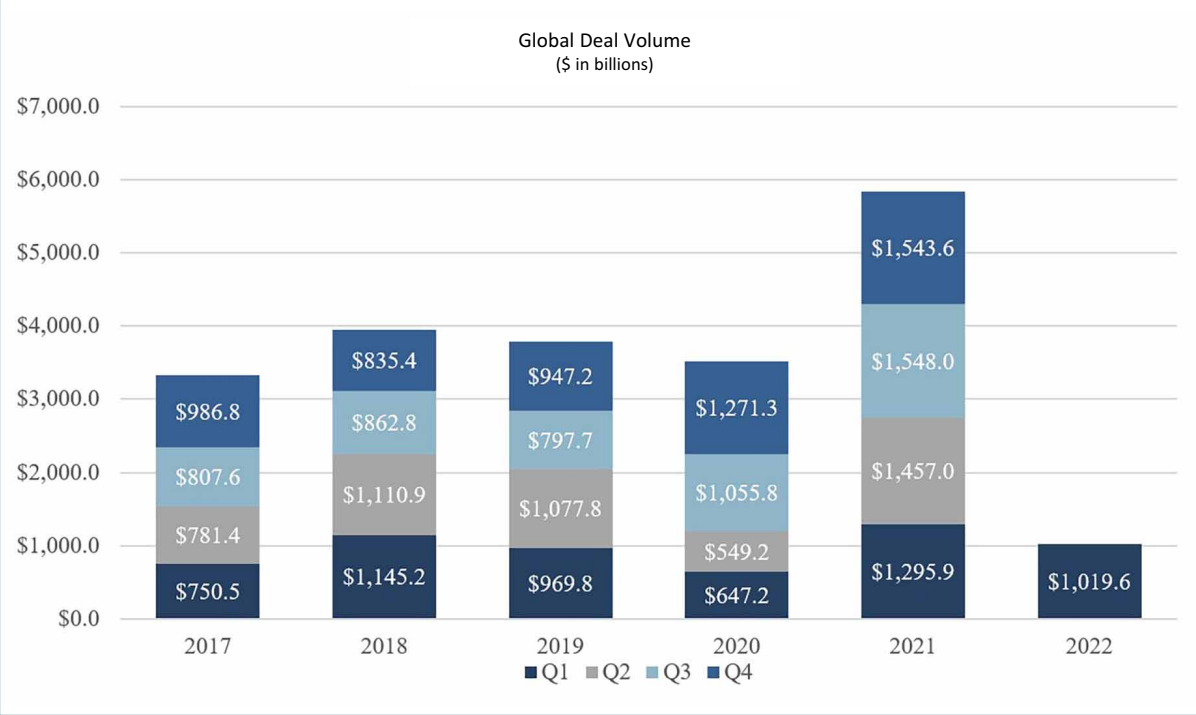
Cravath Quarterly Review
M&A, Activism and Corporate Governance
Volume 4 | Issue 1
Q1 2022

Mergers & Acquisitions

TRENDS[1]



Source: Refinitiv, An LSEG Business.

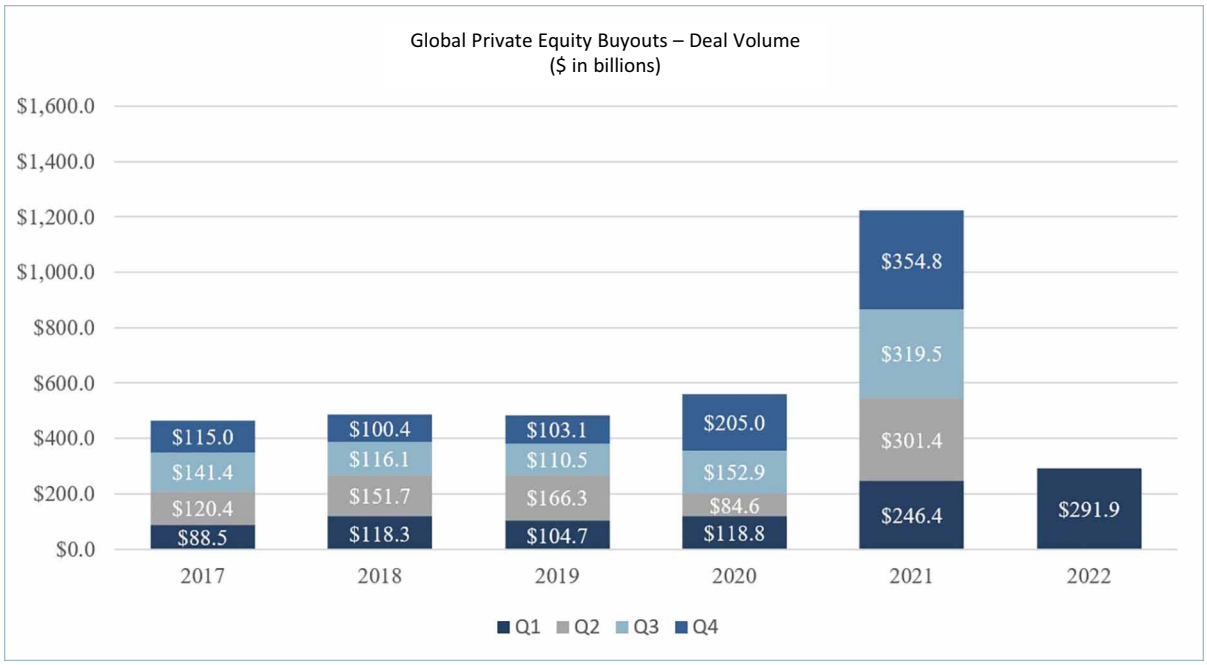
Q1 2022: $1 Trillion Streak Continues

After the strongest annual period for M&A on record,[2] global M&A activity slowed in Q1 2022, with $1.02 trillion in announced deal value, a year-over-year decrease of ~21% compared to Q1 2021, and the weakest quarter for M&A since Q2 2020. Nonetheless, Q1 2022 marked the seventh consecutive quarter to surpass $1 trillion in announced deal value. There were nearly 13,000 deals announced globally in the quarter, a year-over-year decrease of ~17% compared to Q1 2021.

The year-over-year decrease in deal volume in Q1 2022 also saw a decrease in overall deal size. In Q1 2022, the total value of deals between $1 billion and $5 billion totaled $281.2 billion, a year-over-year decrease of ~40% compared to Q1 2021. Despite the decrease in overall deal size, the aggregate value of mega deals was up ~46% for the quarter compared to Q1 last year, with 14 deals greater than $10 billion totaling $253.6 billion.

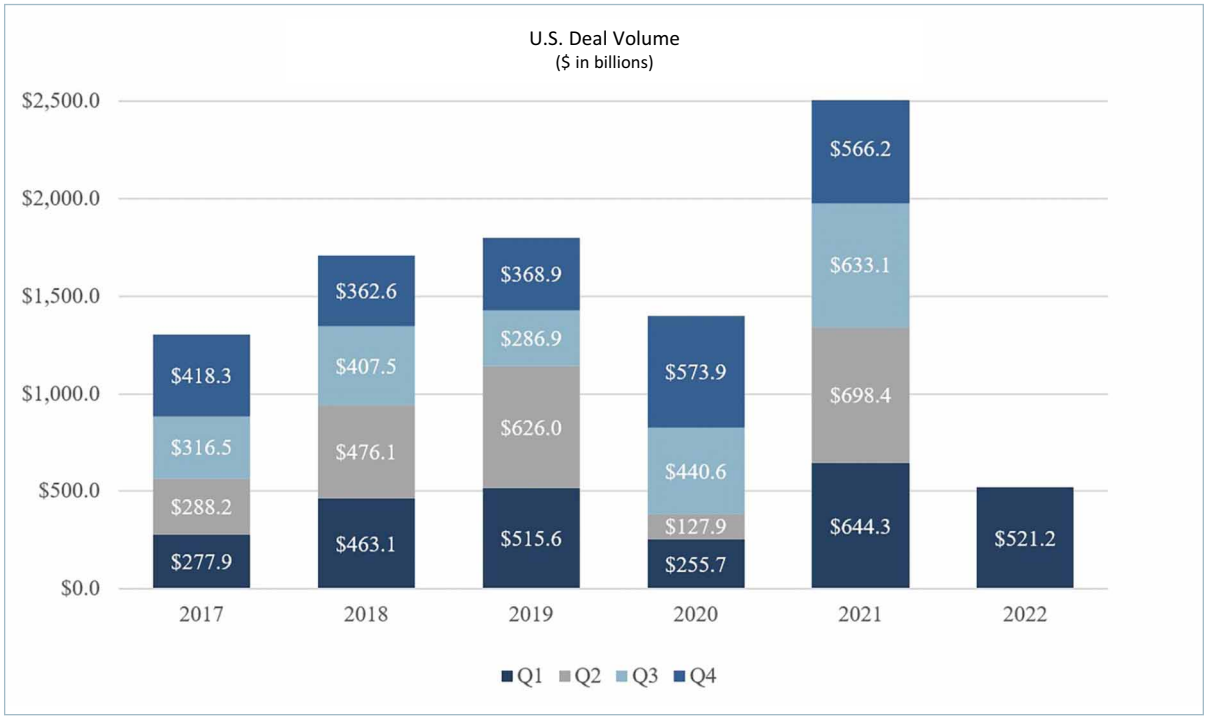
[1] All data regarding M&A activity is from Refinitiv unless otherwise indicated. Deal values and volume may vary across our newsletters due to continuous updates to the M&A activity sources.

[2] Refinitiv began keeping records in 1980.



Source: Refinitiv, An LSEG Business.

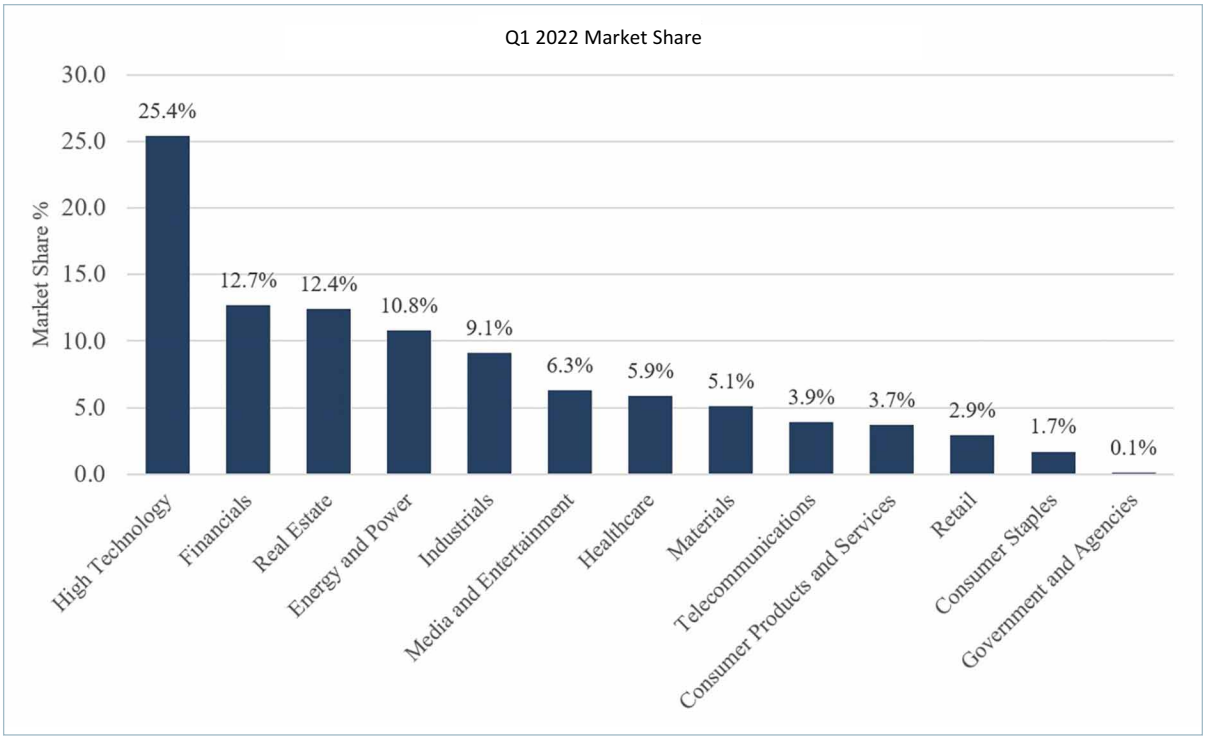
Private-equity buyouts in Q1 2022 reached $291.9 billion globally, an increase of ~18% compared to Q1 last year, accounting for ~29% of M&A activity in Q1 2022, which is an all-time record. Over 2,900 private equity-backed deals were announced in Q1 2022, which represented a decrease of ~21% compared to Q1 last year. The average global private equity deal size in Q1 2022 increased to $171.1 million, up from $142.1 million in Q1 2021.



Source: Refinitiv, An LSEG Business.

Deal-Making Down Across All Regions
M&A activity for U.S. targets amounted to $521.2 billion during Q1 2022, a decrease of ~19% compared to Q1 2021, and the slowest quarter for U.S. deal-making since Q3 2020. In Q1 2022, U.S. M&A accounted for ~51% of overall deal-making worldwide, up slightly from ~50% a year ago.

M&A activity for European targets totaled $235.7 billion in Q1 2022, a decrease of ~6% compared to 2021 levels and the lowest quarter since Q1 2020. In the Asia Pacific region, deal making totaled $174.1 billion in Q1 2022, a ~22% decrease compared to Q1 2021, and the slowest first quarter since 2020.



Source: Refinitiv, An LSEG Business.

Technology M&A Deal Percentage Increases as Cross-Border Deals Decline
M&A in the technology sector totaled $258.9 billion during Q1 2022, representing a decrease of ~5% compared to Q1 2021 but accounting for a record ~25% of overall deal value. The number of technology deals decreased ~17% compared to Q1 2021, but the aggregate value was driven in large part due to Microsoft Corporation's $75 billion announced acquisition of Activision Blizzard, Inc. Real estate deal making accounted for ~12% of activity during Q1 2022, an increase compared to 5% in Q1 last year.

Cross-border M&A activity totaled $328.2 billion during Q1 2022, a ~24% decrease compared to Q1 2021. The technology, financials and real estate sectors collectively accounted for ~55% of cross-border deals during Q1 2022, up from ~40% in Q1 last year.

SPACs Market Update[3]
Q1 2022 saw a continued slowdown in the special purpose acquisition companies ("SPACs") market. In Q1 2022, 38 de-SPAC transactions were announced, totaling $31.0 billion or ~3% of total global M&A deal value, down from ~17% in Q1 2021.[4] During Q1 2022, 17 previously announced de-SPAC mergers were terminated, compared to 18 terminations in total for 2021 and 10 terminations in Q4 2021. In Q1 2022, there was a significant increase in the number of SPAC IPOs that were withdrawn or abandoned, with 61 SPAC IPOs being withdrawn or abandoned. In all of 2021, only 11 SPAC IPOs were withdrawn or abandoned, with eight such withdrawals or abandonments occurring in Q4 2021. In Q1 2022, there were only 55 priced SPAC IPOs, down from 163 priced SPAC IPOs in Q4 2021. For a summary of the U.S. Securities Exchange Commission's (the "SEC") proposed rules that will enhance disclosure required in conjunction with transactions involving SPACs, please refer to the *SEC Updates* subsection below.

[3] All data regarding SPAC activity is from Deal Point Data unless otherwise indicated.
[4] Refinitiv, *Global Mergers & Acquisitions Review, First Quarter 2022, Financial Advisors*, (Apr. 2022), https://thesource.refinitiv.com/thesource/getfile/index/4a8075c9-d301-4ced-8630-a0dc33f5b4e7?utm_source=Eloqua&utm_medium=email&utm_campaign=&utm_content=NL_M&A%20Financial%20Advisory%20Review_1Q22.

LEGAL & REGULATORY DEVELOPMENTS

Cases

Q1 2022 featured a number of notable Delaware decisions regarding M&A contractual disputes and related matters.

***Level 4 Yoga, LLC v. CorePower Yoga, LLC, CorePower Yoga Franchising, LLC*, No. CV 2020-0249-JRS (Del. Ch. Mar. 1, 2022).**

In this post-trial decision, the Delaware Court of Chancery required CorePower Yoga, LLC and CorePower Yoga Franchising, LLC (together, "CorePower"), Colorado limited liability companies operating a chain of yoga studios, to consummate an acquisition of the assets of Level 4 Yoga, LLC ("Level 4"), its franchisee, after finding that CorePower failed to prove the occurrence of a material adverse effect ("MAE") or a breach of Level 4's covenant to operate the business in the ordinary course ("Ordinary Course Covenant"), and ordered specific performance and compensatory damages together with prejudgment interest on the deal price.

In May 2019, CorePower exercised a pre-existing contractual call option requiring Level 4 to sell to CorePower all of its yoga studios under the CorePower Yoga brand. On November 27, 2019, the parties memorialized this acquisition in an Asset Purchase Agreement (the "APA") pursuant to which CorePower agreed to purchase all of Level 4's assets in three tranches, the first of which was slated to occur on April 1, 2020. As the closing of the first tranche approached and the emergence of COVID-19 in the U.S. began to force businesses to temporarily close, CorePower requested a delay in closing, which Level 4 refused. Due to emergency orders imposed in response to the COVID-19 pandemic and at CorePower's direction, Level 4 closed all of its studios. On March 26, 2020, CorePower declared the APA was no longer valid, invoking the APA's MAE clause and claiming Level 4 failed to "conduct the Business in the Ordinary Course of Business so that the Business does not experience a Material Adverse Effect". Level 4 responded by seeking a declaratory judgment that it had complied with all of its pre-closing obligations and requesting an order requiring specific performance, compensatory damages and prejudgment interest on the deal price.

In determining whether an MAE occurred, the Court considered whether, due to COVID-19, there had been an adverse change in Level 4's business that was consequential to earnings over a "commercially reasonable period". In its analysis, the Court assessed the MAE provision at the time the MAE was invoked, concluding that "even if the effect ultimately was significant, at the time CorePower purported to invoke the No-MAE Representation, there was absolutely no basis for CorePower to conclude that the business effects of COVID-19 were then, or later would be, significant".[5]

In determining whether an Ordinary Course Covenant breach occurred, the Court considered how Level 4 operated historically based on the "consistent with past practice" phrasing in the provision. The evidence at trial showed that Level 4 historically adhered to CorePower's standards and directives and, therefore, when CorePower ordered the temporary closure of studios, Level 4 was obligated to comply. As a result, the Court found Level 4's actions reflected compliance with its franchisee obligations and thus were consistent with past practice.

In the absence of an MAE and an Ordinary Course Covenant breach, the Court held that CorePower's refusal to consummate the acquisition was not excused and granted specific performance along with compensatory damages and prejudgment interest for Level 4.

***John D. Arwood, et al. v. AW Site Services, LLC*, C.A. No. 2019-0904-JRS (Del. Ch. Mar. 9, 2022).**

In this post-trial decision, the Delaware Court of Chancery awarded AW Site Services, LLC ("AWS") $3.9 million in compensatory damages as a result of John Arwood's and the selling entities' breach of the representations and warranties of the Asset Purchase Agreement entered into in connection with the sale of the Arwood Waste business ("Arwood Waste") to AWS (the "Agreement"), rejecting Arwood's "sandbagging" defense and, in the process, reaffirming that Delaware is a pro-sandbagging jurisdiction. The Court denied AWS's claims for fraud, holding that AWS's extensive due diligence was inconsistent with the requirement of "justifiable reliance" for an action for fraud.

Arwood Waste was sold to AWS for all cash pursuant to the Agreement. In connection with the sale, AWS was given unfettered access to the books of Arwood Waste, through which it became clear to AWS that Arwood was not a sophisticated businessman. Following closing,

[5] *Level 4 Yoga, LLC v. CorePower Yoga, LLC*, 2022 WL 601862, at *22 (quoting *Bardy Diagnostics*, 2021 WL 2886188, at *27).

AWS discovered that Arwood Waste was illegally overcharging its customers and, in response, AWS withheld the amounts remaining in escrow pursuant to the Agreement. Arwood brought claims of breach of contract against AWS, seeking specific performance that would require AWS to release the funds held in escrow. AWS responded with counterclaims of breach of contract relating to breaches of the representations and warranties of the Agreement and for fraud with respect to other representations not in the Agreement. In response to the breach of contract claim, Arwood raised a sandbagging defense, arguing that AWS either knew prior to closing that the representations were false or was recklessly indifferent to their veracity and therefore should not be allowed to rely on the representations for its breach of contract claim. In its decision, however, the Court clarified that Delaware is a pro-sandbagging jurisdiction, which is consistent with Delaware's contractarian nature and aligns with Delaware's public policy for favoring private ordering.

Delaware's contractarian nature and preference for private ordering at the heart of this aspect of *Arwood* is in contrast to the Delaware Court of Chancery's decision in *Boardwalk*.[6] In *Boardwalk*, the Delaware Court of Chancery ordered Loews Corporation ("Loews") to pay over $690 million in damages in connection with Loews' take-private of Boardwalk Pipeline Partners, LP ("Boardwalk"), finding that Loews breached the Boardwalk limited partnership agreement in taking an action that was conditioned upon a receipt of an opinion of counsel. The Court held that, although the opinion was in fact received by Loews (as expressly required by the agreement), the opinion did not satisfy the agreement because it was not given in good faith by counsel (an implied standard for the opinion that was not required by the agreement). The *Boardwalk* decision shows that even contractarian analysis may fail in the presence of lack of good faith.

In *Arwood*, the Court acknowledged that "there is something unsettling about allowing a buyer to lay in wait on the other side of closing with a breach claim he knew before closing he would bring against the seller" rather than requiring the buyer to bring the breach to the seller and allow the seller to remedy it prior to closing. Anti-sandbagging clauses, however, have emerged as an effective risk-management tool to address this concern. The Agreement contained no such anti-sandbagging clause, and as such, the parties were subject to default Delaware common law permitting sandbagging. The Court also found that, even if Delaware law did not permit sandbagging, sandbagging would not have been implicated in this case as AWS's actions did not meet the standard of "actual knowledge" of the relevant breach. Arwood was ordered to pay $3.9 million in compensatory damages to AWS.

AWS also brought claims for fraud and fraudulent inducement. The Court held that, although AWS was not aware of the falsity of the relevant representations and warranties, AWS could not satisfy the element of the cause of action that is "justifiable reliance" on the false representation. Given the extensive due diligence by AWS and its substantially greater sophistication than Arwood, the Court held AWS was not justified in relying on the false representations, which would have been required to support a fraud claim.

***Manti Holdings, LLC v. The Carlyle Group Inc.*, C.A. No. 2020-0657-SG (Del. Ch. Feb. 14, 2022).**

In this memorandum opinion, the Delaware Court of Chancery rejected the defendants' ("Defendants") argument that the plaintiff stockholders ("Plaintiffs") waived their right to redress against the Defendants for breach of fiduciary duty relating to the sale of Authentix Acquisition Company, Inc. ("Authentix"). Defendants, which consisted of (i) preferred stockholders of Authentix and affiliates of such preferred stockholders, alleged to be controllers, and (ii) three former directors and officers of Authentix allegedly associated with the controllers, asserted that the stockholders agreement entered into by Plaintiffs contained a provision that prospectively waived claims for breaches of fiduciary duty. The Court held that the applicable provision containing the purported waiver was not a clear and knowing relinquishment of such right to redress, and therefore was not an effective waiver.

On September 12, 2017, Authentix's board approved a sale of the corporation, which Plaintiffs alleged was motivated by Defendants' self-imposed deadline to cash out their preferred stock. Plaintiffs filed claims against Defendants for breach of fiduciary duty, aiding and abetting, civil conspiracy and unjust enrichment. Defendants argued that Plaintiffs' claims were precluded as Plaintiffs waived the right to challenge the sale pursuant to the stockholders agreement, which required the stockholders party thereto to "consent to and raise no objections against" a sale of Authentix that was approved by the Board and a majority of stockholders.

[6] *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2019 WL 4927053 (Del. Ch. Nov. 12, 2021).

In its analysis, the Court noted that a waiver of fiduciary duties must be clear and unequivocal, and that any ambiguity in the intent of the purported waiver should be interpreted as tipping "the interpretive scales. . . in favor of preserving fiduciary duties". The Court highlighted that, while the drafters of the stockholders agreement enumerated additional actions stockholders were required to take in connection with the obligation to "consent to and raise no objections against" a sale of Authentix, the drafters failed to enumerate an explicit waiver of fiduciary duties in connection therewith. In light of the absence of an explicit waiver, combined with the Court's assessment that Plaintiffs were not objecting to the sale but rather seeking redress for breaches of fiduciary duty leading up to the sale, the Court found that the purported waiver language did not demonstrate a clear and unequivocal waiver of fiduciary rights. In finding that no waiver had occurred in the first place, the Court avoided deciding the issue of whether fiduciary duties to corporate stockholders could be waived. In a closing footnote, however, the Court hinted that it would not find such a waiver permissible, stating, "finding such waiver effective is a proposition that would blur the line between LLCs and the corporate form and represent a departure from norms of corporate governance. . . even under the limited circumstances here".

***Cox Communications, Inc. v. T-Mobile US, Inc.*, No. 340, 2021 (Del. Mar. 3, 2022).**

In this appeal, the Delaware Supreme Court reversed the Court of Chancery's ruling that the 2017 settlement agreement between Cox Communications, Inc. ("Cox") and Sprint Corporation ("Sprint"), T-Mobile U.S., Inc.'s ("T-Mobile") predecessor in interest, required Cox to enter into an exclusive provider agreement with T-Mobile if it chose to enter the mobile wireless market, finding instead that Cox could partner with another wireless service provider so long as Cox first negotiated the open terms with T-Mobile in good faith.

In April 2020, T-Mobile purchased Sprint and made a bid to serve as a mobile network operator for Cox in response to a request for proposal by Cox. Cox chose to instead partner with Verizon and in response T-Mobile alleged Cox was in breach of a 2017 settlement agreement with Sprint, which stated that before Cox provided wireless mobile services to its customers, it would enter into a "definitive" exclusive provider agreement with Sprint "on terms to be mutually agreed upon between the parties" (the "MVNO Provision"). Under the threat of litigation, Cox filed suit in the Delaware Court of Chancery seeking a declaration that the MVNO Provision either lacked material terms and was an unenforceable agreement to agree or only required Cox to negotiate with T-Mobile in good faith. The Delaware Court of Chancery ruled in T-Mobile's favor, however, finding that the MVNO Provision required Cox to use Sprint's network if it ever decided to offer wireless mobile services and then to negotiate with Sprint in good faith to resolve the open terms of the agreement. The Court of Chancery enjoined Cox from partnering with any mobile network operator other than T-Mobile for wireless mobile service.

In its *de novo* consideration of the MVNO Provision, the Delaware Supreme Court read the provision as a single promise contemplating a future definitive agreement but leaving many terms open for later negotiation between the parties, contrasting the trial court's reading of two promises for Cox, *first*, to make a deal with Sprint or refrain from entering the wireless mobile services market and, *second*, to negotiate open terms in good faith after entering into an exclusive relationship with T-Mobile. In the Delaware Supreme Court's reading, the MVNO Provision is a so-called "Type II agreement" akin to that recognized in *SIGA v. PharmAthene*, which requires parties to negotiate open terms in good faith but does not obligate them to agree to make a deal.[7] In *SIGA v. PharmAthene*, the Delaware Supreme Court recognized two types of enforceable preliminary agreements, Type I agreements in which all the points that require negotiation are agreed upon and Type II agreements where the parties agree on certain major terms but leave other terms for future negotiation. Type I agreements are fully binding and Type II agreements commit parties to negotiate the open terms in good faith. According to the Delaware Supreme Court, the MVNO Provision was a Type II agreement as key terms such as price had not yet been agreed upon. As a Type II agreement, the MVNO Provision only required Cox to negotiate in good faith with T-Mobile to come to agreement on the open terms. However, those good-faith negotiations may fail to result in a definitive agreement. As the trial court did not decide on whether this obligation for good-faith negotiations had been satisfied, the Delaware Supreme Court reversed and remanded the case to the Court of Chancery to decide the issue.

[7] *SIGA Technologies, Inc. v. PharmAthene, Inc.*, 67 A.3d 330 (Del. Mar. 24, 2013).

OTHER DEVELOPMENTS

Delaware General Corporation Law Amended To Offer Captive D&O Insurance

Section 145 of the DGCL was amended, effective February 7, 2022, to authorize a Delaware corporation to use captive insurance to protect its current and former directors, officers and other indemnifiable persons. The captive insurance may be used to protect covered persons against liability even if the corporation would not be empowered to indemnify them, subject to a limited set of minimum exclusions.

CFIUS

Prioritization of Non-Notified Transactions

U.S. government budget documents released in late March 2022 confirm that the Committee on Foreign Investment in the United States ("CFIUS", or the "Committee") will, for the foreseeable future, continue to prioritize identifying and addressing transactions within its jurisdiction that are not voluntarily notified to the Committee ("non-notified transactions"). Specifically, in its FY2022-2026 Strategic Plan, the U.S. Department of the Treasury ("Treasury"), which chairs CFIUS, formally established "accelerated timelines for identification and processing" of non-notified transactions as a "measure and indicator of success".[8] Further, Treasury's Congressional Justification of Appropriations for its CFIUS activities indicated that CFIUS is experiencing "significantly expanded activity with respect to non-notified transactions".[9] Together, these documents corroborate the experience of many CFIUS practitioners and market participants and affirm that the risk of receiving CFIUS inquiries on non-notified transactions that may be of interest to the U.S. government remains high.

Outbound Investment Screening

Policymakers continue to focus on whether—and if so, how—the U.S. government should screen investments by U.S. persons in countries of concern for national security implications. On February 4, 2022, the House of Representatives passed the America COMPETES Act of 2022, which included provisions that would establish a CFIUS-like review process for certain outbound investments. Companion legislation passed by the Senate did not include these provisions, and the two chambers are expected to go to conference in the coming weeks to reconcile their bills. In the meantime, the Biden Administration, which has generally expressed support for addressing the national security implications of outbound investment,[10] has demonstrated its ability to use executive action to impose outbound investment restrictions, including by issuing an Executive Order on April 6, 2022, prohibiting new investment in Russia by U.S. persons.[11]

Inaugural CFIUS Conference

On April 14, 2022, Treasury announced that it will hold the first CFIUS Conference on June 16, 2022, in Washington, D.C.[12] The inaugural conference will be a hybrid virtual and in-person event featuring speakers from across the U.S. government who will provide insights on CFIUS authorities, processes and practices, primarily for the business community.

Personnel Developments

On March 8, 2022, President Biden announced his intent to nominate Paul Rosen for the position of Assistant Secretary of the Treasury for Investment Security.[13] Rosen previously served as Counsel to the Senate Judiciary Committee, a federal prosecutor at the Justice Department and Chief of Staff at the Department of Homeland Security before moving to private practice, where he handled cybersecurity and government investigations matters as a partner at a large law firm. The Senate Banking Committee held a nomination hearing for Rosen on April 6, 2022.[14] If confirmed, Rosen would be only the second person to serve as Assistant Secretary for Investment Security, a position created by the passage of the Foreign Investment Risk Review Modernization Act in 2018. The confirmation of an Assistant Secretary is expected to bring welcome political-level CFIUS leadership to Treasury.

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[8] *Strategic Plan 2022-2026*, U.S. Department of the Treasury, https://home.treasury.gov/system/files/266/TreasuryStrategicPlan-FY2022-2026.pdf.
[9] *Department of the Treasury Committee on Foreign Investment in the United States Activities, Congressional Budget Justification and Annual Performance Plan and Report FY 2023*, U.S. Department of the Treasury, https://home.treasury.gov/system/files/266/07.-CFIUS-FY-203-CJ.pdf.
[10] Press Release, *Remarks by National Security Advisor Jake Sullivan at the National Security Commission on Artificial Intelligence Global Emerging Technology Summit*, The White House (Jul. 13, 2021), https://www.whitehouse.gov/nsc/briefing-room/2021/07/13/remarks-by-national-security-advisor-jake-sullivan-at-the-national-security-commission-on-artificial-intelligence-global-emerging-technology-summit/.
[11] Executive Order 14071, *Prohibiting New Investments in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression*, 87 Fed. Reg. 20999 (Apr. 8, 2022).
[12] Press Release, *Save the Date: Inaugural CFIUS Conference,* U.S. Department of the Treasury (Apr. 14, 2022), https://home.treasury.gov/news/featured-stories/save-the-date-inaugural-cfius-conference.
[13] Press Release, *President Biden Announces Key Nominees*, The White House (Mar. 8, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/08/president-biden-announces-key-nominees-4/.
[14] Nomination Hearing, *United States Senate Committee on Banking, Housing, and Urban Affairs* (Apr. 6, 2022), https://www.banking.senate.gov/hearings/03/29/2022/nomination-hearing.

Bank M&A

On February 15, 2022, the comment period closed on the Department of Justice (the "DOJ") Antitrust Division's (the "Division") request for comments on whether and how the Division should revise the 1995 Bank Merger Competitive Review Guidelines. The recent request for comment sought input on various issues, including the scope of the Division's review of bank mergers and the data submitted by banks and otherwise available to the Division in its review. This request for comment followed the Division's earlier solicitation for input in September 2020. In response to the recent request for comment, the DOJ received 23 comments,[15] including comments submitted by Cravath, Swaine & Moore LLP on behalf of client(s) regarding the deposit data that is used by the Division to evaluate proposed bank mergers.[16]

In addition, on March 25, 2022, the Federal Deposit Insurance Corporation ("FDIC") officially published a Request for Information ("RFI") seeking comment on its bank merger framework.[17] This FDIC action followed disagreement among the FDIC's Directors at the end of 2021 about whether to officially publish the RFI.[18] The RFI notes a review of the FDIC's bank merger framework is necessary due to: (i) the increased number of large and systemically important banking organizations within the banking industry; (ii) the FDIC's responsibility to promote public confidence in the banking system, maintain financial stability, review proposed mergers and resolve failing banks; (iii) requirements to consider financial stability risk under amendments made by the Dodd-Frank Act; and (iv) the Executive Order by President Biden asking U.S. agencies to consider the impact that consolidation may have on maintaining a competitive marketplace.[19] Among other things, the RFI requests comment on whether the federal banking agencies should consider additional quantitative measures when reviewing bank mergers and whether they should broaden the way the convenience and needs of the community factor is considered, including whether the Consumer Financial Protection Bureau should be consulted. Comments are due by May 31, 2022.

Other ways to improve financial stability are also being considered. In his prepared remarks at the Wharton Financial Regulation Conference 2022 just following quarter-end, Acting Comptroller of the Currency Michael Hsu said that his agency is looking at reforms to improve the resolvability of large regional banks that are not designated as global systemically important banks.[20] One option on the table is for the Office of the Comptroller of the Currency to condition approval of large bank mergers on commitments to adopt certain resolution capabilities of the U.S. global systemically important banks, including being capable of a "single-point-of-entry" resolution, holding sufficient bail-in-able long-term debt at the parent, and ensuring that major business lines and/or portfolios are separable. These capabilities are intended to allow a large banking organization to fail and enter insolvency proceedings at the parent company level, with an insured bank or other significant operating subsidiaries continuing to operate outside of any insolvency proceeding and eventually being sold to different buyers. He closed his remarks by inviting thoughts from academics and stakeholders on the issue.

Sanctions

The imposition of sweeping U.S. sanctions and export controls against Russia in the wake of its invasion of Ukraine in Q1 2022[21] will undoubtedly result in increased scrutiny of targets' business activities in Russia and Ukraine. These measures have ranged from banning U.S. persons from making new investments in Russia to requiring licenses for all exportations of controlled items, software or technology from the U.S. to Russia.[22] The U.S. has not

[15] *2022 Antitrust Division Banking Guidelines Review: Public Comments*, DOJ (last updated Feb. 18, 2022), https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide/2022-Bank-Guideline-Review.

[16] *Letter to Assistant Attorney General Kanter* (Feb. 15, 2022), https://www.justice.gov/atr/page/file/1474326/download.

[17] *FDIC Request for Information on Bank Merger Act*, FIL-11-2022, FDIC (Mar. 25, 2022), https://www.fdic.gov/news/financial-institution-letters/2022/fil22011.html.

[18] See Cravath Quarterly Review, 3.4 (2021) at 11-12, https://www.cravath.com/a/web/pVQfWw53CFqUa2iejrTK2Z/3A1WMu/cravath-manda-activism-and-corporate-governance-quarterly-review-2021-q4.pdf.

[19] *Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions*, 87 Fed. Reg. 18740 (Mar. 31, 2022), https://www.govinfo.gov/content/pkg/FR-2022-03-31/pdf/2022-06720.pdf.

[20] *Acting Comptroller of the Currency Michael J. Hsu, Remarks Before the Wharton Financial Regulation Conference 2022 "Financial Stability and Large Bank Resolvability"* (Apr. 1, 2022), https://occ.gov/news-issuances/speeches/2022/pub-speech-2022-33.pdf?source=email.

[21] *See, e.g.*, Press Release, *U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs,* U.S. Department of the Treasury (Feb. 24, 2022), https://home.treasury.gov/news/press-releases/jy0608; Press Release, *Commerce Implements Sweeping Restrictions on Exports to Russia in Response to Further Invasion of Ukraine,* U.S. Department of Commerce (Feb. 24, 2022), https://www.commerce.gov/news/press-releases/2022/02/commerce-implements-sweeping-restrictions-exports-russia-response.

[22] Executive Order 14071, *Prohibiting New Investments in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression*, 87 Fed. Reg. 20999 (Apr. 8, 2022); *Expansion of Sanctions Against the Russian Industry Sector Under the Export Administration Regulations (EAR),* 87 Fed. Reg. 12856 (Mar. 8, 2022); Press Release, *Commerce Department Expands Restrictions on Exports to Russia and Belarus in Response to Ongoing Aggression in Ukraine,* U.S. Department of Commerce (Apr. 9, 2022), https://www.commerce.gov/news/press-releases/2022/04/commerce-department-expands-restrictions-exports-russia-and-belarus.

been alone in implementing increasingly strict sanctions and export controls against Russia—it has been joined by Canada, the U.K., the European Union and several other allies across the globe.[23] Accordingly, enhanced due diligence into business activities involving Russia and Ukraine should be undertaken for all targets—not just targets that are within U.S. jurisdiction. Such topics should include understanding whether the target currently is in compliance with existing sanctions and export controls, its future plans for the business (*i.e.*, continue, wind down or sell the business) and contingency plans if any of its business activities become prohibited by sanctions or export controls. In addition, it is also important to understand whether the target or any of the target's counterparties have dealings with sanctioned persons in Russia and to fully grasp the scope of those dealings. Comprehensive diligence would be required because even indirect dealings between a target and a sanctioned Russian person could result in regulatory issues.[24] For example, sanctions on several Russian banks have disrupted payment flows into and out of Russia even where the underlying transactions between non-bank counterparties do not breach sanctions. Given that hundreds of persons have been added to the sanctions lists in Q1 2022[25]—and we expect more to come—it is crucial for an acquiror to understand the target's potential liability under sanctions imposed by the U.S. or any other relevant jurisdiction. Under U.S. sanctions laws, acquired companies must be in compliance with relevant sanctions as of the closing date, and there is no grace period for a newly acquired company to become integrated into the acquiror's sanctions compliance program.[26] As a result, conducting thorough pre-closing sanctions-related due diligence and developing a plan to address any of the target's sanctions risks are crucial in the current regulatory environment.

Tax and Executive Compensation

Minimum Income Tax on the Wealthiest Taxpayers

In March 2022, President Biden's Fiscal Year 2023 Revenue Proposals (the "Revenue Proposals") proposed a minimum tax of 20% on total income, which would generally include unrealized capital gains for taxpayers with greater than $100 million in net worth.[27] This minimum tax liability would equal 20% of the sum of the taxpayer's taxable income and unrealized gains on assets, including ordinary assets, less the sum of the taxpayer's unrefunded, uncredited prepayments and regular tax.[28] Taxpayers with illiquid assets would be able to elect to include only the unrealized gain in tradeable assets in their minimum tax liability calculation.[29] However, such taxpayers would be subject to a deferral charge (not to exceed 10% of unrealized gains) on later realization of gains on the excluded (*i.e.*, non-tradeable) assets.[30] This proposal would be effective for taxable years beginning after December 31, 2022.[31] There appear to be significant political impediments to the enactment of this proposal.

Taxing Carried (Profits) Interests as Ordinary Income

Also in the Revenue Proposals, "carried interest" capital gain would be converted into income for services with a taxable-income floor of $400,000.[32] The Revenue Proposals would equalize the highest long-term capital gain rate to the highest ordinary-income rate, significantly reducing the tax benefits from carried interest arrangements.[33] Additionally, the change to carried interest would subject carried interest income to the self-employment tax regime and include certain anti-abuse rules.[34] The Revenue Proposals would also repeal the three-year carried interest limitation of Section 1061 of the Internal Revenue Code for only those taxpayers with taxable income

[23] *See, e.g.*, Fact Sheet, *United States, European Union, and G7 to Announce Further Economic Costs on Russia*, The White House (Mar. 11, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/fact-sheet-united-states-european-union-and-g7-to-announce-further-economic-costs-on-russia/.

[24] *See FAQ 400*, Office of Foreign Assets Control (last updated Aug. 13, 2014), https://home.treasury.gov/policy-issues/financial-sanctions/faqs/400.

[25] *See, e.g.*, Press Release, *U.S. Treasury Sanctions Russia's Defense-Industrial Base, the Russian Duma and Its Members, and Sberbank CEO*, U.S. Department of the Treasury (Mar. 24, 2022), https://home.treasury.gov/news/press-releases/jy0677.

[26] *See, e.g., A Framework for OFAC Compliance Commitments*, U.S. Department of the Treasury (May 2, 2019), https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20190502_33; Enforcement Release: April 1, 2022, *OFAC Settles with S&P Global, Inc. for $78,750 Related to Apparent Violations of the Ukraine-Related Sanctions Regulations in 2016 and 2017*, Office of Foreign Assets Control (Apr. 1, 2022), https://home.treasury.gov/system/files/126/20220401_spglobal.pdf; Enforcement Information for June 13, 2019, *Expedia Group, Inc. ("Expedia") Settles Potential Civil Liability for Apparent Violations of the Cuban Assets Control Regulations*, Office of Foreign Assets Control (June 13, 2019), https://home.treasury.gov/system/files/126/20190612_expedia.pdf.

[27] *General Explanations of the Administration's Fiscal Year 2023 Revenue Proposals*, United States Department of the Treasury (Mar. 2022), https://home.treasury.gov/system/files/131/General-Explanations-FY2023.pdf.

[28] *Id.* at 34.

[29] *Id.*

[30] *Id.* at 35.

[31] *Id.* at 36.

[32] *Id.* at 50.

[33] *Id.* at 31.

[34] *Id.* at 51.

exceeding $400,000.[35] This proposal would be effective for the taxable years beginning after December 31, 2022.[36]

Antitrust

POLICY DEVELOPMENTS

Listening Forums on Effects of M&A

On March 17, 2022, the DOJ and the Federal Trade Commission (the "FTC") jointly announced the launch of a series of listening forums focusing on markets commonly impacted by M&A activity that may reduce competition, including food and agriculture, healthcare, media and entertainment and technology.[37] Through these forums, the agencies are soliciting public input on ways to modernize federal merger guidelines to better detect and prevent anticompetitive deals. DOJ Assistant Attorney General Jonathan Kanter and FTC Chair Lina Khan will attend each event with staff from both agencies. The first listening forum, focusing on food and agriculture, was held on March 28, 2022.[38] All listening forums will be open to the public, webcast on the FTC's website, transcribed, posted online and included as part of the public record.

Spring Antitrust Enforcers Summit/ABA Antitrust Spring Meeting

On April 4, 2022, the DOJ and FTC held a Spring Enforcers Summit, during which AAG Kanter and Chair Khan reiterated their commitment to reconsidering antitrust enforcement frameworks to match market realities in view of alleged mounting evidence of high concentration across industries. A recurring theme at the Summit was the agencies' concern regarding transactions in which large firms acquire nascent threats to their business, and how to better identify and stop such transactions. Several antitrust authority representatives, including from outside the U.S., questioned the effectiveness and appropriateness of using "behavioral" remedies for vertical transactions, which seek to protect competition by prohibiting a newly merged firm from engaging in certain future conduct or requiring it to provide intellectual property licenses. In his opening remarks, AAG Kanter stressed that his agency is "[m]ore committed than ever to litigate" deals it views as anticompetitive.[39]

On April 8, 2022, AAG Kanter and Chair Khan participated in the Enforcers Roundtable at the ABA Antitrust Spring Meeting.[40] Chair Khan commented that due to the number of transactions facing the agency, she would like to see Congress extend the Hart-Scott-Rodino Act's 30-day waiting period to provide FTC staff with more time to thoroughly investigate deals. During a separate session, the FTC's Director of the Bureau of Competition, Holly Vedova, stated that the U.S. antitrust agencies are considering increasing the amount of data they require in their premerger notification form.

LEGISLATIVE DEVELOPMENTS

U.S. Congress

Prohibiting Anticompetitive Mergers Act

On March 16, 2022, Senator Elizabeth Warren and Representative Mondaire Jones introduced bicameral legislation that would define and make illegal all "prohibited mergers", including all deals valued at over $5 billion or resulting in market shares above 33% for sellers or 25% for employers. The legislation would also give the DOJ and the FTC stronger tools to reject deals in the first instance without court orders and establish procedures for antitrust agencies to conduct retrospective reviews and break up harmful deals.[41]

ENFORCEMENT

Federal Trade Commission

On January 25, 2022, the FTC commissioners voted 4–0 to authorize an administrative complaint and seek a preliminary injunction in federal court to block Lockheed Martin Corp.'s ("Lockheed") proposed $4.4 billion acquisition

[35] *Id.*

[36] *Id.*

[37] Press Release, *Justice Department and FTC Launch Listening Forums on Firsthand Effects of Mergers and Acquisitions*, DOJ (Mar. 17, 2022), https://www.justice.gov/opa/pr/justice-department-and-ftc-launch-listening-forums-firsthand-effects-mergers-and-acquisitions.

[38] *FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions: Food and Agriculture*, FTC (Mar. 28, 2022), https://www.ftc.gov/news-events/events/2022/03/ftc-justice-department-listening-forum-firsthand-effects-mergers-acquisitions-food-agriculture.

[39] *Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit*, DOJ (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

[40] *Assistant Attorney General Jonathan Kanter Virtually Participated in the Enforcers Roundtable at the ABA Spring Meeting*, DOJ (Apr. 8, 2022), https://www.justice.gov/opa/video/assistant-attorney-general-jonathan-kanter-virtually-participated-enforcers-roundtable-aba.

[41] Press Release, *Warren, Jones Introduce Bicameral Legislation to Ban Anticompetitive Mergers, Restore Competition, and Bring Down Prices for Consumers,* Sen. Elizabeth Warren (Mar. 16, 2022), https://www.warren.senate.gov/newsroom/press-releases/warren-jones-introduce-bicameral-legislation-to-ban-anticompetitive-mergers-restore-competition-and-bring-down-prices-for-consumers.

of Aerojet Rocketdyne Holdings, Inc. ("Aerojet").[42] The administrative complaint alleged that if the deal were allowed to proceed, Lockheed would use its control of Aerojet to harm defense contractors and further consolidate multiple markets critical to national security and defense. On February 13, 2022, Lockheed announced it had terminated the planned acquisition.[43]

On February 7, 2022, U.S. semiconductor chip supplier Nvidia Corporation ("Nvidia") announced that it would abandon its proposed $40 billion acquisition of U.K. chip design provider Arm Limited ("Arm").[44] The FTC had previously filed an administrative action to block the acquisition, alleging that because Arm's technology is a critical input that enables competition between Nvidia and its competitors in several markets, the proposed merger would give Nvidia the ability and incentive to use its control of this technology to undermine its competitors, reducing competition and ultimately resulting in reduced product quality, reduced innovation, higher prices and less choice.[45]

On February 17, 2022, the FTC commissioners voted 4-0 to authorize an administrative complaint and file a suit in federal court to block the proposed merger of Lifespan Corporation and Care New England Health System, Rhode Island's two largest healthcare providers.[46] The administrative complaint alleged that the deal was likely to increase prices and reduce quality of care for inpatient general acute care hospital services and inpatient behavioral health services in the state of Rhode Island and 19 nearby Massachusetts communities. On February 24, 2022, the parties terminated the proposed merger.[47]

On February 24, 2022, Chief Administrative Law Judge Michael Chappell announced the dismissal of antitrust charges in an April 2020 complaint issued by the FTC staff against tobacco company Altria Group, Inc. ("Altria") and electronic cigarette maker JUUL Labs, Inc. ("JUUL").[48] The complaint alleged that Altria and JUUL entered a series of agreements, including Altria's acquisition of a 35% stake in JUUL, that eliminated competition in violation of federal antitrust laws. Judge Chappell concluded that FTC staff failed to demonstrate both the anticompetitive effects of the non-compete provision and a reasonable probability that Altria would have competed in the e-cigarette market in the near future, through marketing a competing product independently, or through collaboration or acquisition. FTC staff have filed a notice of appeal of the decision.

Department of Justice Antitrust Division

On February 24, 2022, the DOJ filed a civil antitrust lawsuit in federal court to block UnitedHealth Group Incorporated's ("UnitedHealth") proposed $13 billion acquisition of Change Healthcare Inc.[49] The DOJ's complaint alleges that the acquisition would give UnitedHealth access to a vast amount of its rivals' competitively sensitive information that would allow it to gain an unfair advantage and harm competition in health insurance markets.[50] According to the complaint, the proposed transaction would also eliminate UnitedHealth's only major rival for first-pass claims editing technology, which health insurers use to help adjudicate claims. Trial is set to begin on August 1, 2022.

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[42] Press Release, *FTC Sues to Block Lockheed Martin Corp.'s $4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc.*, FTC (Jan. 25, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-sues-block-lockheed-martin-corporations-44-billion-vertical-acquisition-aerojet-rocketdyne.

[43] Press Release, *Statement Regarding Termination of Lockheed Martin Corporation's Attempted Acquisition of Aerojet Rocketdyne Holdings Inc.*, FTC (Feb. 15, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-lockheed-martin-corporations-attempted-acquisition-aerojet.

[44] Press Release, *Statement Regarding Termination of Nvidia Corp.'s Attempted Acquisition of Arm Ltd.*, FTC (Feb. 14, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-nvidia-corps-attempted-acquisition-arm-ltd.

[45] Press Release, *FTC Sues to Block $40 Billion Semiconductor Chip Merger*, FTC (Dec. 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger.

[46] Press Release, *FTC and Rhode Island Attorney General Step in to Block Merger of Rhode Island's Two Largest Healthcare Providers*, FTC (Feb. 17, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-rhode-island-attorney-general-step-block-merger-rhode-islands-two-largest-healthcare-providers.

[47] Press Release, *Statement Regarding Termination of Attempted Merger of Rhode Island's Two Largest Healthcare Providers*, FTC (Mar. 2, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/03/statement-regarding-termination-attempted-merger-rhode-islands-two-largest-healthcare-providers.

[48] Press Release, *Administrative Law Judge Dismisses FTC Antitrust Complaint Against Altria Group and JUUL Labs, Inc.*, FTC (Feb. 24, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/administrative-law-judge-dismisses-ftc-antitrust-complaint-against-altria-group-juul-labs-inc.

[49] Press Release, *Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare*, DOJ (Feb. 24, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare.

[50] Complaint, *United States v. UnitedHealth Grp.*, No. 1:22-cv-00481 (D.D.C. Feb. 24, 2022).

On March 17, 2022, the DOJ filed a civil antitrust lawsuit in federal court to block Grupo Verzatec S.A. de C.V.'s $360 million acquisition of Crane Co.[51] The DOJ's complaint alleges that the proposed transaction would harm competition in the production and sale of pebbled fiberglass reinforced plastic (FRP) wall panels, whose product and performance characteristics make it the wall covering of choice for many restaurants, grocery stores, hospitals and convenience stores across the U.S.[52] A trial date has not been set.

On March 29, 2022, Finnish cargo handling equipment company Cargotec Corporation announced it had abandoned its intended $5 billion merger with Konecranes Plc one day after the DOJ informed the parties that their settlement proposal was not sufficient to address concerns that the proposed combination would eliminate important competition in four types of shipping container handling equipment used by port customers to move goods in the global supply chain.[53]

PERSONNEL DEVELOPMENTS

On March 30, 2022, the U.S. Senate voted 51-50, with Vice President Harris breaking a 50-50 tie, to advance President Biden's nominee to be the fifth FTC commissioner, Alvaro Bedoya, to a final confirmation vote. His appointment would give Democrats a 3-2 voting majority. Bedoya is the Founding Director of the Center on Privacy and Technology at Georgetown University Law Center, where he is also a visiting professor. In 2016, Bedoya co-authored a comprehensive report on law enforcement face recognition and the implications for privacy, civil liberties and civil rights. He previously served as Chief Counsel of the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law.

Activism[54]

In April 2022, Lazard released its *Q1 2022 Review of Shareholder Activism* (the "Lazard Report"), which offers key observations regarding activist activity levels and shareholder engagement in the first quarter of 2022.

Key findings/insights from the Lazard Report include:

- Activism in Q1 2022 continued Q4 2021's active pace with 73 new campaigns launched globally, marking the busiest quarter on record globally and the busiest six-month period globally for activism since 2018 when combined with Q4 2021.
- U.S. activism campaigns continued to account for the largest share of global activity, accounting for ~60% of new campaigns and ~55% of capital deployed.
- Despite a decline in activity following the onset of the Ukraine War, Europe registered 15 new activist campaigns in Q1 2022, representing a 50% increase compared to Q1 2021.
- Approximately 30% of all activist campaigns in Q1 2022 featured an M&A-related objective, down from ~47% in Q1 2021.[55] Of these campaigns, demanding an outright sale was the most common activism approach, which is a change from recent periods where scuttle/sweeten campaigns were the most common approach.
- Thirty-eight board seats were secured by activists in Q1 2022, with 37 being secured via settlement and one secured by proxy fight. Eighty-five seats remain "in play" heading into Q2 2022, including a number of notable potential contests.
- The SEC's adoption of a universal proxy rule does not take effect until August 2022, but activists have already begun requesting universal proxy usage in recent campaigns.

[51] Press Release, *Justice Department Sues to Block Verzatec's Proposed Acquisition of Crane*, DOJ (Mar. 17, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-verzatec-s-proposed-acquisition-crane.

[52] Complaint, *United States v. Grupo Verzatec S.A. de C.V., et al.*, No. 1:22-cv-01401 (N.D. Ill. Mar. 17, 2022).

[53] Press Release, *Shipping Equipment Giants Cargotec and Konecranes Abandon Merger After Justice Department Threatens to Sue*, DOJ (Mar. 29, 2022), https://www.justice.gov/opa/pr/shipping-equipment-giants-cargotec-and-konecranes-abandon-merger-after-justice-department.

[54] Unless otherwise indicated, all data regarding activism is from Lazard, *Q1 2022 Review of Shareholder Activism* (Apr. 19, 2022), https://www.lazard.com/media/452060/lazards-q1-2022-review-of-shareholder-activism-vff.pdf, which includes all data for campaigns conducted globally by activists at companies with market capitalizations greater than $500 million at the time of campaign announcement and select campaigns with market capitalizations less than $500 million at time of announcement included during the COVID-19 pandemic-induced market downturn; companies that are spun off as part of a campaign process are counted separately.

[55] Lazard, *Q1 2021 Review of Shareholder Activism* (Apr. 14, 2021), https://www.lazard.com/media/451619/lazards-q1-2021-review-of-shareholder-activism-vf.pdf.

- Public companies continue to experience increased Environmental, Social and Governance ("ESG") pressure.

TRENDS

Activism in Q1 2022 While Many Board Seats Remain "In Play" Going into Q2 2022

Q1 2022 saw a spike in campaigns initiated and capital deployed compared to Q1 2021 levels, with 73 new campaigns in Q1 2022, up from 55 in Q1 2021, and $15.8 billion of capital deployed in new campaigns in Q1 2022, up from $10.8 billion in Q1 2021.

Thirty-eight board seats in total were secured by activists in Q1 2022 and 85 seats remain "in play" going into Q2 2022, including potential contests at Kohl's Corporation ("Kohl's") (10 seats), Zendesk, Inc. ("Zendesk") (4 seats) and LivePerson, Inc. (4 seats). The recent trend of proportionally fewer board seats being won through proxy contests continued, as all but one of the board seats secured by activists in Q1 2022 were won through settlements as opposed to final proxy votes. Starboard Value LP's high-profile proxy fight for four board seats at Huntsman Corporation ("Huntsman") was resolved in late March, with all 10 of Huntsman's nominees prevailing at the annual shareholder meeting.

There were 62 activists waging campaigns in Q1 2022, more than half of the total 122 activists in all of 2021 and an increase from 51 activists in Q1 2021.[56] "First time" activists accounted for ~34% of Q1 2022 activists, accounting for the highest proportion of activity since 2013.[57] Icahn Enterprises L.P. and Ancora Holdings Group, LLC ("Ancora") were prolific in Q1 2022 launching four new campaigns each, matching the same number of campaigns each launched during all of 2021.

Approximately 30% of all activist campaigns during Q1 2022 were related to M&A, down from ~47% in Q1 2021. In a departure from recent years, demands for an outright sale were the most common M&A activism approach, overtaking opposition to announced deals; a change in line with the reduced deal volume in Q1 2022 relative to prior quarters. Notable examples of demands for outright sale include Everbridge, Inc./Ancora and Cano Health, Inc./Third Point LLC. The potential for more interplay between private equity and activism is drawing attention as activists partner with private equity to submit bids, traditional private equity engages in activist behavior and activists pursue their own private equity strategies.

Activism Campaign Activity Continued to Increase in the U.S. and Increased in Europe Amid the Ukraine War

U.S. activism activity during Q1 2022 continued its 2021 rebound, as the 44 campaigns initiated accounted for ~60% of global campaigns in Q1 2022 (compared to 37 campaigns accounting for ~45% in Q1 2021 and 27 campaigns accounting for ~54% in Q4 2021) and ~55% of global capital deployed (compared to ~54% in Q1 2021).[58] U.S. companies with market capitalizations of less than $2 billion remained the primary focus of activists, accounting for ~40% of U.S. campaigns launched in Q1 2022. While the technology sector remained a leading sector for capital deployment, accounting for ~34% of U.S. capital deployed, the industrials and the consumer sectors increased compared to Q1 2021 levels, together accounting for ~46% of U.S. capital deployed in Q1 2022, compared to only ~29% in Q1 2021. The retail sector, which spiked in 2021 at ~16% of U.S. capital deployed, returned to its 2017-2020 average level of ~3%.[59]

European activity also rebounded in Q1 2022, with 15 campaigns initiated, representing a 50% increase from 10 campaigns in Q1 2021 and continuing the Q4 2021 momentum of 16 campaigns initiated.[60] French companies were disproportionately targeted in Q1 2022, accounting for ~27% of European targets, nearly three times France's historical share. The Ukraine War has led to significant market destabilization and monopolization of the news cycle, which potentially affected the pace of activism. European activity declined ~40% in March 2022 compared to the prior month, following the onset of the Ukraine War (compared to U.S. activity, which increased by ~62% during the same period). This decline in campaigns was led primarily by a decrease in

[56] *Id*.

[57] Lazard, 2018 *Review of Shareholder Activism* (Jan. 9, 2019), https://www.lazard.com/media/450805/lazards-2018-review-of-shareholder-activism.pdf.

[58] Lazard, *Q1 2021 Review of Shareholder Activism* (Apr. 14, 2021), https://www.lazard.com/media/451619/lazards-q1-2021-review-of-shareholder-activism-vf.pdf; Lazard, *2021 Review of Shareholder Activism* (Jan. 19, 2022), https://www.lazard.com/media/452017/lazards-2021-review-of-shareholder-activism_vff.pdf.

[59] Lazard, *Q1 2021 Review of Shareholder Activism* (Apr. 14, 2021), https://www.lazard.com/media/451619/lazards-q1-2021-review-of-shareholder-activism-vf.pdf.

[60] Lazard, *2021 Review of Shareholder Activism* (Jan. 19, 2022), https://www.lazard.com/media/452017/lazards-2021-review-of-shareholder-activism_vff.pdf.

non-European activists, who historically have initiated ~41% of campaigns targeting European companies. In Q1 2022, the proportion of campaigns initiated by non-European activists fell to ~27%, the lowest proportion since it fell to ~25% during the COVID-19 outbreak, suggesting that non-European activists may prefer to focus on local targets rather than commit capital in foreign regions during major crises. Additional factors during these major crises (*i.e.*, desire not to appear tone deaf, limited media coverage and market instability) may cause some public activism to be replaced by private agitation, which may later come to light.

Public Company ESG Pressure Continues To Grow

Public companies continue to experience increased ESG pressure. ESG-related activism continues to grow as evidenced by the increasing number of environmental and social proposals ("E&S Proposals") submitted for consideration at annual shareholder meetings and the SEC's long-awaited rules to enhance and standardize climate-related disclosures for public companies. For a summary of the SEC's climate change disclosure rule, please refer to the *SEC Updates* subsection below. If the SEC's climate change proposal is approved, the increased transparency on corporate climate strategies will likely further perpetrate ESG proposal action, which is currently at heightened levels. In Q1 2022, there have been 438 E&S Proposals submitted, which is almost the same amount as the 443 submitted for all of 2021.

Environmental-related proposals continue to comprise a substantial portion of the E&S Proposals, with ~20% of E&S Proposals having an environmental theme. The continued momentum of environmental-related proposals is evidenced by the substantial increase in the number of environmental-related proposals submitted for consideration at annual meetings in Q1 2022. In Q1 2022, there have been 89 environmental-related proposals submitted for consideration at annual meetings, which is more than the 74 that were submitted for all of 2021 and the 42 that were submitted for all of 2020. The increase in the number of environmental-related proposals is likely driven by increasing demands for companies to disclose their emissions and "net zero" plans.

SELECT CAMPAIGNS/DEVELOPMENTS

Company	Market Capitalization ($ in billions)[61]	Activist	Development/Outcome
McDonald's Corporation	$187.5	Carl C. Icahn	• In February 2022, it was reported that Carl C. Icahn privately threatened a proxy contest for board representation if the McDonald's Corporation ("McDonald's") continued to keep pregnant pigs in gestation crates. • In February 2022, Icahn nominated Leslie Samuelrich and Maisie Ganzler for election to the McDonald's board at the 2022 annual meeting.

[61] Market capitalization as of campaign announcement according to Bloomberg L.P.

SELECT CAMPAIGNS/DEVELOPMENTS

Company	Market Capitalization ($ in billions)[61]	Activist	Development/Outcome
Toshiba Corporation	$18.8	3D Investment Partners Pte Ltd.	• In January 2022, 3D Investment Partners Pte Ltd. ("3D") requested that Toshiba Corporation ("Toshiba") convene a special meeting to propose an amendment of the company's articles to require the implementation of the company's previously announced plan of separating into three distinct companies, and requested that the strategic review committee consider new alternatives for increasing corporate value. • In February 2022, Toshiba announced that it would only seek to spin off its device business and break up into two companies rather than three. • In March 2022, Institutional Share Services ("ISS"), along with other activists, opposed Toshiba's reorganization plan. • In March 2022, Toshiba announced that shareholders rejected the company's reorganization plan and proposals from 3D to seek buyout offers. • In April 2022, 3D sent a letter to Toshiba requesting that Toshiba establish and disclose a mid-range plan, solicit indications of interest from potential purchasers and consult with shareholders regarding the board's composition. • In April 2022, Toshiba announced that it would no longer pursue splitting up the company and set up a committee to consider strategic alternatives, including bids to take Toshiba private.
Zendesk, Inc.	$14.4	JANA Partners LLC	• In February 2022, JANA Partners LLC ("JANA") sent a letter to the Zendesk board nominating four individuals for board election, urging that they would be capable of executing their fiduciary duties and engage with potential purchasers of the company. Zendesk confirmed it had received the notice of nomination and stated it would review. • In February 2022, Zendesk terminated its proposed acquisition of Momentive Global Inc. after it failed to pass a shareholder vote. • In March 2022, JANA sent a letter to the Zendesk board suggesting they have been delaying a 2022 Annual Meeting and urging them to set a record date and date for the 2022 Annual Meeting, since no record date had been provided in a timeframe consistent with past practices.
Kohl's Corporation	$6.9	Macellum Advisors GP, LLC	• In January 2022, Macellum Advisors GP, LLC ("Macellum") sent a letter to Kohl's shareholders expressing the need for urgent boardroom changes due to Kohl's underperformance. • In February 2022, in response to Kohl's rejection of a takeover interest from a private equity firm and adoption of a limited-duration poison pill, Macellum issued a statement of discontent. • In February 2022, Macellum nominated a slate of 10 individuals for election to the Kohl's board at the 2022 annual meeting.

SELECT CAMPAIGNS/DEVELOPMENTS

Company	Market Capitalization ($ in billions)[61]	Activist	Development/Outcome
Nielsen Holdings plc	$6.3	Elliot Investment Management L.P.; WindAcre Partners LLC	• On March 14, 2022, it was reported that Elliot Investment Management L.P. ("Elliot"), along with a group of private equity investors, were in advanced talks to buy Nielsen Holdings plc ("Nielsen") for roughly $15 billion, including the assumption of debt. • On March 22, 2022, the Nielsen board rejected the takeover offer, arguing that the proposal "significantly undervalues" the company and its growth prospects. • On March 29, 2022, Nielsen entered into a definitive purchase agreement to be acquired by a private equity consortium led by Evergreen Coast Capital Corporation, an affiliate of Elliot, and Brookfield Business Partners L.P. for approximately $16 billion, including the assumption of debt. • In April 2022, WindAcre Partners LLC increased its stake in Nielsen from 9.6% to 27.3% in an attempt to put itself in a position to block the proposed acquisition of Nielsen and submitted a binding resolution for shareholders to consider that would seek to block Nielsen from de-listing ordinary shares on the New York Stock Exchange whose owners refuse to tender.

Corporate Governance

PROXY ADVISOR UPDATES

ISS Debuts New Data Verification Portal[62]
ISS launched a new data verification portal for U.S. corporations that will significantly expand ISS's current program. The new portal will provide more than 400 governance and compensation datapoints available for companies to verify their own information against ISS's proxy research. Examples of these datapoints include those contained in ISS's proxy research reports, such as individual director information, board and committee descriptions, and executive compensation details.

ASSET MANAGER 2022 PRIORITIES

BlackRock 2022 CEO Letter[63]
In January 2022, BlackRock, Inc. ("BlackRock") CEO Larry Fink published his annual letter to CEOs. Fink touched on several of the hot topics in 2022, including stakeholder capitalism, impacts of COVID-19 on the workforce, increases in the availability of capital, climate change and sustainability, and ESG as it relates to shareholder votes. He stressed that CEOs must take the lead in setting their company's long-term approach and strategic plans, and must reach out directly to and engage with shareholders. Additionally, he noted high resignation rates and high wage growth rates, emphasizing that workers are seeking more from their employers and that companies will need to adjust to the new post-COVID-19 workforce reality. Fink reiterated that climate risk should be considered an investment risk and asked CEOs to consider how their company is reacting. Lastly, Fink highlighted that BlackRock is launching a Center for Stakeholder Capitalism, which will bring CEOs, investors, policy experts and academics together to explore stakeholder capitalism in greater depth.

[62] Press Release, *Institutional Shareholder Services Launches New Portal for Proxy Research Data Verification*, ISS (Jan. 5, 2022), https://insights.issgovernance.com/posts/institutional-shareholder-services-launches-new-portal-for-proxy-research-data-verification.
[63] Larry Fink, *Larry Fink's 2022 Letter to CEOs* (Jan. 17, 2022), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

BlackRock Engagement Priorities[64]
In February 2022, BlackRock released its Investment Stewardship Engagement Priorities for 2022. BlackRock's engagement priorities are focused on:

- **Board quality and effectiveness:** For companies that BlackRock seeks to directly engage with in order to understand the board's responsibilities, BlackRock will reach out to those directors who are non-executive, independent and tasked with meeting shareholders. BlackRock also encourages companies to disclose the manner in which they are achieving board diversity and self-identified demographic data for directors.

- **Strategy, purpose and financial resilience:** BlackRock looks to companies to discuss how their business has accounted for sustainability risks and opportunities, how their strategies are aligned with creating long-term value, and how stakeholder interests are considered in decision making.

- **Incentives aligned with value creation:** BlackRock encourages companies to disclose incentives that are rewarded for long-term value creation and sustained financial performance.

- **Climate and natural capital:** BlackRock looks to companies to discuss how their business models will align with global warming limited to below 2°C, global net zero emissions by 2050 and sustainable uses of natural resources.

- **Company impacts on people:** BlackRock urges companies to disclose steps taken towards maintaining a diverse workforce and to demonstrate importance given to human capital management.

State Street 2022 Proxy Voting Agenda and CEO Letter[65]
On January 12, 2022, State Street Global Advisors ("State Street") CEO Cyrus Taraporevala released his annual letter to board members of companies within the State Street portfolio outlining State Street's 2022 proxy voting agenda, including:

- **Climate-related disclosures:** State Street is expecting companies listed on the major U.S., Canadian, U.K., European and Australian indices to align their climate-related disclosures with the Task Force on Climate-Related Financial Disclosures ("TCFD") framework. Companies should disclose board oversight of climate-related risks, Scope 1 and Scope 2 emissions and greenhouse gas ("GHG") emission reduction targets. State Street will vote against directors in companies that do not meet disclosure expectations. State Street also released expectations for companies that have adopted climate transition plans (such as decarbonization and climate governance), and, starting in 2023, will make voting decisions on companies not meeting the disclosure expectations.

- **Diversity disclosures:** State Street is expecting all companies to disclose information related to diversity, equity and inclusion efforts as it relates to: (i) board oversight; (ii) strategy; (iii) goals; (iv) metrics of both its workforce and board; and (v) board diversity. State Street will vote against the Nominating Committee chairs of S&P 500 and FTSE 100 companies that fail to disclose board diversity or fail to have at least one director from an underrepresented group and will vote against the Compensation Committee chairs of S&P 500 companies that fail to disclose an EEO-1 report. State Street now expects all companies to include one female director and, in the 2023 proxy season, will expect the boards of companies to be comprised of 30% female directors and may vote against the Nominating Committee chairs if these requirements are not met.

- **Human capital disclosure:** State Street expects companies to disclose information related to human capital management as it relates to: (i) board oversight; (ii) strategy; (iii) compensation; (iv) voice; and (v) diversity, equity and inclusion. State Street may act against companies not offering such disclosure, including supporting shareholder proposals targeted at further disclosure or voting against relevant directors. State Street is also asking companies to disclose director overboarding policies. State Street will waive its voting policy and vote in support of a director who sits on more than four public company boards or a board chair or lead independent director who sits on more than three public company boards if the company has a director overboarding policy that includes a number of specific disclosures.

[64] BlackRock, *BlackRock Investment Stewardship Engagement Priorities* (Feb. 2022), https://www.blackrock.com/corporate/literature/publication/blk-stewardship-priorities-final.pdf.

[65] Cyrus Taraporevala, *CEO's Letter on Our 2022 Proxy Voting Agenda* (Jan. 12, 2022), https://www.ssga.com/us/en/individual/mf/insights/ceo-letter-2022-proxy-voting-agenda.

Updates to Vanguard Voting Policy[66]

- **Director capacity and commitments:** The Vanguard Group, Inc. ("Vanguard") explained that it will typically not support reelecting a director who is a named executive officer ("NEO") and sits on more than two public boards. Functionally, this means an NEO can sit on their "home board" and another public board, or two outside public boards. Additionally, Vanguard will look for companies to adopt a policy on director overboarding and disclose how it will implement such policy.

- **Diversity and qualifications disclosure:** Vanguard specified that board diversity disclosure should include gender, race, ethnicity, tenure, skills and experience of directors on a self-identified basis, either at an aggregate level or individual level. Vanguard will generally vote for shareholder proposals seeking such disclosure and proposals asking for board diversity policies.

- **Oversight failings:** Vanguard will vote against a director or committee if there is material risk of oversight failure with respect to climate risk. Specifically, Vanguard will assess the risk's materiality, any impact disclosures will have to price the risk, any company business strategies already disclosed, including risk mitigation plans, and company-specific context, market regulations and expectations.

- **Hybrid/virtual meetings:** Vanguard confirmed it will support the use of hybrid or virtual meetings, provided that shareholder rights are not limited.

- **Key committee independence:** Vanguard clarified that if a board does not have a nominating and governance committee, only independent directors should participate in nominating directors.

ESG UPDATES

ISSB Launches Consultation on First Two Proposed Standards[67]

On March 31, 2022, the International Sustainability Standards Board ("ISSB") launched a consultation on its first two proposed standards in exposure drafts for general requirements for disclosure of sustainability-related financial information and climate-related disclosures. The two exposure drafts build upon the recommendations of the TCFD and incorporate industry-based disclosure requirements derived from Sustainability Accounting Standards Board ("SASB") standards. The comment period closes on July 29, 2022, and the ISSB aims to issue the new standards by the end of 2022. On March 31, 2022,[68] the ISSB also communicated plans for building upon the SASB Standards and for embedding SASB's industry-based standards development approach into the ISSB's standards development process. The SASB Standards will transition into IFRS Sustainability Disclosure Standards and will be owned by the IFRS Foundation in June 2022. The ISSB is expected to consult on its standard-setting priorities later in 2022, including to request feedback on the sustainability-related information needs of investors and on further development of industry-based requirements (building on SASB standards).

SEC UPDATES

SEC Proposes Amendments to Form PF[69]

On January 26, 2022, the SEC proposed amendments to Form PF, the confidential reporting form for investment advisers to private funds and certain commodity pool operators and commodity trading advisors. The proposed new rules would mandate hedge fund and private equity fund advisers to file a Form PF within one business day after an event that indicates stress or potential harm to investors or the financial system. As a result, the Financial Stability Oversight Council and the SEC would be provided with more timely disclosure. Additionally, the proposal decreases the

[66] Vanguard, *Proxy Voting Policy for U.S. Portfolio Companies* (Jan. 2022), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/US_Proxy_Voting.pdf.

[67] IFRS Foundation, *ISSB Delivers Proposals that Create Comprehensive Global Baseline of Sustainability Disclosures* (Mar. 31, 2022), https://www.ifrs.org/news-and-events/news/2022/03/issb-delivers-proposals-that-create-comprehensive-global-baseline-of-sustainability-disclosures/.

[68] IFRS Foundation, *ISSB Communicates Plans to Build on SASB's Industry-Based Standards and Leverage SASB's Industry-Based Approach to Standards Development* (Mar. 31, 2022), https://www.ifrs.org/news-and-events/news/2022/03/issb-communicates-plans-to-build-on-sasbs-industry-based-standards/.

[69] Press Release, *SEC Proposes Amendments to Enhance Private Fund Reporting*, SEC (Jan. 26, 2022), https://www.sec.gov/news/press-release/2022-9.

reporting threshold from $2 billion to $1.5 billion for private equity advisers. The proposal also requires large private equity funds and liquidity funds to offer enhanced disclosure on information used for risk assessments. The comment period closed on March 21, 2022.

SEC Proposes Rule Amendments To Modernize Beneficial Ownership Reporting[70]

On February 10, 2022, the SEC proposed amendments to Sections 13(d) and 13(g) of the Securities Exchange Act of 1934. 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. The comment period on the proposed amendments closed on April 11, 2022.

SEC Proposes Rules To Enhance and Standardize Cybersecurity-Related Disclosure for Public Companies[71]

On March 9, 2022, the SEC proposed new rules that would require public companies to disclose cybersecurity incidents, risk management, strategy and governance in their SEC filings. In particular, a public company would have four business days to report under a new Item 1.05 of Form 8-K any material cybersecurity incident, to be triggered based on a determination of materiality. Regulation S-K would also be updated to require public companies to provide updates on previously reported cybersecurity incidents on Forms 10-Q and 10-K and Form 20-F for foreign private issuers. Companies would also be required to disclose on Form 10-K policies and procedures on cybersecurity risks and their boards' oversight of and management's role in assessing and managing such risks. Companies would be asked to list any members of their boards of directors who have expertise in cybersecurity and specify the nature of such expertise in their Forms 10-K and proxy statements. The comment period on the proposed new rules will close on May 9, 2022.

SEC Proposes Landmark Rules To Enhance and Standardize Climate-Related Disclosures[72]

On March 21, 2022, the SEC proposed long-awaited rules to enhance and standardize climate-related disclosures for public companies. The proposed rules include significant and detailed line-item disclosures in a number of climate-related areas, such as climate risk identification, management and governance; requirements to report Scope 1 and Scope 2 emissions, and if material or if included in an emissions target, Scope 3 emissions; mandatory third-party attestation over Scope 1 and Scope 2 emissions; requirements to report GHG emission reduction targets, if any, and related information about targets and goals; and new requirements under Regulation S-X requiring climate-specific disclosures in a new note to registrants' audited financial statements. The requirements will apply to both domestic and foreign private issuers. A phase-in period for certain requirements is included, with the compliance date dependent on a registrant's filer status. There is also an additional phase-in period for Scope 3 emissions disclosure requirements and certain attestations. The comment period on the proposed new rules will close on May 20, 2022.

SEC Proposes Rules Requiring Enhanced Disclosure for SPAC Transactions[73]

On March 30, 2022, the SEC proposed rules that will enhance disclosure required in conjunction with transactions involving SPACs. The new rules would require additional disclosures to public shareholders in connection with SPAC and de-SPAC transactions about SPAC sponsors, conflicts of interest and sources of dilution, as well as the fairness of de-SPAC transactions to the SPAC's public shareholders (as contrasted with fairness to the SPAC) and related financing information. If adopted as proposed, this requirement would effectively

[70] Cravath, Swaine & Moore, *SEC Proposes Rule Amendments To Modernize Beneficial Ownership Reporting* (Feb. 25, 2022), https://www.cravath.com/news/sec-proposes-rule-amendments-to-modernize-beneficial-ownership-reporting.html.

[71] Cravath, Swaine & Moore, *SEC Proposes Rules To Enhance and Standardize Cybersecurity-Related Disclosure for Public Companies* (Mar. 17, 2022), https://www.cravath.com/news/sec-proposes-rules-to-enhance-and-standardize-cybersecurityrelated-disclosure-for-public-companies.html.

[72] Cravath, Swaine & Moore, *SEC Proposes Landmark Rules To Enhance and Standardize Climate-Related Disclosures* (Mar. 29, 2022), https://www.cravath.com/news/sec-proposes-landmark-rules-to-enhance-and-standardize-climaterelated-disclosures.html.

[73] Press Release, *SEC Proposes Rules to Enhance Disclosure and Investor Protection Relating to Special Purpose Acquisition Companies, Shell Companies, and Projections*, SEC (Mar. 30, 2022), https://www.sec.gov/news/press-release/2022-56.

mandate fairness opinions in de-SPAC transactions. The proposed rules would also make the forward-looking statements liability safe harbor granted by the Private Securities Litigation Reform Act of 1995 unavailable in de-SPAC filings. For de-SPAC transactions, the proposed rules "clarify" that underwriters in the SPAC initial public offering would also be deemed to be statutory underwriters in the de-SPAC, if the underwriter takes steps to facilitate the de-SPAC or any related financing transaction (or otherwise participates, directly or indirectly, in the de-SPAC). For SPAC transactions, if the SPAC satisfies certain proposed conditions related to its duration, asset composition, business purpose and activities, it will not need to register as an "investment company" under the Investment Company Act of 1940. The comment period on the proposed new rules will close on the later of May 31, 2022 or 30 days from publication in the Federal Register.

SEC Issues New Staff Accounting Bulletin No. 121 on Accounting for Crypto-Assets[74]

On March 31, 2022, the SEC published Staff Accounting Bulletin ("SAB") No. 121 to address accounting for SEC filers that have obligations to safeguard crypto-assets held for their platform users. SAB No. 121 instructs relevant SEC filers to record on their balance sheets their obligations to safeguard crypto-assets as liabilities and the crypto-assets held for their platform users as assets. The safeguarding liability should be measured at initial recognition and at each reporting date at the fair value of crypto-assets that the SEC filer is responsible for holding for its platform users. Assets should be recognized at the same time that it recognizes the safeguarding liability, measured at initial recognition and at each reporting date at the fair value of the crypto-assets held for its platform users. In practice, SAB No. 121 will have the overall effect of increasing both sides of the balance sheet. This SAB is effective as of April 11, 2022 for those in process of registering securities, with a transition period for already reporting companies until its financial statements covering the first interim or annual period ending after June 15, 2022. Registrants will not be required to restate prior periods.

SEC Posts New CDIs Related to M&A Topics and SPACs[75]

The SEC's Division of Corporation Finance issued new M&A-related Compliance and Disclosure Interpretations ("CDIs") on March 22, 2022. The CDIs addressing Form 8-Ks specify which material terms and conditions of a material definitive agreement should be disclosed under Item 1.01 and whether the material definitive agreement should be filed as an exhibit to Item 1.01. The CDIs on proxy rules and Schedules 14A and 14C detail when a private target's public communications may be considered soliciting materials under the proxy rules, when a target can avail itself of Rule 14a-12 for public communications when it will not be filing its own definitive proxy statement and when an acquiror can avail itself of Rule 14a-12 for public communications when it will not be filing a definitive proxy statement but the target will. The CDI regarding SPACs notes that although SPAC redemptions tend to take the form of a tender offer (*i.e.*, SPAC security holders are given a limited time to request redemptions), if the SPAC sponsor also plans to purchase shares outside of the redemption offer, SEC Staff will not object to such purchases as long as certain listed conditions are satisfied.

Comment Period Reopened on Proposed Pay Versus Performance Rules[76]

The SEC reopened the comment period for its proposed pay versus performance rules, originally proposed in 2015 to fulfill mandates under the Dodd-Frank Act. The proposed rules will require companies to disclose more information describing the relationship between executive compensation and its financial performance. The comment period closed on March 4, 2022.

[74] Staff Accounting Bulletin, *Staff Accounting Bulletin No. 121*, SEC (Mar. 31, 2022), https://www.sec.gov/oca/staff-accounting-bulletin-121.

[75] Compliance and Disclosure Interpretations, *Exchange Act Form 8-K*, SEC (Mar. 22, 2022), https://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm#102.04; Compliance and Disclosure Interpretations, *Proxy Rules and Schedules 14A/14C*, SEC (Mar. 22, 2022), https://www.sec.gov/corpfin/proxy-rules-schedules-14a-14c-cdi#101.02; Compliance and Disclosure Interpretations, *Tender Offers and Schedules*, SEC (Mar. 22, 2022), https://www.sec.gov/divisions/corpfin/guidance/cdi-tender-offers-and-schedules.htm#166.01.

[76] Cravath, Swaine & Moore, *SEC Reopens Comment Period for Proposed Pay Versus Performance Rule* (Feb. 4, 2022), https://www.cravath.com/news/sec-reopens-comment-period-for-proposed-pay-versus-performance-rule.html.

PERSONNEL ANNOUNCEMENTS

January 21, 2022 marked Commissioner Elad L. Roisman's final day at the SEC.[77] On March 15, 2022, Commissioner Allison Herren Lee announced that she will not seek a second term as a Commissioner and will step down from the SEC once her successor is confirmed.[78] Her appointment is set to expire in June 2022. On April 6, 2022, President Biden announced his intent to fill Commissioner Lee's Democratic seat with Jamie Lizárraga and the Republican vacancy created by Commissioner Roisman's resignation with Mark Uyeda.[79]

On January 10, 2022, the SEC swore in Erica Y. Williams as Chair of the Public Company Accounting Oversight Board.[80] Chair Williams' initial term is set to expire on October 24, 2024.

[77] Statement, *Departing Statement*, SEC (Jan. 21, 2022), https://www.sec.gov/news/statement/roisman-departure-statement-012122.

[78] Statement, *Statement on Planned Departure from the Commission*, SEC (Mar. 15, 2022), https://www.sec.gov/news/statement/lee-20220315.

[79] Statements and Releases, *President Biden Announces Key Nominees*, The White House (Apr. 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/president-biden-announces-key-nominees-10/.

[80] News Release, *Erica Y. Williams Sworn in as PCAOB Chair*, PCAOB (Jan. 10, 2022), https://pcaobus.org/news-events/news-releases/news-release-detail/erica-y-williams-sworn-in-as-pcaob-chair.