more detailed discussion of these attributes.

Second, we look to find the determinants of shareholder SOGP voting outcomes. Despite the lack of a strong disciplinary mechanism, we do find that shareholders, on occasion, vote against golden parachutes rather than simply rubber-stamping them.[21] As to what determines such outcomes, we find that ISS "against" recommendations have by far the most explanatory power for voting and likely more than has been found with respect to SOP voting. While it remains difficult to directly compare our results with those from the SOP studies, the result seems to support the hypothesis that shareholders do not take SOGP as seriously as they do SOP.[22] At the same time, the firm's prior performance, as measured by the return on assets ("ROA"), also seems to play an independent, albeit lesser, role in determining voting outcomes. That is, the firms that perform better financially seem to attract less dissent from their shareholders. The latter result is consistent with existing scholarship on SOP that shows firm performance is correlated with voting outcomes.[23]

Third and finally, we examine the effect of SOGP on golden parachutes. The examination is divided into two parts. First, looking at the broad trends in golden parachutes, we examine how they evolved before and after the advent of SOGP under Dodd-Frank. Even though SOGP itself may lack any direct disciplinary force, one possibility may be that SOGP puts some indirect pressure on the growth of golden parachutes over time. However, when we look at the absolute size of golden parachute obligations taken on by firms in their contracts with CEOs, we find that they grew at a faster rate after the adoption of SOGP than before, even after controlling for an extensive set of plausible controls including CEO compensation levels generally. When we look at the ratio of golden parachutes to annual compensation, on the other hand, we do not find any evidence of this change in the growth rate. At minimum, SOGP does not seem to be suppressing golden parachutes. Second, utilizing our hand-collected data, we look at changes to golden parachutes during the period one year prior to the

21. The fact that the shareholders actually express their voice on advisory SOGP, along with the fact that the proxy advisory firms, including ISS, make somewhat tailored recommendations on SOGP, raises an interesting question. Even though the advisory vote is nonbinding and there may be few implicit discipline mechanisms against the directors and the executives, we suspect that the institutional shareholders may be exercising their voting rights under SOGP so as to satisfy their fiduciary obligations to their own investors. This, in turn, will create an incentive to the proxy advisory firms to provide a few more meaningful recommendations to their own client base. In short, even though the votes are purely advisory and there may be no other market-based sanctioning mechanism, based on the institutional shareholders' own fiduciary obligations, there would be some correlation between how they vote and the attributes of golden parachutes.

22. See *supra* note 16 on comparing regression coefficient estimates from different empirical studies.

23. *See, e.g.*, Ertimur et al., *supra* note 5, at 973–78; Fisch et al., *supra* note 5, at 124.

public announcement of a deal through its closing to see if firms amend existing golden parachutes in anticipation of SOGP votes.[24] We find that firms that amend golden parachutes during the run-up to a deal are *more* likely to experience increases (rather than reductions) in the value of the previously disclosed golden parachute promises than are firms that do not amend their contracts. This suggests that firms do not act out of fear of negative shareholder votes, contrary to the experience with SOP.

Our findings suggest that SOGP may not be achieving its desired purpose of constraining golden parachutes. To the extent that one believes golden parachutes reflect arms-length bargaining among executives, boards that are faithful to the shareholders, and potentially, acquirers, this may be of little consequence. If, on the other hand, one believes golden parachutes are often inefficient contractual terms requiring regulatory intervention, this poses a problem. Based on our empirical findings, we suggest a few policy changes to the existing regime. One answer to SOGP's inconsequentiality is to make the vote binding somehow. Unlike SOP votes, SOGP votes are taken before (and not after) the executives are to receive the severance payments. By making the SOGP votes binding, we can provide a more meaningful formal disciplinary tool to the shareholders. Another possibility is to try to harness the implicit, market-based discipline on the directors and the executives through more robust disclosure.[25] We focus on two groups in particular: the target company directors who also serve (or expect to serve) as directors for other companies and the directors of the acquiring corporation. For instance, to the extent that the target company directors also serve as directors at other companies and approve golden parachutes that receive strong negative votes from target shareholders, disclosing this fact to the other companies' shareholders might allow those shareholders to discipline the directors.

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24. In an earlier study, Hartzell, Ofek, and Yermack also examine the last minute increase in executive compensation, either through augmentation of golden parachutes, special cash bonuses, or post-merger employment. Jay C. Hartzell, Eli Ofek & David Yermack, *What's in It for Me? CEOs Whose Firms Are Acquired*, 17 REV. FIN. STUD. 37, 39 (2004). They show that, in cases where the CEOs receive such extra compensation, target shareholders' returns from the merger are lower. *Id.* at 59. The study reflects mergers between 1995 and 1997 and thus does not consider the impact of SOGP. *Id.* at 41. They also find GP amendments in only 12% of firms during the run-up to a deal, but they focus on the cash severance component of GPs rather than the broader universe of amendments that we study. *Id.* at 46.

25. A growing body of literature examines the role the law plays in facilitating reputational sanctions by providing relevant information to the market participants. *See, e.g.*, Scott Baker & Albert Choi, *Contract's Role in Relational Contract*, 101 VA. L. REV. 559 (2015) [hereinafter Baker & Choi, *Contract's Role*]; Scott Baker & Albert H. Choi, *Reputation and Litigation: Why Costly Legal Sanctions Can Work Better than Reputational Sanctions*, 47 J. LEGAL STUD. 45 (2018) [hereinafter Baker & Choi, *Reputation and Litigation*].

The Essay is organized as follows. In Part I, we review the structure and practice of golden parachutes, including the recent legislative changes that require shareholders' advisory votes at public companies facing potential changes in control. We also discuss ISS's recommendation guidelines with respect to such votes. In Part II, the core of the Essay, we present our empirical analyses of SOGP. We start with a brief description of the datasets we use, along with descriptive statistics of the data, and present the empirical results that show: (1) what determines ISS's voting recommendations; (2) how shareholders vote; and (3) how golden parachutes have changed over time (before and after the legislative change), including for those companies that expect an imminent change in control. Part III presents a few policy implications based on the empirical findings, and the last Part concludes with suggestions for future research.

I. GOLDEN PARACHUTES AND SHAREHOLDERS' ADVISORY VOTES ON EXECUTIVE COMPENSATION

A. An Introduction to Golden Parachutes

On February 4, 2015, beleaguered retailers Office Depot and Staples entered into a merger agreement under which Staples would acquire Office Depot and Office Depot shareholders would receive a combination of cash and Staples shares.[26] If the deal was consummated, Office Depot's Chairman and CEO, Roland Smith, would no longer serve as the top executive and would become entitled to over $47 million in cash, accelerated equity, and other benefits.[27] Institutional Shareholder Services recommended its clients vote in favor of the merger but against management with respect to the Say-on-Golden-Parachute vote.[28] At a meeting on June 19 of the same year, the merger was approved by Office Depot shareholders with 447,184,660 votes for and 748,824 votes against, or over 99% in favor.[29] On the other hand, the SOGP vote was met with approval by only 246,680,492 shares in favor as opposed to 201,100,277 against, only a 55% to 45% margin.[30]

26. Office Depot, Inc., Annual Proxy Statement (Schedule 14a) (May 15, 2015), https://www.sec.gov/Archives/edgar/data/800240/000119312515190524/d892614ddefm14a.htm [https://perma.cc/5AH9-MC8K].

27. *See id.* at 83 (setting out golden parachute compensation for Office Depot executives).

28. This information was derived from the ISS Company Vote Results database, one of the sources we used to compile data for this project. *See infra* Section II.A.

29. Office Depot, Inc., Current Report (Form 8-K) (June 19, 2015), https://www.sec.gov/Archives/edgar/data/800240/000119312515230133/d945744d8k.htm [https://perma.cc/6UYN-3UCN].

30. *Id.*

The Office Depot-Staples merger was eventually cancelled for antitrust reasons,[31] and Smith retired soon after with a payout of less than $11 million.[32] But what caused ISS to recommend against Smith's GP? What caused shareholders to vote so differently on the related proposals? And why did Smith and Office Depot appear to do nothing ahead of the SOGP vote to avoid a potentially embarrassing loss? In short, the Office Depot example causes one to wonder how SOGP works and whether it matters.

Large U.S. firms adopted golden parachutes in significant numbers beginning in the early 1980s, ostensibly as a way to lubricate the takeover market.[33] An active takeover market allows acquirers to buy undervalued firms by sharing a portion of any potentially unlocked value with the selling shareholders via a deal premium.[34] This process often involves replacing incumbent management, which gives those managers incentives to avoid the takeover.[35] The threat of a takeover might lead incumbent managers to perform better in order to avoid

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31. *See* Michael J. de la Merced & Rachel Abrams, *Office Depot and Staples Call Off Merger After Judge Blocks It*, N.Y. TIMES (May 10, 2016), https://www.nytimes.com/2016/05/11/business/dealbook/staples-office-depot-merger.html [https://perma.cc/W6ZL-GUSZ] ("A federal judge . . . blocked a $6.3 billion proposed merger of Staples and Office Depot, dashing another huge deal and handing the Obama administration one more antitrust victory.").

32. Office Depot, Inc., Annual Proxy Statement (Schedule 14a), 71 (May 4, 2018), https://www.sec.gov/Archives/edgar/data/800240/000119312518087753/d533814ddef14a.htm#rom533814_ [https://perma.cc/UA5S-MTDD].

33. *See* Richard A. Lambert & David F. Larcker, *Golden Parachutes, Executive Decision-Making, and Shareholder Wealth*, 7 J. ACCT. & ECON. 179, 183–85 (1985) (discussing the incentive alignment hypothesis of golden parachutes, which "assumes that the compensation provided . . . has a favorable influence on top management's reaction to takeover bids").

34. *See* Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1161 (1981) ("A cash tender offer typically presents shareholders of the 'target' corporation with the opportunity to sell many if not all of their shares quickly and at a premium over the market price."); Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 819 (1981) ("[A]n offer provides shareholders with the opportunity to sell their shares for a substantial premium over market price."); Henry Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 115–17 (1965) (describing the process of direct purchase of shares). Even when a company is not being mismanaged and/or undervalued, an acquirer may decide to purchase the company for other reasons, such as synergies. To the extent that the target management may be against such acquisitions, golden parachutes can still function as an inducement.

35. *See, e.g.*, Lambert & Larcker, *supra* note 33, at 184:

> There are three aspects of the loss incurred by the managers of target firms. First, the manager does not receive wages until he finds new employment. Second, the manager may not be paid as much in his new job. This can arise if the manager possesses firm-specific human capital or if the incentive plan of his former company was structured to pay him less than his marginal product in the early part of his career and more than his marginal product later in his career. When the executive is terminated, he loses the additional late period payout because his new company has no incentive to pay him more than his marginal product. Finally, the manager loses any non-pecuniary benefits of his position, including his power and prestige.

becoming a target in the first place.[36] But other avoidance techniques are also available, with incumbent managers often in a position to resist takeovers by virtue of their control and their relationship with their board.[37]

Firms adjusted their arrangements with executives, in part, to solve the problem of incumbent recalcitrance.[38] Stock and option awards became common forms of compensation, and their values increased and often vested upon a takeover, providing incumbents with a possible windfall even if they might later be fired. Still, the pain of termination may not have been entirely eliminated for managers with significant firm-specific human capital investments or access to the private benefits of control. Golden parachutes helped to further encourage incumbent managers to accept takeover bids by promising them additional payments. Specifically, golden parachutes promise that, for a period of time following (and, in some cases, for a period of time prior to) a change in control, the acquiring company will pay target managers enhanced severance if terminated under certain circumstances.[39]

Golden parachutes commonly define a "change in control" as a merger, the acquisition of some percentage of company shares, or the turnover of a majority of the incumbent board.[40] In some cases, this

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36. *See, e.g.*, Andrei Shleifer & Robert W. Vishny, *Management Entrenchment: The Case of Manager-Specific Investments*, 25 J. FIN. ECON. 123, 126 (1989) ("We assume that control mechanisms such as . . . hostile takeovers are only partially effective. It is in the interest of the manager to make them less effective. We show how manager-specific investments help the manager reduce the threat of replacement.").

37. The most famous entrenchment device is the poison pill, which effectively prevents takeovers unless they are approved by the target's board. *See, e.g.*, *id.* The pill may be particularly effective when coupled with a staggered board, which prevents a hostile buyer from taking control of the board in two or more election cycles. *See, e.g.*, Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 904 (2002). But more subtle subversion tools are available to target managers. *See, e.g.*, Brian Broughman, *CEO Side Payments in Mergers and Acquisitions*, 2017 BYU L. REV. 67, 90–91:

> Targets generally rely on their CEO to negotiate the merger agreement. This position gives the CEO considerable discretion to negotiate personal benefits into the agreement that is sent to the board. . . . [I]f the CEO leaves prior to closing or otherwise become uncooperative during negotiations, this could destroy a great deal of the firm's value to the acquirer. The CEO's holdup power makes it especially hard and costly for the board to replace her as primary negotiator on behalf of the firm. The CEO can use such holdup power to bargain for personal benefits. (footnotes omitted).

38. For more on these devices, see Andrew C.W. Lund & Robert Schonlau, *Golden Parachutes, Severance, and Firm Value*, 68 FLA. L. REV. 875 (2017).

39. *See, e.g.*, Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 834 (2002) (discussing the use of golden parachutes to discourage CEOs blocking takeovers). Some single-trigger GPs do not require a subsequent termination.

40. Sales of substantially all assets of the company are usually covered as well.

"single trigger" activates payment obligations on the part of the firm even when the executives continue their employment with the combined entity. However, more often a number of subsequent termination scenarios serve as a "double trigger" that results in the golden parachute payment.[41] Those scenarios usually involve a termination by the company without "cause" or a resignation by the CEO for "good reason."[42] The standard golden parachute consists of various components, including a cash payment articulated as a multiple of an executive's salary and bonus. Often, executives are to receive continued perks for a period of time and perhaps enhanced contributions to retirement plans.[43] The equity compensation plan under which stock awards have been made or the merger agreement will frequently call for automatic vesting of this equity upon the change in control, but if not, the golden parachute may require accelerated vesting. Finally, golden parachutes may call for gross-ups to make executives whole for excise taxes they may incur under Section 4999 of the Internal Revenue Code ("IRC").[44]

It remains an open question whether golden parachutes increase or decrease shareholder wealth. They might increase shareholder wealth by encouraging more takeovers at premiums to current share prices. One of us has argued that golden parachutes can also allow the current shareholders to shift compensation costs onto future shareholders.[45] Golden parachutes might also encourage managers to

41. *See* Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 259 (2006).

42. *See generally id.* at 253 (discussing "good reason" triggers, which include diminution in responsibilities, diminution in compensation, and forced relocation).

43. In our hand-collected sample, we find these "other" amounts at 76% of firms that make some sort of GP promise.

44. *See* I.R.C. § 4999 (2012) (imposing excise tax on recipient of excess parachute payment). That excise tax (along with a loss of deduction on the company side under Section 280G) came about when Congress first attempted to rein in GPs in 1984. *See* Deficit Reduction Act of 1984, Pub. L. 98-369, 98 Stat. 494 (codified as amended in scattered sections of the U.S.C.). Section 4999 imposes a 20% excise tax on executives receiving "excess" parachute payments, i.e., payments above three times the executive's average compensation during the period prior to the deal. I.R.C. § 4999. Until the adoption of Section 409A in 2004, which restricted payment of deferred compensation to executives, GPs were the only terms in an executive employment agreement subject to their own special tax penalty. *See* I.R.C. § 409A (2012) (amended 2018). The recently repealed § 162(m) of the I.R.C. also imposed tax consequences on high levels of pay that are not sufficiently "performance-based." *See* Mullane, *supra* note 1 at 519–26; Gregg D. Polsky, *Controlling Executive Compensation Through the Tax Code*, 64 WASH. & LEE L. REV. 877, 884 (2007) ("Section 162(m) was intended both to reduce the overall level of executive compensation and to make such compensation more sensitive to firm performance.").

45. *See, e.g.*, Albert Choi, *Golden Parachute as a Compensation Shifting Mechanism*, 20 J.L. ECON. & ORG. 170 (2004) (suggesting that because the incidence of GPs is partly born by the acquirer, GPs can permit target shareholders to shift some of their compensation burden onto acquirers).

pursue more valuable but risky projects and manage for the long term by reducing the penalties for short-term failure normally associated with takeovers.[46]

On the other hand, recent academic criticisms of golden parachutes have focused on the potential for these contracts to actually *exacerbate agency costs* at public firms.[47] Specifically, by making terminations less painful, golden parachutes might create effort disincentives for CEOs.[48] Recent research suggested that golden parachute adoptions may be associated with subsequent declines in firm value.[49] Even if they do not produce perverse incentives, golden parachutes may divert more of the deal premium away from shareholders than is strictly necessary to overcome executive resistance.[50] To that extent, shareholders at the target firm may understandably believe that their payout in a takeover has been reduced because a larger golden parachute was awarded to their CEO. Even if they believe that some amount of compensation was necessary or appropriate to encourage the deal, higher-than-necessary golden parachutes might lead to shareholder dissatisfaction over the lost opportunity. In fact, some institutional shareholders have fought with portfolio firms over what they viewed as excessive golden parachutes, going so far as to threaten to vote against a proposed merger.[51]

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46. *See* Simone M. Sepe & Charles K. Whitehead, *Rethinking Chutes: Incentives, Investments, and Innovation*, 95 B.U. L. REV. 2027, 2032 (2015) ("With [golden parachutes], managers are assured of realizing the long-term value of their work even if the company is acquired, and as a result, they are more likely to specifically invest in the firm.").

47. There are, of course, other criticisms of golden parachutes, mostly centered on concerns for distributive justice. *See, e.g.*, Paul G. Wilhelm, *Application of Distributive Justice Theory to the CEO Pay Problem: Recommendations for Reform*, 12 J. BUS. ETHICS 469, 472–73 (1993) ("[W]hy should golden parachutes be available only to a few top executives and not to the many other management team members?").

48. Presumably, however, shareholders (represented by the compensation committee directors) can offset such a perverse incentive through an increase in the normal pay-for-performance sensitivity, accomplished by, for instance, relying more on stock options, grants, or just plain old bonuses.

49. *See, e.g.*, Lucian Bebchuk, Alma Cohen & Charles Wang, *Golden Parachutes and the Wealth of Shareholders*, 25 J. CORP. FIN. 140, 150–51 (2014) (discussing the ways that golden parachutes might decrease firm value by "contribut[ing] to managerial slack" and creating a " 'selling-out' effect"). In another paper, two of us questioned recent empirical work suggesting that golden parachutes are associated with decreases in firm value. *See* Lund & Schonlau*, supra* note 38, at 905 (observing that basic severance promises, rather than enhanced severance under golden parachutes, may be responsible for the correlations between golden parachutes and firm value declines observed by others).

50. *See* Lambert & Larcker, *supra* note 33, at 185 ("[T]he GP increases the cost of . . . conducting a takeover and dismissing management. That is, the GP contract requires the acquiring firm to retain and/or compensate executives that it might prefer to terminate. This reduces the takeover premium that the acquiring firm is willing to pay.").

51. *See Treasurer, CalPERS Seek to End "Golden Parachutes" from Mergers*, CEDAR VALLEY BUS. MONTHLY (Aug. 14, 2004), https://wcfcourier.com/business/local/treasurer-calpers-seek-to-

B. Advisory Votes and Executive Compensation

Perhaps unsurprisingly, shareholders are not the only ones that have been dissatisfied with golden parachutes. Since they achieved critical mass within public companies in the 1980s, these contracts have also been a popular political target. Until the enactment of the Dodd-Frank Act with its requirement of SOGP votes, the most concrete legislative attack on golden parachutes came in 1986 when Congress established the excise tax for "excess" ones with a corresponding loss of compensation deductions for the firm.[52] To be an "excess" golden parachute, the total amount paid to the executive must exceed three times the executive's "base amount," understood to be the average of the five prior years' taxable compensation.[53] If that occurs, the paying firm cannot deduct the compensation for purposes of the corporate income tax and, more importantly for practical purposes, the recipient must pay a 20% excise tax on top of normal income taxes.[54] Private companies may avoid these consequences by obtaining shareholder approval of the payments prior to the merger, but public companies may not avail themselves of this escape route.[55]

More recently, Congress and the SEC have shifted gears in the fight against excessive golden parachutes and now rely more on shareholders to police these arrangements. First, the SEC adopted enhanced disclosure requirements surrounding compensation generally—and golden parachutes specifically—so that shareholders might better understand the promises being made to executives.[56] To channel any resulting outrage, the Dodd-Frank Act included two advisory votes.

First came a requirement that public companies submit the entirety of their "top five" compensation arrangements to a shareholder

end-golden-parachutes-from-mergers/article_6db197d2-27e6-5753-8873-06ddc53ac734.html [https://perma.cc/F48Z-3M28] (stating that the board of the California Public Employees' Retirement System plans to vote against a prospective merger to fight against costly corporate executive severance packages).

52. *See supra* note 1 and accompanying text.

53. I.R.C. § 280G (2012).

54. *Id.*; I.R.C. § 4999 (2012). As discussed above, the target company can promise to neutralize the effect of this additional excise tax on the recipients by further "grossing up" the total severance payments.

55. I.R.C. § 280G.

56. *See* Securities Exchange Act of 1934 § 14A(b)(1), 15 U.S.C. § 78n (2012). Item 5 of Schedule 14A mandated disclosure of "any substantial interest, direct or indirect, by security holdings or otherwise, of any person who has been an executive officer or director since the beginning of the last fiscal year in any matter to be acted upon," so many firms already disclosed such information. Shareholder Approval of Executive Compensation and Golden Parachute Compensation, 76 Fed. Reg. 6010 (Feb. 2, 2011) (codified at 17 C.F.R. pts. 229, 240, 249).

SOP vote.[57] The SOP provision in Dodd-Frank introduced in 2009 mirrored a provision introduced by Representative Frank two years earlier before the financial crisis exploded. SOP followed similar regimes adopted in the UK and a number of other jurisdictions since 2000.[58] It covers all pay received by top executives, including golden parachutes.[59] Unlike the revised UK version in place since 2013, the vote is not binding on firms.[60]

Second, the Dodd-Frank Act required public companies to submit golden parachutes to an SOGP advisory shareholder vote to be held simultaneously with any shareholder vote on a change in control.[61] Thus, golden parachutes are the only term in CEO compensation contracts that are subject to their own discrete shareholder votes. Unlike SOP, SOGP was not in the Senate version of Dodd-Frank until the very end of the legislative process, when the House version including the provision was adopted in conference without any notable public discussion or congressional debate. The vote is advisory and may be avoided entirely if the golden parachute was disclosed in conjunction with an earlier SOP vote.[62] However, few firms avail themselves of this

57. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 951(a)(1), 15 U.S.C. § 78n-1(a)(1) (2012). Section 951 of Dodd-Frank also requires firms to submit to a non-binding shareholder vote on the frequency of the SOP vote, i.e., every one, two, or three years, with that vote occurring no less frequently than once every six years. 15 U.S.C. § 78n-1(a)(2). SOP subjects the compensation of the executives named in the firm's proxy statement to a shareholder vote.

58. *See* Lisa M. Fairfax, *Shareholder Democracy on Trial: International Perspective on the Effectiveness of Increased Shareholder Power*, 3 VA. L. & BUS. REV. 1, 17 (2008) (noting SOP's adoption in Sweden); Sandeep Gopalan, *Say on Pay and the SEC Disclosure Rules: Expressive Law and CEO Compensation*, 35 PEPP. L. REV. 207, 226–36 (2008) (describing SOP's adoption in the United Kingdom and Australia); Randall S. Thomas & Christoph Van der Elst, *Say on Pay Around the World*, 92 WASH. U. L. REV. 653 (2015) (analyzing SOP legislation across the globe).

59. *See* 15 U.S.C. § 78n-1(a) (requiring approval of all compensation disclosed pursuant to Item 40 of Regulation S-K). As we will discuss later, the fact that the golden parachutes are also subject to annual SOP votes could imply that, before the change-in-control actually takes place, the company may be more hesitant in increasing (or promising very generous) golden parachutes and is more likely to increase the payment immediately before the change-in-control takes place.

60. The advisory nature of the votes was even highlighted in the final version of the Dodd-Frank Act, which specified that any action or inaction by the board in response to the votes was not grounds for a fiduciary-duty violation under state corporate law. *See* 15 U.S.C. § 78n-1(c)(1)–(3); Shareholder Approval of Executive Compensation and Golden Parachute Compensation, 76 Fed. Reg. 6010, 6011 (Feb. 2, 2011) (codified at 17 C.F.R. pts. 229, 240, 249) ("These shareholder votes also do not 'create or imply any change to the fiduciary duties of such issuer or board of directors' nor do they 'create or imply any additional fiduciary duties for such issuer or board of directors.' " (footnotes omitted)).

61. 15 U.S.C. § 78n-1(b)(2).

62. *See* 15 U.S.C. § 78n-1(a)(1). To qualify as having been subject to a prior Say-on-Pay vote (and thus exempt from the specific GP advisory vote requirement at a later date), firms must disclose information required by Item 402(t) of Regulation S-K. For annual report purposes, on the other hand, they need only provide information under Item 402(j). The two disclosures are similar, thus one might have expected firms to disclose under 402(t) to receive the waiver from future Say-on-GP votes.

preclearance option.[63] It seems likely that firms view the downside of waiting for an SOGP vote at the time of a deal as being relatively small since the advisory nature of the vote and the final-period nature of most GP-triggering transactions mean their directors are unlikely to face any consequences.

In both cases, the legislative history is not clear on Congress's substantive goals regarding compensation levels or features. As a witness before the House considering the provisions, Gene Sperling, Counselor to the Secretary of the Treasury, testified: "[W]e were not coming with a particular legislative or even regulatory proposal. We really were in a sense trying to shine a spotlight on a practice that we think . . . that shareholders and management should reexamine."[64] Representative Frank himself observed, "It's a question of empowering the shareholders to decide the appropriate level because it's their money and giving regulators the ability to prevent compensation incentives that encourage taking inappropriate and excessive risk."[65] Whether SOP or SOGP are deemed effective on their own terms, therefore, appears to hinge on firms' sensitivity to shareholder voice as much as on reductions in overall GP promises or adjustment of particular terms. We examine each of these in Part II.

1. The Advisory Vote Experience with Say on Pay

SOP and SOGP are not the first examples of direct shareholder votes on executive compensation matters. For example, under stock exchange rules, shareholders are required to pass equity compensation

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63. *See, e.g.*, Michael G. O'Bryan, David M. Lynn & Scott G. Hodgdon, *New Golden Parachute Compensation Disclosure and Shareholder Advisory Vote Requirements,* MORRISON FORESTER 2 (June 3, 2011), http://media.mofo.com/files/Uploads/Images/110603-SEC-Golden-Parachute-Requirements.pdf [https://perma.cc/ULY3-35NV]:

> Based on the filings thus far this proxy season, it is unlikely that companies will often use the Say-on-Pay vote exception. In the months since the requirement for a mandatory Say-on-Pay vote became effective, only a handful of issuers have voluntarily included the Item 402(t) golden parachute compensation disclosures in their annual meeting proxy statements. Companies may be concerned with how these disclosures could impact the required Say-on-Pay vote, including whether such disclosures would be viewed favorably by proxy advisory services if the annual meeting proxies include the additional golden parachute compensation disclosures. In addition, companies may be concerned that providing such disclosures voluntarily signals the market that the company could be engaged in a significant transaction in the coming months.

(footnote omitted).

64. *Compensation Structure and Systemic Risk: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 27 (2009) (statement of Gene Sperling, Counselor to the Secretary of the Treasury, U.S. Department of the Treasury).

65. Press Release, Barney Frank, Chairman, U.S. House Comm. on Fin. Servs. (July 16, 2009), https://democrats-financialservices.house.gov/news/documentsingle.aspx?DocumentID=382736 [https://perma.cc/V3ZY-X9KU].

plans pursuant to which firms distribute restricted stock and options.[66] As discussed above, shareholder votes are able to cleanse "excess" golden parachutes from being subject to tax penalties, at least in the private company context.[67] Recently repealed tax rules encouraged firms to have shareholders approve bonus plans in order to qualify them as deductible "performance-based" compensation.[68] And, indirectly, annual director elections have at times become referenda on executive compensation matters.

Expanding these voting rights to include advisory SOP and SOGP votes was attacked, on the one hand, as being weak medicine for whatever ailed executive compensation. The earlier voting rights that shareholders held had direct and certain consequences in the event of a negative vote. If an equity plan, for instance, was voted down, then it could not be used by exchange-listed companies to award options or restricted stock. If a bonus plan was voted down, compensation paid under it could not receive IRC 162(m)'s favorable "performance-based" designation for tax purposes.[69] And, of course, directors being voted out via proxy contest would be an incredibly significant event. Because SOP and SOGP were nonbinding, critics denounced them as little more than a routinized set of votes on precatory proposals related to executive compensation under the "town hall meeting" rule in the federal proxy rules.[70]

On the other hand, some commentators worried that SOP and SOGP, although advisory, represented an improper and potentially consequential incursion by shareholders into the traditional

66. *See, e.g.*, Christopher S. Armstrong, Ian D. Gow & David F. Larcker, *The Efficacy of Shareholder Voting: Evidence from Equity Compensation Plans*, 51 J. ACCT. RES. 909, 910 (2013); Andrew C.W. Lund, *What Was the Question? The NYSE and Nasdaq's Curious Listing Standards Requiring Shareholder Approval of Equity-Compensation Plans*, 39 CONN. L. REV. 119, 122 (2006) (discussing shareholder roles in determining compensation levels of executives at public companies).

67. *See supra* note 52–55 and accompanying text (discussing the implications of the Internal Revenue Code on GP payments).

68. *See* I.R.C. § 162(m) (2012) (outlining deduction protocol for excessive employee remuneration).

69. When the bonus or option plan is no longer considered "performance based," for any such compensation over $1 million per year, the company may no longer be able to treat them as an expense so as to reduce the corporate-income tax burden. *See id*. This preference for performance-based compensation was eliminated in the recent tax bill revising the Internal Revenue Code. Regina Olshan et al., *Section 162(m) After the Tax Cuts and Jobs Act: What to Do Now,* SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES (Jan. 4, 2018), https://www.skadden.com/insights/publications/2018/01/section-162m-after-the-tax-cuts-and-jobs-act [https://perma.cc/3DFV-MSEU].

70. *See* 17 C.F.R. § 240.14a-8 (2019). For more on shareholder proposals, see Jie Cai & Ralph Walkling, *Shareholders' Say on Pay: Does it Create Value?*, 46 J. FIN. & QUANTITATIVE ANALYSIS 299 (2011); and Yonca Ertimur, Fabrizio Ferri & Stephen Stubben, *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals*, 16 J. CORP. FIN. 53 (2010).

decisionmaking domain of directors. At best, SOP and SOGP would add needless costs to the proxy process.[71] Worse, boards might be directly or indirectly influenced by shareholders who misunderstood the impact of pay in setting executive incentives and attracting highly qualified managers.[72] Worst, proxy advisors—chiefly ISS—might come to dominate shareholder votes and apply pernicious or unintelligible standards to public company pay, including golden parachutes.[73]

Unsurprisingly given the heat of this debate, SOP has been the subject of a fair amount of study by academics in law and finance as well as advisory groups.[74] Early studies of SOP voting found over 90% "yes" votes overall.[75] Over time, that support has continued. Only 1.4%–2.8% of pay plans were voted down in any given year between 2011 and 2016.[76] Depending on the threshold one adopts, substantial shareholder opposition has occurred with respect to either 7.4%–8.8% of votes (30% disapproval) or 23.5%–28.4% of votes (10% disapproval), neither of which suggests large-scale shareholder dissatisfaction over pay practices.[77]

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71. *See Empowering Shareholders on Executive Compensation: H.R. 1257, The Shareholder Vote on Executive Compensation Act: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. App. at 120–47 (March 8, 2007) (prepared statement of Stephen N. Kaplan, Neubauer Family Professor of Entrepeneurship and Finance, University of Chicago Graduate School of Business) (attesting to the unnecessary costs imposed by say-on-pay voting). Some suggested more attenuated negative effects. *See* Minor Myers, *The Perils of Shareholder Voting on Executive Compensation*, 36 DEL. J. CORP. L. 417 (2011) (observing that positive SOP results may enable boards to deflect blame for compensation decisions).

72. *See, e.g.*, Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1815 (2011) (arguing that Dodd-Frank's executive compensation provisions are inconsistent with the board-centric model of corporate governance); Thomas et al., *supra* note 7, at 1215 (asking "whether the . . . say-on-pay regime will change executive pay level and practices, and more generally, the dialogue between management and shareholders on the subject").

73. *See, e.g.*, Stephen M. Bainbridge, *The Corporate Governance Provisions of Dodd-Frank*, 2 ENGAGE J. 33, 33–34, (2010); Bainbridge, *supra* note 72; Gordon, *supra* note 5, at 326; *A Call for Change in the Proxy Advisory Industry Status Quo: The Case for Greater Accountability and Oversight*, CTR. EXECUTIVE COMPENSATION 7–8 (Jan. 2011), http://online.wsj.com/public/resources/documents/ProxyAdvisoryWhitePaper02072011.pdf [https://perma.cc/5U8W-H4VY].

74. *See, e.g.*, James F. Cotter, Alan R. Palmiter & Randall S. Thomas, *The First Year of Say-on-Pay under Dodd-Frank: An Empirical Analysis and Look Forward*, 81 GEO. WASH. L. REV. 967 (2013).

75. *Id.* at 979–80 (finding that pay plans in the next year following SOP adoption experienced 91.2% support overall and that only 1.3% of firms experienced greater than 50% dissent).

76. *See 2016 Say on Pay Results: End of Year Report*, SEMLER BROSSY 1 (Feb. 1, 2017), http://www.semlerbrossy.com/wp-content/uploads/SBCG-2016-Year-End-Say-on-Pay-Report-02-01-2017.pdf [https://perma.cc/69WD-SHLU].

77. *Id.*

These studies have also tended to show that ISS has not applied a routinized, one-size-fits-all approach to SOP recommendations.[78] Moreover, it appears that shareholders do not blindly follow ISS recommendations when voting on SOP. The earliest studies found that shareholders appeared to adjust ISS voting recommendations downward (more dissent) in cases of poor firm performance and upward (less dissent) in cases of excellent firm performance.[79] Recent work confirms that, while proxy advisor recommendations play an important role, shareholders, particularly institutional shareholders, appear to base their voting decisions on many other factors, such as whether the firm has produced a good return in the recent past (as measured by either return on assets or abnormal return) and whether the total executive pay seems very large (as measured by whether the total pay is in the highest quartile among all publicly traded companies).[80]

Finally, contrary to predictions of SOP's inconsequentiality, studies have found that, on average, firms actively respond to negative SOP recommendations and votes.[81] Ertimur et al. (2013), for instance, found that firms experiencing a negative recommendation or substantial (but not majority) shareholder opposition reported changes to pay practices in the subsequent year.[82] Under the Dodd-Frank Act, firms must disclose how they have responded to the previous year's SOP results in their subsequent proxies.[83] Ertimur et al. (2013) showed that when 30% or more of the shares vote against the compensation, more than 70% of the firms respond by changing their pay practices in the

78. *See* Ertimur et al., *supra* note 5, at 953 ("Contrary to critics' concerns . . . we find limited evidence of a 'one-size-fits-all' approach. That is, in most cases, the presence of certain provisions in the compensation plan does not automatically translate into negative recommendations.").

79. *See* Cotter et al., *supra* note 74, at 986 (analyzing how total stock returns and ISS recommendations correlate with shareholder votes); *see also* Ryan Krause, Kimberley A. Witler & Matthew Semadeni, *Power to the Principals! An Experimental Look at Shareholder Say-on-Pay Voting*, 57 ACAD. MGMT. J. 94 (2014) (discussing how shareholders care about firm performance when exercising their SOP votes). Shareholders appeared to be better able to buck ISS "for" recommendations in the face of countervailing information (regarding recent increases in CEO pay or "excess" pay) than they were ISS "against" recommendations. That is, ISS "against" recommendations seemed dispositive in ways that ISS "for" recommendations were not. *Id.* at 989.

80. Ertimur, Ferri and Oesch show, for instance, the better the company's financial return and the lower the CEO's total pay, the less likely shareholders will vote against the executive pay. Ertimur et al., *supra* note 5, at 954. Fisch, Palia, and Solomon, using a more updated dataset, also corroborate these findings. Fisch et al., *supra* note 5, at 121–23. Similar to Ertimur et al., Fisch et al. show that the negative SOP votes are correlated with lower stock returns and lower return on assets. *Id.* They also show a strong correlation between excess CEO pay (in terms of quartiles) and firm returns (in terms of quartiles). *Id.* Most of these correlations survive the inclusion of a control for *ISS Against*. *See id.* at 119–23 (finding that say on pay may actually be a say on performance).

81. *See* Cotter et al., *supra* note 74, at 1002–10 (presenting four case studies in which company management actively responded to negative ISS reports).

82. Ertimur et al., *supra* note 5, at 986.

83. *See* discussion *supra* note 11.

subsequent year.[84] Elsewhere, researchers found that boards reduced CEO compensation in response to negative SOP votes.[85] Interestingly, other researchers found an ex ante effect of SOP, whereby boards reduced CEO compensation and made it more performance based in advance of SOP votes.[86] Although other studies found SOP to be less effective in shaping contracting practices,[87] these findings suggest that SOP, despite being advisory, may be able to influence incumbent boards to make corporate governance changes under certain circumstances.

2. Advisory Votes on Golden Parachutes

Like SOP, SOGP provides for an advisory vote on executive compensation and was adopted at the same time as SOP. These similarities raise the question of whether what we are learning about SOP can map onto the experience with SOGP. To this point, the only research done on the SOGP process has been summary work by advisory firms. From this work, we know that the results of SOGP votes have generally been favorable. According to a Pearl Meyer white paper, of the 699 GP votes held from implementation in 2011 through 2016, 70% resulted in high shareholder approval (80% approval or greater) while majority negative votes were obtained in only 5% of cases.[88]

At the same time, a superficial look suggests that ISS is becoming aggressive in its recommendations against GPs.[89] ISS and

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84. Ertimur et al., *supra* note 5, at 985 fig.1.

85. Marinilka B. Kimbro & Danielle Xu, *Shareholders Have a Say in Executive Compensation: Evidence from Say-on-Pay in the United States*, 35 J. ACCT. & PUB. POL'Y 19, 36 (2016) ("[E]ven when [the return on assets] increases, there is a *reduction* in excessive compensation in firms with high SOP dissent.").

86. *See* Steven Balsam, Jeff Boone, Harrison Liu & Jennifer Yin, *The Impact of Say-on-Pay on Executive Compensation*, 35 J. ACCT. & PUB. POL'Y 162, 188 (2016) ("[F]irms modified their compensation packages with an eye toward winning shareholder approval of their executive compensation" ahead of SOP's adoption).

87. *See* Kelly R. Brunarski, T. Colin Campbell & Yvette S. Harman, *Evidence on the Outcome of Say-On-Pay Votes: How Managers, Directors, and Shareholders Respond*, 30 J. CORP. FIN. 132, 147 (2015) ("SOP legislation has not had the intended effect of improving CEO contracting, at least in the short term.").

88. Margaret Black & Daniel Wetzel, *Updated: Say on Golden Parachute Votes*, PEARL MEYER 2 (June 20, 2016), https://www.pearlmeyer.com/say-golden-parachute.pdf [https://perma.cc/PJ6Q-3RW9].

89. Margaret Black & Daniel Wetzel, *Updated: Say on Golden Parachute Votes*, PEARL MEYER 3 (Dec. 17, 2013), http://web.archive.org/web/20140429050745/http://www.pearlmeyer.com/Pearl/media/PearlMeyer/ArticlesWhitepapers/PMP-ART-SOGPUpdate-12-17-2013.pdf [https://perma.cc/K7QC-KPTK]:

> These recent changes in its voting guidelines appear to be increasing the likelihood that ISS will issue a negative voting recommendation on transaction pay proposals. In fact, ISS seems to be doing so roughly twice as often as for Say on Pay proposals. Negative voting recommendations were made for 35 of the 125 SOGP proposals (approximately 28%) brought before shareholders in meetings between February 1, 2013 and October

other proxy advisory firms have maintained guidelines relating to GPs for some time, even predating the SOGP regime.[90] ISS's 2016 Proxy Voting Guidelines, which remain practically unchanged, recommend voting "case-by-case on say on Golden Parachute proposals" and "consider[ing] . . . existing change-in-control arrangements maintained with named executive officers rather than focusing primarily on new or extended arrangements."[91] ISS further calls out problematic features that may lead to a negative recommendation without spelling out precisely how the decision will be made:

> Single- or modified-single-trigger cash severance; [s]ingle-trigger acceleration of unvested equity awards; [e]xcessive cash severance (>3x base salary and bonus); [e]xcise tax gross-ups triggered and payable (as opposed to a provision to provide excise tax gross-ups); [e]xcessive golden parachute payments (on an absolute basis or as a percentage of transaction equity value); or [r]ecent amendments that incorporate any problematic features (such as those above) or recent actions (such as extraordinary equity grants) that may make packages so attractive as to influence merger agreements that may not be in the best interests of shareholders . . . .[92]

The ISS guidelines conclude by noting that "[r]ecent amendment(s) that incorporate problematic features will tend to carry more weight on the overall analysis."[93] Other shareholder advisors and institutional shareholders have begun to adopt similar guidelines. Glass Lewis, ISS's most significant competitor, has adopted guidelines that are more opaque.[94] Vanguard, similar to other institutional

31, 2013. In contrast, 20% of proposals received "Against" recommendations in voting results filed through December 31, 2012, as reported in our March 2013 update.

90. This makes sense given the common belief that GPs were the subject of a large number of shareholder proposals in earlier periods. *See, e.g.*, Bebchuk et al., *supra* note 39, at 140. In fact, Georgeson Annual Corporate Governance reports categorized shareholder proposals relating to all forms of severance as "Golden Parachute" proposals, artificially inflating the perceived levels of shareholder dissatisfaction with GPs in particular. *See, e.g.*, *2008 Annual Corporate Governance Review*, GEORGESON 32 (2008), https://www.georgeson.com/us/Documents/acgr/acgr2008.pdf [https://perma.cc/V4YN-JGLH] (describing Boeing shareholder proposal as one to approve/vote on future GPs); *see also* The Boeing Company, Proxy Statement (Schedule 14a), Item 9 (Mar. 14, 2008), https://www.sec.gov/Archives/edgar/data/12927/000119312508057498/ddef14a.htm#toc96257_38 [https://perma.cc/J7NG-L4PM] (describing Boeing shareholder proposal to require shareholder approval of certain future severance agreements).

91. *United States Summary Proxy Voting Guidelines: 2016 Benchmark Policy Recommendations*, INSTITUTIONAL S'HOLDER SERVS. 42 (2016), https://www.issgovernance.com/file/policy/2016-us-summary-voting-guidelines-23-feb-2016.pdf [https://perma.cc/L9C4-NB7F]. ISS explicitly called out such features beginning in 2013 about a year and a half after SOGP votes were actually underway.

92. *Id.* at 42.

93. *Id.*

94. *Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice: United States*, GLASS LEWIS 33 (2019), https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf [https://perma.cc/6MG7-SN3M] (stating that "[e]gregious or excessive . . . severance payments, including . . . golden parachutes" is a factor that militates in favor of a negative recommendation on an SOP vote).

investors, has explicitly accepted that GPs may be appropriate in most contexts, subject to restraints on specific features.[95]

Yet, to our knowledge, no one has attempted a full treatment of SOGP. Partially, the failure to study SOGP may stem from an assumption that SOGP plays a negligible role, if any, in compensation or deal planning. On the other hand, it may partly stem from a lack of available data. Information about proxy advisor recommendations and shareholder votes is available, as is information about projected GP payout amounts that is required to be disclosed each year by public companies.[96] But there is no database that aggregates final GP promises as disclosed in the merger proxy leading to the SOGP vote, which is ultimately the information on which proxy advisors and shareholders are basing their decisions and which may deviate substantially from the previously disclosed GP projections due to contract amendments, increases in equity values, or salary and bonus increases, among other things. Our hand collection of golden parachute data from merger proxies solves this problem.

How similar to SOP is SOGP in theory? Despite their obvious similarities, there is reason to think the two voting regimes are apt to have different results. Under SOP, directors who fail to react to proxy advisors or shareholder pressure face plausible consequences, up to and including shareholder backlash in the next director election. SOGP, on the other hand, takes place only in the context of takeovers where the directors experiencing dissent are unlikely to be standing for reelection in the coming years, and, even if they are continuing as directors in the new entity, they will be subject to votes from a much different shareholder group in ensuing years. As such, they are subject only to reputation costs in the director labor market, which may not be strong enough to compel action.

Furthermore, SOP puts bargaining pressure on executives. Sometimes, executives may be willing to amend their existing compensation arrangements in order to placate shareholders because they anticipate future interactions as they continue as executives. Other times, the directors are unilaterally choosing to grant equity awards, pay bonuses, or raise salaries. In either case, executives are not in a particularly strong position to force pay decisions that might antagonize shareholders. CEOs holding golden parachutes are in

95. *Proxy Voting Guidelines for U.S. Portfolio Companies*, VANGUARD FUNDS 13 (2019), https://about.vanguard.com/investment-stewardship/portfolio-company-resources/proxy_voting_guidelines.pdf [https://perma.cc/6XQR-729R] ("A fund will vote for proposals to approve golden parachutes unless they are excessive or unreasonable (e.g., severance payments total more than three times salary plus bonus, are 'single trigger,' or include excise tax gross-ups.")).

96. *See* discussion *supra* note 56 and accompanying text.

another situation entirely. They are likely to be terminating their relationship with the firm as part of the merger and may therefore be less willing to renegotiate existing golden parachutes to appease proxy advisors or shareholders.

This leaves open the possibility that initial golden parachute terms might be negotiated in the shadow of future SOGP votes. On the other hand, a golden parachute promise with no takeover in the offing may not prove salient enough to shareholders to generate enough outrage. In any event, a golden parachute promise with no takeover in the offing that does generate shareholder outrage is necessarily going to be subject to shareholder dissent via the annual SOP vote rather than an SOGP vote that does not need to be held until a takeover occurs. Thus, SOGP may be less effective than other corporate governance tools (including SOP specifically) in shaping compensation decisions.

II. EMPIRICAL TESTS

In this Part, we empirically examine the experience with SOGP since its adoption under the Dodd-Frank Act. The most pertinent questions are whether the SOGP regime has had an effect on proxy advisors' recommendations and shareholders' voting behavior, and whether SOGP has had an overall effect on golden parachute contracting. If SOGP had, or was perceived to have had, no disciplinary effect, we would expect a number of things. First, golden parachute incidence and dollar values would have been unaffected by SOGP's adoption. Target firms would not adjust golden parachutes downward in the face of actual or potential negative SOGP recommendations or votes. We would also expect to see certain phenomena with respect to the voting process itself. Proxy advisors might economize by using simple, one-size-fits-all criteria when making their recommendations if their clients were expected to care less about the vote. Further, SOGP voters might simply adopt whatever proxy advisor recommendations they receive if it is obvious to them that it is not wise to expend their own resources to sort through the merits of the decision.

A. Data Collection and Sample Description

Our empirical study utilizes four different data sources: (1) ISS voting data which show the results of SOGP votes; (2) CRSP-Compustat data that include various company financial and nonfinancial characteristics, such as Book Value of Assets, Return on Assets ("ROA"), and Market Value of Equity ("MVE"); (3) the Execucomp dataset, from which we get information on executives that receive golden parachute payments, including CEO salary, bonus, and projected golden parachute payments (the summed amount including unobservable amounts of potential cash payments and accelerated equity vesting); and (4) a novel, hand-collected dataset (pulled from the companies' merger proxies and S-4 registration statements) on final golden parachute payments that have been subjected to SOGP votes. We discuss this in more detail below.

First, we use the ISS Company Vote Results database to find all SOGP votes at Russell 3000 firms from 2011 to 2017 related to GPs and find 803 observations. We then merge those firms with the CRSP-Compustat sample for annual financial data by fiscal year and firm-identifying information, yielding 647 observations through June 2017. After removing cases triggering an SOGP vote but not actually involving a golden parachute (usually instances of an excise tax reimbursement pursuant to Section 4985 of the IRC), we have 631 observations. We call this the "Russell 3000 Sample." Consistent with earlier empirical studies on SOP, we merge these firms with Execucomp for compensation information as well as insider characteristics such as CEO age, tenure, and ownership. Execucomp does not track many of the firms in the ISS SOGP vote database, leaving us with 263 firms with complete information. We call this subset of the Russell 3000 Sample the "Execucomp Sample."

In addition, instead of relying solely on commercially available data, we have also hand collected and coded each proxy statement preceding an SOGP vote for firms in the Russell 3000 Sample. Those proxies come in the form of either a definitive merger proxy or an S-4 filed by an acquiring company in a stock-for-stock deal. Both of these documents require information described in Item 502(t) of Regulation S-K, which calls for tabular disclosure of potential GP payments broken out into categories: cash, equity, and perquisites/other. We collected data regarding the final potential GP payments disclosed in the proxy, breaking amounts into cash (salary and bonus), equity, perquisites ("other" excluding tax gross-ups and pension plan accelerations), and the total (all amounts including tax gross-ups and pension plan accelerations). Firms are not required to disclose bona fide post-transaction employment agreements between (1) named executive officers of the target and (2) the acquirer.[97] This potentially subjects our hand coding to a serious undercounting problem to the extent acquirers transform current GPs into post-transaction employment contracts with severance protections. In fact, however, targets very often describe

97. 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).

such arrangements either directly (in which case we include such potential payments in our GP data) or with a statement that no such arrangements have been entered into between the parties.[98]

This provides two advantages. First, our data are able to break down the components of golden parachutes rather than simply observing the total as Execucomp does. This is important to the extent that certain features of golden parachutes are handled differently by proxy advisors or shareholders than others. Second, we observe closer-to-actualized golden parachute obligations than those disclosed in earlier annual proxy statements. The amounts we find via hand coding remain hypothetical to the extent they are double triggers and rely on a future termination. But the commercially available data commonly used in academic studies provides a snapshot of golden parachutes from a much earlier date, which necessarily cannot account for late amendments or increases in golden parachutes' equity value brought on by any deal premium. Most obviously, it is these data and not ones from earlier periods that proxy advisors and shareholders are examining when they are making their SOGP decisions.

TABLE 1: GOLDEN PARACHUTE SIZES AND INCIDENCE BY YEAR

Year	Number of CEOs	Number of CEOs with GPs	Average GP ($ 1,000s)	Median GP ($ 1,000s)	Average Ratio of GP to Salary	Median Ratio of GP to Salary
2006	1,895	1,084	11,503.27	4,576.26	13.08	7.58
2007	2,237	1,680	11,167.63	4,744.50	13.08	8.22
2008	2,160	1,660	8,907.90	4,270.73	10.14	6.80
2009	2,122	1,687	10,721.46	5,472.06	12.53	8.78
2010	2,095	1,712	12,791.29	6,690.08	14.49	10.30
2011	2,057	1,660	11,834.42	6,373.80	13.25	9.49
2012	2,019	1,608	12,496.98	6,827.52	13.66	9.64
2013	1,978	1,587	14,858.91	8,186.56	15.73	11.44
2014	1,941	1,598	15,881.52	8,976.26	16.56	12.26
2015	1,858	1,513	14,290.72	8,347.68	14.57	10.92
2016	1,753	1,442	15,780.63	10,081.44	16.30	12.86
2017	76	67	16,139.96	11,435.87	17.27	15.08

We begin by observing golden parachute incidence and dollar values during the period preceding SOGP's adoption through the present across all Execucomp firms whether or not they experience a

98. This transparency is somewhat puzzling but may be explained by the requirement in Items 5(a) and 5(b)(xii) of Schedule 14A to disclose such agreements if they constitute a "substantial interest" in the business combination. *See* 17 C.F.R. § 240.14a-101 (2019).

change-in-control event. Table 1 presents this data in an easy-to-read format. Firms with golden parachutes ranged from 75.1% (2007) to 82.3% (2014 and 2016). Only 57.2% of firms reported golden parachutes in 2006, though that number is so far from subsequent years, we believe it likely represents an error in reporting either by firms or Execucomp in the first year following the adoption of new compensation disclosure rules. These data show that firms adopted golden parachutes regardless of whether a change-in-control event was apt to occur as part of a standard CEO employment agreement. Average and median golden parachutes were generally increasing throughout the period. The average golden parachute was over $11 million in 2007, dipped to under $9 million in 2008,[99] and steadily rose to over $15 million. Median amounts reflected a similar trajectory. We return to this data below to examine the effect of SOGP's introduction in 2011.

TABLE 2: SAMPLE CHARACTERISTICS OF SOGP FIRMS

	Mean	**Median**	**Observations**
Book assets (millions)	4,349.49	1,137.30	631
ln(MVE) (millions)	6.41	6.33	631
ROA	0.06	0.08	631
Abnormal Returns	0.00	-0.02	631
Insider Holdings	5.36	1.11	631
Institutional Holdings	69.13	78.27	631
Deal Premium	1.28	1.20	631
CEO Total Compensation (millions)	7.16	4.64	263
CEO Golden Parachute (GP) (millions)	16.44	11.53	263
CEO Salary + Bonus (millions)	1.04	0.90	263
Ratio of CEO GP to Salary	16.99	13.29	262
CEO Tenure	8.48	7.00	263
All CEO Total Compensation (millions)	5.34	2.08	48,240
All CEO Golden Parachute (GP) (millions)	12.67	6.59	21,895

When we narrow our focus to firms experiencing an SOGP vote (as shown in Table 2 except for the final two rows), we see that the median annual compensation in the year of a golden parachute event for CEOs from the Execucomp Sample was $4.64 million ($7.16 million average) as compared with $2.08 million ($5.34 million average) in the

99. We suspect this dip is driven by the drop in GP equity value during the financial crisis.

Execucomp database more generally.[100] The median preexisting GP obligation to a CEO experiencing a golden parachute event was $11.53 million ($16.44 million average) compared to $6.59 million ($12.67 million average) in the overall Execucomp database. This results in an average golden-parachute-to-compensation ratio of 2.48 for the fiscal year prior to an SOGP vote.[101] With our hand-coded data we are able to compare predicted golden parachutes from the prior fiscal year to final golden parachutes at the time of the deal. We find a median Final GP of $13.11 million ($19.22 million average), or a 13.7% (16.9%) increase between the prior fiscal year and the period immediately preceding the SOGP vote. Execucomp does not separate the components of a golden parachute in its data, so we are unable to determine which parts of golden parachutes might be driving this last-period increase. It is likely the case that the value of golden parachute equity increased during that period, assuming the amount of unvested equity stayed relatively constant (i.e., the executive did not cash out more than he received), as the takeover will usually occasion a jump in equity value. It may also be the case that executives were able to negotiate for extra compensation during this period,[102] a potentiality that we address in Table 7 below.

B. Proxy Advisors

Our first empirical examination attempts to answer whether and how recommendations issued by ISS, by far the most important proxy advisory firm,[103] correlate with various characteristics of golden parachutes, executives, firms, and the takeover deal. Tables 3 and 4 tabulate information regarding the SOGP votes in our Russell 3000 Sample by year.

100. We look to the fiscal year of the shareholder vote on SOGP and match that with the fiscal year compensation information in the Execucomp database. When Execucomp drops the firm in that fiscal year because of the takeover, we use the prior fiscal year's compensation information from Execucomp.

101. Note that this number is substantially below the GP/Salary ratios shown in Table 1. This is primarily because the denominator in the implied ratio from Table 2 is total annual compensation as opposed to salary only in Table 1.

102. *See* Broughman, *supra* note 37, at 90–91 (discussing the possibility that CEOs "can use . . . holdup power to bargain for personal benefits").

103. See Choi et al., *supra* note 9, for a more detailed discussion on proxy advisory firms and the perceived influence of ISS.

TABLE 3: SAMPLE DESCRIPTION—PROXY ADVISOR RECOMMENDATIONS

Year	SOGP Events	Average % of Shares Outstanding Voted For	Average % of Shares Outstanding Voted Against	# ISS Recommendations	
				For	Against
2011	37	0.62	0.09	32	4
2012	81	0.57	0.13	64	17
2013	120	0.59	0.13	84	35
2014	99	0.61	0.12	71	26
2015	123	0.59	0.15	88	32
2016	135	0.63	0.13	100	35
2017	36	0.60	0.17	21	15

From Table 3, we see an overall recommendation rate of 72.9% by ISS for SOGP proposals. The table shows variation in ISS recommendations across time. There is a noticeably small rate of negative recommendations in 2011 and a noticeably large rate of negative recommendations in the first part of 2017. Although the reasons behind this difference require more detailed empirical analysis, we suspect that it stems from the general downturn or up-turn in the stock market, which, in turn, affects the size of the golden parachute, especially through the stock- and option-vesting provisions.

Table 4 shows that although the ISS recommendations on golden parachutes are correlated with the recommendations on the mergers, there is some divergence. Foremost, out of 626 mergers that were subject to shareholder approval, ISS recommended "for" the merger in 611 cases: the rate of recommendation in favor of the merger is about 97.6%, which raises the specter that ISS is more or less "rubber-stamping" the merger proposals. At the same time, however, out of the 626 golden parachute proposals, ISS was recommending "against" in 159 cases, which is a negative recommendation rate of about 25.4%. Unlike its recommendations on mergers, there seems to be a significantly higher variation with respect to ISS's recommendations on golden parachutes. If we were to take a closer look at split-recommendation cases, out of 611 cases where ISS recommended "for" votes on mergers, in 159 cases (about 26%), ISS's recommendation on SOGP was "against." Somewhat interestingly, out of the eleven cases where ISS recommended against the merger, in seven cases, they also recommended that the shareholders approve the golden parachute payments. The number of observations in Table 4 is reduced by 5 because in those cases we were unable to find ISS's recommendation on the merger.

TABLE 4: CORRELATION IN PROXY ADVISOR RECOMMENDATIONS

		ISS SOGP Recommendation			
		Against	Do Not Vote	For	Total
ISS Merger Recommendation	Against	3	1	7	11
	Do Not Vote	0	2	2	4
	For	159	4	448	611
	Total	162	7	457	626

Consistent with the findings of Ertimur et al. (2013) with respect to SOP, we expect to find a positive relationship between ISS "against" SOGP recommendations and both high golden parachute amounts as well as poor firm performance.[104] To get a better understanding of how ISS's recommendations are related to various measures, we estimate a logistic regression where the dependent variable is an indicator variable equal to one if ISS recommends "against." ISS specifically calls out problematic GP features that may lead to a negative recommendation: (1) single-trigger payouts or equity vesting even if the executive is not fired; (2) tax gross-ups; (3) high levels of cash severance relative to previous salary and bonus; and (4) "excessive" parachutes generally.[105] ISS also notes that recent amendments may be weighted more heavily. The single- or double-trigger nature of golden parachutes is difficult to capture in our data. Some (but not a majority) of companies break out single- and double-trigger payouts in their merger proxies. We are, however, able to identify firms that promise tax gross-ups and also to construct indicator variables (1) where final golden parachute cash amounts are greater than three times the prior year's cash compensation according to Execucomp, and (2) where CEOs experienced a golden parachute amendment during the year preceding the announcement of the merger.[106]

104. *See* Ertimur et al., *supra* note 5, at 966.

105. *See* discussion *supra* note 92 and accompanying text.

106. We are able to observe amendments by reviewing public filings, generally 8-Ks, that call out Item 5.02 of Regulation S-K (Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers), 10-Qs and 10-Ks containing amendments as exhibits, and 8-Ks disclosing the merger where amendments to a GP are discussed. We do not capture ordinary course salary, bonus increases, or equity grants, all of which will affect GP amounts. Nor are we able to capture changes to terms of equity plans or merger provisions, both of which might call for different vesting provisions for unvested equity.

As noted, we predict that ISS's SOGP recommendations will be significantly related to compensation concerns. We therefore include the final value disclosed for the *CEO GP* contract at the time of the shareholder vote and *CEO Total Compensation* to control for possible excessive compensation as well as indicators for *Prior SOP Vote* and *Prior Compensation Activism* to control for general dissatisfaction that may exist with pay arrangements at a firm. SOGP votes happen simultaneously with shareholder votes on the underlying deal, and it is possible that an SOGP recommendation might be influenced by ISS's positive or negative view of the overall deal. Therefore, we also control for *Deal Premium* measured as the stock price one business day after the announced merger divided by the stock price twenty business days before the announcement. We include an indicator, *ISS Against Merger*, equal to one if ISS recommended against the merger.[107] As measures of performance, we include *Abnormal Returns* and *ROA*. We include these variables because proxy advisors (and their shareholder clients) may be more willing to agree to high GPs in the face of recent good performance by management as something of a parting gift common in the relational contracting literature.[108] Finally, we also control for size and ownership structure.

Table 5 presents our results. Final golden parachute amounts are significantly correlated with ISS "against" recommendations. We also find a significant positive relationship between ISS "against" recommendations and firms with golden parachutes in the highest quartile. This suggests that ISS applies its "excessive golden parachute" criteria based not only on the absolute size of the golden parachute but also on a relative basis. Firm performance seems to have an uncertain relation to ISS recommendations, with ROA quartiles exhibiting the expected sign but not showing statistical significance. We find some evidence that higher deal premiums may cause ISS to recommend "against" less frequently. ISS claims that recent amendments to golden parachutes may be weighted more heavily in its analysis, but we find no significant relationship between recent amendments and ISS "against" recommendations.

In the context of Say-on-Pay votes, Ertimur et al. (2013) found by reviewing ISS recommendation reports that tax gross-up provisions

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Thus, our *GP Amendment* variable necessarily undercounts the number of cases in which the terms of a GP have changed during the run-up to a deal.

107. We found "against" merger recommendations for eleven deals, or less than 2% of the sample. In those cases, ISS recommended voting in favor of the GP in seven cases and against the GP in three cases.

108. *See, e.g.*, Baker & Choi, *Contract's Role*, *supra* note 25; Baker & Choi, *Reputation and Litigation*, supra note 25.

in golden parachutes were the only feature that suggested ISS adopts a one-size-fits-all approach to those SOP votes.[109] With respect to SOGP recommendations, we unsurprisingly find strong evidence that 280G gross-up provisions are significantly related to ISS "against" recommendations.[110] Combined with the earlier discussed relationship between "against" recommendations and highest quartile golden parachutes, there appears to be more evidence of a one-size-fits-all approach to SOGP votes, albeit one that is consistent with the SOP experience.[111]

TABLE 5: DETERMINANTS OF PROXY ADVISOR RECOMMENDATIONS

	(1)	(2)	(3)	(4)	(5)	(6)
CEO Golden Parachute	0.039***					
	(0.002)					
Q1 CEO Golden Parachute (Smallest Quartile)		-0.293			-0.296	
		(0.518)			(0.507)	
Q4 CEO Golden Parachute (Largest Quartile)		0.825**			0.838**	
		(0.045)			(0.040)	
Q1 ROA (Worst Quartile)		0.205			0.193	
		(0.583)			(0.604)	
Q4 ROA (Best Quartile)		-0.516			-0.518	
		(0.195)			(0.192)	
Q1 Abnormal Returns (Worst Quartile)		0.610			0.608	
		(0.101)			(0.102)	
Q4 Abnormal Returns (Best Quartile)		-0.093			-0.119	
		(0.813)			(0.759)	
Low Abnormal Returns and Large Golden Parachute			0.164			0.162
			(0.842)			(0.844)
Low ROA and Large Golden Parachute			0.713			0.727
			(0.117)			(0.104)
ROA	-1.151		-1.782	-2.107		-1.769
	(0.490)		(0.274)	(0.188)		(0.274)
Abnormal Returns	-0.533		-0.372	-0.412		-0.380
	(0.347)		(0.517)	(0.445)		(0.506)
GP Cash > 3 X (Salary +	-0.213	-0.180	0.053	0.234	-0.147	0.092

109. Ertimur et al., *supra* note 5, at 968.

110. However, we find no evidence that excessive cash payments drive ISS recommendations.

111. We are not able to capture at least one of the factors that, according to ISS, determines its recommendation—single versus double triggers—which may complicate our data or tend to show another "automatic" against feature. Another variable that does seem to affect the ISS's negative recommendation is the amount of institutional holdings: the larger the institutional holdings, the more likely that ISS will recommend against the SOGP. We are not entirely sure what drives this result, but one possible explanation relates to the fact that ISS's clients are institutional shareholders. When a firm's shares are mainly owned by institutions (compared to firms where institutional holdings are low), it is likely that ISS will conduct a more thorough examination of the golden parachutes and make a negative recommendation—rather than rubber-stamping the proposed payment.

Bonus) & Recent Amendment	(0.714)	(0.763)	(0.925)	(0.673)	(0.803)	(0.870)
Tax Gross-Up	1.513***	1.650***	1.623***	1.706***	1.641***	1.613***
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
CEO Total Compensation	-0.000	0.000	0.000			
	(0.690)	(0.688)	(0.659)			
ln(MVE)	-0.321**	-0.246	-0.188	-0.051	-0.227	-0.166
	(0.046)	(0.122)	(0.212)	(0.682)	(0.138)	(0.240)
CEO Tenure	0.015	0.011	0.010			
	(0.525)	(0.653)	(0.664)			
Prior SOP Vote	0.029	0.015	0.178	0.329	0.029	0.187
	(0.967)	(0.982)	(0.796)	(0.629)	(0.967)	(0.787)
Prior Compensation Activism	0.455	1.051	0.865	1.371	1.159	0.992
	(0.716)	(0.384)	(0.477)	(0.241)	(0.325)	(0.400)
Insider Holdings	-0.001	-0.002	-0.001	0.003	-0.002	-0.001
	(0.974)	(0.907)	(0.954)	(0.885)	(0.939)	(0.977)
Institutional Holdings	0.019*	0.019**	0.021**	0.022**	0.019**	0.021**
	(0.057)	(0.046)	(0.028)	(0.025)	(0.046)	(0.028)
ISS Against Merger	-0.398	-0.307	-0.409	-0.697	-0.337	-0.449
	(0.817)	(0.854)	(0.802)	(0.679)	(0.837)	(0.782)
Deal Premium	-1.392	-1.401*	-1.190	-1.049	-1.402*	-1.196
	(0.100)	(0.088)	(0.146)	(0.183)	(0.086)	(0.141)
Recent Amendment	0.744	0.673	0.498	0.381	0.642	0.462
	(0.198)	(0.252)	(0.377)	(0.494)	(0.269)	(0.408)
Constant	-2.077	-1.960	-2.704	-3.601*	-1.942	-2.707
	(0.364)	(0.387)	(0.218)	(0.085)	(0.387)	(0.211)
Year Controls	Yes	Yes	Yes	Yes	Yes	Yes
N	263	263	263	263	263	263
Chi-square	60.107	57.014	52.803	48.763	56.629	52.405
Prob < Chi-square	0.000	0.000	0.000	0.000	0.000	0.000
Pseudo R2	0.182	0.172	0.160	0.147	0.171	0.158

P-values in parentheses. *** $p<0.001$, ** $p < 0.01$, * $p<0.05$.

C. Shareholder Voting

We next turn to shareholder voting on SOGP itself. Average shareholder SOGP dissent was 9.4% in 2011 and peaked at 17.1% in the limited sample from 2017. During the five years in between, SOGP dissent remained relatively constant at approximately 13%. In untabulated results, firms experienced dissent greater than 40% in 14.4% of SOGP votes and dissent greater than 20% in 32.2% of such votes.[112] Although average dissent is well below 50% and there are relatively few instances of threshold-breaching dissent at particular firms, these levels of dissent are considerably higher than those in SOP votes described above.

112. In the smaller Execucomp Sample, we see higher levels of dissent: 20.7% of firms experience greater than 40% dissent and 39.6% of firms experience greater than 20% dissent.

Similar to proxy advisor recommendations, we estimate an OLS regression with the percent of overall shareholder votes that dissent as the dependent variable. Again, we control for the final value disclosed for the *CEO GP* contract at the time of the shareholder vote, with *CEO Total Compensation*, *Prior SOP Vote*, and *Prior Compensation Activism* as compensation-related factors that might affect shareholder voting. Additionally, we continue to control for *Deal Premium*, firm performance, firm size, and ownership structure. We include indicator variables for *ISS Against Merger* and *ISS Against GP* recommendations.

Table 6 shows, unsurprisingly, that ISS "against" recommendations are strongly correlated with shareholder dissent. In untabulated results, our 66.5% R-square result drops to approximately 10% when we drop the *ISS Against* variable.[113] Moreover, *ISS Against* appears to be economically significant. On average, after controlling for all the other variables, the percent of dissenting votes is 32.4% higher if ISS offers a negative recommendation. Once we take into account ISS's recommendations, the effect of tax gross-ups in GPs on shareholder negative votes disappears and, in one specification, turns significant (at the 10% level) and *negative*, suggesting that shareholders care less about gross-ups than does ISS. Also, to the extent that ISS's recommendations seem closely related with *Deal Premium*, the effect of the deal premium also loses its statistical significance in shareholder votes. Perhaps most interesting are variables that become significant, even when controlling for ISS "against" recommendations. The amount of the golden parachute is significantly and positively related to shareholder dissent, albeit at a level that may be economically insignificant. These findings suggest that shareholders may attempt to discipline CEOs with high golden parachutes more than ISS would otherwise recommend. Further, shareholders appear to give high-performing executives a pass regardless of what ISS recommends.

113. It is possible that these findings are subject to omitted variable bias as we are not able to capture single-trigger provisions in our data. Shareholders may be responding to these provisions and not to ISS recommendations and we are not able to tease those stories apart.

TABLE 6: DETERMINANTS OF DISSENTING SHAREHOLDER VOTES

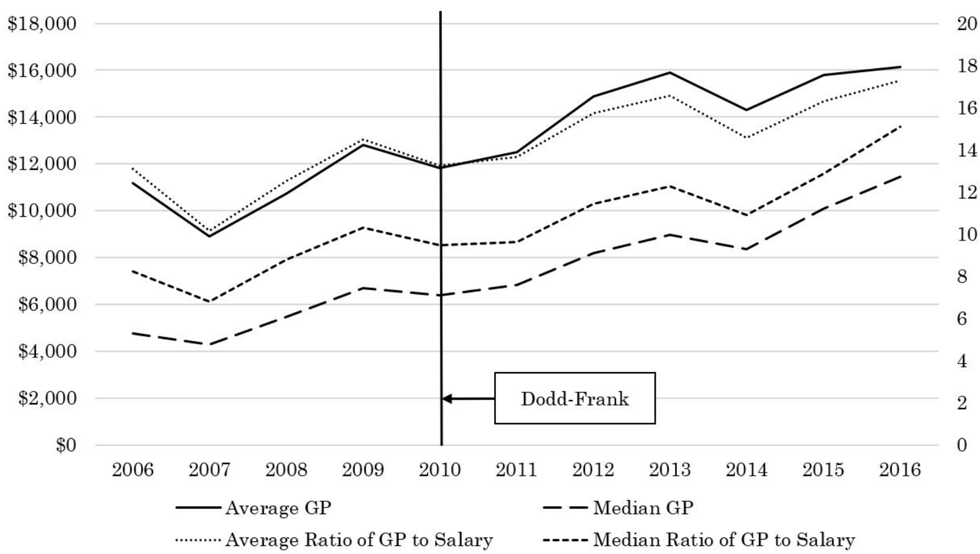
	(1)	(2)	(3)	(4)	(5)	(6)
ISS Against	0.324***	0.328***	0.332***	0.332***	0.328***	0.331***
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
CEO Golden Parachute	0.001**					
	(0.025)					
Q1 CEO Golden Parachute (Smallest Quartile)		-0.009			-0.010	
		(0.680)			(0.640)	
Q4 CEO Golden Parachute (Largest Quartile)		0.007			0.009	
		(0.725)			(0.673)	
Q1 ROA (Worst Quartile)		-0.021			-0.020	
		(0.266)			(0.274)	
Q4 ROA (Best Quartile)		-0.047**			-0.046**	
		(0.015)			(0.017)	
Q1 Abnormal Returns (Worst Quartile)		0.009			0.008	
		(0.647)			(0.654)	
Q4 Abnormal Returns (Best Quartile)		-0.005			-0.003	
		(0.785)			(0.875)	
Low Abnormal Returns and Large Golden Parachute			-0.032			-0.033
			(0.468)			(0.450)
Low ROA and Large Golden Parachute			0.014			0.015
			(0.551)			(0.496)
ROA	-0.024		-0.045	-0.052		-0.042
	(0.768)		(0.586)	(0.517)		(0.605)
Abnormal Returns	0.001		-0.002	0.004		-0.001
	(0.965)		(0.942)	(0.875)		(0.971)
Tax Gross-Up	-0.035*	-0.028	-0.028	-0.027	-0.029	-0.029
	(0.060)	(0.131)	(0.131)	(0.138)	(0.119)	(0.120)
CEO Total Compensation	-0.000	0.000	0.000			
	(0.637)	(0.905)	(0.886)			
ln(MVE)	-0.012*	-0.008	-0.006	-0.004	-0.007	-0.005
	(0.093)	(0.298)	(0.405)	(0.541)	(0.306)	(0.419)
CEO Tenure	-0.001	-0.001	-0.001			
	(0.407)	(0.301)	(0.366)			
Prior SOP Vote	0.014	0.016	0.019	0.020	0.014	0.017
	(0.675)	(0.645)	(0.580)	(0.568)	(0.696)	(0.627)
Prior Compensation Activism	-0.021	0.020	-0.005	0.006	0.021	-0.003
	(0.736)	(0.760)	(0.935)	(0.919)	(0.735)	(0.958)
Insider Holdings	-0.001	-0.001	-0.001	-0.001	-0.001	-0.001
	(0.295)	(0.387)	(0.358)	(0.311)	(0.374)	(0.349)
Institutional Holdings	-0.000	-0.000	0.000	0.000	-0.000	0.000
	(0.841)	(0.993)	(0.910)	(0.951)	(0.988)	(0.918)
ISS Against Merger	0.023	0.024	0.016	0.014	0.025	0.017
	(0.741)	(0.724)	(0.818)	(0.835)	(0.719)	(0.810)
Deal Premium	0.000	0.016	0.012	0.013	0.016	0.013
	(0.989)	(0.623)	(0.698)	(0.675)	(0.616)	(0.687)
Constant	0.194**	0.174*	0.145	0.121	0.161*	0.132
	(0.037)	(0.071)	(0.117)	(0.165)	(0.091)	(0.143)
Year controls	Yes	Yes	Yes	Yes	Yes	Yes
N	254	254	254	254	254	254
R-square	0.665	0.666	0.658	0.656	0.665	0.657

P-values in parentheses. *** p<0.001, ** p < 0.01, * p<0.05

D. Changes in Golden Parachutes over Time and Golden Parachute Amendments

As discussed earlier, SOGP may be materially different from SOP, most notably because there is no second stage opportunity to discipline directors or executives who fail to respond to SOGP concerns or dissent. This suggests that the SOGP vote rule and individual SOGP votes could have relatively little (or no) impact on golden parachute practices. To determine whether SOGP has had an effect on golden parachutes, we first look to see whether firms adjusted their golden parachute practices upon the advent of SOGP. If SOGP was able to effectively harness shareholder outrage, particularly in controlling the size of golden parachutes, we should see reductions in golden parachute dollar values, incidence, or both. If SOGP was inconsequential, we would see no trend in particular.

FIGURE 1: GOLDEN PARACHUTE VALUES AND RATIOS BY YEAR



In fact, Figure 1 graphically represents how golden parachutes have evolved over the past ten years or so. Solid and long-dashed lines (at the top and at the bottom) plot the average (mean) and median sizes of golden parachutes, respectively, and they are subject to the scale at the left margin, where the unit of measurement is $2,000. Two short-dashed lines (in the middle of the figure), subject to the scale at the right margin, plot average (mean) and median ratios of golden parachutes to annual salary. Even without any systematic analysis, the figure shows that all lines seem to be growing over time and there seems to be no discernable slowdown after Dodd-Frank—that is, after July 2010.

Turning to a more systematic analysis, Table 7 reports the regression coefficients and shows that golden parachutes (in terms of their absolute size) are systematically larger after 2010. Columns 1 and 2 in Table 7 use golden parachute value as the dependent variable. Columns 3 and 4 use the ratio of golden parachute value to total CEO compensation as the dependent variable. The strong results in columns 1 and 2 show that the values of golden parachutes increased following SOGP.[114] The weaker results in columns 3 and 4 indicate that this increase may have occurred at the same time as overall CEO compensation increased. Our results control for year effects, industry effects, firm size, firm performance, CEO compensation, and CEO tenure.[115] We also control for the small subset of firms without golden parachutes in 2006 and 2007 to ensure our inference is not being driven by late golden parachute adoptions.

It is difficult to estimate the precise point in time when SOGP became a likely requirement, as the change was introduced into Dodd-Frank legislation in 2009 and final rules were promulgated in 2011. For robustness, we confirm in untabulated results that our results are not sensitive to whether the "post" period is defined as post-2010 or post-2011. In additional, untabulated robustness tests, we confirm that our results are not sensitive to controlling for firm size using book assets (as shown in the table) or using market values.

114. When we focus only on the top 10% (in terms of absolute size) of the golden parachutes, the results are even more robust.

115. Our results are not sensitive to whether the model is estimated as a fixed-effect model, a random-effect model, or as a pooled-OLS model.

TABLE 7: GOLDEN PARACHUTE INCIDENCE AND VALUES PRE- AND POST-SOGP RULE[116]

	(1)	(2)	(3)	(4)
Post	4.686***	3.813**	0.320	0.341
(Indicator for Years 2011–2017)	(0.005)	(0.021)	(0.159)	(0.129)
ln(Book Assets)	3.671***	4.273***	0.106***	0.099***
	(0.000)	(0.000)	(0.000)	(0.000)
CEO Tenure	0.168***	0.191***	-0.012**	-0.011**
	(0.002)	(0.000)	(0.013)	(0.016)
ROA	20.733***	12.751***	-0.301	-0.155
	(0.000)	(0.000)	(0.331)	(0.621)
CEO Total Compensation	0.069	0.061	-0.006	-0.006
	(0.287)	(0.301)	(0.204)	(0.211)
Indicator for Firm Having GP in 2006 or 2007	7.979***	7.630***	1.641***	1.595***
	(0.000)	(0.000)	(0.000)	(0.000)
Constant	-27.720***	-32.990***	0.427**	0.508
	(0.000)	(0.000)	(0.017)	(0.545)
Industry Controls	No	Yes	No	Yes
Year Controls	Yes	Yes	Yes	Yes
N	20,652	20,613	20,602	20,563
R-square	0.181	0.219	0.086	0.100

P-values in parentheses. *** p<0.001, ** p < 0.01, * p<0.05.

Finally, it is possible that SOGP was effective in shaping golden parachute practices, but not in the initial contract. SOGP only occurs in the context of a soon-to-close deal, offering firms and CEOs the ability to wait until a deal is closed to amend the golden parachute downward in the face of an imminent SOGP vote. The golden parachute information has to be disclosed in part in annual proxy statements, but, given that annual proxy statements contain lots of other information, golden parachute-related information may well be dominated by other compensation information when the deal is not expected in the near future. Nevertheless, to the extent that disclosing very generous golden parachute payments in the SOP process could subject the directors and

116. In the current setup, as the table indicates, we have included both year dummies and a separate dummy (indicator) variable (as seen on the first row), which distinguishes between the pre- and post-SOGP period. The advantage of using both types of indicator variables is that, while the year dummies will control for the annual fluctuations in golden parachutes, pre- and post-dummy will pick up the difference that stems from the change in law. For the results reported in Table 7, indicators for both years 2006 and 2017 were not included as controls to avoid collinearity issues. To ensure our inference is not dependent on this modeling assumption, we corroborate our inferences using a few other untabulated specifications: (1) with only the pre- and post-2010 dummy without specific year controls and (2) with only the year dummies. It turns out that the substantive results are the same. In fact, with only the year dummies, the joint significance (on the coefficient estimates for the years after 2010 or after 2011) is significant at the 1% level and all the year coefficients are positive, corroborating our inference from the results in Table 7.

executives to future disciplinary forces, one would suspect that, given the absence of such forces in the SOGP votes, the managers are more likely to amend golden parachutes in the final proxy. Furthermore, amendments to golden parachutes leading up to an SOGP vote could possibly reflect managerial power of CEOs to extract private benefits during the last-period deal process.

To estimate the possibility of this delayed consequentiality, we separate our Execucomp Sample into two groups: firms at which we found golden parachute amendments during the period beginning one year prior to the signing of the merger agreement through the SOGP vote (138 firms) and all other firms (141 firms).

We find that nonamending firms had promised CEOs higher golden parachutes during the period before the deal than amending firms. This is consistent with the view that CEOs use the amendment process to augment relatively low golden parachutes. More tellingly, we find that firms experiencing golden parachute amendments saw increases in awards over the prior fiscal year's of 39% compared with increases of 21% at nonamending firms. Recall that it is difficult to determine how much of the year-over-year increase in golden parachute awards is due to rising equity prices associated with a deal. That complication should disappear in this analysis as both amending and nonamending firms should experience similar equity price increases. The almost double increase in golden parachute awards for amending firms suggests that amendments are not entered into to respond to potential shareholder dissent via SOGP, but rather as a way for firms to increase executive compensation. Of course, it is possible that these firms would have amended golden parachutes upwards anyway for firm-specific reasons and SOGP may have constrained them to augment those awards less than they might have otherwise.[117] In Table 8, the benchmark year information is provided to give a sense of how the golden parachute values change. The benchmark year is the fiscal year prior to either the agreement date or amendment date, whichever is first.

117. In separate tests we check to see if there are meaningful differences between the firms that ultimately amend and those that do not across commonly used variables on firm and CEO characteristics. Along these lines, we only find that firms that ultimately amend their GPs tend to have longer-tenured CEOs as of the beginning of the two-year period before a deal. This may mean that more entrenched CEOs are better able to extract augmentations ahead of deals. Alternatively, it may mean that amending CEOs were employed under more "stale" contracts with off-market GP promises.

TABLE 8: GOLDEN PARACHUTE AMENDMENTS

	Mean	10th Percentile	Median	90th Percentile	N
Firms Without Amendments					
DEF 14A Total Value	20,536.21	3,812.38	14,044.64	44,910.76	141
DEF 14A Cash	6,075.70	1,036.25	4,600.00	11,155.94	141
DEF 14A Equity	12,825.56	957.73	8,028.19	30,341.46	141
DEF 14A Perks Benefits	294.22	0.00	46.48	212.17	140
Execucomp GP (Year of Vote)	18,604.42	3,388.00	13,116.34	39,869.23	134
Execucomp GP (Benchmark Year)	17,327.10	3,388.00	11,325.91	39,053.35	138
Execucomp GP (Benchmark Year-1)	16,876.76	2,464.92	10,997.76	34,596.92	134
Ratio of DEF 14Total Value (Year of Vote) to Execucomp GP (Benchmark Year)	2.06	0.69	1.21	2.34	134
Ratio of DEF 14Total Value (Year of Vote) to Execucomp GP (Benchmark Year-1)	2.22	0.66	1.25	2.79	129
Firms With Amendments					
DEF 14A Total Value	21,214.84	4,243.49	15,196.94	43,856.29	138
DEF 14A Cash	6,930.60	962.3	5,324.60	14,641.23	138
DEF 14A Equity	12,508.08	1,005.99	8,557.51	27,643.61	138
DEF 14A Perks Benefits	89.3	0.00	35.36	198.53	138
Execucomp GP (Year of Vote)	17,420.64	1,697.35	12,758.23	40,214.38	132
Execucomp GP (Benchmark Year)	14,949.40	1,434.27	11,112.69	32,452.60	132
Execucomp GP (Benchmark Year-1)	13,897.92	1,190.95	10,509.81	31,625.00	128
Ratio of DEF 14Total Value (Year of Vote) to Execucomp GP (Benchmark Year)	5.29	0.70	1.39	4.64	125
Ratio of DEF 14Total Value (Year of Vote) to Execucomp GP (Benchmark Year-1)	2.61	0.66	1.63	5.66	121

III. MAKING SOGP MORE EFFECTIVE

For those who believe that golden parachutes generally reflect the result of arms-length bargaining and are therefore apt to be efficient, the ineffectiveness of SOGP in constraining them is little or no cause for concern. For those in that camp, the greater tendency of (a) ISS to apply one-size-fits-all criteria to its recommendations and (b) shareholders to delegate voting decisions to ISS (or other proxy advisory firms) in SOGP votes might be initially troubling. But the apparent unwillingness of firms to change their CEO contracts limits the problematic impact of those phenomena. For those who believe that golden parachutes are more pernicious, however, SOGP seems to be largely ineffective. Although the following policy suggestions are directed more at the latter camp, regardless of where one stands on the issue, there is still room for improvement by making SOGP more effective. The proposals focus on two large areas: (1) making SOGP binding and (2) attempting to harness the implicit and reputational effects on the target and acquiring companies' directors. We discuss these in turn.

A. Making SOGP Vote "Binding"

The key features that prove problematic for SOGP are its advisory nature and that it necessarily occurs in the firm's final period when no second-stage discipline of recalcitrant directors and CEOs is readily available. One possible solution would be to make SOGP (at least partially) binding. An important difference between SOP and SOGP is that while SOP asks the shareholders to vote on the previous year's executive pay, SOGP is prospective, asking the shareholders to express their opinions on the parachute payments that are to be made once the change-in-control transaction closes in the (near) future.[118] Making the SOGP vote binding would attempt to utilize this important difference.

In terms of how strongly the golden parachute payment would depend on the shareholder vote (or the trigger threshold), we can consider different degrees. One possibility is to put the shareholder vote on golden parachutes on par with the shareholder vote on the transaction by making the entire parachute payment depend on clearing the approval threshold. For instance, if the transaction requires the approval of at least a majority of the outstanding stock, SOGP can adopt the same threshold. Furthermore, if the golden parachute proposal fails to satisfy the threshold, the failure would deny the entire severance payment to the executives. Another possibility is to impose some type of supermajority denial (or submajority approval) structure or to deny the executives the portion of the payment that exceeds the golden parachute payment previously disclosed as part of an SOP vote. (Or these two approaches could be combined.) Under this

118. *See* discussion *supra* Section I.B. In order to implement this change, given that the federal securities law focuses on disclosure and does not (at least directly) deal with firm's governance issues, we will have to make a necessary change in the corporate law.

proposal, the executives are still "guaranteed" some severance payment and the additional, amended payment will be denied only in "exceptional" cases, such as when more than two-thirds or three-quarters of the shareholders disapprove the payment.

With respect to making the SOGP vote binding, the most challenging aspect is dealing with the impact of the uncertainty a binding vote would impose on the target executives. Assuming that target CEOs require the insurance that golden parachutes provide, binding SOGP votes could possibly reduce the value of those provisions. Faced with substantial uncertainty, perhaps valuable deals would be missed, or perhaps CEOs would require more compensation in other corners of their employment contracts (such as their annual stock or other compensation). The uncertainty problem would be starker in a regime where the approval threshold is relatively high and when the failure to secure the threshold implies denial of the entire golden parachute payment. The problem could be substantially mitigated if the system utilized a supermajority disapproval threshold (e.g., more than two-thirds or three-quarters of shares must disapprove the GP payment) and, more importantly, if the approval is with respect to only the additional, incremental portion.

Even under the existing regulatory structure, firms and executives can increase the certainty of golden parachutes by getting approval for those promises (even the ones about additional compensation) in the immediately prior SOP disclosure and vote. In fact, as described above, the potential for avoiding an SOGP vote by a prior cleansing SOP vote preceded by enhanced golden parachute disclosure is a feature of the law.[119] It is noteworthy that few if any firms have employed this procedure since SOGP came into effect.[120] If SOGP was binding such that a failed SOGP vote led to the loss of valuable golden parachute promises, firms and their CEOs would surely utilize this safety valve.

Effectively moving the SOGP vote forward into the prior year's SOP vote is not without problems, however. Most importantly, it could limit the ability of firms to enter into new golden parachutes or amendments to preexisting golden parachutes immediately prior to a deal. If they did so, those new provisions would require and be subject to a binding SOGP vote. Our results suggest that most of these amendments are increasing payouts to CEOs, but we do not know whether those increases are efficient.

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119. *See supra* note 62 and accompanying text.
120. *See supra* note 63 and accompanying text.

Second, folding SOGP into a previous SOP vote runs the risk of bundling different features of a compensation package. Golden parachutes that might be objectionable enough for shareholders to vote against in isolation may not be objectionable enough to justify a vote against a CEO's entire pay package. Still, the evidence on SOP votes shows that golden parachute features (tax gross-ups) influence the recommendations of ISS and shareholder voting. Moreover, even if bundling causes golden parachutes to be relatively less salient, the alternative is an advisory SOGP vote that apparently has little effect on CEO contracting at all.

B. Harnessing Implicit and Reputational Mechanisms

Another possible avenue of making the SOGP vote more effective is to focus on possible implicit and reputational mechanisms against the directors. While it is true that the target company directors and executives are no longer likely to serve the combined entity for large, publicly traded companies, it is well known that many directors serve on multiple boards.[121] Hence, even when the target firm is disappearing through a change-in-control transaction, many of the target company directors will continue serving as directors at other firms. If, for instance, the fact that the target directors approved an outrageous golden parachute payment that was voted down by a large majority of target shareholders is known or disclosed to the other firms where the target directors continue their service, such information could play an important role in their reelection possibilities.[122] If so, this could exert some pressure on the target directors to disapprove outsized golden parachute payments (or to disapprove amendments at the last minute in favor of the executives). A similar logic could also apply to departing target executives, who would continue serving as executives at other firms or would do so in the future. Disclosing such information could potentially reduce the target executives' attractiveness in the labor market.[123]

121. *See* Michal Barzuza & Quinn Curtis, *Board Interlocks and Outside Directors' Protection*, 46 J. LEGAL STUD. 129, 140–52 (2017) (documenting the frequency of directors serving on multiple boards and showing how such board interlocks can function as a propagation mechanism).

122. *See* Baker & Choi, *Reputation and Litigation*, *supra* note 25, at 47–48 (explaining that legal mechanisms can provide relevant information to market participants so as to facilitate market-based reputational incentives).

123. A supplementary mechanism might be to require the target directors to justify the parachute payments when they receive substantial negative votes from the shareholders. Currently, the target directors can simply go ahead and make the GP payments, even when a large majority of shareholders object under SOGP, without providing any explanation whatsoever. By requiring them to offer proper justifications on why they are not being responsive to the target

Another possibility is to focus on the directors and executives of the acquiring corporation. Although in many cases the acquiring corporation's shareholders do not get to vote on the transaction,[124] if the fact that the target executives received outsized severance payments (at least part of which is borne by the acquiring corporation) is disclosed to the acquiring corporation's shareholders, they could impose some discipline against their own directors, who, in turn, might become more hesitant in agreeing to a large golden parachute in deal negotiations. Especially when the severance pay would trigger negative tax consequences, such as nondeduction of payment or additional excise liability combined with a tax gross-up, highlighting such negative consequences to the acquiring corporation's shareholders could induce them to become more vigilant regarding the target executives' golden parachute payments.

Of course, nothing in the current SOGP regime prevents these sorts of soft sanctions from being imposed. SOGP votes and the underlying contractual promises are already public but not readily available to the shareholders of interlock or acquiring corporations. Under the current regime, shareholders or their advisors would have to focus on such voting results independently or have their attention drawn to such matters by disclosure requirements that call for information about happenings at (a) directors' interlocked firms and (b) acquired firms, respectively. Our proposals would make it easier for the shareholders at interlocked or acquiring corporations to obtain information about the GP payments and SOGP votes at target companies.

CONCLUSION

The appropriate role for shareholders in monitoring executive compensation has proven to be a durable controversy in corporate law and corporate governance. In particular, shareholder voting on executive compensation has proliferated of late and has led to surprising consequences in some instances. This Essay extends the analysis of shareholder voting to a previously unexplored area—Say On Golden Parachute. The empirical analyses conducted to this point on Say on Pay have shown generally positive results for shareholder

shareholders' disapproval, and by disclosing such information to the other shareholders (for whom the target directors also serve on the board), we can further boost the implicit disciplinary mechanism.

124. This is largely due to the fact that an acquiring corporation would utilize a wholly owned subsidiary to merge with (or acquire shares of) the target corporation in a triangular structure.

involvement in the compensation process despite SOP being merely advisory.

Our analysis of the experience with SOGP is not as positive. We find little evidence that SOGP is having significant effects on golden parachute contracting. Foremost, we show that since the adoption of SOGP, the incidence and dollar values of golden parachutes have increased. We find little evidence that firms resisted amending their golden parachutes downward until a vote was imminent. In fact, we find that firms facing imminent votes that amended their golden parachutes experienced greater year-over-year award increases than did firms that did not amend.

There are also softer signs of SOGP's inconsequentiality. Shareholders appear more willing to follow ISS vote recommendations than they do in the SOP context. This sort of "blind" adherence makes sense and is quite rational if shareholders do not value SOGP. Shareholders also appear to bundle considerations of previous firm performance with SOGP votes, an approach that does not seem coherent given the premise of SOGP. Finally, ISS voting recommendations seem to adopt more of a one-size-fits-all approach, turning on the presence of tax gross-ups and the golden parachute reaching a threshold level. This streamlined approach is susceptible to numerous interpretations, but perhaps the most charitable is that the proxy advisory firm is economizing on its decisionmaking process with respect to a decision it deems relatively unimportant.

This apparent inconsequentiality is not simply due to SOGP's advisory nature. Experience with SOP seems to show that advisory votes can work in certain circumstances. SOGP's apparent failure to constrain golden parachutes suggests that the differences between the two regimes, in particular SOGP's "last-period" nature, make such provisions an inapt target for an advisory mechanism. In tackling these two issues—SOGP's nonbinding nature and the last-period problem—we propose several policy measures that attempt to at least mitigate the problems, including making SOGP (at least partially) binding and also utilizing implicit discipline mechanisms against the directors of the target and acquiring companies. None of the proposals are free from possible challenges, however. We have addressed some of those above but recognize that deep disagreements about shareholder power over executives remain.