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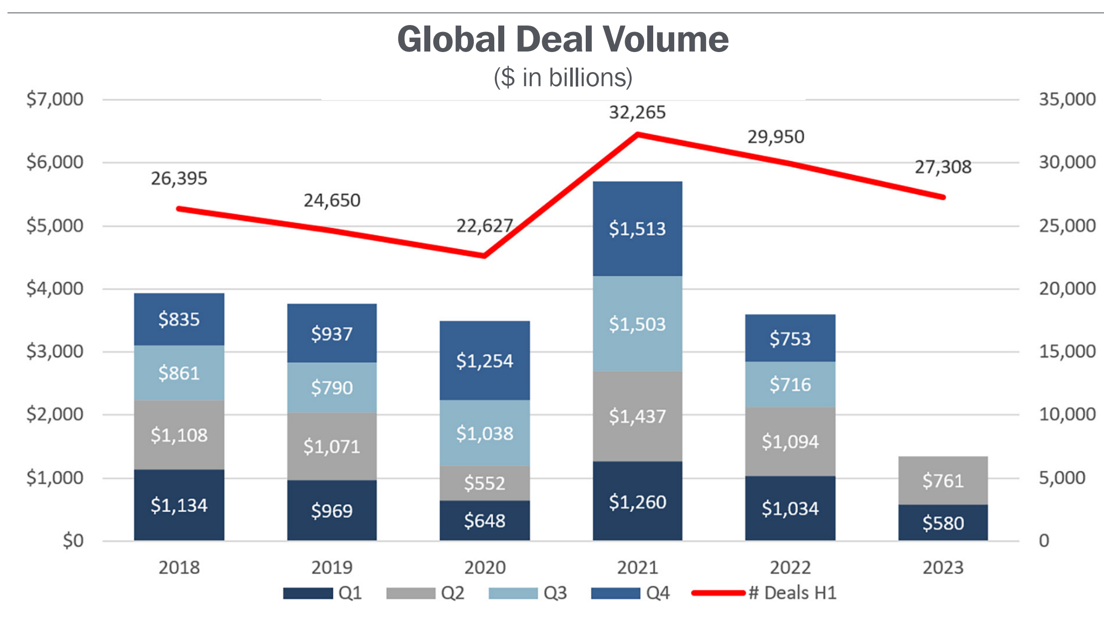
Cravath Quarterly Review

M&A, ACTIVISM AND CORPORATE GOVERNANCE

01

Mergers & Acquisitions

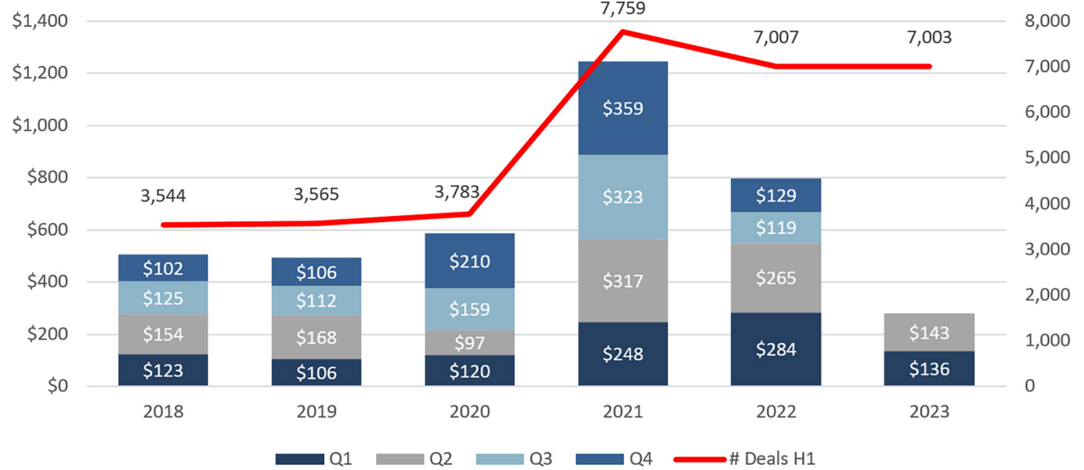
TRENDS[1]



SOURCE Refinitiv, An LSEG Business.

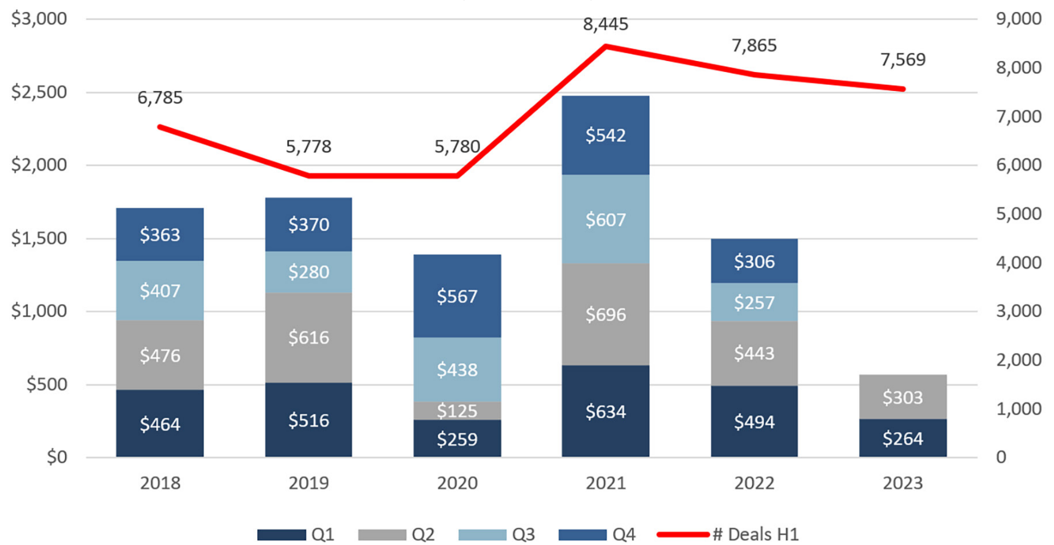
H1 2023: M&A Activity Falls, Announced Deal Volume Below $1 Trillion for Fourth Consecutive Quarter

Global M&A activity slowed in H1 2023, with $1.3 trillion in announced deal volume, a decrease of ~37% compared to H1 2022. Q2 2023, with announced deal volume of $761 billion, marked the fourth consecutive quarter to fall below $1 trillion in announced deal volume. There were slightly over 27,300 deals announced in H1 2023, a decrease of ~9% compared to H1 2022's nearly 30,000 deals.



SOURCE Refinitiv, An LSEG Business.

Private equity buyouts in H1 2023 reached $279 billion globally, a decrease of ~49% compared to H1 2022. Slightly over 7,000 private equity-backed deals were announced in H1 2023, in line with H1 2022's approximately 7,000 deals.



SOURCE Refinitiv, An LSEG Business.

H1 2023: Dealmaking Down Across All Regions

M&A activity for U.S. targets amounted to $567 billion in H1 2023, a decrease of ~40% compared to H1 2022. M&A activity for European targets totaled $263 billion in H1 2023, a decrease of ~49% compared to H1 2022. In the Asia-Pacific region, dealmaking totaled $294 billion in H1 2023, a decrease of ~35% compared to H1 2022. Cross-border M&A activity totaled $494 billion in H1 2023, a decrease of ~25% compared to H1 2022.

LEGAL & REGULATORY DEVELOPMENTS

Cases

Q2 2023 featured a number of notable Delaware decisions.

IN RE COLUMBIA PIPELINE GROUP, MERGER LITIGATION, C.A. NO. 2018-0484-JTL (DEL. CH. JUNE 30, 2023).

In June 2023, the Delaware Court of Chancery found TC Energy Corp. ("TransCanada") liable to the shareholders of Columbia Pipeline Group Inc. ("Columbia") for aiding and abetting fiduciary duty breaches of Columbia's directors and officers in connection with TransCanada's acquisition of Columbia.

In 2015, Columbia started and subsequently terminated a sale process, of which TransCanada was a bidder. Each bidder in this initial sale process was required to enter into a non-disclosure agreement, with a standstill provision that prohibited such bidder from seeking to acquire Columbia without permission from Columbia's board. Following the termination of the sale process, and notwithstanding the standstill, TransCanada continued to engage with Columbia's CEO and CFO on a potential acquisition. TransCanada ultimately succeeded in acquiring Columbia.

At trial, the plaintiffs alleged that Columbia's CEO and CFO had breached their duty of loyalty during the sale process, that Columbia's board had breached its duty of care by failing to provide active oversight over the sale process and that Columbia's CEO, CFO and board had breached their duty of disclosure by failing to disclose all material information to Columbia's stockholders in connection with the vote on the transaction. Notably, the plaintiffs sought to impose liability on TransCanada for aiding and abetting all of such breaches.

On the duty of loyalty and duty of care claims, the court found that Columbia's CEO, CFO and board had breached their fiduciary duties. The court found that Columbia's CEO and CFO were motivated to facilitate a sale due to certain change of control benefits they would receive in connection with a sale and, as a result, took numerous actions that fell outside the range of reasonableness, including continuing to engage with TransCanada after Columbia's board terminated the sale process, providing information selectively to TransCanada and not to other potential bidders and ignoring "blatant" violations of TransCanada's standstill. The court also faulted the board with failing to provide adequate oversight. In finding TransCanada liable on the aiding and abetting claim, the court stated that TransCanada "knowingly participated" in such breaches of duty because it had at least constructive knowledge of the fiduciary duty breaches and because, based on the totality of the circumstances, it had exploited such breaches. In particular, the court stated that

the "decisive moment" of exploitation came when TransCanada reneged on an agreement in principle of $26 per share, lowered its bid to $25.50 per share, demanded an answer in three days and threatened to announce publicly that the negotiations were dead unless Columbia accepted the reduced offer, despite the fact that such an announcement would have been in violation of its standstill.

On the duty of disclosure claim, the court found that Columbia's CEO, CFO and board breached their fiduciary duties by failing to disclose, among other things, interactions between Columbia's CEO and CFO and TransCanada that were in violation of the standstill. The court found TransCanada liable for aiding and abetting such breach for failing to correct such omissions in Columbia's proxy statement, despite having a right under the merger agreement to review and comment on such proxy statement.

IN RE EDGIO, INC. STOCKHOLDERS LITIGATION, C.A. NO. 2022-0624-MTZ (DEL. CH. MAY 1, 2023).

In May 2023, the Delaware Court of Chancery denied a motion to dismiss a claim seeking to enjoin the enforcement of certain defensive measures adopted by Edgio, Inc., f/k/a Limelight Network, Inc. ("Edgio") in a stockholders' agreement entered into in connection with a business combination that had been approved by a fully informed, uncoerced vote of disinterested stockholders, holding that, notwithstanding such vote, "enhanced scrutiny" was the applicable standard of review.

In March 2022, Edgio entered into an agreement with College Parent, L.P. ("College Parent"), pursuant to which Edgio acquired a business unit from College Parent for approximately $300 million of Edgio's common stock, equating to approximately 35% of Edgio's outstanding common stock. As part of such transaction, College Parent entered into a stockholders' agreement with Edgio, which obligated College Parent to, among other things, vote for the directors recommended by Edgio's board, either vote in favor of the Edgio board's recommendations with respect to non-routine matters or vote *pro rata* with all other stockholders with respect to routine matters and abide by a two-year lockup and certain other transfer restrictions, including a restriction on transfers of Edgio stock to activist investors. The approval of a majority of Edgio stockholders was required under NASDAQ listing rules for the issuance of the stock consideration in the transaction and Edgio's stockholders voted in favor of the issuance in support of the acquisition.

The plaintiffs sought to enjoin the enforcement of the voting and transfer provisions of the stockholders' agreement, arguing that the provisions act as defensive measures that entrench Edgio's board and are thus subject to the enhanced scrutiny standard of review articulated in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). Edgio argued that in view of the stockholder vote obtained in connection with the stock issuance, Edgio's stockholders had "cleansed" the plaintiffs' claims under the standard espoused in *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015), and so the decision to enter into the stockholders' agreement should be subject to the more deferential business judgment standard of review.

In denying the motion to dismiss, the court distinguished claims for injunctive relief and damages relief, concluding that *Corwin* was not designed to cleanse post-closing claims to enjoin alleged entrenchment devices. The court proceeded to find that the plaintiffs pled facts supporting a reasonable inference that Edgio's board acted defensively in response to a perceived threat, held that enhanced scrutiny under *Unocal* applied and denied the motion to dismiss.

NEW ENTERPRISE ASSOCIATES 14 LP ET AL. V. RICH ET AL., C.A. NO. 2022-0406-JTL (DEL. CH. MAY 2, 2023).

In May 2023, the Delaware Court of Chancery denied a motion to dismiss claims of breach of fiduciary duty in connection with a drag-along sale, despite the plaintiffs having expressly covenanted not to sue with respect to such a sale. In so ruling, the court held that such covenant was valid to protect the defendants against most such claims, but that, as a matter of public policy, it could not insulate the defendants from tort liability based on intentional wrongdoing.

In 2013 and 2014, certain investment funds sponsored by Core Capital Partners III, L.P. and New Enterprise Associates (collectively, the "Funds") invested in Fugue, Inc., a startup company ("Fugue"). Following an unsuccessful sale process in 2020, Fugue engaged in additional fundraising through a recapitalization, which the Funds elected not to participate in. As part of the recapitalization, however, the Funds entered into a voting agreement that (1) obligated the Funds to support and participate in any sale of Fugue that satisfied a list of eight criteria and that is approved by Fugue's board and a majority of the preferred shares held by the incoming investors (a "Drag-Along Sale") and (2) prohibited the Funds from suing over a Drag-Along Sale, including by asserting claims for breaches of fiduciary duty (the "Covenant").

Shortly after the recapitalization, a potential acquiror contacted Fugue and, without disclosing the existence of the potential acquiror to the Funds, Fugue engaged in two undisclosed and allegedly conflicted equity issuances that primarily benefited the recapitalization investors and management. Shortly thereafter, Fugue negotiated a merger with the acquiror, which was consummated pursuant to the Drag-Along Sale provision of the voting agreement. Following the closing of the merger, the Funds brought suit, asserting claims for breach of fiduciary duty.

In denying the motion to dismiss in view of the Covenant, the court held that covenants not to sue for breach of fiduciary duty are not facially invalid under Delaware law, and found that the Covenant satisfied a two-step analysis as to validity: (1) the provision must be narrowly tailored to address a specific transaction that otherwise would constitute a breach of fiduciary duty; and (2) the provision must survive close scrutiny for reasonableness, including in light of the non-exclusive factors enumerated under *Manti Holdings, LLC v. Authentix Acquisition Co.*, 261 A.3d 1199 (Del. 2021).[2]

Despite concluding that the Covenant was not wholly invalid, the court declined to dismiss the plaintiffs' claims, citing a public policy limitation on contractually foreclosing claims for intentional torts and the court's view that the plaintiffs' allegations could support a claim for a bad faith breach of fiduciary duty (*i.e.*, an intentional tort).

IN RE BAKER HUGHES, A GE COMPANY, DERIVATIVE LITIGATION, C.A. NO. 2019-0201-LWW (DEL. CH. APRIL 17, 2023).

In April 2023, the Delaware Court of Chancery granted a motion to terminate a stockholder derivative suit (the "Action"), holding that a sole-member special litigation committee of Baker Hughes Company ("Baker Hughes"), although "imperfect", had met its burden in concluding that the challenged transactions were fair to Baker Hughes and that such Action should be terminated.

The Action, which was brought by Baker Hughes' stockholders in March 2019, alleged in part that members of Baker Hughes' board had breached their fiduciary duties in approving certain affiliated transactions with General Electric Company ("GE") in 2018, a time during which GE held a majority interest in Baker Hughes. In October 2019, Baker Hughes' board formed a special litigation committee (the "SLC") consisting of a single director (who had not been on the board at the time of the

challenged transactions), and tasked such committee with investigating and evaluating the allegations raised in, and with making decisions with respect to, the Action.

The SLC retained outside legal and financial advisors, conducted a nine-month investigation and prepared a written report detailing its factual assessments, the applicable legal standards, the merits of the plaintiffs' claims and certain other factors. Based on its work, the SLC concluded that a court would likely hold that the challenged transactions were entirely fair to Baker Hughes and that terminating the Action with prejudice would best serve the interests of Baker Hughes and its stockholders. In light of such conclusion, the SLC then moved for an order terminating the Action.

In reviewing such motion, the court applied a two-step analysis from *Zapata Corp. v. Maldonado*, 430 A.2d 779, 789 (Del. 1981). Under such analysis, the court first reviews the independence of the SLC members and considers whether the SLC conducted a good-faith investigation of reasonable scope that yielded reasonable bases supporting its conclusion. If the SLC meets its burden under this first step, the court can then elect to grant dismissal or proceed to a discretionary second step where the court "applies its own business judgment" to determine if dismissal is in the best interests of the company. As to the first prong of the *Zapata* standard, the court found that the SLC was independent, had conducted a thorough investigation in good faith and reached reasonable conclusions. In light of such determination, the court declined to conduct an independent evaluation of the merits and granted the SLC's motion to terminate.

INTERTEK TESTING SERVICES NA, INC. V. EASTMAN, C.A. NO. 2022-0853-LWW (DEL. CH. MARCH 16, 2023).

In March 2023, the Delaware Court of Chancery granted a motion to dismiss a claim for breach of a non-compete covenant in a stock purchase agreement, finding that the covenant was facially unenforceable due to its unreasonable geographic scope. In granting such motion, the court expressly declined to "blue pencil" such covenant to limit it to a reasonable scope.

In 2018, plaintiff Intertek Testing Services NA, Inc. ("Intertek") purchased Alchemy Investment Holdings, Inc. ("Alchemy") pursuant to a stock purchase agreement that contained a number of restrictive covenants that purported to limit certain of the sellers' post-sale activities. Among such restrictions was a covenant that purported to restrict Jeff Eastman, the co-founder, major stockholder and CEO of Alchemy, from competing "anywhere in the world" with the business of Alchemy for a period of five years. In 2022, Intertek brought suit against Eastman, alleging that Eastman had engaged in activities in violation of such covenant. Eastman moved to dismiss the complaint, arguing, among other things, that the covenant was unenforceable.

In granting the motion to dismiss, the court stated that, in order to be enforceable, a covenant not to compete must be reasonable in scope and duration, both geographically and temporally, and advance a legitimate economic interest of the party enforcing the covenant. The court ultimately found that the non-compete failed to meet such requirement as the provision was not "tailored to the competitive space reached by the seller" and "extend[ed] to markets untouched by Alchemy's business".[3] In declining to blue pencil the non-compete provision, the court reasoned that doing so would be inequitable in light of Intertek's relative sophistication.

HIGHTOWER HOLDING, LLC V. GIBSON, C.A. NO. 2022-0086-LWW (DEL. CH. FEBRUARY 9, 2023).

In February 2023, the Delaware Court of Chancery denied plaintiff HighTower Holding, LLC's ("HighTower") motion for a preliminary injunction enjoining the defendant John Gibson from breaching certain non-compete provisions. In so ruling, the court applied Alabama law, which generally disfavors non-competes, despite the parties' contractual choice of Delaware law.

In 2019, Gibson, a licensed financial advisor in Alabama, and his partners sold a majority interest in a financial advisory firm to HighTower. In connection with such sale, Gibson entered into certain agreements containing restrictive covenants prohibiting Gibson from competing with HighTower. Such agreements also contained customary Delaware choice of law provisions. In 2022, after Gibson resigned from HighTower and formed a new investment advisor firm, HighTower filed a complaint against Gibson alleging, among other things, breach of such agreements, and sought a preliminary injunction to enjoin Gibson from competing with HighTower.

In denying HighTower's motion for a preliminary injunction, the court held that the non-compete provisions in question were likely unenforceable under Alabama law and, as a result, HighTower had failed to establish a reasonable probability of success on the merits of its claim for breach. The court stated that, although the parties' contractual choice of law will generally control, the law of the default state (*i.e.*, that which would apply absent a choice of law provision) governs in certain circumstances, including if (1) enforcement of a covenant would conflict with a fundamental policy of the default state's law and (2) the default state has a materially greater interest in the issues at hand than Delaware.

After examining the "significant relationship" Alabama had to the parties and the transaction in question, and the limited ties to Delaware, the court determined that Alabama was the "default state". Further, the court found that Alabama law expressed a "fundamental public policy" against restrictive covenants, particularly with respect to professional services, and that Alabama's interest in preventing the enforcement of non-competes against Alabama residents working in Alabama outweighed Delaware's more general interest in freedom of contract. As a result, the court determined that Alabama law applied and that HighTower's claim was therefore unlikely to prevail on the merits.

CFIUS

New FAQs

In May 2023, the Department of the Treasury ("Treasury"), which chairs the Committee on Foreign Investment in the United States ("CFIUS"), posted two new frequently asked questions ("FAQs") to CFIUS's website: one pertaining to the disclosure of information regarding limited partners ("LPs") of investment funds involved in a transaction undergoing CFIUS review, and a second pertaining to the timing requirements of mandatory CFIUS filings in multi-stage transactions.[4]

The FAQ regarding LPs confirmed CFIUS's practice of increasingly requesting detailed information regarding all foreign investors that are involved, directly or indirectly, in a transaction undergoing CFIUS review, including the LPs of an investment fund. The FAQ notes that, although the scope of the information requested by CFIUS will depend on the facts and circumstances of the transaction in question, CFIUS may request information regarding an

LP's jurisdiction of organization and ultimate ownership, among other information. Further, it may do so regardless of any arrangements that may otherwise limit the disclosure of an LP's identity or ultimate ownership, such as a non-disclosure agreement between the LP and the investment fund.

The FAQ regarding timing requirements of mandatory CFIUS filings in multi-stage transactions clarified that, when a multi-stage transaction triggers a mandatory CFIUS filing, the filing must be made at least 30 days prior to the earliest date upon which the foreign person acquired any equity interest. For example, if Company A acquired, in a transaction that triggered a CFIUS mandatory filing requirement, a 25 percent ownership interest in Company B on July 1, but its acquisition of certain controlling rights in Company B was deferred until after CFIUS reviews the transaction, the parties would nevertheless be required to notify CFIUS of the transaction no later than June 1. This new FAQ is significant because, prior to this guidance, market participants regularly structured multi-stage transactions such that a foreign investor would make an initial passive investment in a U.S. business prior to filing with CFIUS, and then seek CFIUS's approval to acquire negotiated board rights or other non-passive involvement in or access to the U.S. business. The new FAQ clarifies that this sequencing is not permissible where the transaction triggers a mandatory filing requirement.

Expanded Jurisdiction over Certain Real Estate Transactions

On May 5, 2023, Treasury issued a notice of proposed rulemaking that would add eight military installations to the list of sensitive facilities around which certain real estate transactions are covered under CFIUS's jurisdiction.[5]

The eight installations—located in California (1), Texas (3), South Dakota (1), North Dakota (1), Iowa (1) and Arizona (1)—include Grand Forks Air Force Base in Grand Forks, North Dakota. As we covered in the Q4 2022 Quarterly Review, press reports indicated that CFIUS determined it did not have jurisdiction to review the acquisition by an affiliate of Fufeng Group Limited, a China-based entity, of land located near Grand Forks Air Force Base. We noted that CFIUS's determination that it lacked jurisdiction in such a high-profile matter may lead CFIUS to expand its jurisdiction over real estate acquisitions, which it could do through the rulemaking process by, among other things, adding more sites to its published list of sensitive military installations. CFIUS is now proposing to do exactly that. Comments on the proposed rule were due by June 5, 2023, and CFIUS is expected to finalize the rule in the near term.

02

Antitrust

POLICY DEVELOPMENTS

FTC and DOJ Propose Changes to the Merger Guidelines

In July 2023, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") announced proposed changes to the merger guidelines.[6] The announcement stated that the goal of the new guidelines was to update how the agencies evaluate mergers in the modern economy. The merger guidelines now articulate thirteen guidelines for evaluating whether a merger is anticompetitive. The guidelines preserve many of the analytical techniques used in antitrust analysis, but have heightened the skepticism that the agencies have towards mergers and acquisitions. A few of the major changes in the guidelines are: (1) lowering concentration thresholds for a merger to be presumed

anticompetitive; (2) focusing on using non-econometric evidence to identify lessening of competition; (3) emphasizing non-price harms (*e.g.*, innovation or quality); (4) expanding scrutiny of vertical and conglomerate mergers; (5) reviving theories of harms that had previously been abandoned by enforcers and courts; and (6) raising the requirements for the agencies to credit various defenses to mergers.[7] The guidelines are not law, but are indicative of how the FTC and the DOJ will evaluate transactions going forward and provide guidance regarding the circumstances under which the agencies are likely to challenge a transaction. Ultimately, the courts will be the final arbiter of whether the heightened scrutiny of mergers in the revised guidelines will be upheld in a litigated challenge to a merger. The draft merger guidelines will be open for a 60-day public comment period that ends September 18, 2023.

FTC and DOJ Propose Changes to HSR Premerger Notification Process

In June 2023, the FTC and the DOJ announced proposed changes to the premerger notification form, instructions and rules under the Hart-Scott-Rodino ("HSR") Act.[8] The announcement stated that the changes are intended to increase the effectiveness and efficiency of screening transactions for potential competition issues that require in-depth investigation. The revised form will require significantly more information from each of the parties to a transaction, including: (1) transaction rationale; (2) investment vehicle or corporate relationships; (3) horizonal products and services and non-horizontal business relationships; (4) projected revenue, transaction analysis and market conditions; (5) structure of entities involved, such as private equity; (6) prior acquisitions; (7) classification of employees to assess labor market issues; and (8) foreign entity subsidies that could distort the competitive process. The proposed amendments will be open for a 60-day public comment period that ends August 28, 2023.

FTC and DOJ Look to New Theories for Pharmaceutical Merger Review

In June 2023, the FTC and the DOJ released a summary of a two-day conference held in June 2022 with federal, state and international enforcers that discussed new approaches to enforcing antitrust laws in pharmaceutical merger review.[9] The conference was the culmination of the Multilateral Pharmaceutical Merger Task Force that started in March 2021. During her opening remarks FTC Chair Lina Khan expressed concern over "killer" acquisitions that hurt potential competition and the use of bundling and tying in the pharmaceutical industry. Participants in the conference discussed a number of proposals to change the merger review process, including: (1) a new presumption of anticompetitive harm for large originator firms that would require showing merger-specific efficiencies; (2) skepticism over the effectiveness of divestiture settlements in merger agreements; (3) a "second look" policy to evaluate whether past merger review decisions had the expected result on competition; and (4) a two-part purchasing analysis to incorporate the effects of pharmacy benefit managers on competition among pharmaceutical manufacturers. Additionally, the summary provides details on a panelist, Professor Patricia Danzon of the University of Pennsylvania, who stated that large pharmaceutical firms with "blockbuster" drug portfolios can engage in cross-market leveraging to achieve preferred status on all their drugs. This is the same theory that was used in the Amgen / Horizon Therapeutics merger challenge, which is discussed further below.

DOJ Taking Wider View in Bank Mergers

In June 2023, Assistant Attorney General ("AAG") for the Antitrust Division Jonathan Kanter said that the DOJ will be moving beyond the standard merger review process for banks in a speech at a Brookings Institution event.[10] Instead of focusing on local-market deposit holdings and branch overlaps, the DOJ will broaden its review to include other dimensions of competition including fees, interest rates, product variety and customer service. The merger review will include consideration of increased coordination as well as large banks entrenching their positions. The DOJ is working with banking regulators to update the 1995 bank merger guidelines in order to account for the increased complexity and technological innovation that has occurred since the guidelines were issued.

ENFORCEMENT

Federal Trade Commission

In April 2023, CalPortland Company ("CalPortland") announced that it had terminated its $350 million acquisition of assets from Martin Marietta, Inc., a rival cement producer.[11] The FTC had not yet challenged the acquisition, but its investigation had concluded that the acquisition would have eliminated head-to-head competition and that post-acquisition CalPortland would own half of all cement plants in the Southern California market. The investigation also found that the acquisition would have made unilateral price increases easier from reduced competition as well as coordinated price increases because there would be only four remaining competitors.

Also in April 2023, the FTC sought a temporary restraining order and preliminary injunction to stop Louisiana Children's Medical Center ("LCMC") from integrating three recently acquired New Orleans hospitals from HCA Healthcare, Inc. ("HCA") into its six-hospital network.[12] The parties believed they were exempt from the notification and waiting period requirements in the HSR Act because the Attorney General of Louisiana had approved the merger under a Certificate of Public Advantage ("COPA"). The FTC's position is that a COPA is not a listed statutory exemption to the HSR Act and no court has recognized a COPA as a basis for non-compliance with the HSR Act. The case is currently pending in the Eastern District of Louisiana.

Also in April 2023, the FTC voted 4-0 to require Illumina, Inc. ("Illumina"), a DNA sequencing provider, to divest GRAIL, Inc. ("GRAIL"), a multi-cancer early detection ("MCED") test maker, essentially requiring Illumina to unwind its August 18, 2021 purchase of GRAIL.[13] The decision reversed the FTC's administrative law judge's initial decision to dismiss the FTC's antitrust claims. The FTC found that the acquisition would reduce innovation in the MCED test market, raise prices, reduce choice and reduce quality. The parties have appealed the FTC's decision to the Fifth Circuit, and enforcement of the order is stayed pending appeal.

In May 2023, Boston Scientific Corporation announced that it had terminated its $230 million agreement to purchase M.I. Tech Co., a manufacturer of non-vascular stents.[14] The FTC had not challenged the acquisition, but was investigating the acquisition. In a statement, FTC Bureau of Competition Director Holly Vedova said, "I am pleased that Boston Scientific and M.I. Tech have abandoned their proposed transaction in response to investigations by FTC staff and our overseas enforcement partners. The FTC will not hesitate to take action in enforcing the antitrust laws to protect patients and doctors."

Also in May 2023, the FTC voted 3-0 to block Amgen Inc.'s ("Amgen") $27.8 billion proposed acquisition of Horizon Therapeutics plc

("Horizon").[15] The FTC filed a complaint in the Northern District of Illinois seeking a temporary restraining order and preliminary injunction to stop the transaction. In its complaint, the FTC alleged that the transaction would enable Amgen to engage in cross-market bundling by offering rebates on its existing drugs to insurance companies and pharmacy benefit managers in exchange for preferential treatment of Horizon's drugs Tepezza (used to treat thyroid eye disease) and Krystexxa (used to treat chronic refractory gout).[16] This conduct, the FTC argued, would harm competition by raising Tepezza and Krystexxa rivals' barriers to entry if and when they eventually gain FDA approval because these smaller rivals would not be able to match the rebates Amgen could offer.[17] Amgen had offered a commitment to not engage in bundling with respect to Tepezza and Krystexxa, but the FTC rejected this proposal and instead proceeded to seek a preliminary injunction to block the deal.[18] In a statement, FTC Bureau of Competition Director Holly Vedova said, "Rampant consolidation in the pharmaceutical industry has given powerful companies a pass to exorbitantly hike prescription drug prices, deny patients access to more affordable generics, and hamstring innovation in life-saving markets. Today's action – the FTC's first challenge to a pharmaceutical merger in recent memory – sends a clear signal to the market: The FTC won't hesitate to challenge mergers that enable pharmaceutical conglomerates to entrench their monopolies at the expense of consumers and fair competition."[19]

In July 2023, the FTC voted 3-0 to block IQVIA Holdings Inc.'s ("IQVIA") proposed acquisition of Propel Media, Inc.[20] The FTC alleges that "the proposed acquisition would give IQVIA a market-leading position in programmatic advertising for health care products, namely prescription drugs, to doctors and other health care professionals." Additionally, the FTC alleges that "[t]he merger would also increase IQVIA's incentive to withhold key information to prevent rival companies and potential entrants from effectively competing". The two companies provide "demand-side platforms" for programmatic advertising and are two of the three largest providers in the market. The FTC believes that the merger would lead to higher health care prices and reduced innovation. In a statement, FTC Bureau of Competition Director Holly Vedova stated, "[g]iven the rampant consolidation across the pharmaceutical industry, it's critical that the market for health care product advertising remains competitive to ensure that patients and their doctors have access to high quality, affordable products".

DOJ Antitrust Division

In May 2023, the DOJ announced that it had reached a settlement in its litigation to block ASSA ABLOY AB's ("ASSA ABLOY") proposed $4.3 billion acquisition of Spectrum Brand Holding Inc.'s hardware and home improvement division.[21] Under the terms of the settlement, ASSA ABLOY must divest assets in premium mechanical door hardware and smart locks to Fortune Brands Innovations, Inc. ("Fortune") to maintain competition. The settlement also requires: (1) expanded intellectual property rights related to smart locks for Fortune; (2) appointment of a monitoring trustee; (3) penalty provision if transfer of a manufacturing facility is delayed; and (4) preservation of DOJ's right to seek additional relief if smart lock competition does not reach pre-merger levels. In negotiating the settlement, the DOJ had told ASSA ABLOY that it could not divest assets to a private equity buyer to remedy the harm to competition DOJ had alleged.[22] While the DOJ has not yet announced a blanket prohibition on private-equity divestiture buyers, the prohibition in ASSA ABLOY is consistent with the antitrust agencies' heightened scrutiny of private equity under the Biden administration,[23] and with statements made by AAG Jonathan Kanter in

May 2022 that "very often settlement divestitures [involve] private equity firms [often] motivated by either reducing costs at a company, which will make it less competitive, or squeezing out value by concentrating [the] industry in a roll-up".[24] This was the first consent decree that the DOJ has entered into since a January 2022 DOJ policy statement that discouraged such agreements.[25]

03

Activism[26]

In July 2023, Barclays released its Shareholder Advisory Group H1 2023 Review of Shareholder Activism (the "Barclays Report"), which offers key observations regarding activist activity levels and shareholder engagement in the first half of 2023.

Key findings/insights from the Barclays Report include:

- Activism in H1 2023 continued 2022's active pace with 133 new campaigns globally, representing a ~4% increase from H1 2022 and the highest first half of activist activity over the past four years.
- U.S. activist activity declined in H1 2023 but continued to represent the largest regional share of global activist activity at ~41% of all new campaigns. The 54 new campaigns launched in the United States in H1 2023 represented a ~23% decrease from H1 2022 and a ~19% decrease from H2 2022.
- Increased activist activity in Europe in H1 2023 offset the decreased activist activity in the United States. The 41 new campaigns launched in Europe in H1 2023 (~31% of all new campaigns) represented the busiest first half on record in Europe and a ~41% increase from H1 2022.
- Companies with market capitalizations in excess of $10 billion were targeted more frequently in H1 2023 than in any other first half on record.
- Approximately 46% of all activist campaigns in H1 2023 featured an M&A-related objective, above the four-year average of 42%. Agitating for sale and break-up/divestiture transactions were the most common M&A-related objectives.
- Activists won 81 director seats in H1 2023, above the four-year average of 78 director seats and representing an 8% increase from H1 2022. Activists won board seats in 80% of contested elections in H1 2023 (8 of 10), compared with a 33% win rate in H1 2022 (3 of 9).

04

Corporate Governance

TRENDS FROM THE 2023 PROXY SEASON[27]

Director Elections and Say-on-Pay Proposals

Although shareholder support for directors remains strong, at an average of approximately 94.9%, the number of directors receiving less than 90% shareholder support has more than doubled to 12.9% (compared to 6.6% in 2022). Say-on-pay proposals also continued to receive strong support, at an average of approximately 91% (similar to the 2022 proxy season), with only 12 failed votes occurring since January 1, 2023.

Volume of Shareholder Proposals

As of mid-May, there have been 951 total shareholder proposal submissions, which exceeds the record-breaking number of submissions received during the 2022 proxy season. Of the

proposal submissions received in 2023, ten proponents represented 54% of the submissions.[28] Of these proposal submissions, 34% have been withdrawn, omitted or not included in the proxy, which suggests that both companies and proponents may be increasingly willing to negotiate on these issues. Additionally, the number of "anti-ESG" related proposals (*i.e.*, related to rolling back social-related policies) has significantly increased to over 9% of all proposals received during the 2023 proxy season. No anti-ESG-related proposal has passed or received majority support to date.

Support for Shareholder Proposals

As of mid-May 2023, only three environmental shareholder proposals had passed out of the 48 put to a vote, reflecting a passage rate of approximately 6%. Of the proposals that passed, two proposals related to sustainable packaging and one proposal related to methane emission disclosures.

The volume of shareholder proposals focused on social topics increased this year, with 420 received (compared to 409 received in 2022). However, the average support of such proposals dropped 6 percentage points since 2022. Additionally, the average support for racial equity audits, reproductive rights and mandatory employee arbitration decreased by more than 10 percentage points.

Low support for environmental and social proposals may have been impacted by decreased support from key proxy advisors Institutional Shareholder Services ("ISS") and Glass Lewis. For example, "FOR" recommendations on environmental proposals in 2023 have decreased roughly 8 and 10 percentage points for ISS and Glass Lewis, respectively.

NYSE AND NASDAQ UPDATE[29]

On June 9, 2023, the SEC approved amendments proposed by the New York Stock Exchange ("NYSE")[30] and the Nasdaq Stock Market ("Nasdaq")[31] to their listing standards to implement the clawback requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The amendments provide that:

- if an accounting restatement is required, any erroneously awarded incentive-based compensation received on or after October 2, 2023 must be clawed back; and
- listed companies must adopt a compliant clawback policy no later than December 1, 2023.

The NYSE amendments also include technical updates to the delisting process, including that:

- non-compliance with the listing standards (not limited to failure to adopt a compliant clawback policy) may be subject to a cure period; and
- NYSE's requirement to initiate suspension and delisting procedures will commence on the first anniversary after NYSE sends a delinquency notice to such listed company, rather than the first anniversary of the compliance deadline.

The Nasdaq amendments do not include any analogous technical updates.

SEC UPDATES

SEC Amends Rules Requiring Disclosures of Issuer Share Repurchase and Rule 10b5-1 Plans[32]

On May 3, 2023, the SEC adopted final rules to add or update a number of disclosure requirements relating to an issuer's repurchase of its registered equity securities. The final rules[33] replace the current requirements in Item 703 of Regulation S-K that domestic U.S. issuers

disclose in their periodic reports repurchase data for the quarter on a monthly basis with extensive new quantitative and qualitative disclosures about issuer repurchases, including:

- daily quantitative data about the issuer's repurchases during the most recently ended quarter;
- narrative disclosure about the issuer's share repurchase programs, including the rationales behind, and objectives of, any share repurchases and the process or criteria used in determining the amount of repurchases; and
- disclosure regarding an issuer's adoption or termination of Rule 10b5-1 trading plans.

For domestic U.S. issuers, these disclosures will appear in quarterly reports on Form 10-Q or, for the fourth quarter, annual reports on Form 10-K. The final rules will also require foreign private issuers, other than Canadian issuers that report pursuant to the Multijurisdictional Disclosure System, to provide similar quarterly disclosures in a report on new Form F-SR, which will be due within 45 days after the end of each fiscal quarter. Domestic U.S. issuers will be required to comply with the new disclosure requirements, including mandatory tagging using Inline XBRL, in their periodic reports on Forms 10-K and 10-Q beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023.

In response to the amendments, on May 12, 2023, the U.S. Chamber of Commerce sued the SEC to challenge the recently adopted disclosure rules for share repurchases. The complaint makes claims based on the First Amendment and the Administrative Procedure Act, alleging that the rules compel speech on important business decisions to the detriment of investors. The case is currently pending in the U.S. Court of Appeals for the Fifth Circuit.

SEC Reopens Comment Period for Proposed Amendments to Modernize Beneficial Ownership Reporting

On April 28, 2023, the SEC reopened the comment period for proposed amendments to modernize the rules governing beneficial ownership reporting.[34] The proposed amendments would, among other things, expand the application of Regulation 13D-G to certain derivative securities to include a holder of a cash-settled derivative security, other than a security-based swap, if the derivative is held "with the purpose or effect of changing or influencing the control of the issuer of such class of equity securities, or in connection with or as a participant in any transaction having such purpose or effect". In addition, the proposed amendments expand the circumstances under which two or more persons are deemed to have formed a "group" subject to beneficial ownership reporting obligations by specifying that two or more persons who "act as" a group for purposes of acquiring, holding or disposing securities will be treated as a "group". Finally, the proposed amendments generally shorten the deadlines for filing Schedules 13D and 13G and their related amendments. Additionally, the staff of the SEC's Division of Economic and Risk Analysis released a memorandum that provides supplemental data and analysis related to the proposed amendments' economic effects.[35] The public comment period ended on June 27, 2023.

SEC Spring 2023 Regulatory Agenda[36]

On June 23, 2023, the U.S. Office of Information and Regulatory Affairs released the Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions, which included a list of regulatory actions the SEC plans to take in the near term and the long term.[37] 37 proposed rules are indicated as

intended to be finalized by October 2023, including proposals related to climate change disclosure,[38] cybersecurity,[39] shareholder proposals under Rule 14a-8[40], modernization of beneficial ownership reporting[41] and restrictions on special purpose acquisition companies[42]. Additionally, the agenda suggests the SEC may propose 18 new rules, including on topics such as amendments to disclosure rules regarding corporate board diversity[43] and human capital management[44] and amendments to the "held of record" definition for purposes of Section 12(g) of the Securities Exchange Act of 1934[45].

SAY ON FREQUENCY ITEM 5.07 8-K OR 8-K/A REMINDER

Many public companies were required to include an advisory "say on frequency" proposal in their 2023 proxy statement. Because "say on frequency" proposals are advisory in nature, an issuer must disclose its final determination in its voting results Form 8-K. If a final decision is not made until after the voting results Form 8-K is published, the company must file an amendment to the Form 8-K disclosing its final determination on the advisory vote. If filing an amendment, the 8-K/A will be due no later than 150 days after the date of the end of the annual meeting in which the say on frequency vote occurred (and no later than 60 days prior to the deadline for submitting shareholder proposals for the issuer's 2024 annual meeting).[46]

1 All data regarding M&A activity is from Refinitiv unless otherwise indicated. Deal values and volume may vary across our newsletters due to continuous updates to the M&A activity sources.

2 Such non-exhaustive factors include (i) the presence of a written contract, (ii) the clarity of the waiver, (iii) the stockholder's understanding of the waiver's implications, (iv) the stockholder's ability to reject the provision, (v) the existence of bargained-for consideration and (vi) the stockholder's sophistication.

3 The court previously reached similar conclusions in *Kodiak Building Partners, LLC v. Adams, C.A. No. 2022-0311-MTZ (Del. Ch. Oct. 6, 2022) (holding that a non-compete provision restricting competition "within a 100-mile radius of any other location" served by the purchased business or its subsidiaries was overbroad).*

4 See *https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-frequently-asked-questions.*

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10 Jon Hill, *DOJ to Scope Bank Mergers With Wider Antitrust Lens, Law360 (June 20, 2023 12:39 PM), https://www.law360.com/articles/1690583/doj-to-scope-bank-mergers-with-wider-antitrust-lens.*

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13 Press Release, *FTC Orders Illumina to Divest Cancer Detection Test Maker GRAIL to Protect Competition in Life-Saving Technology Market, FTC (Apr. 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-orders-illumina-divest-cancer-detection-test-maker-grail-protect-competition-life-saving.*

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26 Unless otherwise indicated, all data regarding activism is from Barclays, *Shareholder Advisory Group H1 2023 Review of Shareholder Activism and 5 trends in shareholder activism that have emerged in 2023 (Jul. 19, 2023), https://www.cib.barclays/our-insights/5-trends-in-shareholder-activism-that-have-emerged-in-2023.html. Sources of data used in the Barclays Report include Bloomberg, FactSet, Insightia, 13D Monitor, press reports and publicly available data and sources. Market data in the Barclays Report is as of June 30, 2023. All data in the Barclays Report is for campaigns conducted globally by activists at companies with market capitalizations greater than $500 million at time of campaign announcement; select campaigns with market capitalizations less than $500 million due to depressed valuation at the time of campaign announcement (company was larger than $500 million in prior twelve months).*

27 Unless otherwise indicated, data in this section is taken from Georgeson, *An Early Look At The 2023 Proxy Season. This section also relies on Georgeson's categorization of shareholder proposals as "environmental", "social" or "governance". Note that the numbers in this section pertaining to the 2023 proxy season reflect the analysis of voting results of Russell 3000 companies who have held their annual meetings through mid-May 2023. Because the 2023 proxy season is not yet complete and there may be gaps in available data, some of the data may not comprehensively represent the entire 2023 proxy season.*

28 The ten proponents included: John Chevedden, As You Sow Foundation, Kenneth Steiner, Myra Young/James McRitchie, National Center for Public Policy Research, New York State Common Retirement/New York State Comptroller, National Legal and Policy Center, Green Century Capital Management, Mercy Investment Services and SEIU Master Trust/Service Employees International.

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33 Release No. 34-97424, *Share Repurchase Disclosure Modernization (May 3, 2023), https://www.sec.gov/rules/final/2023/34-97424.pdf.*

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Cravath, Swaine & Moore LLP

NEW YORK

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
T+1-212-474-1000
F+1-212-474-3700

LONDON

CityPoint
One Ropemaker Street
London EC2Y 9HR
T+44-20-7453-1000
F+44-20-7860-1150

WASHINGTON, D.C.

1601 K Street NW
Washington, D.C. 20006-1682
T+1-202-869-7700
F+1-202-869-7600

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