Cravath Quarterly Review
M&A, Activism and Corporate Governance

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Q1 2021

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Mergers & Acquisitions

TRENDS[1]

After the strongest quarter in global M&A activity in over a decade during Q4 2020, global M&A momentum continued in Q1 2021, with $1.16 trillion in announced deal value making Q1 2021 the most active first quarter since at least 2001.[2] The strength of Q1 2021, combined with the subdued M&A activity during Q1 2020 caused by the onset of the COVID-19 pandemic, resulted in an overall year-over-year increase by deal value of ~96.8%. The U.S. market continued its strong performance from Q4 2020 with 1,595 deals worth $563 billion announced in Q1 2021, which is the highest deal value for a quarter in the U.S. since at least 2001. All global regions saw year-over-year increases by deal value compared to Q1 2020, including North America, which had a ~176.2% increase in deal value, Europe, which had a ~51.4% increase in deal value, and the Asia Pacific region (excluding Japan), which had a ~28.7% increase in deal value. Private equity recorded its highest market share by volume of M&A activity since at least 2001, accounting for ~22.8% of all deals by volume and ~25% of all deals by value in Q1 2021. Special purpose acquisition companies ("SPACs") were responsible for $219.5 billion in deal value across 99 deals during Q1 2021, which was greater than the combined SPAC deal value during all of 2020.[3] In terms of sector activity, the Technology, Media and Telecommunications ("TMT") sector was the most active sector by deal value, accounting for ~29.7% of global deal value.

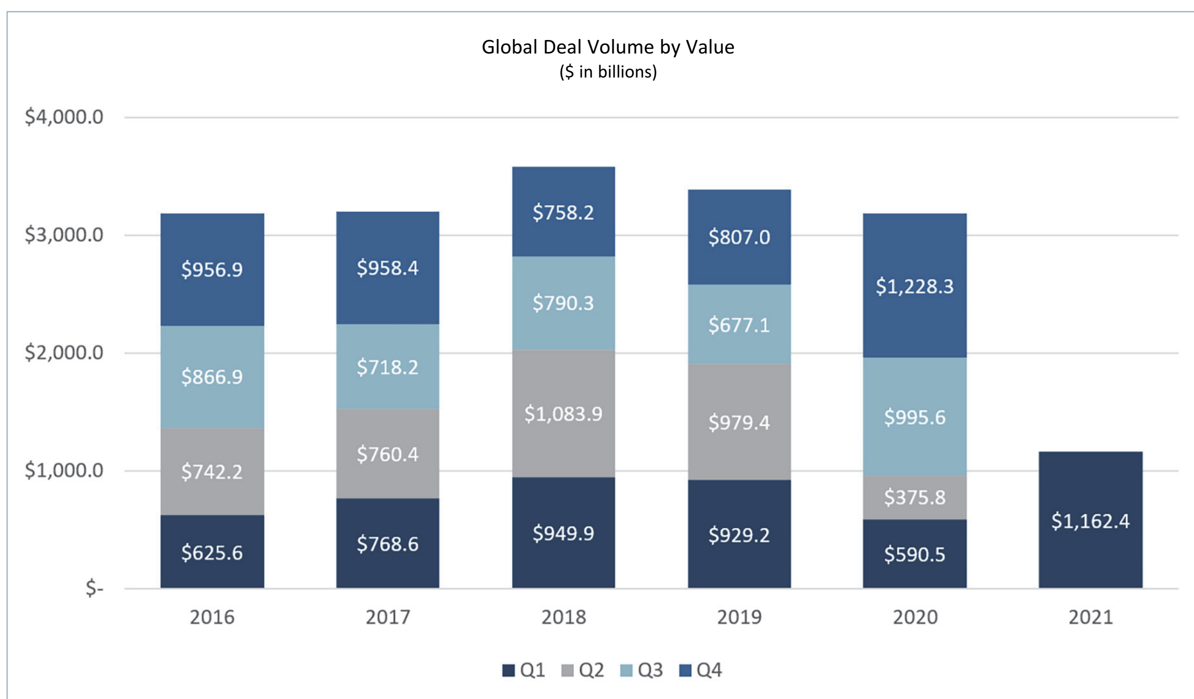
Q1 2021 Continued Strong Global M&A Momentum from Q4 2020

The $1.16 trillion in announced deal value during Q1 2021 eclipsed the $966.3 billion in deal value announced during the entire first half of 2020. Q1 2021 also saw a shift towards larger deals overall, despite a decline in megadeals, as the average deal value in Q1 2021 was $518.7 million, the highest value since 2006. The shift towards larger deals was especially pronounced in the $2 billion to $5 billion range, which increased from ~19.5% of total deal value during Q4 2020 to ~23.6% of total deal value in Q1 2021 ($274 billion across 91 deals). This was driven in part by the increased value and number of SPAC mergers, as the average deal value for SPAC mergers was $2.2 billion in Q1 2021, relative to $1.2 billion during fiscal year 2020. However, megadeals with values of $5 billion or more declined on both an absolute and relative basis during Q1 2021, representing only ~36.4% of total deal value in Q1 2021 ($423.4 billion across 46 deals), relative to ~44.5% of total deal value during the M&A rebound in the second half of 2020.

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

[2] Mergermarket began recording M&A data in 2001.

[3] According to data from Dealogic.



Source: Mergermarket

Record Quarter for Cross-Border M&A Activity Across All Regions

After declines during 2020, Q1 2021 saw $516.6 billion in cross-border M&A activity, an increase of ~27.2% by deal value relative to Q1 2020. This deal value was the highest level recorded since 2001 and a near return to the historical average of cross-border M&A activity as a percentage of global M&A activity, as it accounted for ~44.4% of total deal value.

North America had a very active start to 2021, with $633 billion spent overall on North American companies in Q1 2021. Inbound cross-border M&A activity in the region was $94.3 billion in deal value, an increase of ~215.7% year-over-year, and outbound cross-border M&A activity in the region was $150.4 billion, an increase of ~127.0% year-over-year. The two largest deals announced during Q1 2021 were cross-border transactions involving target companies based in the U.S.—AerCap Holdings N.V.'s $30 billion acquisition of GE Capital Aviation Services LLC from General Electric Company and Canadian Pacific Railway Ltd.'s $28.6 billion merger with Kansas City Southern (which is currently subject to a topping bid by Canadian National Railway Company valued at $33.7 billion).

European M&A had a strong start to 2021, with $291.3 billion spent overall on European companies in Q1 2021. Nearly half of European M&A activity in Q1 2021 resulted from cross-border activity. Foreign M&A investment into Europe during Q1 2021 was $134.4 billion across 359 deals, which represented ~46% of Europe's deal value in Q1 2021, up from ~37.1% during fiscal year 2020. European outbound cross-border M&A activity during Q1 2021 was $82.9 billion, an increase of ~212.7% relative to Q1 2020.

In Latin America, overall M&A activity generated $26.8 billion in deal value in Q1 2021 (of which $22 billion resulted from Brazil-based targets), a decline of ~25% by deal value relative to Q4 2020, but a dramatic increase of ~244% by deal value relative to Q1 2020. Inbound cross-border M&A activity in the region was $10.5 billion in deal value, an increase of ~164.5% year-over-year, and outbound cross-border M&A activity in the region was $0.2 billion in deal value, a decrease of ~79.6% year-over-year.

In the Asia Pacific region (excluding Japan), overall M&A activity generated $163 billion in deal value in Q1 2021. Inbound cross-border M&A activity in the region was $30.7 billion in deal value, an increase of ~117.5% year-over-year (of which $15.4 billion, or ~50.2%, went to India and $9.4 billion, or ~30.6%, went to China), and outbound cross-border M&A activity was $37.3 billion in deal value, an increase of ~101.8% year-over-year.

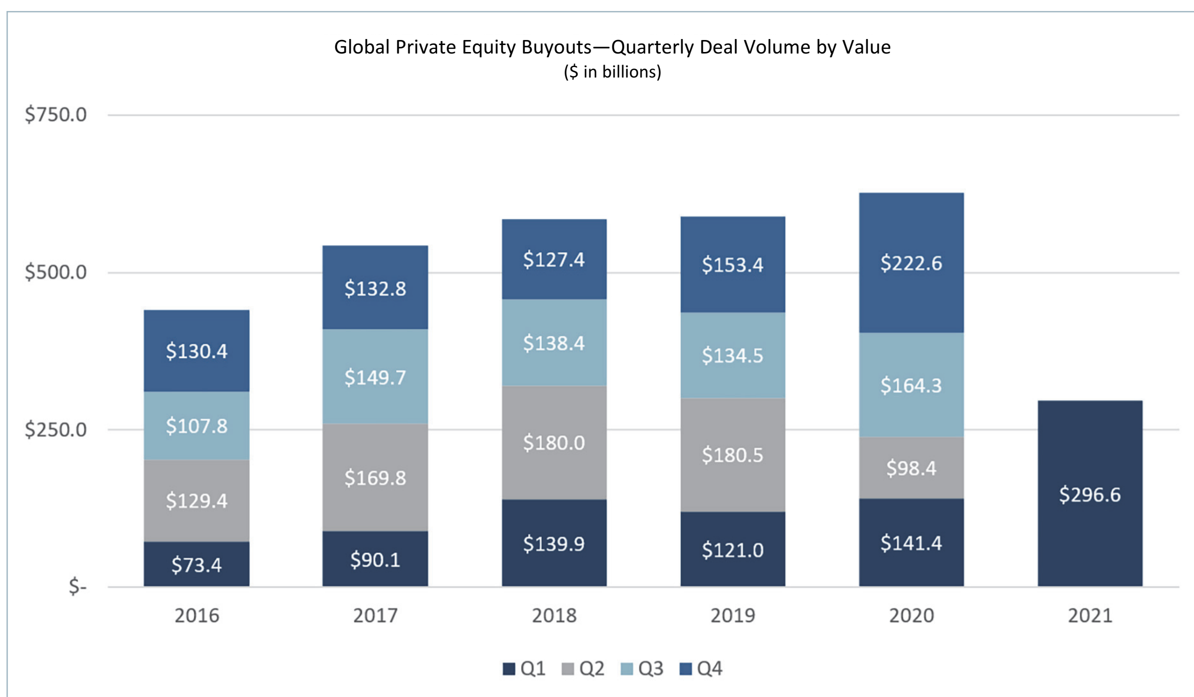
In Japan, overall M&A activity generated $15.5 billion in deal value in Q1 2021, an increase of ~19.2% year-over-year. Inbound cross-border M&A activity in Japan was $4.6 billion in deal value, an increase of ~229.3% year-over-year, and outbound cross-border M&A activity was $19.4 billion, an increase of ~109.7% year-over-year.

In the Middle East & Africa region, overall M&A activity generated $32.7 billion in deal value in Q1 2021, an increase of ~52% year-over-year. Inbound cross-border M&A activity in the region was $24.7 billion in deal value, an increase of ~390.5% year-over-year and the highest quarterly inbound deal value since Q4 2007, and outbound cross-border M&A activity in the region was $5.6 billion, an increase of ~75% year-over-year.

Private Equity Has Strongest Quarter by Deal Value Since Before the Financial Crisis

Private equity buyouts accounted for $296.6 billion in deal value during Q1 2021, resulting in the strongest quarter for private equity buyouts by deal value since Q2 2007. The $296.6 billion in deal value represented an increase of ~33.2% in deal value relative to Q4 2020 and an increase of ~109.8% in deal value relative to Q1 2020. In terms of deal count, private equity buyouts declined ~1.8% from 1,177 deals in Q4 2020 to 1,156 deals in Q1 2021. As a result of the surge in private equity activity, private equity buyouts represented ~25.6% of the overall value of global M&A activity and ~22.8% of the overall global deal count, the latter of which is the highest market share for private equity buyouts since at least 2001.

On a regional basis, private equity buyouts remained an important driver of European M&A. European buyouts accounted for $75.5 billion in deal value across 459 buyouts, the highest quarterly deal value since Q2 2007 and a ~21.7% increase relative to Q1 2020. European buyout value accounted for ~25.5% of the global buyout value and ~39.7% of the global buyout deal count. In the U.S., buyout activity accounted for $160.1 billion in deal value (the U.S.'s highest quarterly buyout deal value since Q2 2007) across 477 deals, which represented ~54% of the global buyout value and ~41.3% of the global buyout deal count.

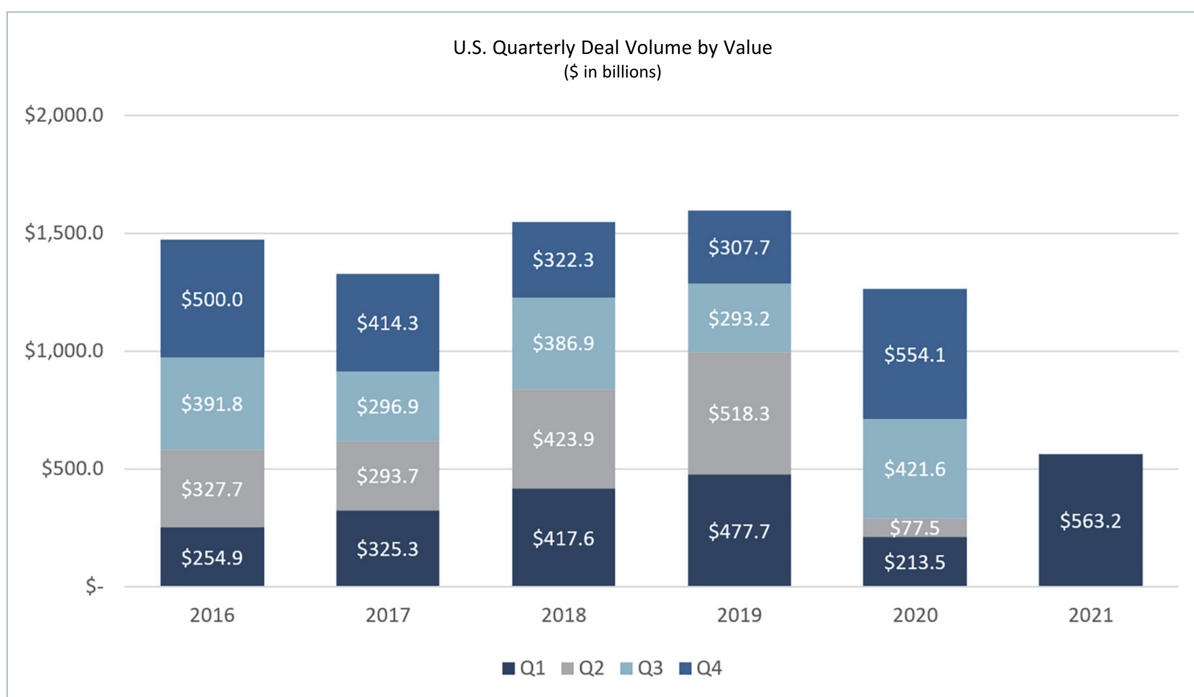


Source: Mergermarket

U.S. M&A Has Record-Breaking Quarter, Continuing Momentum from Q4 2020

U.S. M&A activity continued its strong momentum from Q4 2020, accounting for $563 billion in deal value across 1,595 deals in Q1 2021, a slight ~1.6% increase by deal value (versus $554 billion) and a 6.6% decrease by deal count (versus 1,708 deals) relative to Q4 2020, and a ~163.8% increase by deal value (versus $213.5 billion) relative to Q1 2020. For the second consecutive quarter, U.S. M&A activity by deal value was the highest quarterly value since at least 2001. The $563 billion in deal value during Q1 2021 also nearly doubled the $291 billion in deal value during the entire first half of 2020.

The U.S. had 29 corporate divestitures totaling $50.3 billion in deal value during Q1 2021, breaking the previous divestiture value record of $49 billion set in Q2 2007. U.S. corporate divestitures during Q1 2021 were led by the largest deal in the U.S. during that period—AerCap Holdings N.V.'s $30 billion acquisition of GE Capital Aviation Services LLC from General Electric Company. As further described below, SPACs were also a significant driving force behind U.S. M&A activity, as they were responsible for $165 billion in deal value across 79 deals during Q1 2021, or ~29.3% of the U.S. deal value during the quarter. Private equity buyouts in Q1 2021 also accounted for their second-highest[4] quarterly deal value since at least 2001, with $160.1 billion in deal value across 477 leveraged buyout transactions, an increase of ~305.5% and ~22.9%, respectively, relative to Q1 2020.



Source: Mergermarket

[4] The record for U.S. buyout volume was set in Q2 2007 during the pre-financial crisis LBO boom, which had $178 billion in deal value across 286 buyouts.

Surge in SPAC M&A Activity and IPOs, Driven by the U.S.

SPACs were involved in $219.5 billion in deal value across 99 deals globally during Q1 2021, which was greater than the combined SPAC deal value during all of 2020.[5] SPACs in the U.S. accounted for $165 billion in deal value across 79 deals, representing ~75.2% of global SPAC deal value. SPACs also targeted larger transactions in Q1 2021 relative to 2020, as the average deal value for SPAC transactions globally increased from $1.2 billion during fiscal year 2020 to $2.2 billion in Q1 2021. The largest SPAC deal in the U.S. during Q1 2021 was the $11.8 billion merger of Churchill Capital Corporation IV with Atieva, Inc. (d/b/a Lucid Motors).

In Q1 2021, 304 SPACs raised $97 billion through IPOs globally, 298 of which occurred in the U.S. raising $95 billion. The $95 billion raised by SPACs through IPOs in the U.S. in Q1 2021 already exceeds the $83 billion raised in 248 SPAC IPOs in the U.S. during all of 2020.

Increase in Deal Activity Across Nearly All Sectors, Led by Technology, Media and Telecommunications

The TMT sector led the way in Q1 2021 in terms of global deal value, posting $344.9 billion worth of deals and accounting for ~29.7% of global deal value. The shift towards transactions in the TMT sector was especially pronounced relative to Q1 2020—year-over-year TMT deal value increased ~247% from $99.4 billion in Q1 2020 (a roughly 2.5 times greater increase than the ~96.8% increase in year-over-year deal value across all sectors relative to Q1 2020). While nearly every sector had increases in deal value year-over-year, the Transport sector had an especially pronounced increase of ~424.9% relative to Q1 2020 resulting from $66.9 billion in deal value across 140 deals in Q1 2021 (versus $12.7 billion in deal value across 170 deals in Q1 2020).

LEGAL DEVELOPMENTS

Delaware Cases

Q1 2021 featured a number of notable Delaware decisions regarding activism, fiduciary duties and M&A contractual disputes.

The Williams Companies Stockholder Litigation, C.A. No. 2020-0707-KSJM (Del. Ch. Feb. 26, 2021).

In this post-trial decision, the Delaware Court of Chancery declared a stockholder rights plan (the "Plan") unenforceable and permanently enjoined its continued operation. The Williams Companies ("Williams") board of directors had adopted the Plan at the onset of the COVID-19 pandemic. The Plan had four key components: (i) a 5% trigger; (ii) a beneficial ownership definition that expanded the definition of "beneficial ownership" for purposes of Rule 13d-3 under the Securities Exchange Act of 1934 (the "Exchange Act") to include synthetic interests created by derivative positions, such as warrants or options; (iii) an "acting-in-concert" provision that extended to parallel conduct and included a "daisy chain" concept (whereby a person acting in concert with another person is deemed to be acting in concert with any third party who is also acting in concert with such other person) and (iv) a narrowly defined exception for passive investors.

The Court analyzed the Williams stockholders' challenge to the Plan as a direct claim subject to the enhanced scrutiny standard of review articulated in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). The Court drew upon trial testimony to infer that the Plan was intended to protect against three threats: (i) stockholder activism during a time of market uncertainty and a low stock price, (ii) activists that might pursue short-term agendas or disrupt or distract management and (iii) "lightning strikes" by activists rapidly accumulating greater than 5% of Williams' common stock but waiting to disclose the accumulation for the 10 full days permitted under Section 13(d) of the Exchange Act. The Court determined that the Williams board had conducted a good-faith, reasonable investigation in deciding to adopt the Plan. However, the Court held that the Williams board's conclusions regarding the first and second threats were inadequately grounded because the threats were too abstract.

[5] According to data from Dealogic.

The Court withheld judgment on whether the third threat justified a response by the Williams board, holding that even if it did, adoption of the Plan fell outside the range of reasonableness. Acknowledging that the Plan was not coercive or preclusive, the Court concluded that the Plan was still a disproportionate response that went beyond the "gap-filling" purpose of preventing "lightning strikes". In reaching this decision, the Court criticized each of the elements of the Plan described above, with a particular focus on the expansive nature of the acting-in-concert provision. The Plan deemed a person to be acting in concert with another person if: (i) such person knowingly acted in concert or in parallel with such other person, or towards a common goal with such other person, relating to changing or influencing control over Williams; (ii) each person was conscious of the other person's conduct and this awareness was an element of their respective decision-making processes and (iii) at least one additional factor supported a determination by the Williams board that such persons had intended to act in concert or in parallel (including exchanging information, attending meetings, conducting discussions or making an invitation to act in parallel). The Court also contrasted the Plan to other versions of stockholder rights plans recently proposed by scholars to prevent lightning strikes, which included (a) less expansive acting-in-concert provisions, (b) exemptions for stockholders who disclose their position within two days of crossing the 5% threshold or (c) increased triggering threshold percentages.

***Firefighters' Pension System of Kansas City Trust v. Presidio, Inc.*, C.A. No. 2019-0839-JTL (Del. Ch. Jan. 29, 2021).**

In this pleading-stage decision, the Delaware Court of Chancery denied in part and granted in part a motion to dismiss claims against Presidio Inc.'s ("Presidio") controlling stockholder, directors, officers, financial advisor and acquirer in connection with Presidio's acquisition by BC Partners Advisors L.P. ("BC Partners"). Presidio was a publicly traded corporation controlled by Apollo Global Management LLC ("Apollo"), which held a 42% equity interest. Apollo planned to exit its investment in the near term, and Apollo's contractual right to appoint the majority of the Presidio board was scheduled to expire at the end of 2019. In May 2019, Apollo and its financial advisor LionTree Advisors, LLC ("LionTree") met on separate occasions with BC Partners and Clayton Dubilier & Rice, LLC ("CD&R") to discuss potential transactions. Unlike BC Partners, which was interested in purchasing Presidio to operate as a standalone entity, CD&R hoped to combine Presidio with another portfolio company operating in Presidio's line of business. After a meeting in June 2019 between the Presidio CEO, LionTree and CD&R, which was not disclosed to the Presidio board, the Presidio CEO and LionTree encouraged the Presidio board to pursue bilateral negotiations with BC Partners, which resulted in Presidio agreeing to be acquired by BC Partners for $16 per share on August 14, 2019. A go-shop period followed, and on the last day of the go-shop period, CD&R submitted a proposal to acquire Presidio for $16.50 per share, which the Presidio board declared superior. LionTree promptly disclosed the price of CD&R's bid to BC Partners, and BC Partners quickly bid $16.60 per share and demanded a response within 24 hours. Despite indications that CD&R could increase its bid subject to additional diligence access, the Presidio board accepted BC Partners' revised offer, and CD&R walked away.

In resolving the motion to dismiss, the Court first held that it was reasonably conceivable that the applicable standard of review was enhanced scrutiny, concluding that Apollo's cyclical investment process did not support an inference of a disabling conflict, and that *Corwin* cleansing was unavailable because the stockholder vote was tainted by the proxy statement's failure to mention LionTree's alleged "tip" to BC Partners about the price of CD&R's bid. Applying the enhanced scrutiny standard of review, the Court held that it was reasonably conceivable that the Presidio board breached its fiduciary duties by running a sale process in a manner that fell outside the range of reasonableness. The Court took particular issue with (i) LionTree's disclosure of the price of CD&R's bid to BC Partners during the final negotiations, (ii) the Presidio board's pretextual rationales for not pursuing CD&R's bid, (iii) the Presidio CEO and LionTree's encouragement of a single-bidder strategy while failing to disclose to the Presidio board earlier discussions with CD&R and (iv) the Presidio board's failure to properly oversee LionTree's conduct.

The Court held that the complaint stated a claim for damages against the Presidio CEO in his capacity as a director because it was reasonably conceivable that he breached his duty of loyalty by steering the sale process towards a transaction with BC Partners to ensure post-transaction employment and benefits for himself and his brothers. On the other hand, the Court held that the complaint failed to state a claim for damages against the remaining directors (all of whom were exculpated under Presidio's charter), including

those appointed by Apollo, because the plaintiff failed to allege bad faith or a conflict of interest on the part of such directors. With respect to the remaining defendants, the Court held that it was reasonably conceivable that LionTree aided and abetted the directors' breaches of fiduciary duty by knowingly participating in such breaches to sustain its relationship with BC Partners, and that it was reasonably conceivable that BC Partners aided and abetted such breaches by accepting LionTree's tip and using it to curtail the sale process. The Court held that the complaint failed to state a claim against Apollo for breach of the duty of care or breach of the duty of loyalty because Apollo did not have a conflicting interest and its conduct did not amount to bad faith or gross negligence (but the Court did not resolve whether the exculpation provision in Presidio's charter would extend to Apollo).

Morris v. Spectra Energy Partners (DE) GP, LP, No. 489, 2019 (Del. Jan. 22, 2021).

In this decision, the Delaware Supreme Court reversed the Delaware Court of Chancery's dismissal of a class action derivative complaint brought by a minority unit holder of Spectrum Energy Partners L.P. ("Spectrum"), a master limited partnership trading on the New York Stock Exchange. In a prior action, the plaintiff had asserted that Spectrum's general partner and its parent corporation had breached a "good faith" obligation in Spectrum's limited partnership agreement when a conflicts committee approved a reverse dropdown transaction for an allegedly unfair price $661 million below what the plaintiff considered a fair value. The parties conducted discovery and Spectrum moved for summary judgment. However, while the motion was pending, Enbridge, Inc. acquired Spectrum's parent and then acquired Spectrum in a stock-for-stock merger valued at $3.3 billion. After the deal closed, the parties stipulated to dismissal of the initial claim.

Three months later, the plaintiff filed another class action derivative complaint against Spectrum's general partner for breach of the limited partnership agreement and the implied covenant of good faith and fair dealing by failing to secure any value for the pre-merger derivative claim. The Court of Chancery found that the plaintiff lacked standing under the three-part test applicable to derivative claims subsequently extinguished by a merger and articulated in *In re Primedia, Inc. Shareholders Litigation*, 67 A.3d 455 (Del. Ch. 2013). The test requires (i) a viable underlying derivative claim (ii) that is material to the overall transaction and (iii) that will not be pursued by the buyer and is not reflected in the merger consideration. The Court of Chancery found that the plaintiff's claim was immaterial by, first, discounting the $661 million claim to $112 million to reflect the public unitholders' proportionate share of the litigation recovery, second, discounting the claim further to $28 million to reflect a one-in-four chance of prevailing in the litigation and, third, comparing the $28 million claim to the $3.3 billion value of the merger.

The Delaware Supreme Court disagreed with this analysis, holding that when a trial court applies the *Primedia* framework at the pleading stage, it must assess the materiality of the claim using the reasonably conceivable damages articulated in the underlying derivative complaint. According to the Delaware Supreme Court, the Court of Chancery erred when it applied a risk-based discount to the plaintiff's alleged damages. In addition, the Delaware Supreme Court held that if the damages are discounted to reflect the unit holders' proportionate share of the damages, then the merger consideration should be discounted as well. Thus, the Delaware Supreme Court held that the derivative claim as pled was material, because it represented 20% of the consideration that the unit holders would have received from the merger.

Express Scripts, Inc. v. Bracket Holdings Corp., No. 62, 2020 (Del. Feb. 23, 2021).

In this decision, the Delaware Supreme Court reversed the Delaware Superior Court's award of contract damages for fraud. The acquisition agreement at issue provided that, outside of "deliberate" fraud, the seller would not be liable for any breach of the representations and warranties. Despite the express use of the term "deliberate", the Superior Court had instructed the jury that it could award damages under the common law understanding of fraud, which includes both intentional acts and recklessness. The Delaware Supreme Court disagreed with this instruction. Relying on a discussion in *ABRY Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1059 (Del. Ch. 2006) that parties can knowingly accept the risk of fraud caused by recklessness, but not intentional acts, the Delaware Supreme Court reasoned that the use of the adjective "deliberate" in the agreement at issue was sufficient to conclude that the plaintiff had accepted the risk that it would not be made whole for the defendant's reckless conduct.

Lacey v. Mota-Velasco, C.A. No. 2019-0312-SG (Del. Ch. Feb. 11, 2021).

In this pleading-stage decision, the Delaware Court of Chancery dismissed a contract claim by a stockholder of Southern Copper Corporation ("Southern Copper") against Southern Copper's directors for an alleged breach of Southern Copper's charter. Southern Copper's charter

prohibited Southern Copper from entering into transactions with its controlling stockholder involving consideration in excess of $10 million without prior review by an independent committee of Southern Copper's directors. The plaintiff asserted that the Southern Copper board breached both its fiduciary duties and the Southern Copper charter by allegedly entering into such transactions without the review of an independent committee. In a previous decision, the Court found the fiduciary duty claim reasonably conceivable and requested supplemental briefing on the breach of contract claim. In this decision, the Court granted the motion to dismiss with respect to the breach of contract claim, holding that, as a general matter, directors are "not counterparties to [the corporation] with respect to the contractual nexus that is the Charter, the by-laws and the DGCL." Instead, the Court explained that "[t]he relationship between directors and their corporation is typically fiduciary, rather than contractual, and if any claim is created *on behalf of the corporation* by a failure on the part of directors to comply with the entity's formative documents, it is a claim for *breach of fiduciary duty.*"

U.S. Federal Cases

Q1 2021 also featured two notable federal decisions addressing securities and antitrust law.

Gray v. Wesco Aircraft Holdings, Inc., No. 20-1530-cv (2d. Cir. Feb. 26, 2021).
In this decision, the United States Court of Appeals for the Second Circuit affirmed the United States District Court for the Southern District of New York's dismissal of a stockholder plaintiff's claim that members of the Wesco Aircraft Holdings, Inc. ("Wesco") board violated Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder through allegedly false and misleading disclosures made in connection with Wesco's merger with Platinum Equity Advisors, LLC. The complaint asserted that the Wesco board directed management, in bad faith, to revise projections downward to support a lower merger consideration after a six-month sale process produced only five bidders at a price well below the value implied by the initial projections. The Second Circuit held that, even if the complaint plausibly pled a disclosure violation, dismissal was warranted because the plaintiff's theory of damages as the difference between the price implied by the initial projections and the price actually paid was speculative. Acknowledging that the complaint cited some analysts who agreed with the implied valuation when the initial projections were released, the Court asserted: "the complaint has far more compelling allegations that contradict [the plaintiff's] theory: what potential buyers in fact offered."

Steves and Sons, Inc. v. JELD-WEN, Inc., C.A. No. 19-1397 (4th Cir. Feb. 18, 2021).
In this decision, the United States Court of Appeals for the Fourth Circuit affirmed in relevant part a trial court decision requiring JELD-WEN, Inc. ("JELD-WEN"), a molded door and door-skin manufacturer, to undo an allegedly anticompetitive merger with CraftMaster Manufacturing, Inc. ("CMI") which was completed in 2012. Although not directly challenged on appeal, the case represents the first time a divestiture order has resulted from private plaintiff litigation. The plaintiff, Steves and Sons, Inc. ("Steves and Sons"), is one of six firms that manufactures molded doors using outsourced door skins. Before the merger, the door-skin manufacturing market primarily comprised three firms—JELD-WEN, CMI and Masonite International, holding 38%, 16% and 46% of the market share, respectively. After the merger, Masonite International stopped selling door skins to independent molded-door manufacturers like Steves and Sons, leaving JELD-WEN as Steves and Sons' sole option for outsourced door skins. The U.S. Department of Justice (the "DOJ") had investigated the merger twice, once in 2012 and once in 2015, and had declined to challenge the transaction. When asked for comment by the DOJ on two separate occasions, Steves and Sons said in 2012 that it did not object to the merger and in 2015 that the prices paid to JELD-WEN had remained flat. Yet, after disputes over price and quality arose after the completion of the merger, Steves and Sons asserted, and the U.S. District Court for the Eastern District of Virginia agreed, that the merger was anticompetitive. On appeal, the Fourth Circuit decided, among other evidentiary and procedural issues, that Steves and Sons suffered an antitrust injury and that the District Court properly applied the factors governing equitable relief.

Delaware Court of Chancery Nominations

In April 2021, then-Vice Chancellor Kathaleen S. McCormick was nominated and confirmed to serve as Chancellor of the Delaware Court of Chancery upon Chancellor Andre G. Bouchard's retirement. Chancellor McCormick joined the Delaware Court of Chancery in November 2018, when the Court was expanded from five to seven judges, and has authored a number of significant decisions in M&A and fiduciary duty disputes, including the *Williams* decision discussed above. Before joining the Delaware Court of Chancery, Chancellor McCormick practiced commercial, corporate and alternative entity litigation with the Delaware firm Young Conaway Stargatt & Taylor, LLP. Chancellor McCormick is the first woman to hold the office of Chancellor of the Delaware Court of Chancery.

In addition to Chancellor McCormick's nomination and confirmation, Lori W. Will was nominated and confirmed to serve as a Vice Chancellor on the Delaware Court of Chancery. Ms. Will is a partner at the Delaware office of Wilson Sonsini Goodrich & Rosati, where she practices corporate, commercial and federal securities litigation.

SEC Enforcement

Regulation FD
On March 5, 2021, the United States Securities and Exchange Commission (the "SEC") filed a complaint in the United States District Court for the Southern District of New York against AT&T, Inc. ("AT&T") for repeatedly violating Regulation FD, and against three of AT&T's investor relations executives for aiding and abetting such violations, by selectively disclosing material non-public information to research analysts. In its complaint, the SEC asserts that in early March 2016, in anticipation of, among other things, AT&T's consolidated gross revenue missing the Q1 2016 analyst consensus estimate, AT&T executives instructed AT&T's Investor Relations department to privately disclose information to select analysts in order to induce them to lower their revenue estimates, which would thereby reduce the consensus revenue estimate. The SEC's complaint alleges that, in response, AT&T's Investor Relations employees spoke with approximately 20 separate analyst firms and provided analysts with material non-public information, and in certain cases misrepresented the nature of the information being provided. This is the first Regulation FD enforcement action brought by the SEC since 2019, and only the second SEC enforcement action against a company solely for Regulation FD violations since 2013.[6]

SPACs
On March 24, 2021, various news sources reported that the SEC's enforcement division had sent requests for information to investment banks involved in the listing of blank check companies. Sources referred to in the news media explained that the SEC requested information regarding SPAC deal fees and volumes, as well as compliance, reporting and internal controls related to SPAC transactions. Sources quoted in the news media explained that while the inquiries were preliminary, they could develop into a formal investigation.[7]

In addition, the SEC has recently made various public statements concerning SPACs, including the following:

- **Warning Related to Celebrity Involvement with SPACs**
  On March 10, 2021, the SEC's Office of Investor Education and Advocacy issued an investor alert warning investors not to make investment decisions related to SPACs solely due to celebrity involvement in a SPAC, or because "someone famous" says it is a good investment.[8]

- **Considerations for Private Companies Considering Merging with a SPAC**
  On March 31, 2021, Acting Chief Accountant of the Office of the Chief Accountant Paul Munter released a public statement in which he highlighted key considerations for private companies going public through a de-SPAC transaction in order to ensure that target companies in de-SPAC mergers have comprehensive plans in place to prepare them to be a public company, including the following:[9]

  - Market and Timing Considerations
    Due to the accelerated timeline by which private companies go public through a de-SPAC transaction rather than a conventional IPO, private companies must have a comprehensive plan in place to address the resulting demands of becoming a public company on an accelerated timeline. Acting Chief Accountant Munter highlighted that private companies going through de-SPAC transactions must have a management team that understands the various expectations of a public company, including reporting and internal control requirements.

[6] Complaint, *SEC v. AT&T, Inc.*, No. 21-cv-01951 (S.D.N.Y. Mar. 5, 2021).

[7] See Jody Godoy & Chris Prentice, *U.S. regulator opens inquiry into Wall Street's blank check IPO frenzy*, Reuters (Mar. 24, 2021), https://www.reuters.com/article/usa-sec-spacs/exclusive-u-s-regulator-opens-inquiry-into-wall-streets-blank-check-ipo-frenzy-sources-idUSL1N2LM3CH.

[8] Investor Alert, *Celebrity Involvement with SPACs – Investor Alert*, SEC (Mar. 10, 2021), https://www.sec.gov/oiea/investor-alerts-and-bulletins/celebrity-involvement-spacs-investor-alert.

[9] Public Statement, Paul Munter, *Financial Reporting and Auditing Considerations of Companies Merging with SPACs*, SEC (Mar. 31, 2021), https://www.sec.gov/news/public-statement/munter-spac-20200331.

    - Financial Reporting Considerations
      The combined public company following a de-SPAC transaction must have personnel and processes in place to produce high-quality financial reporting in compliance with all SEC rules and regulations.

    - Internal Control Considerations
      Target companies in de-SPAC transactions must understand the requirements for internal control over financial reporting and disclosure controls and procedures, and must have a plan to ensure that the combined public company complies with such requirements.

  - Corporate Governance and Audit Committee Consideration
    Boards involved in de-SPAC mergers must have an understanding of the board's roles, responsibilities and fiduciary duties and have members that (i) will enable the board to meet independence and financial expert requirements and (ii) are prepared for key committee assignments, including on an audit committee.

  - Auditor Considerations
    Target companies in a de-SPAC merger must be prepared to have their annual financial statements audited in accordance with the Public Company Accounting Oversight Board (the "PCAOB") standards by a public accounting firm registered with the PCAOB and in compliance with both PCAOB and SEC independence rules. Acting Chief Accountant Munter cautioned that auditor independence, auditor registration with the PCAOB and other audit-related requirements should be reviewed early in the transaction process, because these considerations may require the target company to obtain a new auditor or to perform additional audit procedures on historical financial statements.

- **Liability in Connection with De-SPAC Transactions**
  On April 8, 2021, Acting Director of the Division of Corporation Finance John Coates issued a public statement explaining his views on certain liability considerations related to SPAC transactions, and, in particular, in connection with the use of projections in de-SPAC transactions. He explained that, while some practitioners and commentators have claimed that an advantage of de-SPAC transactions over traditional IPOs is lesser securities law liability exposure for both the SPAC and the target company, in his view this claim is "overstated at best, and potentially seriously misleading at worst . . . . [I]n some ways, liability risk for those involved [in SPACs] are higher, not lower, than conventional IPOs, due in particular to the potential conflicts of interest in the SPAC structure." Acting Director Coates specifically addressed the claim made by some practitioners and commentators that the safe harbor for forward-looking statements in the Private Securities Litigation Reform Act (the "PSLRA") applies in the context of de-SPAC transactions but not conventional IPOs. To this end, Acting Director Coates explained that: (i) the PSLRA safe harbor only applies in private litigation, and does not prevent the SEC from taking enforcement action; (ii) the PSLRA safe harbor does not protect against false or misleading statements made with actual knowledge that the statement was false or misleading (such as failing to disclose a full set of reliable projections reflecting different potential scenarios for the company's future, and only disclosing the most favorable projections) and (iii) the statements must actually be forward looking.[10] Acting Director Coates also explained that the PSLRA specifically excludes from its safe harbor statements made in connection with "initial public offerings", a term which is not defined in the PSLRA and which could be read to include a de-SPAC transaction as the "initial public offering" of the target company. According to Acting Director Coates, the facts point to a conclusion that the PSLRA safe harbor should not be available for any "unknown private company introducing itself to the public markets", which includes private companies going public through de-SPAC transactions, and "it may be time" for the SEC to use the rulemaking process, or provide guidance, explaining its view on "how or if at all the PSLRA safe harbor should apply to de-SPACs".[11] These statements reflect that the SEC is carefully reviewing filings and disclosures by SPACs and their private targets and additional guidance on this topic may be forthcoming.

[10] On the third point, Acting Director Coates explained that some courts view statements about valuation or operations as outside the PSLRA safe harbor, even if they are derived from or linked to forward-looking projections or statements.

[11] Public Statement, John Coates, *SPACs, IPOs and Liability Risk under the Securities Laws*, SEC (Apr. 8, 2021), https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws.

- **Accounting and Reporting Considerations for Warrants Issued by SPACs**
  On April 12, 2021, Acting Director Coates and Acting Chief Accountant Munter jointly issued a public statement discussing the potential accounting treatment of warrants included in SPAC transactions.[12] In their statement, Acting Director Coates and Acting Chief Accountant Munter asserted that an equity-linked financial instrument, such as a warrant, must be considered indexed to an entity's own stock in order to be treated as equity and not a liability. The SEC officers recently had evaluated a fact pattern related to the terms of warrants issued by a SPAC, where the terms provided for potential changes to the settlement amounts depending upon the characteristics of the holder of the warrant (specifically, whether the warrantholder was a sponsor of the SPAC, one of its permitted transferees or any other party). Because the holder of the warrant is not an input in the pricing of a fixed-for-fixed option on equity shares, the Office of the Chief Accountant concluded, in that case, that the terms of the warrant would prevent the warrants from being indexed to the entity's stock, and therefore that the warrants should be classified as a liability measured at fair value (with changes in fair value reported in earnings each period). The SEC officers also noted that customary provisions in warrant agreements related to the treatment of warrants in partial tender offers may lead to liability treatment, but left open whether other customary warrant terms may be an issue. This interpretation may require some SPACs, which previously classified similar warrants as equity, to restate their financial results. Other SPACs may seek to amend their warrant agreements to remove the relevant provisions, while participants in future SPAC transactions will need to carefully evaluate the terms of the warrant agreement to determine the appropriate treatment. According to media outlets, this revised accounting treatment effectively paused the IPO process for approximately 260 SPACs and significantly reduced the pace of filings for new SPACs.[13]

REGULATORY DEVELOPMENTS

Antitrust

Revised HSR Monetary Thresholds
On February 17, 2021, the United States Federal Trade Commission (the "FTC") decreased the Hart-Scott-Rodino Act (the "HSR Act") monetary thresholds, which took effect on, and apply to transactions that have closed on or after, March 4, 2021. Under the revised thresholds: (i) the minimum size-of-transaction threshold is $92 million (decreased from $94 million); (ii) the size-of-person test applies to transactions valued between $92 million and $368 million (decreased from $94 million and $376 million, respectively); (iii) within the size-of-person test, the relevant sales/assets values are $18.4 million and $184 million (decreased from $18.8 million and $188 million, respectively) and (iv) transactions valued in excess of $368 million (decreased from $376 million) are reportable without regard to the size of the parties.[14]

Suspension of Early HSR Termination
On February 4, 2021, the FTC, with the support of the DOJ, temporarily suspended grants of early termination of the 30-day waiting period under the HSR Act. The FTC stated that it was due to personnel and resource constraints: "the transition to the new Administration and . . . the unprecedented volume of HSR filings for the start of a fiscal year."[15] On March 12, 2021, the FTC clarified that early termination would be granted in limited circumstances following the issuance of a Second Request.[16]

Legislative Developments
On February 4, 2021, Senator Amy Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act in order to "overhaul and modernize" U.S. antitrust law.[17] Among other changes, this proposed legislation would, if enacted: (i) lower the standard under the Clayton Act of 1914 (the "Clayton Act") to forbid acquisitions that "create an appreciable risk of materially lessening competition" rather

[12] Public Statement, John Coates & Paul Munter, *Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies ("SPACS")*, SEC (Apr. 12, 2021), https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs?utm_medium=email&utm_source=govdelivery.

[13] David Michaels, Amrith Ramkumar & Alexander Ospiovich, *SPAC Hot Streak Put on Ice by Regulatory Warnings*, Wall St. J. (Apr. 16, 2021), https://www.wsj.com/articles/spac-hot-streak-put-on-ice-by-regulatory-warnings-11618565403.

[14] Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 86 Fed. Reg. 7870 (Feb. 2, 2021).

[15] Press Release, *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination*, FTC (Feb. 4, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early.

[16] News Release, *HSR Termination After a Second Request Issues*, FTC (Mar. 12, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/03/hsr-early-termination-after-second-request-issues.

[17] Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021).

than acquisitions that "substantially lessen competition", where "materially" is defined as "more than a de minimis amount", (ii) clarify that the Clayton Act prohibition applies to monopsonies, in addition to monopolies, (iii) shift the burden of proof to the merging parties in connection with certain enumerated circumstances, including, among others, (a) mergers that "would lead to a significant increase in market concentration in any relevant market", (b) acquisitions of competitors or nascent competitors by a firm with greater than 50% market share or that otherwise has significant market power, (c) transactions valued at greater than $5 billion and (d) transactions where the acquiring party or the target company has assets, net annual sales or a market capitalization greater than $100 billion, and the acquiring party acquires greater than $50 million of the target company's voting securities or assets and (iv) establish a new section of the Clayton Act that would prohibit "exclusionary conduct[18] that presents an appreciable risk of harming competition".

Policy Developments

On March 18, 2021, Acting FTC Chairwoman Rebecca Kelly Slaughter testified before the House Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law that the FTC should consider withdrawing the updated Vertical Merger Guidelines issued on June 30, 2020.[19] This testimony followed a statement by Commissioners Slaughter and Chopra on December 22, 2020 describing the updated guidelines as taking a "flawed approach" and "reflect[ing] the same status quo thinking that has allowed decades of vertical consolidation to go uninvestigated and unchallenged."[20]

On March 16, 2021, the FTC announced a new working group to update their approach to analyzing the effects of pharmaceutical mergers. The working group consists of the Canadian Competition Bureau, the European Commission, the UK's Competition and Markets Authority, the DOJ and the offices of states' attorneys general. In its release, the FTC said the questions it will consider include, among other things, how current theories of harm can be expanded and refreshed, the full range of a pharmaceutical merger's effects on innovation, what types of remedies would work in the cases to which those theories are applied, and what has been learned about the scope of assets and characteristics of firms that make successful divestiture buyers.[21]

Personnel Developments

On March 22, 2021, Lina Khan, a Columbia Law School professor, was nominated as a Commissioner of the FTC. In a law review article published in 2017, Khan argued that the current framework for assessing competitive harm relied upon by antitrust agencies inadequately captures some forms of anticompetitive behavior.[22] In another law review article published in 2020, Khan and Rohit Chopra, a Commissioner of the FTC and President Biden's nominee for the Director of the Consumer Financial Protection Bureau, argued that enforcers should use the FTC's rulemaking authority under Section 5 of the Federal Trade Commission Act to define unfair methods of competition.[23]

On March 8, 2021, Tim Wu, a Columbia Law School professor, was named special assistant to the President for technology and competition policy, a position on the White House National Economic Council. Khan and Wu are considered leaders of what has been called the "New Brandeis" school of antitrust (or "Hipster Antitrust" by its critics).

As of April 2021, key antitrust leadership positions remained unfilled, including the Assistant Attorney General of the DOJ Antitrust Division, a second Democratic Commissioner to replace Commissioner Chopra and the Chair of the FTC.

[18] The term "exclusionary conduct" is defined as conduct that materially disadvantages competitors or tends to limit their ability or incentive to compete. See *id.* § 9.

[19] *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the H. Subcomm. on Antitrust, Com. & Admin. L. of the Judiciary Comm.*, 117th Cong. (2021) (statement of FTC Acting Chairwoman Rebecca Kelly Slaughter), https://www.ftc.gov/system/files/documents/public_statements/1588320/p180101_prepared_statement_of_ftc_acting_chairwoman_slaughter.pdf.

[20] *Joint Dissenting Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter Regarding the Vertical Merger Commentary*, FTC (Dec. 22, 2020), https://www.ftc.gov/public-statements/2020/12/joint-dissenting-statement-commissioners-rohit-chopra-rebecca-kelly.

[21] Press Release, *FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers*, FTC (Mar. 16, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach.

[22] See Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017).

[23] See Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking,* 87 U. Chi. L. Rev. 357 (2020)

Activism[24]

In April 2021, Lazard released its *Q1 2021 Review of Shareholder Activism*, which offers key observations regarding activist activity levels and shareholder engagement in the first quarter of 2021.

Key findings/insights from the report include:

- The number of campaigns initiated globally in Q1 2021 was in line with Q1 2020, following a pandemic-related downturn in mid-2020;
- The number of board seats won in Q1 2021 was in line with Q1 2020 levels, but activists increasingly are filling these seats with activist employees instead of independent designees;
- U.S. activity continued to rebound with a ~48% year-over-year increase in the number of campaigns initiated, offset by a decline in European activity following a record-setting Q4 2020;
- M&A persists as a primary campaign thesis, with 47% of all activist campaigns initiated in Q1 2021 focusing on an M&A thesis;
- Although still a small portion of overall U.S. equity assets, inflows into ESG-related funds are accelerating;
- The volume of diversity-related proposals continues to increase; and
- Activists are embracing the SPAC trend by sponsoring their own SPACs, but “short activism” by activists targeting SPACs after completion of their de-SPAC transactions is also on the rise.

TRENDS

Global Campaign Activity Down Compared to Q1 2020

Q1 2021 saw a ~10% year-over-year decrease in global campaign activity, with 53 new campaigns launched against 50 companies, and a ~43% year-over-year decrease in global capital deployment to $10.5 billion. That said, Q1 2021 was the second consecutive quarter of elevated campaign activity following the COVID-19 induced downturn during mid-2020, and saw a ~15% increase in capital deployed when compared to Q4 2020.

The most well-known activists initiated only a modest number of campaigns in Q1 2021, with nine leading activists launching two new campaigns apiece. The proportion of first-time activists dropped to a five-year low, making up only ~20% of the 51 activists that launched campaigns in Q1 2021. Consistent with past years, ~47% of all activist campaigns in Q1 2021 related to M&A. However, activists’ traditional focus on targets in the technology and industrials sectors gave way in Q1 2021, with ~19% of the aggregate value of new activist positions targeting companies in the consumer sector, ~18% of the aggregate value of new activist positions targeting companies in the financial institutions sector and ~15% of the aggregate value of new activist positions targeting companies in the healthcare sector.

With 42 board seats won in Q1 2021, the quarter fell in line with levels from prior years. However, the persons appointed to such seats in Q1 2021 disproportionately favored activist employees (instead of independent designees), which accounted for ~38% of such seats, compared to ~27% in 2020 and ~23% in 2019. All of the board seats won in Q1 2021 were won through settlements rather than proxy contests; although, as of the end of Q1 2021, there were 66 board seats in play at 18 companies for the upcoming proxy season.

Regional Campaign Activity Rebounds in the U.S., But Falls in Europe

Activity in the U.S. for Q1 2021 increased ~48% year-over-year with 37 campaigns initiated against 35 companies. Q1 2021 already accounts for nearly half of the 83 campaigns targeting 78 companies in 2020. In addition, campaigns against companies with market caps larger than $25 billion decreased 20% from Q4 2020. Consistent with global trends, 23% less capital was deployed against U.S. technology companies in Q1 2021 relative to the average amount deployed per quarter between 2017 and 2020.

After a record quarter for Europe in Q4 2020 with 22 new campaigns initiated, activity slowed in Q1 2021 with just 10 new campaigns. The decrease reflects a recurring trend of fewer campaigns after fiscal quarters with strong activity. The market’s stabilization has resulted in activists targeting companies that underperform the EuroStoxx 600 by between ~5% and ~15% on a last-12-months

[24] Activism data from Lazard, Q1 2020 Review of Shareholder Activism (Apr. 14, 2021), 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; companies that are spun off as part of the campaign process are counted separately.

basis, compared to Q2 2020 when the average target company underperformed by ~29% and Q4 2020 when the average target company underperformed by only ~1%.

Tier 1 large-cap funds[25] have historically dominated the European activist market, to date launching almost half of the campaigns against the largest European companies. In 2018, Tier 1 large-cap funds accounted for ~33% of European campaigns. In 2020, that percentage shrank to ~16%, and in Q1 2021, Tier 1 large-cap funds comprised only ~10% of European campaigns. An emerging group of new and smaller activists is filling the void by leveraging sophisticated strategies to gain broad shareholder support.

ESG

Although ESG-related funds remain a small portion of overall U.S. equity assets, inflows into these funds have accelerated significantly. From January 2020 through February 2021, inflows for U.S. "ESG Mandate" funds[26] approximated $79.1 billion, whereas the cumulative inflows into U.S. ESG Mandate funds from January 2018 through December 2019 was only $34.4 billion. In January and February 2021 alone, the assets under management of U.S. ESG Mandate funds were approximately $349 billion, $248 billion of which was being managed by active-style funds.

Q1 2021 saw the submission of 45 diversity-related proposals, already surpassing each year's total number of diversity-related proposals submitted since 2016, with the exception of the 57 submitted in 2020. Similarly, Q1 2021 saw the submission of 55 climate-related proposals, already surpassing each year's total number of climate-related proposals submitted since 2016, with the exception of the 64 submitted in 2017. This trend is likely to continue during upcoming quarters, as activists are diversifying their tactics to place pressure on companies regarding ESG issues and the SEC under the Biden administration appears to be less willing to grant no-action requests to companies seeking to exclude climate-related proposals from their proxy materials.

One recent example of ESG-related activism is Engine No. 1 LLC's ("Engine No. 1") campaign to replace four directors at Exxon Mobil Corporation ("Exxon") with an aim of "long-term, sustainable value creation" through, among other means, "putting [Exxon] on a path to net zero total emissions by 2050".[27] In connection with this campaign, 145 other Exxon stockholders have joined together to form the Coalition United for a Responsible Exxon ("CURE"), which supports the emission-reducing campaign and is pushing Exxon "to commit to a deeper, long-term shift of its capital allocation strategies to be consistent with the Paris Agreement".[28]

Other recent examples of ESG-related activism are the "Say-on-Climate" proposals brought by The Children's Investment Fund Management LLP ("TCI") at Union Pacific Railroad Company and Charter Communications, Inc. These proposals ask each company to annually disclose, and develop a plan to manage, its emissions, and to seek approval of such plan by stockholders where appropriate. TCI has pledged to bring such proposals to "hundreds of companies" over the next several years.[29]

SPACs

Leading activists have embraced the market's strong appetite for SPACs by sponsoring their own SPACs. For example, Elliott Management Corporation ("Elliot") sponsored two SPACs in Q1 2021 that together raised approximately $1.5 billion. In addition, Corvex Management LP sponsored one SPAC in Q1 2021 that raised approximately $480 million and, with respect to two previously sponsored SPACs, announced two "de-SPAC" transactions in Q1 2021 that, together, have an estimated value of approximately $3.3 billion. Short sellers have also targeted de-SPACs. Four short campaigns were launched in Q1 2021 against target companies that had recently completed de-SPAC transactions. These short campaigns were initiated an average of 61 days after the completion of the applicable de-SPAC merger.

[25] Tier 1 large-cap funds include Elliott Management, Third Point Management, ValueAct Capital, Trian Partners and Cevian Capital.

[26] Lazard, Q1 2020 Review of Shareholder Activism (Apr. 14, 2021) uses the term "U.S. 'ESG Mandate' funds" to "comprise those with explicit ESG investment criteria", which may not be consistent with industry practice.

[27] Letter from Engine No. 1 LLC to the Board of Directors, Exxon Mobil Corporation (Feb. 22, 2021), https://reenergizexom.com/materials/letter-to-the-board-of-directors-february-22/.

[28] *Exxon Must Change Direction, Not Just Appoint New Board Candidates*, GlobalNewswire (Mar. 3, 2021), https://www.globenewswire.com/news-release/2021/03/03/2186377/0/en/Exxon-Must-Change-Direction-Not-Just-Appoint-New-Board-Candidates.html.

[29] Matthew Green & Simon Jessop, *Billionaire UK investor aims to force hundreds of companies to act on climate*, Reuters (Nov. 20, 2020), https://www.reuters.com/article/us-climate-change-investors/billionaire-uk-investor-aims-to-force-hundreds-of-companies-to-act-on-climate-idUSKBN2802SN; Say on Climate, https://www.sayonclimate.org/ (last visited Apr. 24, 2021).

Select Campaigns / Developments

Company	Market Capitalization ($ in billions)[30]	Activist	Development / Outcome
Exxon Mobil Corporation	$172.9	Engine No. 1 LLC; D.E. Shaw & Co., L.P.	• In January 2021, Engine No. 1 nominated four independent directors to the Exxon board with the support of the California State Teachers' Retirement System. Media sources also reported that Exxon was in talks with D.E. Shaw & Co., L.P. ("D.E. Shaw") regarding adding directors to the Exxon Board. • In February 2021, CURE sent a public letter to the Exxon board disclosing its support for Engine No. 1's proposals. • In March 2021, Exxon added to its now 13-member board Jeffrey Ubben from activist investment firm Inclusive Capital Partners LP and Michael Angelakis, a Comcast Corporation executive and the Chairman and CEO of Atairos Management LP. D.E. Shaw publicly expressed support for the appointments and other changes in strategic direction. CURE publicly stated that it expected further action.
Danone S.A.	$35.6	Bluebell Partners Ltd., Causeway Capital Management LLC; Artisan Partners LP	• In January 2021, Bluebell Partners Ltd. ("Bluebell") demanded the replacement of Danone S.A.'s ("Danone") joint Chairman and CEO. In February 2021, Causeway Capital Management LLC and Artisan Partners LP joined the demand. • In early March 2021, Danone responded by separating the roles of Chairman and CEO and announcing plans to appoint a new CEO, with the current CEO remaining as Chairman. The activists immediately responded with a public letter calling for the Chairman and former CEO to step down. Later that month, Danone announced that its former CEO had stepped down as Chairman.
International Flavors & Fragrances, Inc.	$33.7	Sachem Head Capital Management	• In February 2021, media sources reported that Sachem Head Capital Management ("Sachem Head") had accumulated a $1 billion stake in International Flavors & Fragrances, Inc. ("IFF") and had nominated four directors to the IFF board. • In March 2021, IFF reached an agreement with Sachem Head to provide Sachem Head's managing partner the option to join the IFF board at some point between September 10, 2021 and December 13, 2021, which would expand the IFF board to 14 members.
Laboratory Corporation of America Holdings	$24.1	JANA Partners LLC	• In February 2021, JANA Partners LLC ("JANA") disclosed that it held a 0.8% stake in Laboratory Corporation of America Holdings ("LabCorp"). Media sources reported that JANA may push for a spin-off of LabCorp's Covance business and that JANA had nominated an undisclosed number of directors to the LabCorp board. • In March 2021, JANA withdrew its nominations and LabCorp announced a strategic review of its businesses.
FirstEnergy Corp.	$17.3	Icahn Capital LP	• In February 2021, Icahn Capital LP ("Icahn Capital") informed FirstEnergy Corp. ("FirstEnergy") that Icahn Capital intended to purchase a stake in FirstEnergy of between ~$184 million and ~$920 million. • In March 2021, FirstEnergy and Icahn Capital entered into an agreement, pursuant to which FirstEnergy agreed to appoint two Icahn Capital designees to its now 14-member board and include them on its recommended slate for its 2021 annual meeting.
Bausch Health Companies Inc.	$10.7	Icahn Capital LP	• In February 2021, Icahn Capital disclosed that it held a 7.3% ownership interest in Bausch Health Companies Inc. ("Bausch"), noting that it believed Bausch's shares were undervalued and wished to discuss ways to enhance shareholder value, including in connection with Bausch's ongoing strategic review. • Later that month, Bausch and Icahn Capital entered into an agreement, pursuant to which Bausch agreed to add two Icahn Capital designees to its now 13-member Bausch board as independent directors and include them on its recommended slate for its 2021 annual meeting. The Icahn Capital designees will sit on the Finance and Transactions Committee and assist with evaluating strategic alternatives, including a potential spin-off of Bausch's eye-health business.
Kohl's Corporation	$8.8	Macellum Advisors GP, LLC; Ancora Holdings, Inc.; Legion Partners Asset Management, LLC; 4010 Capital, LLC	• In February 2021, Macellum Advisors GP, LLC, Ancora Holdings, Inc., Legion Partners Asset Management, LLC and 4010 Capital, LLC announced that they had collectively acquired a 9.5% stake in Kohl's Corporation ("Kohl's") and nominated nine independent directors to the 12-member Kohl's board. • In March 2021, the investors filed definitive proxy materials including a "short slate" with only five of the investors' original nine nominees. • In April 2021, Kohl's and the investors reached an agreement, pursuant to which two of the five directors nominated by the investors, as well as a third independent director, will join the Kohl's board following the 2021 annual meeting.

[30] Market capitalization as of the campaign announcement, according to FactSet.

Corporate Governance

2021 PROXY SEASON PREVIEW

The following provides an overview of several key areas that are expected to be important to investors during the 2021 proxy season:[31]

- **Climate Change and Environmental Disclosure**
  Similar to recent years, issues related to climate change and environmental disclosure will be important to investors during the 2021 proxy season, and investors likely will target a more expansive group of companies for enhanced climate disclosure, outside of the traditional industries that pose a high degree of climate risk (such as energy and extractive materials). Many investors now expect company disclosures aligned with the framework established by the Task Force on Climate-Related Financial Disclosures, which includes disclosures related to: (i) an organization's governance around climate-related risks and opportunities; (ii) the impact of climate-related risks on an organization's businesses, strategy and financial planning; (iii) the organization's risk management related to climate-related risks and (iv) the metrics and targets that the organization uses to assess and manage climate-related risks.[32] Companies in extractive and other industries will continue to face investor pressure to set emissions reductions targets. Particular issues that investors likely will raise during the 2021 proxy season include requests that companies: (a) commit to net-zero greenhouse gas emissions by 2050; (b) adopt greenhouse gas reduction targets aligned with the Paris Agreement; (c) implement climate-related scenario analysis; (d) adopt renewable energy targets; (e) link ESG performance to executive compensation and (f) evaluate whether lobbying activities are in accordance with the Paris Agreement goal of limiting the global temperature increase to 1.5° C above pre-industrial levels.

- **Gender and Racial Diversity**
  We expect investors to remain concerned with diversity disclosures related to companies' boards of directors and workforce. Although shareholder proposals in recent years have been focused on gender diversity, we expect that the 2021 proxy season will bring proposals with an expanded focus on racial and ethnic diversity. Many investors now expect disclosure of diversity information that, at a minimum, aligns with the U.S. Equal Opportunity Commission's EEO-1 Survey. Some investors have indicated that they will vote against certain directors at companies not sufficiently disclosing diversity information and/or making progress on diversity-related issues. Recently, proposals calling for "racial audits" of companies' policies and actions related to racial discrimination have seen the proxy advisors split their recommendations, with Glass Lewis generally recommending votes for the proposals and Institutional Shareholders Services ("ISS") generally advising votes against the proposals.

- **Human Capital Management**
  Investors increasingly have become concerned about the health and safety of companies' employees, and this trend was accelerated by the COVID-19 pandemic. During the 2021 proxy season, we expect shareholder proposals related to the implementation of paid sick leave and other health and safety policies. We also expect proposals requesting disclosure regarding how companies are ensuring worker safety during the COVID-19 pandemic. Some investors are requesting disclosure related to how companies are modifying their human capital strategy in response to the COVID-19 pandemic, including with respect to job retention and the adaptation of their workforce to potentially permanent changes caused by the shift to remote work.

- **Executive Compensation**
  Many investors are focused on the executive compensation of companies that implemented pay cuts, furloughs and layoffs as a result of the COVID-19 pandemic, especially companies that received subsidies from the federal government. Investors likely will scrutinize executive compensation adjustments made during the COVID-19 pandemic, including adjustments to performance goals, payout opportunities, option re-pricings and equity grants that occurred during the early months of the pandemic. Some investors are

[31] Matteo Tonello, 2021 Proxy Season Preview and Shareholder Voting Trends (2017-2020) (Feb. 11, 2021), https://conferenceboard.esgauge.org/shareholdervoting; *ICCR's Proxy Resolutions and Voting Guide*, Interfaith Center on Corporate Responsibility, https://www.iccr.org/resources/iccrs-proxy-resolutions-and-voting-guide (last visited Apr. 24, 2021); Ken McPherson, Courteney Keatinge & Julian Hamud, *2021 Proxy Season Preview: U.S.*, Harv. L. Sch. F. Corp. Gov. (Mar. 6, 2021), https://corpgov.law.harvard.edu/2021/03/06/2021-proxy-season-preview-u-s/; Nuveen, LLC, *2021 Proxy Season will Focus on Company Behavior, Not Just Disclosure*, PR Newswire (Apr. 12, 2021), https://www.prnewswire.com/news-releases/2021-proxy-season-will-focus-on-company-behavior-not-just-disclosure-301266299.html.

[32] Task Force on Climate-Related Fin. Disclosures, https://www.fsb-tcfd.org (last visited Apr. 24, 2021).

requesting that ESG goals be included in executive compensation schemes in order to incentivize companies to meet ESG commitments. We expect that investors will consider all of the preceding factors when evaluating say-on-pay votes during the 2021 proxy season.

Proxy Advisory Updates

ISS ESG Scorecards
On February 22, 2021, ISS ESG, a business unit of ISS, launched *ISS ESG Scorecard*, an interactive scoring tool that enables financial institutions to evaluate ESG performance of, and conduct ESG risk assessments of, private companies.[33] While there are a number of similar ESG-related scorecards, the prominence of ISS may make this offering particularly attractive to investors.

Sustainability and Climate Change

IFRS Foundation – Sustainability Standards Board
In February 2021, the International Financial Reporting Standards ("IFRS") Foundation published its response to the comment letters received in response to its consultation paper addressing whether to establish a sustainability standards board to provide a more standardized framework for sustainability reporting, summarizing the types of comments received.[34] Recognizing a demand for consistent standards, the IFRS Foundation said that it would "undertake further detailed analysis" related to developing a sustainability standards board. The Trustees of the IFRS Foundation plan to produce a definitive proposal, including a road map and timeline, by September 2021, which would possibly lead to an announcement on the establishment of a sustainability standards board at the 2021 United Nations Climate Change Conference during the first two weeks of November 2021.

On March 8, 2021, the IFRS Foundation announced that the strategic direction of the new board would include, among other items, (i) a focus on information that is material to the decisions of investors, lenders and other creditors (as opposed to all other stakeholders) and (ii) an initial focus on climate-related reporting, while also working towards meeting the information needs of investors on other ESG matters. On March 26, 2021, the World Economic Forum International Business Council publicly endorsed the IFRS Foundation's efforts in developing a sustainability standards board.[35]

Introduction of the CLEAN Future Act
On March 2, 2021, Congressmen Frank Pallone, Jr. (D-NJ), Paul Tonko (D-NY) and Bobby L. Rush (D-IL) introduced the Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act, which would, if enacted, direct the SEC to enact rules requiring public companies to disclose, among other things, "the identification of, the evaluation of potential financial impacts of, and any risk management strategies relating to: (i) physical risks posed to the covered issuer by climate change; and (ii) transition risks posed to the covered issuer by climate change . . . ."[36]

Increased SEC Focus on Climate Change Matters
In a series of public statements, the SEC has indicated that it is increasingly focused on climate-related matters. For example, on February 24, 2021, then-Acting Chair Lee issued a public statement that she was directing the Division of Corporation Finance to enhance their focus on climate-related disclosures when reviewing public company filings.[37] On March 4, 2021, the SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement, which will develop initiatives to proactively identify ESG-related misconduct.[38] On March 15, 2021, then-Acting Chair Lee issued a public statement requesting public comment on questions related to climate change disclosure "with an eye toward facilitating the disclosure of consistent, comparable, and

[33] See Press Release, *ISS ESG Scorecards Launched to Support ESG Performance and Risk Assessment of Private Companies*, ISS Insights (Feb. 22, 2021), https://insights.issgovernance.com/posts/iss-esg-scorecards-launched-to-support-esg-performance-and-risk-assessment-of-private-companies/.

[34] See Press Release, *IFRS Foundation Trustees announce next steps in response to broad demand for global sustainability standards*, IFRS (Feb. 2, 2021), https://www.ifrs.org/news-and-events/news/2021/02/trustees-announce-next-steps-in-response-to-broad-demand-for-global-sustainability-standards/; Press Release, *IFRS Foundation Trustees announce strategic direction and further steps based on feedback to sustainability reporting consultation*, IFRS (Mar. 8, 2021), https://www.ifrs.org/news-and-events/news/2021/03/trustees-announce-strategic-direction-based-on-feedback-to-sustainability-reporting-consultation/.

[35] Letter from Brian Moynihan, Chair, International Business Council, and Klaus Schwab, Founder and Executive Chairman, World Economic Forum, to the World Economic Forum International Business Council (Mar. 26, 2021), http://www3.weforum.org/docs/WEF_ESG_Letter_Klaus_Schwab_and_Brian_Moynihan_2021.pdf.

[36] H.R. 1512, 117th Cong. (2021).

[37] Public Statement, Allison Herren Lee, *Statement on the Review of Climate-Related Disclosure*, SEC (Feb. 24, 2021), https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure.

[38] Press Release, *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues*, SEC (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

reliable information on climate change", which questions relate to a variety of climate-related topics, including how the SEC should regulate, monitor and guide climate change disclosures.[39] And on March 16, 2021, then-Acting Chair Lee explained in a speech hosted by the Center for American Progress that "we should consider . . . the development of a dedicated standard setter for ESG (similar to [the Financial Accounting Standards Board]) under SEC oversight to devise an ESG reporting framework that would complement our financial reporting framework."[40]

Diversity

Amendment to Nasdaq Proposed New Listing Requirements
On February 26, 2021, in response to comments received by the SEC, NASDAQ submitted a revised proposal to the SEC in connection with its proposed rule change to adopt listing rules related to board diversity.[41] This revised proposal included, among other things: (i) a one-year grace period for companies that no longer meet the diversity objectives as a result of a vacancy on their board of directors; (ii) an exemption for smaller boards (with five or fewer directors) allowing them to include only one diverse director, instead of two; (iii) a requirement that companies make board diversity information publicly available in advance of annual shareholder meetings to align with the timing of other governance related disclosures and (iv) a two-year grace period to fully meet the diverse director objective for new companies that list after the phase-in period.

Council of Institutional Investors Letter to the Senate Banking Committee and Draft Legislation
On March 18, 2021, the Council of Institutional Investors sent a letter to the Senate Banking Committee, urging the Senate to enact draft legislation that would direct the SEC to require U.S. stock exchanges to adopt certain minimum listing standards recommended in the SEC Investor Advocate's 2020 annual report.[42] The draft legislation specifically directs the SEC to adopt rules requiring the exchanges to prohibit the listing of any company that (i) fails to make adequate disclosure of the diversity of its board of directors and senior executives, as well as the company's efforts to promote diversity or (ii) has two or more classes of common stock with unequal voting rights for more than seven years after its IPO.

SEC Updates

Senate Confirms Gary Gensler as Chair of the SEC
On April 14, 2021, the Senate confirmed Gary Gensler as Chair of the SEC. Chair Gensler previously served as Chair of the U.S. Commodity Futures Trading Commission ("CFTC") during the Obama Administration. Chair Gensler's time at the CFTC gave him a reputation as a tough but effective regulator while implementing provisions of the Dodd-Frank Act and generally taking a more rigorous approach towards enforcement. Before his confirmation, Chair Gensler joined with then-Acting Chair Lee in signaling a desire for increased and more specific line-item disclosure requirements about ESG-related matters, such as: (i) the effects on public companies of climate change and their responses to it; (ii) human capital and workforce matters; (iii) diversity and inclusion and (iv) corporate political contributions and lobbying activities. Chair Gensler also indicated that he may look skeptically on former Chair Jay Clayton's reforms relaxing the rules around offerings exempt from registration, which made it easier for companies to complete such offerings and expanded the range of investors who can participate in them.

Enforcement

- **Greater Subpoena Power Within the Division of Enforcement**
  On February 9, 2021, then-Acting Chair Lee announced that senior officers can approve issuing a Formal Order of Investigation, which allows senior Division of Enforcement staff to issue subpoenas and take sworn testimony. Then-Acting Chair Lee indicated that this change would allow Division of Enforcement staff "to act more swiftly to detect and stop ongoing frauds, preserve assets, and protect

[39] Public Statement, Allison Herren Lee, *Public Input Welcome on Climate Change Disclosures*, SEC (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

[40] Allison Herren Lee, *Speech By Acting Chair Lee on Meeting Investor Demand for Climate and ESG Information at the SEC*, Harv. L. Sch. F. Corp. Gov. (Mar. 16, 2021), https://corpgov.law.harvard.edu/2021/03/16/speech-by-acting-chair-lee-on-meeting-investor-demand-for-climate-and-esg-information-at-the-sec/.

[41] 86 Fed. Reg. 14484 (Mar. 16, 2021).

[42] Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to the Honorable Sherrod Brown and the Honorable Pat Toomey (Mar. 18, 2021), https://www.cii.org/files/issues_and_advocacy/correspondence/2021/2021%20Investor%20Advocate%20Letter.pdf.

vulnerable investors."[43] This policy was a reversal of the more limited Division of Enforcement subpoena authority instituted in 2017 by former Commissioner Michael Piwowar, who was designated as Acting Chair of the SEC by President Trump from January to May 2017, and it generally indicates that the Division of Enforcement will be more empowered in the Biden administration.

- **End of Settlements Conditioned Upon Disqualification Waivers**
  On February 11, 2021, then-Acting Chair Lee announced that the SEC will no longer allow settlements of enforcement actions to be conditional on the SEC granting a disqualification waiver (*e.g.*, WKSI waivers, Rule 506 bad actor waivers, etc.). In addition to the direct implications relevant for settling enforcement actions, this announcement also suggests that the SEC will take a tougher approach on granting these waivers than it did previously.[44]

This review relates to general information only and does not constitute legal advice.
Facts and circumstances vary. We make no undertaking to advise recipients of any legal changes or developments.

[43] Public Statement, Allison Herren Lee, *Statement of Acting Chair Allison Herren Lee on Empowering Enforcement to Better Protect Investors*, SEC (Feb. 9, 2021), https://www.sec.gov/news/public-statement/lee-statement-empowering-enforcement-better-protect-investors.

[44] Public Statement, Allison Herren Lee, *Statement of Acting Chair Allison Herren Lee on Contingent Settlement Offers*, SEC (Feb. 11, 2021), https://www.sec.gov/news/public-statement/lee-statement-contingent-settlement-offers-021121.