Cravath Quarterly Review

M&A, ACTIVISM AND CORPORATE GOVERNANCE

01

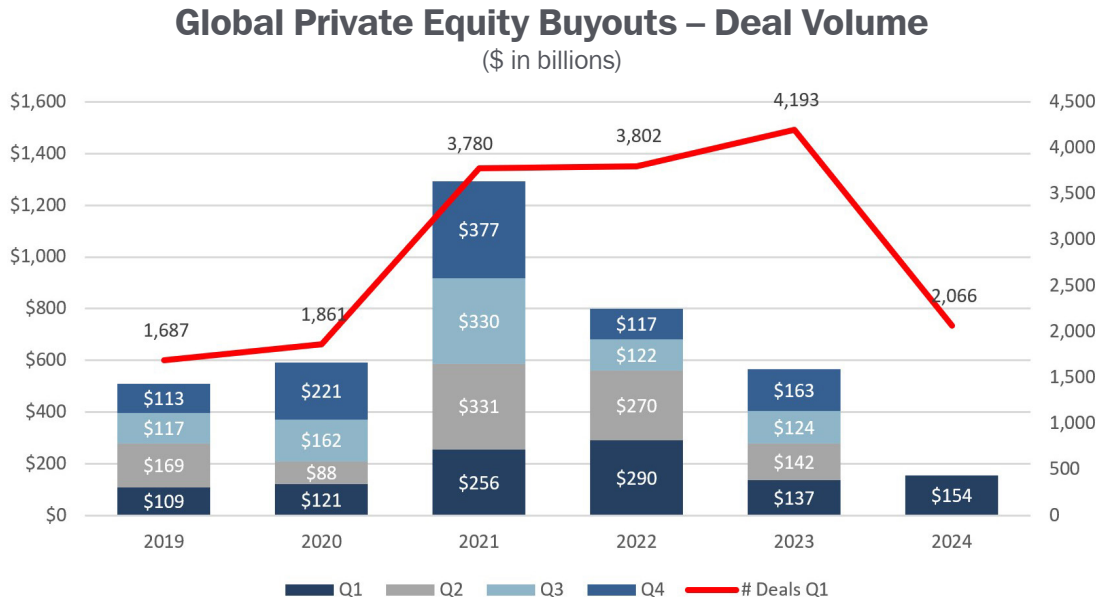
Mergers & Acquisitions

TRENDS

SOURCE Refinitiv, An LSEG Business.

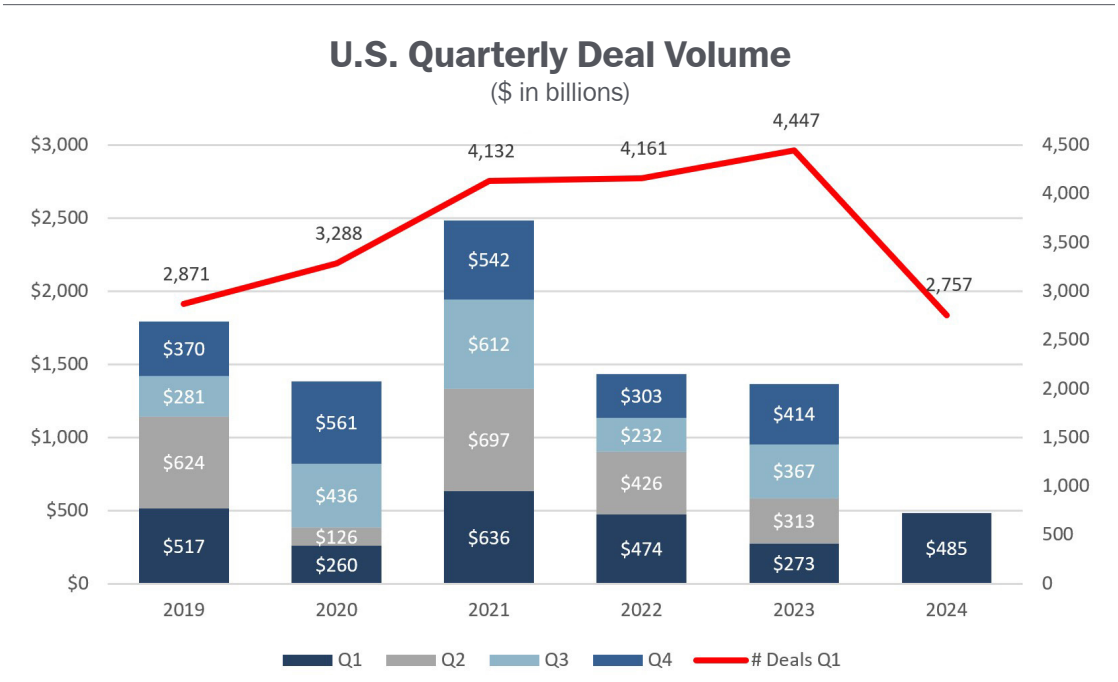
Q1 2024: M&A Activity Increases Year-over-Year, Announced Deal Volume Below $1 Trillion for Seventh Consecutive Quarter

Global M&A activity in Q1 2024 totaled $798 billion, an increase of ~38% compared to Q1 2023 but a decrease of ~10% compared to Q4 2023. Q1 2024 marked the seventh consecutive quarter to fall below $1 trillion in announced deal volume. There were over 10,700 deals announced in the first quarter of 2024, a decrease of ~31% compared to Q1 2023 and a decrease of ~20% compared to Q4 2023.



SOURCE Refinitiv, An LSEG Business.

Private equity buyouts in Q1 2024 reached $154 billion globally, an increase of ~13% compared to Q1 2023 and a decrease of ~6% compared to Q4 2023. Nearly 2,100 private equity-backed deals were announced in Q1 2024, which represented a decrease of ~51% compared to Q1 2023's nearly 4,200 deals and a decrease of ~27% compared to Q4 2023.



SOURCE Refinitiv, An LSEG Business.

Dealmaking Up in US and Europe

M&A activity for U.S. targets amounted to $485 billion in Q1 2024, an increase of ~78% compared to Q1 2023 and an increase of ~17% compared to Q4 2023. M&A activity for European targets totaled $142 billion in Q1 2024, an increase of ~58% compared to 2023 levels and a two-year high. In the Asia-Pacific region, dealmaking totaled $105 billion in Q1 2024, a ~28% decrease compared to Q1 2023 and the slowest first quarter since 2013. Cross-border M&A activity totaled $193 billion in Q1 2024, an 8% increase compared to Q1 2023 and the strongest quarter for cross-border M&A in two years.

LEGAL & REGULATORY DEVELOPMENTS

Cases

The end of 2023 and Q1 2024 featured a number of notable decisions by the Delaware Chancery Court.

LOST-PREMIUM DAMAGES

CRISPO V. MUSK, ET AL., C.A. NO. 2022-0666-KSJM (DEL. CH. OCT. 31, 2023).

In October 2023, the Delaware Court of Chancery issued an opinion regarding the enforceability of so-called *Con Ed* provisions—provisions that allow a target company to recover lost-premium damages for a buyer's breach of a merger agreement in the event of a termination of the agreement (the "Lost-Premium Provisions").

After Elon Musk purported to terminate his highly publicized acquisition of Twitter, Inc. ("Twitter"), a stockholder of Twitter sued Musk for breach of the merger agreement, asserting standing as a third-party beneficiary and seeking specific performance and lost-premium damages. After Musk eventually closed the transaction, the plaintiff petitioned for mootness fees, asserting that his claim contributed to the consummation of the transaction.

The court denied the plaintiff's petition for mootness fees, finding that the claim was not meritorious when filed because the plaintiff did not have standing as a third-party beneficiary. In reaching this decision, the court found that since only stockholders, and not the company, expected to receive a premium under the merger agreement, allowing the target company to recover lost-premium damages would be an unenforceable penalty, and since the merger agreement at issue did not confer third-party beneficiary status on stockholders, the Lost-Premium Provision was therefore unenforceable. Additionally, the court rejected the argument that the merger agreement granted stockholders third-party beneficiary status for the narrow purpose of enforcing the lost-premium provision, reasoning that such a status was not available while Twitter was pursuing specific performance. The court suggested that the only ways to permit recovery of lost-premium damages were to confer express third-party beneficiary status on stockholders to pursue such claims directly or for an agent to be appointed to pursue such claims on the stockholders' behalf, though the court questioned a company's ability to unilaterally appoint itself an agent for this purpose, suggesting that such agency relationship could be established in the company's charter.

Following the ruling, in March 2024, the Council of the Corporation Law Section of the Delaware State Bar Association (the "Council") proposed amendments to the Delaware General Corporation Law ("DGCL") that would allow parties to a merger agreement to contract for lost-premium provisions, regardless of provisions of contract law that would otherwise make them unenforceable, such as those, through the adoption of the merger agreement, pertaining to liquidated damages. The amendments, if passed, would also expressly enable the appointment of stockholder representatives to enforce the rights of stockholders under a merger agreement.

CONTROLLING STOCKHOLDERS

IN RE SEARS HOMETOWN AND OUTLET STORES, INC. STOCKHOLDER LITIGATION, C.A. NO. 2019-0798-JTL (DEL. CH. JAN. 24, 2024).

In January 2024, the Delaware Court of Chancery issued a post-trial opinion finding that when a controlling stockholder sells stock or exercises its voting power to alter a corporation's status quo, it may owe fiduciary duties of good faith and care to not intentionally, or through grossly negligent action, harm the corporation or its minority stockholders. The court held that the controller's unilateral action to amend bylaws or remove directors should be subject to enhanced scrutiny, under which the controller bears the burden of showing that he acted in good faith for a legitimate objective, had a reasonable basis for believing that action was necessary and selected a reasonable means for achieving his legitimate objective.

Sears Hometown and Outlet Stores, Inc. ("Sears") formed a special committee of independent directors in connection with its evaluation of potential strategic transactions with its controlling stockholder. After initial negotiations with the controller failed, the special committee recommended liquidation of Sears's distressed business segment. The controller disagreed, and, in an effort to stop the liquidation, the controller (1) amended the corporation's bylaws by written consent to subject the liquidation to onerous procedural requirements and (2) removed two members of the special committee from the Sears board. Sears ultimately sold its distressed business to the controller, and minority Sears stockholders challenged the terms of the deal.

The court distinguished between a controller's exercise of its stockholder rights and the impact of the controller's actions. Applying enhanced scrutiny review to the controller's exercise of voting power, the court concluded that the controller did not breach his fiduciary duties by exercising his voting power to amend the bylaws and remove directors from the Sears board, calling them a "drastic but necessary" means of achieving his objective. The court then applied entire fairness review to the sale of the distressed business, concluding that, given that the controller's removal of special committee members hindered the negotiations and that the controller paid a price "below the range of fairness," the transaction was not entirely fair. The court awarded damages to the minority stockholders equal to the difference between the transaction price and the court's assessment of the fair value of the company.

CHANGING CORPORATE DOMICILE

PALKON, ET AL. V. MAFFEI, ET AL., C.A. NO. 2023-0449-JTL (DEL. CH. FEB. 20, 2024).

In February 2024, the Delaware Court of Chancery declined to enjoin two Delaware public companies, TripAdvisor, Inc. ("TripAdvisor") and its parent company, Liberty Tripadvisor Holdings Inc. ("Parent"), from converting into Nevada corporations, but declined to dismiss stockholder claims for damages arising out of the conversion.

In 2023, the boards of TripAdvisor and Parent approved the conversion of both companies from Delaware corporations into Nevada corporations. The conversions also received majority approval from stockholders, including Gregory B. Maffei, CEO and Chairman of Parent and the controlling stockholder of both companies. Following the approval, stockholders of both companies challenged the proposed conversions as self-interested and not entirely fair. The plaintiffs alleged that Maffei approved the conversion to reduce litigation risk to himself and other directors at the expense of other stockholders.

The court declined to dismiss the plaintiffs' claims. Applying entire fairness review, it held that: (1) it was reasonably conceivable that the conversions would confer a material benefit on the defendants by reducing the stockholders' litigation rights; and (2) the conversions had not been "cleansed" by procedural protection such as an independent special committee. Nevertheless, the court declined to enjoin the conversions because monetary awards would be an adequate

remedy in this case. The court left open the possibility of awarding monetary damages to the plaintiffs and stated that it would consider enjoining companies from departing Delaware in extreme scenarios.

STOCKHOLDERS' AGREEMENTS AND BOARD DECISION-MAKING

WEST PALM BEACH FIREFIGHTERS' PENSION FUND V. MOELIS & COMPANY, C.A. NO. 2023-0309-JTL (DEL. CH. FEB. 23, 2024).

In February 2024, the Delaware Court of Chancery issued an opinion invalidating certain stockholder consent and board composition–related rights in the stockholder agreement between Moelis & Co. ("Moelis") and its founder, Ken Moelis (the "Moelis Stockholder Agreement").

At issue were the following provisions in the Moelis Stockholder Agreement: (1) "pre-approval requirements" requiring the Moelis board to obtain Ken Moelis's prior written consent before taking certain corporate actions, which the court characterized as "virtually everything the [b]oard can do," (2) board composition requirements compelling the Moelis board to ensure that Ken Moelis can select a majority of board members and (3) a committee composition requirement requiring the Moelis board to populate any board committee with a number of Moelis designees proportionate to the number of Ken Moelis's designees on the full Moelis board. Stockholders challenged the validity of the foregoing provisions, arguing that certain provisions of the Moelis Stockholder Agreement failed the test articulated in *Abercrombie v. Davies*[2] and endorsed by the Supreme Court of Delaware that governance restrictions violate the DGCL when they effectively remove from directors "in a very substantial way their duty to use their own best judgment on management matters" or "limit in a substantial way the freedom of director decisions on matters of management policy."

The court found that the pre-approval requirements as a whole, certain of the board composition provisions and the committee composition provision violated the DGCL and are therefore invalid, but stated that many of the challenged provisions would be permissible if they were codified in Moelis's charter instead. Acknowledging that many stockholder agreements contain provisions similar to those found to be invalid in this case, the court noted that "[w]hen market practice meets a statute, the statute prevails." The court's ruling has already been cited in cases seeking to challenge various agreements relating to board composition and stockholder rights, including in the activist settlement context, such as *Miller v. Bartolo*[3] (challenging Crown Castle Inc.'s settlement agreement with Elliot Investment Management, LP) and *Quade v. Apollo Global Management*[4] (challenging Apollo Global Management Inc.'s board agreements favoring the company's former managing partners).

In March 2024, the Council proposed amendments to the DGCL that would, among other things, allow a corporation to enter into contracts with current or prospective stockholders whereby the corporation agrees, among other things, to (i) restrict itself, the board or one or more directors from taking specified actions or (ii) require approval from one or more persons or entities before taking specified corporate actions. The amendments would require that the corporation receive consideration for entering into such contracts, and such consideration may include inducing stockholders to take or refrain from certain actions. The amendments would not allow the directors to overdelegate their authority to manage the corporation.

02

Antitrust

FEDERAL TRADE COMMISSION NOMINATIONS

In March 2024, the Senate confirmed two new Commissioners of the Federal Trade Commission ("FTC")—Andrew Ferguson, formerly Virginia's Solicitor General, and Melissa Holyoak, formerly Utah's Solicitor General—and approved a new term for current FTC Commissioner Rebecca Slaughter.[5] The five-member FTC is now complete and composed of three Democratic-appointed commissioners, including Chair Lina Khan, and two Republican-appointed commissioners.

ENFORCEMENT

Federal Trade Commission

In January 2024, the FTC sued to block Novant Health, Inc.'s acquisition of two hospitals in North Carolina's Eastern Lake Norman Area from Community Health Systems, Inc., alleging that the deal "threatens to raise prices and reduce incentives to invest in quality and innovative care that would benefit patients."[6]

In February 2024, the FTC and nine states sued to block the Kroger Company ("Kroger")'s $24.6 billion acquisition of the Albertsons Companies, Inc. ("Albertsons"), alleging that the "proposed deal will eliminate fierce competition between Kroger and Albertsons, leading to higher prices for groceries and other essential household items for millions of Americans."[7] The FTC also alleged that the proposed deal would "immediately erase aggressive competition for workers, threatening the ability of employees to secure higher wages, better benefits, and improved working conditions."[8] This case is the first merger challenge to allege harm to competition in labor markets, which, as we previewed in our Q3 2023 newsletter,[9] the agencies have been increasingly focused on during the Biden Administration. The challenge also alleges that Kroger and Albertsons's proposal to divest several hundred stores and other assets to C&S Wholesale Grocers is an inadequate divestiture proposal that "falls far short of mitigating the lost competition between Kroger and Albertsons."[10]

Department of Justice

In January 2024, the U.S. District Court for the District of Massachusetts blocked JetBlue Airways Corporation ("JetBlue")'s $3.8 billion acquisition of Spirit Airlines Inc. ("Spirit Airlines"), ruling that the proposed merger would substantially lessen competition in violation of the Clayton Act.[11] In March 2023, the Department of Justice ("DOJ") and seven states had sued to block the merger.[12] The court's decision followed a 17-day trial that began in October 2023. Following the court's decision, JetBlue announced that it was terminating its merger agreement with Spirit Airlines.[13]

In March 2024, Dole plc ("Dole") announced that it had agreed with Fresh Express Incorporated ("Fresh Express") to terminate Fresh Express's previously announced $308 million acquisition of Dole's Fresh Vegetables division. The DOJ had not yet challenged the acquisition, but its investigation had concluded that "the merger would have reduced the number of competitors" and "raised grocery prices for food products that are purchased by 85% of American households."[14]

03

CFIUS

National Defense Industrial Strategy

In January 2024, the U.S. Department of Defense ("DoD") released its first-ever National Defense Industrial Strategy (the "NDIS").[15] The NDIS, which will guide DoD's engagement with the U.S. defense industrial base over the next three

to five years, emphasizes that DoD will seek to "advance policies aimed at deterring and countering adversaries from using economic means to weaken U.S. national security."[16] This includes, among other things, combatting "adversarial capital", that is, adversarial nations "strategically employing investments in key U.S. and allied defense industries to harvest critical technologies, gain access to pioneering innovation and research and development efforts, leverage opaque private-public reporting structures to mask ultimate beneficial ownership, and capitalize on dual-use technologies that may be used to close the gap in the U.S. military's comparative advantage."[17]

The NDIS specifically mentions CFIUS as an authority through which the U.S. Government can combat adversarial capital, signifying that DoD will continue to play a key role in CFIUS's review of transactions involving technologies, services, or supply chains related to achieving or maintaining military advantage, even if the transaction parties do not operate in an industry sector classically associated with the defense industrial base.

Update to Critical and Emerging Technologies List

On February 12, 2024, the White House Office of Science and Technology Policy ("OSTP") released an updated list of critical and emerging technologies ("CETs") that are potentially significant to U.S. national security.[18] The list, which will inform the U.S. Government's national security-related activities, including the CFIUS process, was generated through an interagency process facilitated by OSTP, the National Science and Technology Council and the National Security Council.

The updated list contains 18 CET areas of particular importance to the national security of the United States, listed below. Foreign investments in U.S. businesses that operate in these technology areas should be carefully assessed for CFIUS implications.

1. Advanced Computing
2. Advanced Engineering Materials
3. Advanced Gas Turbine Engine Technologies
4. Advanced and Networked Sensing and Signature Management
5. Advanced Manufacturing
6. Artificial Intelligence
7. Biotechnologies
8. Clean Energy Generation and Storage
9. Data Privacy, Data Security, and Cybersecurity Technologies
10. Directed Energy
11. Highly Automated, Autonomous, and Uncrewed Systems (UxS), and Robotics
12. Human-Machine Interfaces
13. Hypersonics
14. Integrated Communication and Networking Technologies
15. Positioning, Navigation, and Timing (PNT) Technologies
16. Quantum Information and Enabling Technologies
17. Semiconductors and Microelectronics
18. Space Technologies and Systems

Department of Agriculture

On March 9, 2024, the Consolidated Appropriations Act, 2024, was enacted into law. The legislation provides that the Secretary of Agriculture shall be included as a member of CFIUS on a case-by-case basis with respect to transactions involving agricultural land, agriculture biotechnology, or the agriculture industry, as determined by the Secretary of the Treasury in coordination with the Secretary of Agriculture.[19] Further, the legislation provides that the Secretary of Agriculture shall, to the maximum extent practicable, notify CFIUS of any agricultural land transaction that the Secretary has reason to believe is within CFIUS's jurisdiction, may pose a risk to the national security of the United States, and is subject to the reporting requirements of the Agricultural Foreign Investment Disclosure Act of 1978.

This statutory change is not expected to lead to significant changes in CFIUS's substantive review of transactions involving the agriculture industry because CFIUS already involves USDA in its review of such transactions on an *ad hoc* basis. Nevertheless, the statutory mandate, together with additional funds appropriated to carry out the mandate, may result in more agricultural transactions coming to the attention of CFIUS and, ultimately, undergoing CFIUS review.

White House Statement on Pending Transaction under CFIUS Review

On March 14, 2024, the White House issued a statement from President Biden implicitly opposing the pending acquisition by Nippon Steel Corporation ("Nippon Steel"), a Japan-headquartered steelmaker, of United States Steel Corporation ("U.S. Steel"), a steel producer headquartered in Pennsylvania.[20] Specifically, President Biden indicated that "it is vital for [U.S. Steel] to remain an American steel company that is domestically owned and operated."[21]

President Biden's statement is unusual because, according to a public statement by Nippon Steel, the transaction is progressing through the CFIUS review process.[22] The statement is thus a notable departure from the Government's general policy of not commenting on transactions under CFIUS review, and raises concerns regarding the politicization of the CFIUS process. Transaction parties planning for a CFIUS review would do well to consider how politics may affect the process, particularly during this U.S. presidential election year.

04

Activism[3]

Observations regarding activist activity levels in Q1 2024 include:

- Global activist activity in Q1 2024 fell from 2023's active pace with ~65 new campaigns globally, representing a ~15% decrease from Q1 2023 and a ~10% decrease from Q4 2023.
- U.S. activist activity increased in Q1 2024, representing the largest regional share of global activist activity at ~60% of all new campaigns. The ~40 new campaigns launched in the United States in Q1 2024 represented a ~20% increase from Q1 2023 and a ~10% increase from Q4 2023.
- Activist activity in Europe decreased in Q1 2024. The ~5 new campaigns launched in Europe in Q1 2024 (~10% of all new campaigns globally) represented a ~50% decrease from Q1 2023 and held steady from Q4 2023.
- Activist activity outside the United States and Europe increased in Q1 2024. The ~20 new campaigns launched outside the United States and Europe in Q1 2024 (~30% of all new campaigns globally) represented a ~40% increase from both Q1 2023 and Q4 2023.

05

Corporate Governance

ASSET MANAGER 2024 PRIORITIES

Updates to Vanguard Voting Policy[24]

The Vanguard Group, Inc. ("Vanguard") updated its proxy voting policy for U.S. portfolio companies effective February 1, 2024. Changes include:

- *Board and Committee Independence:* Vanguard clarified that it expects the majority of directors on noncontrolled boards to satisfy the relevant exchange listing or regulatory requirements for independence. Vanguard may vote against the entire board in the second year that a board is not majority independent. Additionally, Vanguard expects that all key committees are comprised entirely of independent directors and will generally vote against a nominating committee where any key committee is not entirely independent.
- *Board Composition:* Vanguard updated its guidelines on board composition to include a section explaining that boards should be "'fit for purpose' reflecting sufficient diversity of skills, experience, perspective, and personal characteristics (such as gender, age, race, and ethnicity)" such that the board has appropriate "cognitive diversity" to enable effective, independent oversight. Vanguard expects companies to disclose their perspectives on board structure and how their approach supports the company's strategy, long-term performance and shareholder returns.
- *Escalation Process for Director and Committee Accountability:* Vanguard clarified that it will vote against directors where the board has failed to satisfy its oversight role or failed to respond to actions approved by a majority of shareholders that the board took unilaterally against shareholder interests.
- *Environmental/Social Proposals:* Vanguard explained that it will evaluate every environmental and social shareholder proposal on its own merits in the context that the board has ultimate responsibility for risk management and oversight. Vanguard expects this oversight to include material risks specific to both the relevant sector and the company itself.
- *Advisory Votes on Executive Compensation (Say on Pay):* Vanguard updated its Say on Pay section by providing further context on the categories of factors it considers when evaluating executive compensation.

Blackrock 2024 Investors Letter[25]

In March 2024, BlackRock, Inc. ("BlackRock") CEO Larry Fink published a letter to investors, combining his annual letter to CEOs and annual letter to shareholders of BlackRock in one statement. Fink touched on the important role he expects capital markets to play in many Americans' goals to retire comfortably. Fink expressed concern that a comfortable retirement is more challenging to achieve today than it was 30 years ago given increased life expectancy and identified potential responses, such as the Netherlands tying increases to the retirement age to increases in life expectancy and Japan's efforts to treat 60-plus year-olds as late-career workers with experience to offer. Additionally, Fink advocated for workers receiving increased assistance with investing by making investing more intuitive and affordable and called for a pragmatic approach to energy transition and decarbonization.

SEC UPDATES

SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors[26]

On March 6, 2024, the Securities and Exchange Commission ("SEC") adopted final rules requiring climate-related disclosures for public companies (the "Climate Rules"). The requirements of the Climate Rules can generally be grouped into five categories:

- *Governance, Strategy and Risk Management Disclosures:* The Climate Rules require a description of climate-related governance at both the board of directors and management levels. The Climate Rules require disclosure of the extent to which climate-related risks have materially impacted or are reasonably likely to materially impact the registrant, including its strategy, results of operations or financial condition, including both in the short term (*i.e.*, in the next 12 months) and in the longer term (*i.e.*, beyond the next 12 months). The Climate Rules also require a description of the registrant's process for identifying, assessing and managing material climate-related risks, including how it identifies whether it has incurred or is reasonably likely to incur a material physical or transition risk and how it decides whether to mitigate, accept or adapt to such risk.
- *Targets and Goals:* Registrants will be required to describe any climate-related target or goal set by the registrant that has materially affected or is reasonably likely to materially affect the registrant's business, results of operations or financial condition, as well as provide annual updates on the progress made toward such target or goal.
- *Scope 1 and 2 Greenhouse Gas (GHG) Emissions Metrics:* Large accelerated filers and accelerated filers (but not smaller reporting companies or emerging growth companies) are required to disclose their Scope 1 and Scope 2 GHG emissions if material, with the SEC making clear it intends registrants to apply traditional definitions of materiality used elsewhere in the federal securities laws. Registrants will also need to describe the assumptions and methodology used in preparing their emissions disclosures.
- *Safe Harbor:* The Climate Rules provide a safe harbor under the Private Securities Litigation Reform Act for climate-related disclosures pertaining to transition plans, scenario analyses, the use of internal carbon prices and targets and goals made pursuant to the new disclosure requirements, except for historical facts (which would include, for example, annual updates regarding progress made toward targets or goals or under transition plans).
- *Regulation S-X Financial Statement Disclosures:* The new Article 14 of Regulation S-X requires companies to disclose the aggregate amount of expenditures, losses, capitalized costs and charges, excluding recoveries, incurred as a result of severe weather events and other "natural conditions," such as hurricanes, tornadoes, flooding, drought, wildfires, extreme temperatures and sea level rise, subject to certain minimum thresholds.

The Climate Rules, which will become effective on May 28, 2024, apply to both domestic and most foreign private issuers, regardless of industry sector, and to annual reports and registration statements. Compliance obligations are phased in at different times depending on the requirement and the registrant's filer status, with the first filing deadline occurring as early as March 2026 for large accelerated filers, covering fiscal years beginning in 2025. A full discussion of the Climate Rules can be found in the two Cravath client alerts on the subject.[27] On April 4, 2024, the SEC issued an order voluntarily staying the Climate Rules pending Eighth Circuit review.[28]

SEC Adopts Rules to Enhance Investor Protections Relating to SPACs, Shell Companies, and Projections[29]

On January 24, 2024, the SEC adopted rules and amendments to provide greater investor protection and enhance disclosures in IPOs by SPACs and in subsequent business combination transactions between SPACs and target companies, commonly known as "de-SPAC transactions." The new rules require enhanced disclosures about conflicts of interest, SPAC sponsor compensation and dilution, among other disclosure requirements. Under the new rules, companies involved in de-SPAC transactions must disclose all material bases of projections and all material assumptions underlying the projections. The adopted rules and amendments become effective July 1, 2024.

SEC Investor Advisory Committee Revisits Materiality as a Disclosure Standard[30]

On March 7, 2024, the SEC's Investor Advisory Committee held a panel titled *Examining the Use of Materiality as a Disclosure Standard — Can the Definition be Improved to Better Serve Investors?* To commemorate the 25th anniversary of Staff Accounting Bulletin 99 – Materiality ("SAB 99") and consider whether SAB 99 merited any updates. SAB 99 has been a highly influential codification of the SEC staff's view that misstatements cannot be deemed immaterial only because they do not reach a specific quantitative threshold and that exclusive reliance on quantitative benchmarks is inappropriate and qualitative factors must be considered as well. John White, Cravath Partner and Chair of the Firm's Corporate Governance and Board Advisory Practice, participated on the panel.

CYBERSECURITY UPDATE

Trends Emerge as Early Filers Comply with SEC Cybersecurity Rules[31]

As of December 18, 2023, all registrants other than smaller reporting companies were required to begin complying with the SEC's final rules regarding disclosure by public companies, including foreign private issuers, of cybersecurity risk management, strategy, governance and related incidents. Major themes and best practices emerged, including:

- Most companies reported aligning with frameworks such as the National Institute of Standards and Technology Cybersecurity Framework.
- Many companies highlighted continuous monitoring efforts performed by sophisticated third parties.
- Oversight responsibilities for cybersecurity were frequently integrated into a company's larger enterprise risk management framework, with oversight most frequently delegated to the audit committee.

ACCOUNTING UPDATE

PCAOB Sanctions Audit Firms for Violating Rules and Standards Related to Audit Committee Communications[32]

On February 20, 2024, the Public Company Accounting Oversight Board ("PCAOB") announced disciplinary orders that sanctioned four audit firms for violations of PCAOB rules regarding communications that firms are required to make to audit committees under Auditing Standard 1301: Communications with Audit Committees ("AS 1301"). Each of the four sanctioned firms failed to make certain required communications with audit committees. AS 1301 requires auditors to communicate with a company's audit committee regarding certain

matters related to the conduct of an audit and to obtain certain information from the audit committee to the extent such information is relevant to the audit. The primary objective of AS 1301 is to encourage effective two-way communications between auditor and audit committee so both sides understand pertinent matters related to the audit.

The PCAOB has displayed an interest in strengthening its enforcement of accounting standards. The four firms were sanctioned in connection with a sweep performed by the PCAOB that led to previous sanctions for eight firms in 2023.

NYSE UPDATE

NYSE Issues Update to Listed Company Compliance Guidance Memo[33]

On January 31, 2024, the New York Stock Exchange ("NYSE") published its 2024 Listed Company Compliance Guidance Memo (the "NYSE Memo"). The NYSE Memo provides three new updates to the NYSE Listed Company Manuel ("LCM") in 2024:

- *Recovery of Erroneously Awarded Compensation:* Listed companies are required to have in place policies and procedures for the recovery of erroneously awarded compensation, subject to limited exceptions.[34]
- *Sales of Securities to Passive Shareholders:* The NYSE amended Sections 312.03(b) and 312.04 of the LCM to expand the circumstances under which listed companies may sell securities without shareholder approval to large passive investors. The amendment limits Section 312.03(b)(i) in its application to sales to a director, officer, controlling shareholder or member of a control group or any other substantial security holder of the company that has an affiliated person who is an officer or director of the company (each an "Active Related Party"). Section 312.03(b)(i) is no longer applicable to passive shareholders that do not meet the definition of Active Related Party.
- *Shortened Settlement Cycle (T+1):* In connection with SEC updates to Rule 15c6-1(a), the NYSE Memo notes that the settlement cycle is shortened from two business days after the trade date (T+2) to one business day after the trade date (T+1). The shortened settlement cycle goes into effect on May 28, 2024.

06

Additional Policy Updates

President Biden Issues Executive Order and DOJ Concurrently Issues ANPRM Regarding Protection of Americans' Bulk Sensitive Data

On February 28, 2024, President Biden issued an Executive Order, and the DOJ concurrently issued an advanced notice of proposed rulemaking ("ANPRM"), proposing a regulatory regime to prevent access to Americans' bulk sensitive personal data by "countries of concern." DOJ's proposed regulatory regime would prohibit and/or restrict transfer of Americans' bulk sensitive personal data to such countries.

Under the ANPRM, there are six "countries of concern": China (including Hong Kong and Macau), Russia, Iran, North Korea, Cuba and Venezuela. "Sensitive Personal Data" would include: (i) covered personal identifiers; (ii) geolocation/sensor data; (iii) biometric data; (iv) human "'omic" data; (v) personal health data; and (vi) personal financial data. "Government Related Data" would include data with connections to U.S. government employees, contractors, officials and certain sensitive locations.

U.S. persons would be prohibited from engaging in certain specified "covered data transactions," transferring bulk sensitive personal data (or U.S. government related data) to (i) a country of concern; (ii) an entity owned, controlled by, or subject to the jurisdiction of, a country of concern; or (iii) a person who is primarily a resident of, or an employee or contractor of, a country of concern.

U.S. persons would also be restricted from engaging in certain other transactions involving bulk sensitive personal data, such as those pursuant to vendor, employment and investment agreements, and would need to implement mitigating security measures before such transactions could proceed with countries of concern (and related entities/persons).

Notably, the ANPRM contains broad potential ranges for what would be understood to be "bulk data" for each category of sensitive personal data, ranging from 100 to 10,000 for genomic, biometric and geolocation data, to 10,000 to 1,000,000 for personal health and financial data and covered personal identifiers. DOJ is soliciting input on what the thresholds in the proposed rule should be for each category of sensitive personal data.

DOJ is currently contemplating that the proposed rule may incorporate a licensing and advisory opinion process similar to that used in the OFAC context, and may impose diligence, record keeping and reporting requirements on those engaged in "restricted" transactions.

Comments on the ANPRM were due by April 19, 2024, and a proposed rule can be expected by Q3 2024.

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 *Abercrombie v. Davies*, 123 A.2d 893, 899 (Del. Ch. 1956), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957).

3 *Miller v. Bartolo*, C.A. No. 2024-0176-JTL.

4 *Quade v. Apollo Global Management, Inc.*, No. 2024-0254-NAC.

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