Cravath Quarterly Review
M&A, Activism and Corporate Governance

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Q3 2021

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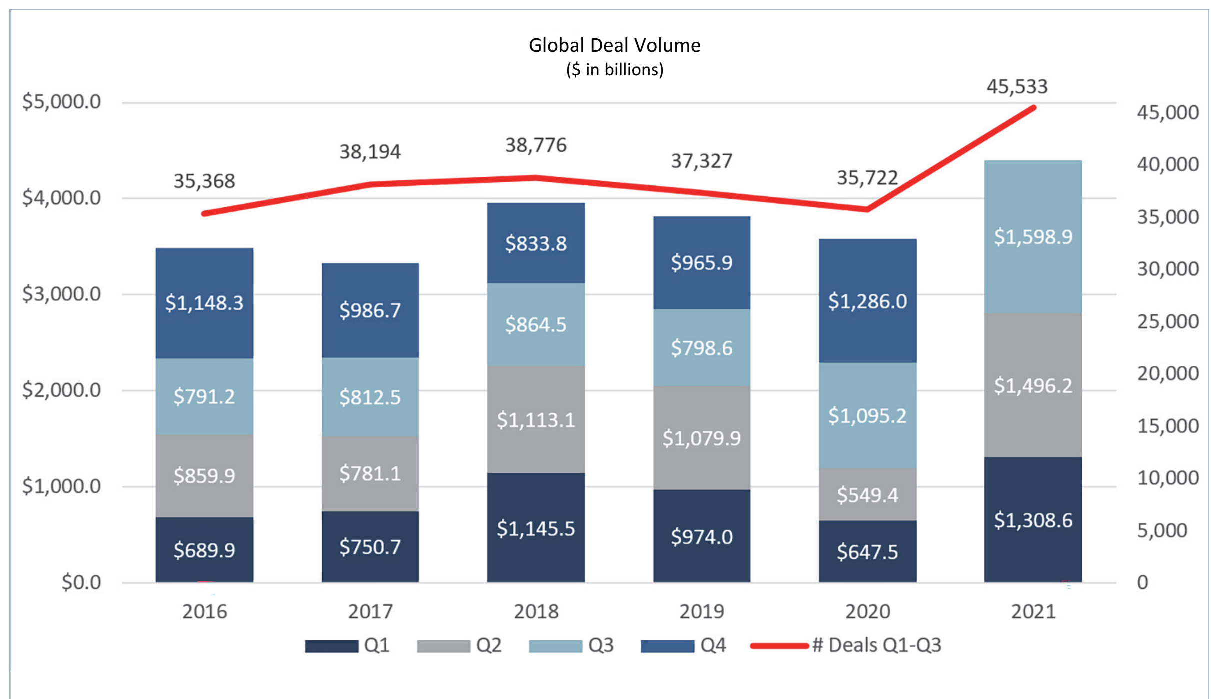
Mergers & Acquisitions

TRENDS[1]

After the strongest half year of global M&A activity in over a decade during H1 2021, global M&A momentum continued in Q3 2021, with almost $1.6 trillion in announced deal value, bringing total deal value recorded in the first nine months of 2021 to roughly $4.4 trillion, an increase of ~92% compared to the same period in 2020. That total represents the strongest opening nine-month period on record (in terms of both deal value and deal number) and surpasses the previous full-year M&A deal record set in 2015, which saw $4.3 trillion in total deal value recorded.[2]



Source: Refinitiv, An LSEG Business.

Q3 2021 Continued Strong Global M&A Momentum from Q2 2021

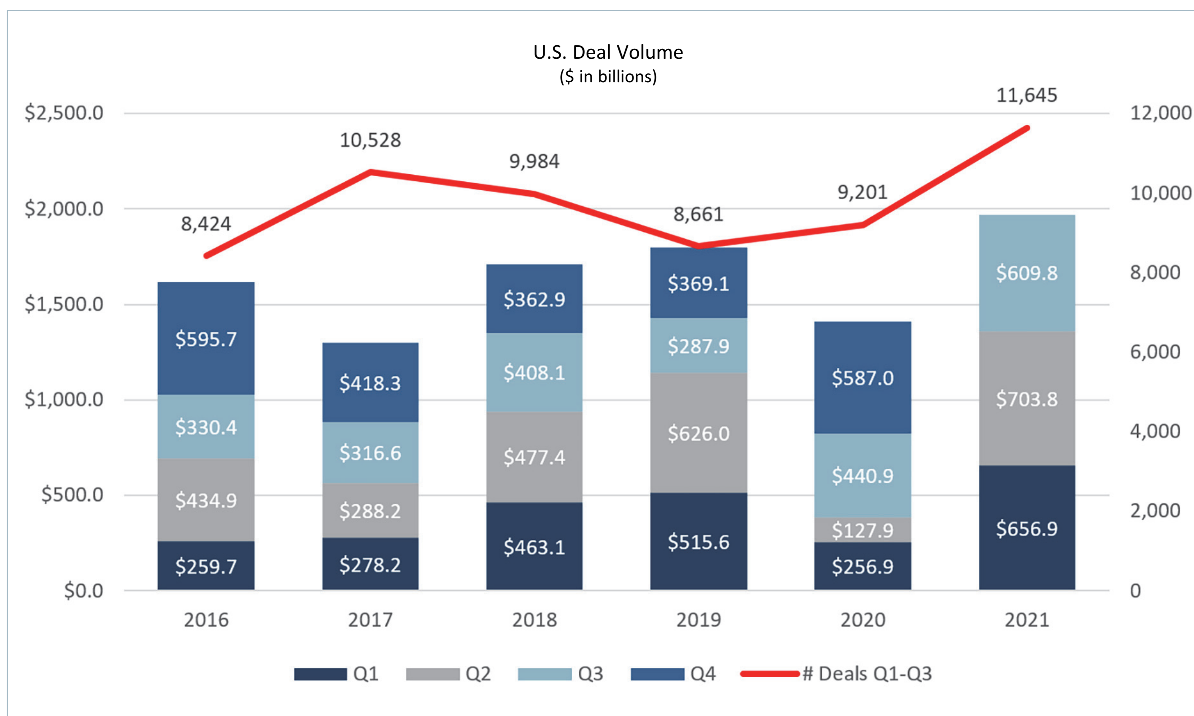
The third quarter of 2021, which registered $1.6 trillion in deal value, saw a ~46% increase in year-over-year deal value, marked the fifth consecutive quarter to surpass $1 trillion and set a new record for the largest quarter for global M&A. While global deal value increased ~7% in Q3 2021 compared with Q2 2021, deal count decreased ~11% in Q3 2021 compared with Q2 2021.

M&A deals between $5 and $10 billion announced during the first nine months of 2021 totaled $661.0 billion, an all-time high and an increase of ~134% compared to the same period in 2020. The first nine months of 2021 also saw the most active period for mega deals (*i.e.*, deals greater than $10 billion in value) in two years, with 43 announced mega deals with a total deal value of $936.5 billion, a ~50% increase by deal value compared to the same period in 2020.

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

[2] Refinitiv began keeping records in 1980.

Special purpose acquisition companies ("SPACs") announced 275 initial business combinations during the first nine months of 2021, representing $545.8 billion in total deal value. After seeing a significant decrease at the beginning of Q2 2021, SPAC IPO issuances in the United States increased in Q3 2021, with 88 issuances raising $16.0 billion in Q3 2021 compared to 64 issuances raising $12.5 billion in Q2 2021.[3]



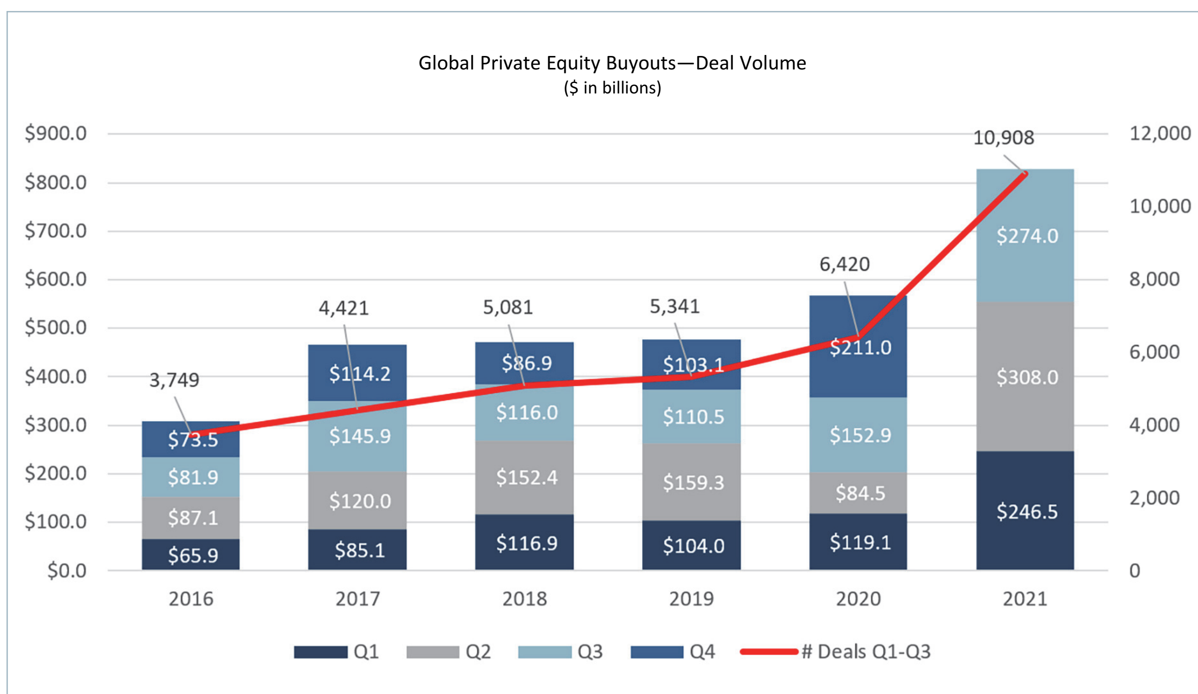
Source: Refinitiv, An LSEG Business.

Regional Year-Over-Year M&A Activity Increases Worldwide

During the first nine months of 2021, M&A activity for U.S. targets amounted to almost $2.0 trillion, an increase of ~139% compared to the same period in 2020 and the strongest opening nine-month period for U.S. deal making on record. U.S. deal volume accounted for ~45% of global M&A activity by deal value during the first nine months of 2021, an all-time high. In Q3 2021, U.S. deal value increased ~38% compared with Q3 2020, while deal count remained steady year-over-year. However, U.S. M&A activity in Q3 2021 decreased ~13% by deal value and ~17% by deal count compared with Q2 2021.

In Europe, M&A activity totaled $1.1 trillion during the first nine months of 2021, an increase of ~69% compared with the same period in 2020 and the highest levels since the global financial crisis of 2008. In Asia, M&A activity totaled $915.2 billion during the first nine months of 2021, a ~53% year-over-year increase. In Australia, M&A activity amounted to a record $203.3 billion, marking a seven-fold year-over-year increase.

[3] Source: Deal Point Data.



Source: Refinitiv, An LSEG Business.

Private Equity, Cross-Border, Technology Sector and Bank M&A Reach Record Highs

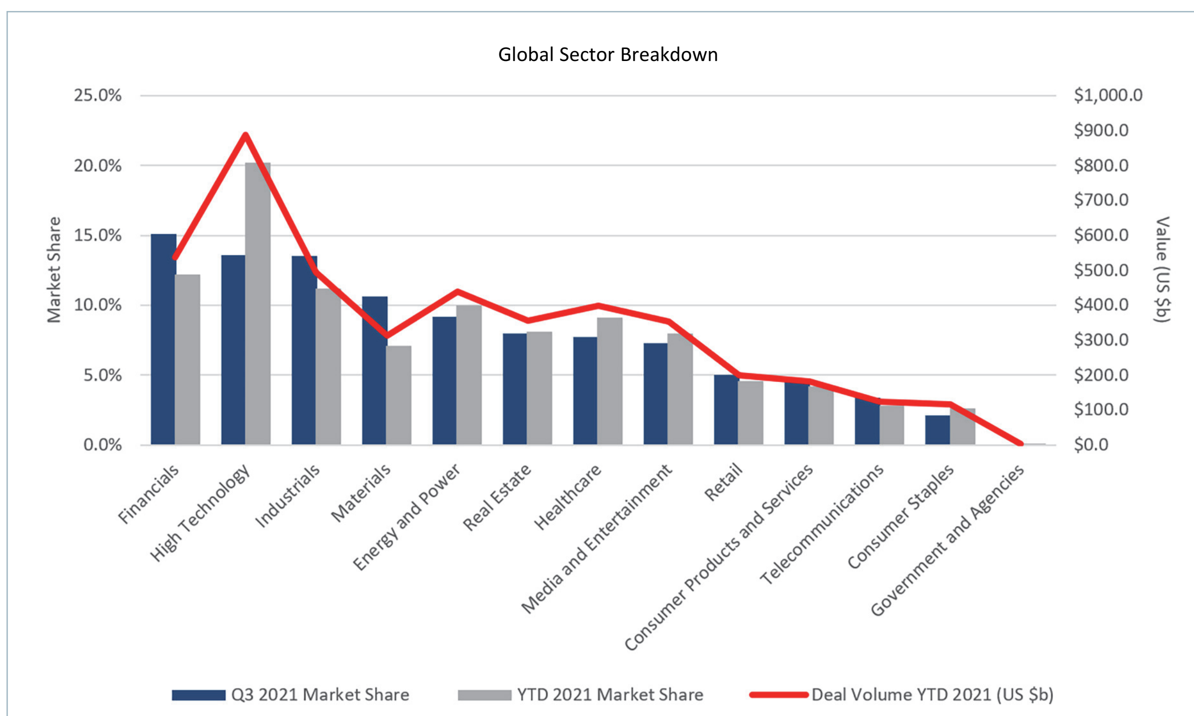
During the first nine months of 2021, private equity-backed buyouts totaled $828.5 billion globally, more than doubling the levels seen during the same period in 2020, and accounted for ~19% of global M&A activity. More than 10,900 private equity deals were announced during the first nine months of 2021, representing a year-over-year increase of ~70%. In Q3 2021, private equity deal value increased ~79% compared with Q3 2020, and deal count increased ~29% year-over-year; however, private equity buyout activity in Q3 2021 decreased ~11% by deal value and ~8% by deal count compared with Q2 2021.

Cross-border M&A activity totaled $1.6 trillion during the first nine months of 2021, representing a ~99% year-over-year increase and the strongest opening nine-month period for cross-border activity on record.

M&A activity in the technology sector totaled a record $888.2 billion during the first nine months of 2021, more than doubling the volume of technology sector deals seen during the same period in 2020 and accounting for ~20% of overall global deal value. The number of technology deals during the first nine months of 2021 increased ~46% year-over-year. M&A activity in the industrials sector accounted for ~11% of activity during this period, an ~80% year-over-year increase.

Globally, deal making activity in the financials sector accounted for ~12% of total deal value during the first nine months of 2021, up ~82% year-over-year. In the U.S. banking sector, notwithstanding statements from policy makers indicating heightened scrutiny around bank consolidation, mergers are on track for the best year since the global financial crisis of 2008, with banks announcing $54 billion in deals through the end of September 2021, up from $17 billion during the same time period in 2020.[4]

[4] See Orla McCaffrey, *Bank Mergers Are On Track to Hit Their Highest Level Since the Financial Crisis*, Wall Street Journal (Sept. 28, 2021), https://www.wsj.com/articles/bank-mergers-are-on-track-to-hit-their-highest-level-since-the-financial-crisis-11632793461.



Source: Refinitiv, An LSEG Business.

LEGAL & REGULATORY DEVELOPMENTS

Cases

Q3 2021 featured a number of notable Delaware decisions regarding M&A contractual disputes, shareholder derivative claims, fiduciary duties and fee shifting.

***Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*, C.A. No. 2021-0175-JRS (Del. Ch. July 9, 2021).**
In this post-trial decision, the Delaware Court of Chancery required Hill-Rom, Inc. ("Hillrom"), a publicly held global medical technology company, to consummate its acquisition of Bardy Diagnostics, Inc. ("Bardy"), a medical device startup, after finding that that Hillrom failed to prove the occurrence of a material adverse effect ("MAE"), and ordered specific performance together with prejudgment interest on the deal price (but denied a claim for compensatory damages for pre-closing covenant breaches based on Hillrom's delay in closing).

On January 15, 2021, the parties entered into an agreement (the "Merger Agreement"), pursuant to which Hillrom would acquire Bardy for $375 million, plus potential earnouts. Bardy's sole product on the market is a single-use, bandage-size "Carnation Ambulatory Monitor" patch that records electrocardiographic data (the "CAM patch"), which was largely sold to Medicare patients. Two weeks after signing, the Medicare program announced that the rates that it would pay for the CAM patch would be reduced from around $365 per patch, which had been the reimbursement rate for years, to under $50. Three days before the scheduled closing date, Hillrom informed Bardy that it would not consummate the merger because the reimbursement rate decrease constituted an MAE. One week later, Bardy filed a complaint seeking specific performance and damages for Hillrom's delay in closing. In its counterclaim for declaratory judgment, Hillrom contended that an MAE had occurred or, in the alternative, the purpose of the Merger Agreement had been frustrated under Delaware common law.

The Court rejected Bardy's argument that because the risk of a reimbursement rate decrease was known at signing, it could not qualify as an MAE impacting Bardy's business. The Court reasoned that the parties could have written the Merger Agreement's MAE clause to cover only "unknown" events, and they elected not to. However, the Court ultimately determined that the reimbursement rate decrease was not an MAE for different reasons. The Court focused on the "durational significance" of the impact of the decrease, citing the principle from *In re IBP, Inc. Shareholders Litigation* that even a broadly written MAE provision is "best read as a backstop" for events that "threaten the overall earnings potential of the target in a durationally significant manner".[5] The Court noted that Hillrom's own projections indicated that Bardy would not turn a profit until at least 2023, and found that the suitable threshold for durational

significance would be whether Bardy would be able to operate under the reduced rates for two years without suffering an MAE. Because it was reasonable to conclude that the Medicare program would revisit the rate decisions within the next two years, having already nearly tripled the rate to roughly $133 while the lawsuit was pending, the Court held that Hillrom had not proven an MAE.

Though the analysis could have ended there, the Court also addressed whether the reimbursement rate decrease, had it risen to the level of an MAE, would have fallen under the MAE carve out in the Merger Agreement for changes in health care laws, and, if so, whether the decrease had a disproportionate impact on Bardy such that the carve out would not apply. The Court concluded that, although it constituted a change in law, the rate decrease did not have a disproportionate impact on Bardy as compared to its only "similarly situated" industry peer, which could be expected to have been similarly affected by the rate decrease.

Lastly, the Court held that the purpose of the merger had not been frustrated, as Hillrom sought to acquire a "growth company with clinically superior technology" and "Bardy remains exactly that".

Online Healthnow, Inc. v. CIP OCL Investments LLC, C.A. No. 2020-0654-JRS (Del. Ch. Aug. 12, 2021).

In this pleading stage decision, the Delaware Court of Chancery denied the defendant's motion to dismiss, allowing a buyer to proceed with fraud claims against a seller and its beneficial owners and agents arising from representations and warranties in a stock purchase agreement (the "SPA") that allegedly were known to be false when made. The Court reached this decision despite provisions in the SPA that expressly limited the time period in which, and the parties against whom, post-closing claims could be brought.

In 2018, Online Healthnow, Inc. ("Online Healthnow") and CIP OCL Investments LLC ("CIP") entered into the SPA, pursuant to which Online Healthnow would acquire CIP. In the SPA, CIP had represented that all its tax returns had been timely filed and were "true, complete and correct in all material respects". Under the SPA's survival provision, all representations and warranties would terminate effective as of the closing, and under the non-recourse provision, claims arising out of the SPA could be asserted only against persons expressly identified as parties in the SPA, and no officers, directors or other third parties would have any liability thereunder. After the acquisition closed, Online Healthnow learned that CIP had underpaid sales tax from 2014 to 2018. According to the complaint, CIP and its private equity sponsor knew of the underpayment prior to negotiating the SPA but did not inform Online Healthnow.

The Court found that Online Healthnow had pleaded with sufficient particularly to support a reasonable inference that the CIP entities made knowingly false representations. Despite the SPA's survival and non-recourse provisions, the Court allowed the plaintiffs to proceed with their fraud claims against the seller, its private equity sponsor and their representatives by extending the logic from the seminal case *ABRY Partners v. F & W Acquisition*[6], where the Court articulated the principle that, as a matter of public policy, a seller cannot insulate itself from liability or the possibility that a sale will be rescinded if the buyer can show that the company's contractual representations and warranties were knowingly false. Here, the Court would not allow the defendants to invoke a non-survival clause "in a contract allegedly procured by fraud to eviscerate a claim that the contract itself is an instrument of fraud". With respect to the non-recourse provision, the Court held that the *ABRY* decision rejected the idea that such a provision can insulate a third party from liability when the third party facilitated or was complicit in the contractual fraud.

***In re Boeing Company Derivative Litigation,* C.A. No. 2019-0907-MTZ (Del. Ch. Sept. 7, 2021).**

In this pleading stage decision, the Delaware Court of Chancery denied in part and granted in part Boeing Inc.'s ("Boeing") motion to dismiss stockholders' derivate claims against certain Boeing officers and members of the board of directors, holding that stockholders had adequately pleaded with particularity that the directors had breached their fiduciary duties with respect to 737 MAX airplane crashes in 2018 and 2019.

The plaintiffs alleged that prior to the first 737 MAX crash in 2018, Boeing failed to implement an adequate safety reporting system, and between

[5] 789 A.2d 14, 68 (Del. Ch. 2001).

[6] 891 A.2d 1032 (Del. Ch. 2006).

the first crash in 2018 and the second in 2019, the board knowingly ignored the safety issues with the planes. In so doing, the plaintiffs claimed that the directors and officers failed to fulfill their *Caremark*[7] oversight duties. In order to maintain a claim under *Caremark*, a plaintiff must allege either that (1) the defendants utterly failed to implement any reporting or information system or controls, or (2) the defendants, having implemented such a system or controls, consciously failed to monitor or oversee the company's operations, thereby disabling themselves from being informed of risks or problems requiring their attention. Further, under a *Caremark* claim, if the plaintiff shows that a failure of oversight was knowing, then it gives rise to an inference that the defendants breached their duty of loyalty by failing to act in good faith.

The Court found that the plaintiffs had sufficiently pleaded that prior to the first 737 MAX crash, the board did not meet the *Caremark* prong-one standard of making a "good faith effort" to put in place a board-level reporting and monitoring system. The Court noted that the board had no committee with direct responsibility for safety, that it did not regularly monitor or discuss safety and that management reporting on safety issues tended to be "ad hoc". The Court therefore found that the pleading-stage record supported an inference of bad faith with respect to such failures.

With respect to the time period between the two crashes, the Court held that the plaintiffs stated a proper claim under *Caremark* prong-two standard, pleading with sufficient particularity that the board knew of corporate misconduct at that time—"the proverbial red flag"—and acted in bad faith to ignore such conduct. The Court noted that after the first crash, the board had information about the 737 MAX that it "should have heeded but instead ignored", viewing the crash as an "anomaly" rather than investigating.

The plaintiffs further alleged that, after both crashes, the directors breached their fiduciary duties by allowing CEO and Chairman of the board Dennis Muilenburg ("Muilenburg") to retire with his unvested equity compensation despite knowing he had misled the board and the federal government with respect to the crashes. The plaintiffs maintained that the board sought to ensure Muilenburg's silence because he was aware of the extent of the board's ignorance about the 737 MAX. The Court found, however, that the plaintiffs did not meaningfully challenge the independence and disinterestedness of the board regarding the terms of Muilenburg's departure.

***Pettry v. Gilead Sciences, Inc.*, C.A. No. 2020-0132-KSJM; *Collins v. Gilead Sciences, Inc.*, C.A. No. 2020-0138-KSJM; *Hollywood Police Officers' Retirement System v. Gilead Sciences, Inc.*, C.A. No. 2020-0155-KSJM; *Ramirez v. Gilead Sciences, Inc.*, C.A. No. 2020-0173-KSJM (Del. Ch. July 22, 2021).**
In this post-trial letter ruling from Chancellor McCormick, the Delaware Court of Chancery shifted the plaintiffs' attorneys' fees and expenses incurred in connection with prosecuting a proceeding under Section 220 of the Delaware General Corporation Law (the "DGCL") to the defendant, Gilead Sciences Inc. ("Gilead"). The Court found that Gilead met the standard of "glaring egregiousness" in its "vexatious" defense of the litigation. In an earlier post-trial ruling discussed in our Q4 2020 newsletter, the Court had previously required Gilead to produce books and records demanded by plaintiffs in five cases brought under Section 220 of the DGCL in order to investigate potential anti-competitive wrongdoing, kickback schemes and patent infringement by Gilead after Gilead initially failed to produce any documents in response to the demands. In this fee-shifting letter, the Court explained that Gilead took a series of actions during the litigation that, collectively, the Court viewed as "glaringly egregious", including arguing that the plaintiffs had not met the credible basis requirement to investigate wrongdoing, misrepresenting the record and taking aggressive positions in discovery. In response to Gilead's argument that fee-shifting cannot be ordered without a showing of *subjective* bad faith, the Court noted that to the extent such a finding is required, it can be inferred based on litigation conduct alone, and that such an inference was warranted here.

***Brookfield Asset Management, Inc. v. Rosson*, No. 406, 2020 (Del. Sept. 20, 2021).**
In this interlocutory appeal, the Delaware Supreme Court unanimously overruled *Gentile v. Rossette*[8], which had previously allowed

[7] 698 A.2d 959 (Del. Ch. 1996).
[8] 906 A.2d 91 (Del. 2006).

plaintiffs to bring direct claims for corporate dilution or overpayment, and reversed the Court of Chancery's denial of defendant Brookfield Asset Management, Inc.'s ("Brookfield") motion to dismiss. The Court ruled that corporate dilution or overpayment claims are exclusively derivative.

Plaintiffs, former minority holders of TerraForm Power, Inc. ("TerraForm") common stock, alleged Brookfield, which, together with its affiliates owned 61.5% of TerraForm, had caused the company to issue stock in a private placement to Brookfield for inadequate value, thereby diluting the plaintiffs' financial and voting interests. The plaintiffs brought direct and derivative breach of fiduciary duty claims against Brookfield, Brookfield's management and the former CEO of TerraForm. The defendants moved to dismiss the direct claims on the basis that they were entirely derivative. Subsequently, TerraForm merged with an affiliate of Brookfield, and the public stockholders, including the plaintiffs, ceased to have any interest in TerraForm, which resulted in the Court of Chancery dismissing the derivative claims.

The Court of Chancery then denied the defendants' motion to dismiss the plaintiffs' remaining direct claims, finding that the *Gentile* exception to the rule created in *Tooley v. Donaldson Lufkin & Jenrette*[9] applied. In its 2004 *Tooley* ruling, the Delaware Supreme Court sought to create a "simple test of straightforward application to distinguish direct claims from derivative claims", turning "solely" on "(1) who suffered the alleged harm (the corporation or the stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)". *Tooley* made clear that dilution claims are "classically derivative". Two years later, *Gentile* established an exception to *Tooley*'s restriction on direct dilution claims for situations where (1) a controlling stockholder causes the corporation to issue "excessive" shares of its stock in exchange for assets of the controlling stockholder that have a lesser value and (2) the exchange causes an increase in the controlling stockholder's stake and a corresponding decrease in the minority stockholders' stake. *Gentile* held that the minority stockholders and the corporation suffer independently, and thus a stockholder is entitled to bring a dilution claim directly. On appeal, the Supreme Court focused on the difficulty Delaware courts have faced in applying *Gentile*. Ultimately, in overruling *Gentile*, the Supreme Court held that "trial and error" and the "tests of time" have proven that the *Gentile* exception to *Tooley* is contradictory and that the difficulty in applying the rule is not a "growing pain" but rather a fatal flaw.

***In re BGC Partners, Inc. Derivative Litigation*, C.A. No. 2018-0722-LWW (Del. Ch. Sept. 20, 2021).**

In this pre-trial decision, the Delaware Court of Chancery denied in part and granted in part the defendants' motion for summary judgment, allowing plaintiff stockholders to proceed with their claims for breaches of fiduciary duty in connection with the $875 million acquisition (the "Acquisition") of Berkeley Point Financial LLC ("Berkeley Point") by BGC Partners, Inc. ("BGC") and concluding that the burden of proof under entire fairness review would not shift to the plaintiffs at trial.

Howard Lutnick, through his control of BGC's parent company and controlling stockholder, effectively controlled both BGC and Berkeley Point at the time of the Acquisition. Mr. Lutnick held a 54.5% economic interest in Berkeley Point, but only a 12.2% economic interest in BGC. After Mr. Lutnick informed BGC's audit committee that he was considering having BGC acquire Berkeley Point, the BGC board established a special committee to evaluate and negotiate the Acquisition. The plaintiffs subsequently brought a derivative suit, claiming that Mr. Lutnick caused BGC to overpay for Berkeley Point because his economic interest in Berkeley Point exceeded his economic interest in BGC, and that the directors improperly approved a related-party transaction.

The defendants moved for summary judgment on the ground that plaintiffs could not establish demand futility, arguing that there was no material dispute as to the independence of the members of BGC's special committee. In addition, the defendants asserted that the plaintiffs had adduced no evidence that the directors advanced Mr. Lutnick's self-interest or discharged their fiduciary duties in bad faith.

The Court of Chancery declined to grant the defendants' motion for summary judgment

[9] 845 A.2d 1031 (Del. 2004).

on demand futility grounds on the basis that material factual disputes remained regarding the independence of two of the special committee members, who represented a majority of the demand board. In assessing the independence of each of the special committee members, the Court of Chancery took into account factors such as each director's income from the board position relative to their household income and professional, social and emotional ties to Mr. Lutnick, finding that one special committee member's independence could have been compromised by the fact that he received half of his household income from his BGC board position, and a second special committee member had "deep respect" and "exceptionally glowing" admiration from Mr. Lutnick that could have colored his judgment had he been asked to press derivative claims against Mr. Lutnick.

The Court of Chancery did, however, grant the defendants' motion for summary judgment as to two of the three special committee members because the plaintiffs could not establish a non-exculpated claim against such directors given the exculpation provision of BGC's certificate of incorporation, while allowing claims against the third special committee member to proceed. In reviewing the motion, the Court of Chancery focused on whether the special committee members who lacked independence from Mr. Lutnick also breached their duty of loyalty by acting to advance Mr. Lutnick's self-interest. While there was no genuine dispute that two of the three special committee members had not undertaken any actions to advance Mr. Lutnick's self-interest in the transaction, the Court of Chancery concluded that there was a genuine factual dispute about whether the remaining special committee member (who the Court of Chancery had already determined lacked independence) may have acted to advance Mr. Lutnick's interests during negotiations by, among other things, being "mindful" of Mr. Lutnick's opinion on certain matters and communicating with Mr. Lutnick about the deal process on several occasions, including running potential financial advisors past Mr. Lutnick before one was retained by the special committee.

***United Food and Commercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund v. Mark Zuckerberg,* No. 404, 2020 (Del. Sept. 23, 2021).**

In this appeal, the Supreme Court unanimously affirmed the Court of Chancery's dismissal of the plaintiff pension fund's complaint and held that the plaintiff should have taken its demand to the Facebook, Inc. ("Facebook") board of directors before filing a derivative suit. In doing so, the Supreme Court adopted a new three-part test for demand futility that may make it more difficult for stockholders to bring derivative claims before first taking their demands to the board of directors.

In 2016, the Facebook board voted in favor of a stock reclassification that would allow Mark Zuckerberg to sell most of his Facebook stock while maintaining voting control of the company. Facebook subsequently spent over $20 million defending a stockholder class action challenging the reclassification before mooting the lawsuit by withdrawing the transaction. Thereafter, Facebook paid plaintiffs' counsel $68 million in attorneys' fees under the corporate benefit doctrine. Following the settlement, another stockholder—the United Food and Commercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund ("Tri-State")—filed a derivative complaint seeking to recoup the money that Facebook spent defending the class action and alleging that the Facebook directors breached their fiduciary duties of care and loyalty by improperly negotiating and approving the reclassification. Tri-State did not make a litigation demand on Facebook's board prior to initiating its lawsuit.

Blending the precedent *Aronson*[10] and *Rales*[11] tests for demand futility, the Court of Chancery formulated a new test under which, the Court held, the plaintiff had failed to prove a demand was futile. The Supreme Court upheld the Court of Chancery's three-part test as the universal standard for all demand-futility claims, holding that if the answer to any of the following inquiries is "yes" for at least half of the directors on the board, demand is excused as futile. The three factors announced under the new test ask: (1) "whether the director received a material personal benefit from the alleged misconduct"; (2) "whether the director would face a substantial likelihood of liability on any of the claims"; and (3) "whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct . . . or who would face a substantial likelihood of liability". The Supreme Court noted that the new test is consistent with *Aronson*,[12] *Rales*[13] and their progeny and would not overrule these precedents.

[10] *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).
[11] *Rales v. Blasband*, 634 A.2d 927 (Del. 1993).
[12] 473 A.2d 805 (Del. 1984).
[13] 634 A.2d 927 (Del. 1993).

Appraisal

Q3 2021 also featured a notable decision regarding the appraisal rights of stockholders.

***Manti Holdings, LLC v. Authentix Acquisition Company, Inc.*, No. 354, 2020 (Del. Sept. 13, 2021).**

In this case, the Delaware Supreme Court upheld the Court of Chancery's ruling that common stockholders of a Delaware corporation are able to contractually waive their statutory appraisal rights for a court determination of fair value.

In connection with a merger in 2008, all stockholders of Authentix Acquisition Company, Inc. ("Authentix") entered into a stockholders agreement, under which the stockholders agreed to refrain from exercising their appraisal rights if a sale of the company were approved by the board and the majority stockholder. When Authentix was subsequently acquired via a merger in 2017, the Authentix common stockholders did not receive advance notice of the merger, were not given an opportunity to vote on the transaction and received little to no consideration as a result of a waterfall provision in the company's certificate of incorporation that gave priority to preferred stockholders. The common stockholders filed a petition for appraisal under Section 262 of the DGCL.

In reviewing the Court of Chancery's decision, the Supreme Court focused on whether Section 262 prohibits a Delaware corporation from enforcing an advance waiver of appraisal rights against its stockholders. The Supreme Court held that though there are certain "fundamental features" of a corporation that cannot be waived, the right of an individual stockholder to seek judicial appraisal is not one of them. Thus, the Supreme Court found, Section 262 does not prohibit sophisticated and informed stockholders, represented by counsel and with bargaining power, from voluntarily waiving their appraisal rights in exchange for consideration. The Supreme Court also affirmed the Court of Chancery's ruling that the stockholders' waiver of appraisal rights was not a stock restriction that was required to be included in the corporation's charter pursuant to Section 151(d) of the DGCL.

SPACs

Enforcement

In addition to investigations by the Securities and Exchange Commission (the "SEC"), as discussed in our Q2 2021 newsletter, companies that have gone public via a de-SPAC transaction have begun to face increased scrutiny by the U.S. Department of Justice (the "DOJ").

On July 15, 2021, Lordstown Motors Corp., which began receiving document and information requests from the SEC in February 2021, disclosed that its de-SPAC merger was also under investigation by the U.S. Attorney's Office for the Southern District of New York.[14]

On July 29, 2021, the United States Attorney for the Southern District of New York unsealed a criminal indictment charging Trevor Milton ("Milton"), the founder of Nikola Corporation ("Nikola"), with securities and wire fraud.[15] The indictment alleges that Milton engaged in a scheme to defraud investors, specifically retail investors, through false and misleading statements regarding Nikola's product and technology development that were made on social media and television, print and podcast interviews. In the press release announcing the charges, the DOJ asserted that Milton "took advantage of the fact that Nikola went public by merging with a [SPAC], rather than through a traditional IPO, by making many of his false and misleading claims during a period where he would not have been allowed to make public statements under rules that govern IPOs".[16] The SEC filed a parallel civil action that same day, charging Milton with violating the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 (the "Exchange Act") and seeking (a) a permanent injunction, (b) a conduct-based injunction, (c) an officer and director bar, (d) disgorgement with prejudgment interest and (e) civil penalties.[17]

The Financial Industry Regulatory Authority ("FINRA") also appears to be stepping up its scrutiny of SPACs. At the Securities Industry and Financial Markets Association's virtual summit on July 22, 2021, FINRA CEO Robert Cook announced that the organization is planning a series of regulatory sweeps to address, among other things, FINRA member firms' dealings with SPACs.[18]

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[14] Lordstown Motors Corp., Post-Effective Amendment No. 2 to Registration Statement (Form S-1), 16 (July 15, 2021).

[15] Complaint, *U.S. v. Milton*, 23 Crim. 478 (S.D.N.Y. 2021).

[16] Press Release, *Former Nikola Corporation CEO Trevor Milton Charges in Securities Fraud Scheme*, DOJ (July 29, 2021), https://www.justice.gov/usao-sdny/pr/former-nikola-corporation-ceo-trevor-milton-charged-securities-fraud-scheme.

[17] Press Release, *SEC Charges Founder of Nikola Corp. With Fraud*, No. 2021-141, SEC (July 29, 2021), https://www.sec.gov/news/press-release/2021-141.

[18] Al Barbarino, *FINRA Sweeps To Target SPACs, Social Media Influencers*, LAW360 (July 22, 2021), https://www.law360.com/articles/1405500.

Regulation

On September 9, 2021, the SEC's Investment Advisory Committee (the "IAC") adopted several recommendations on SPAC regulation put forward by the IAC's Investor as Purchaser and Investor as Owner subcommittees.[19] The subcommittees recommended that the SEC regulate SPACs more intensively by exercising enhanced focus and stricter enforcement of existing disclosure rules under the Exchange Act in relation to the adequacy of disclosure around certain areas, including (a) the role of the SPAC sponsor and an overview of potential conflicts of interest, (b) the economics of the various participants, including the "promote" (or "founder shares"), and their impact on dilution, (c) the mechanics and timeline of the SPAC process, (d) target company areas of focus and the boundaries of the target company search, (e) competitive pressure and risks involved in finding appropriate targets, (f) the acceptable range of terms under which any additional funding (such as public investment in private equity) might be sought at the time of the acquisition and redemption, (g) the manner in which the sponsor plans to assess the capability of a potential target to be a reporting company from a governance and internal control perspective and (h) the minimum pre-de-SPAC diligence the sponsor will commit to regarding the target company's accounting practices.

In remarks before the IAC, SEC Chair Gary Gensler emphasized his focus on strengthening disclosures around dilution and "developing rulemaking recommendations to elicit enhanced disclosures and conducting economic analysis to better understand how investors are advantaged or disadvantaged by SPAC transactions".[20] The IAC subcommittees also recommended that the SEC prepare and publish an analysis of the players in the various SPAC stages, their compensation and their incentives, and noted that based on that analysis, the IAC may then follow up with additional actions regarding SPACs. The IAC's non-binding recommendations will proceed to the full SEC for consideration.

On September 22, 2021, four members of the Senate Banking Committee sent open letters to six SPAC founders seeking information "in order to understand what sort of Congressional or regulatory action may be necessary to better protect investors and market integrity and ensure a fair, orderly, and efficient marketplace".[21] Describing the proliferation of SPACs as "concerning", the letter explained how the SPAC process is often structured to "exploit retail investors to the benefit of large institutional investors" and creates "misaligned incentives" between the SPACs' creators and early investors on one hand and retail investors on the other. The letter asked the investors to respond to a series of questions by October 8, 2021 relating to their relationships with any SPACs, including (a) investments made and work performed; (b) communications with potential or actual investors relating to (i) soliciting investments in any SPACs, (ii) past or projected financial performance of a proposed acquisition or merger target and (iii) voting on a proposed acquisition or merger; (c) cash and non-cash compensation received as a result of their involvement in any SPACs and whether such compensation was tied to the stock price performance of the merger entity; (d) financial or business arrangements between SPACs and entities in which the investors have a financial stake; and (e) ongoing lawsuits or regulatory actions regarding SPACs, target companies, merged entities or the investors themselves for allegedly misleading investors.

Litigation

On August 17, 2021, shareholders brought suit in the U.S. District Court for the Southern District of New York against Pershing Square Tontine Holdings Ltd., a SPAC founded by Bill Ackman ("Ackman"), alleging, among other things, that the SPAC should be deemed an "Investment Company" under the Investment Company Act of 1940 (the "1940 Act") on the grounds that (a) nearly all of the SPAC's assets are invested in U.S. Government securities or mutual funds, (b) investing in securities is essentially the only thing the SPAC has ever done, (c) the SPAC has spent most of its time negotiating a transaction in which it would have invested in more securities and (d) the intention to identify an operating business to acquire in the future is insufficient to allow an entity that qualifies as an

[19] *Draft Recommendations of the Investor as Purchaser and Investor as Owner Subcommittees of the SEC Investor Advisory Committee regarding Special Purpose Acquisition Companies* (Aug. 26, 2021), https://www.sec.gov/spotlight/investor-advisory-committee-2012/draft-recommendation-of-the-iap-and-iao-subcommittees-on-spacs-082621.pdf; Tom Zanki, *SEC Panel Endorses Tougher Regs On SPACs, Insider Trading*, LAW360 (Sept. 9, 2021), https://www.law360.com/articles/1420323/sec-panel-endorses-tougher-regs-on-spacs-insider-trading.

[20] Public Statement, Gary Gensler, *Prepared Remarks Before the Investor Advisory Committee*, SEC (Sept. 9, 2021), https://www.sec.gov/news/public-statement/gensler-iac-2021-09-09.

[21] *E.g.*, Letter from Sherrod Brown, Chris Van Hollen, Tina Smith and Elizabeth Warren, Senators, to Michael Klein, Founder and Managing Partner, M. Klein & Associates, Inc. (Sept. 22, 2021), https://www.warren.senate.gov/imo/media/doc/SPAC%20letters%20[Combined].pdf.

"Investment Company" to avoid regulation under the 1940 Act.[22] According to the complaint, because the SPAC did not register as an "Investment Company", the compensation paid by the SPAC to its sponsors and directors was illegal under the 1940 Act. The complaint also maintained that Pershing Square Capital Management, a hedge fund run by Ackman, should be considered the SPAC's investment adviser under the Investment Advisers Act of 1940 on the grounds that the SPAC depends on the hedge fund for resources and expertise. Lawsuits alleging similar claims were also filed against two other SPACs.

On August 27, 2021, over 60 law firms issued a letter in response to the lawsuits, stating their view that the assertion that SPACs are "Investment Companies" is "without factual or legal basis".[23] The letter pointed out that more than 1,000 SPAC IPOs have been reviewed by the staff of the SEC over two decades and have not been deemed to be subject to the 1940 Act. Drawing on "longstanding interpretations of the 1940 Act, and its plain statutory text", the law firms maintained that "any company that temporarily holds short-term treasuries and qualifying money market funds while engaging in its primary business of seeking a business combination with one or more operating companies is not an investment company under the 1940 Act". The firms also stated that the lawsuits lacked a legal basis for the claim that the personnel of the SPAC sponsors are acting as unregistered investment advisers.

Antitrust

FTC Policy

1995 Policy Statement. As previewed in our Q2 2021 newsletter, at the open meeting of the Federal Trade Commission (the "FTC") on July 21, 2021, the FTC voted along party lines to rescind its "1995 Policy Statement on Prior Approval and Prior Notice Provisions" (the "1995 Policy Statement").[24] Prior to 1995, companies that had previously consummated a merger subject to an FTC consent order were required to obtain prior FTC approval for any subsequent transaction over a *de minimis* threshold in the same product and geographic market for which a violation was alleged, outside of the merger clearance process under the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). As part of the 1995 Policy Statement, the Commission disposed of that requirement, henceforth requiring prior approval only when a "credible risk" of an unlawful merger existed. Now that the FTC has rescinded the 1995 Policy Statement, it can again condition deal approval on the inclusion of such prior notice and approval provisions in its consent orders.

Vertical Merger Guidelines. On September 15, 2021, the FTC voted along party lines to rescind the Vertical Merger Guidelines (the "2020 Guidelines"), which had been adopted jointly with the DOJ in June 2020, as well as the Commentary on Vertical Merger Enforcement issued in December 2020.[25] The 2020 Guidelines, which replaced the 1984 Non-Horizontal Merger Guidelines, served as an outline for the FTC's and DOJ's analytical and enforcement considerations that are specific to vertical mergers, such as market definition, related products, competitive effects and efficiencies. In rescinding the 2020 Guidelines, the FTC majority stated that the 2020 Guidelines' approach to efficiencies contravened the Clayton Act of 1914; under the 2020 Guidelines, the agencies considered the potential benefits related to the elimination of double marginalization (*i.e.*, combining margins on upstream and downstream products) in assessing whether a merged firm would have an incentive to decrease or increase prices as a result of the merger. The FTC majority also stated that the 2020 Guidelines had adopted a flawed economic theory regarding purported pro-competitive benefits of mergers. The FTC announced that the agency was working with the DOJ to review and update the agencies' vertical merger guidance; while the 2020 Guidelines remain in place at the DOJ, the DOJ has committed to a "robust public process" regarding ways the current guidelines can be improved.[26] The FTC is considering ways to provide clear guidance on the characteristics of transactions that are likely unlawful as well as on ineffective remedies. The agency also said it is looking to expand on the harms identified in the 2020 Guidelines to consider various features of modern firms, including in digital markets, and

[22] Complaint, *Assad v. Pershing Square Tontine Holdings, Ltd.*, No. 1:21-cv-06907 (S.D.N.Y. Aug. 17, 2021).

[23] Patrick Smith, *Big Law Stands Up for SPACs as 49 Firms Sign On Against Shareholder Lawsuit*, The American Lawyer (Aug. 27, 2021), https://www.law.com/americanlawyer/2021/08/27/big-law-stands-up-for-spacs-as-49-firms-sign-on-against-shareholder-lawsuit/.

[24] Press Release, *FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers*, FTC (July 21, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter.

[25] Press Release, *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, FTC (Sept. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

[26] Press Release, *Justice Department Issues Statement on the Vertical Merger Guidelines* (Sept. 15, 2021), https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

impacts of mergers on labor markets. Until new guidance is adopted, the FTC's rescission of the 2020 Guidelines leaves significant uncertainty around the approach the agencies will take with respect to vertical mergers.

FTC Agenda. On September 22, 2021, FTC Chair Lina Khan issued a memorandum to FTC staff and Commissioners outlining her "vision and priorities" for the agency.[27] She described a few principles that would guide her strategy, including adopting a holistic approach to identifying harms; orienting enforcement efforts around targeting root causes such as structural incentives that enable unlawful conduct; investing in an interdisciplinary, empiricism-driven approach to understanding market behaviors and business practices; paying attention to next-generation technologies, innovations and nascent industries; and democratizing the agency. She explained that a top policy priority would be to address "rampant consolidation" by strengthening merger enforcement work, focusing resources on scrutinizing dominant firms and revising the merger guidelines. The "ongoing merger surge", she explained, has imposed significant demands on FTC staff and poses a risk that markets will become more consolidated "absent our vigilance and assertive posture". According to the memorandum, the FTC also plans to prioritize addressing "dominant intermediaries and extractive business models", and Chair Khan specifically called attention to how the "growing role of private equity and other investment vehicles . . . may distort ordinary incentive in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations". Outlining several operational objectives, Chair Khan noted the agency's plan to expand its regional footprint and expand its staff to include more technologists, data scientists, financial analysts and experts from outside disciplines.

FTC Review Process

On August 3, 2021, the FTC announced that it was reviewing its processes to determine how best to use its limited resources in light of a recent surge in merger filings that have left the agency unable to complete initial investigations during the designated 30-day period and finalize review of additional information in response to a "second request" during the prescribed timeframes.[28] As a result, with respect to deals it is unable to fully investigate within the requisite timelines, the FTC explained it had begun sending form letters upon expiration of the relevant statutory waiting period to alert companies that the FTC's investigation remains open and remind them that the agency may subsequently determine that the deal was unlawful. The standard form letter warns that "if the parties consummate [the] transaction before the Commission has completed its investigation, they would do so at their own risk". Despite the risk of consummated deals being subsequently challenged or unwound, companies have started to close deals notwithstanding receipt of these letters. In recently negotiated deals, parties have begun to address the possibility of receiving such FTC letters by expressly negotiating whether the customary closing condition relating to the expiration or termination of the waiting period under the HSR Act would be satisfied if the parties receive a standard form letter from the FTC (or if the purchaser can delay closing after the expiration of the statutory waiting period until the underlying investigation has been resolved).[29]

On September 28, 2021, the FTC announced it would be making several changes to how it assesses and negotiates second requests.[30] For example, the FTC stated that it is developing a set of factors to help determine whether a proposed transaction would violate antitrust laws, and that second requests may factor in additional facets of market competition that may be impacted, such as labor markets and cross-market effects. Further, the FTC announced revised policies for complying with second requests, making clear that going forward the second request process will likely be broader and more burdensome to merging parties.

Personnel Developments

On September 13, 2021, Alvaro Bedoya was nominated to fill the FTC seat held by Commissioner Rohit Chopra, whose nomination to serve as head of the Consumer Financial Protection Bureau was confirmed on September 30, 2021. Bedoya is the Founding Director of the Center on Privacy

[27] Memorandum from Lina Khan, FTC Chair, to FTC Staff and Commissioners (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

[28] Holly Vedova, *Adjusting Merger Review to Deal with the Surge in Merger Filings*, FTC (August 3, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

[29] *See* Bryan Koenig, *Merging Cos. Incorporating FTC's 'At Own Risk' Warnings*, Law360 (Sept. 14, 2021), https://www.law360.com/competition/articles/1419392/merging-cos-incorporating-ftc-s-at-own-risk-warnings?nl_pk=96755593-17a9-484c-b94c-318c2e08ab0a&utm_source=newsletter&utm_medium=email&utm_campaign=competition&read_more=.

[30] Holly Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave*, FTC (Sept. 28, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined.

and Technology at Georgetown University Law Center, where he is also a visiting professor. In 2016, Bedoya co-authored a comprehensive report on law enforcement face recognition and the implications for privacy, civil liberties and civil rights. He previously served as Chief Counsel of the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law.

CFIUS

Annual Report for Calendar Year 2020 (July 2021)
In July 2021, the Committee on Foreign Investment in the United States ("CFIUS") published the unclassified version of its Annual Report to Congress for the calendar year 2020.[31] Key findings / insights from the report include:

- The number of filings received by CFIUS in 2020 remained significant: 187 notices (*i.e.*, long-form filings) and 126 declarations (*i.e.*, short-form filings) (compared to 231 notices and 94 declarations in 2019).
- Less than half of 2020 notices (88 notices, or approximately 47%) proceeded to the second-stage investigation period, continuing a downward trend from 2018 and 2019, in which approximately 69% and 49% of notices, respectively, proceeded to investigation.
- In 16 cases, or approximately 9% of 2020 notices, CFIUS cleared the transaction after adoption of mitigation measures (compared to 28 cases, or approximately 12% of notices, in 2019).
- In 81 cases, or approximately 64% of 2020 declarations, CFIUS cleared the transaction without requesting that the parties file a notice, indicating that declarations are increasingly being used to obtain CFIUS clearance, particularly where the acquiror is from a nation that is an ally or partner of the United States (compared to 35 cases, or approximately 37% of declarations, in 2019).
- CFIUS considered 117 "non-notified" transactions in 2020, 17 of which resulted in a request for a filing.

Overall, the data demonstrate that, while CFIUS activity remained robust and the overall number of filings received by CFIUS remained significant, 2020 saw trends toward the increased use of short-form CFIUS declarations, fewer second-stage investigations by CFIUS and fewer cases in which mitigation measures were required by CFIUS, coinciding with an overall decline in cross-border M&A activity, particularly outbound M&A from the Asia-Pacific region, during 2020.

Magnachip Semiconductor Corporation (August 2021)[32]
In March 2021, Magnachip Semiconductor Corporation, a Delaware corporation listed on the New York Stock Exchange ("Magnachip"), announced that it had entered into a definitive agreement with investment vehicles established by Wise Road Capital LTD, a China-based private equity fund ("Wise Road"), and certain of its limited partners, in a take-private transaction with an equity value of approximately $1.4 billion. According to Magnachip—which conducts all of its semiconductor manufacturing and R&D activities in South Korea—it is a holding company without offices, sales operations, employees, tangible assets or IT systems located in the United States. Shortly after announcing the transaction, Magnachip indicated that it did not believe that any U.S. regulatory approvals were required for the transaction. Magnachip and Wise Road did not submit the transaction for CFIUS approval until CFIUS requested, in May 2021, that the transaction undergo a formal review.

On August 27, 2021, CFIUS informed Magnachip and Wise Road that it had identified risks to the national security of the United States arising from the proposed transaction and, absent new information, CFIUS anticipated that it would seek to block the deal. Subsequently, Magnachip and Wise Road withdrew and re-filed their CFIUS notice, thereby providing additional time for discussions with CFIUS concerning potential options to resolve the identified national security concerns.

The Magnachip transaction illustrates that CFIUS will assert jurisdiction over transactions in which the target has only a limited nexus to the United States (in this case, perhaps only an NYSE-listed Delaware holding company), particularly when the transaction involves elements that have long been of interest to CFIUS (*e.g.*, the semiconductor sector and an acquiror with ties to China).

[31] *Annual Report to Congress CY 2020*, CFIUS (July 26, 2021), https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf.

[32] *See Magnachip Semiconductor Corporation, Current Report (Form 8-K) (May 26, 2021); Magnachip Semiconductor Corporation, Current Report (Form 8-K) (June 15, 2021); Magnachip Semiconductor Corporation, Current Report (Form 8-K) (Aug. 27, 2021); Magnachip Semiconductor Corporation, Current Report (Form 8-K) (Sept. 13, 2021).*

Activism[33]

In October 2021, Lazard released its *Q3 2021 Review of Shareholder Activism*, which offers key observations regarding activist activity levels and shareholder engagement in the third quarter of 2021.

Key findings/insights from the report include:

- The number of campaigns initiated globally in Q3 2021 lagged behind Q2 2021 and Q1 2021, but increased 12% over Q3 2020.
- The close of Q3 2021 and beginning of Q4 2021 saw elevated new campaign activity, potentially signaling a busy end to 2021.
- The number of U.S. campaigns increased ~27% year-over-year; and U.S. activity has represented an increased proportion of global activity.
- While activity in Europe has slowed after a record-setting end to 2020, Q3 2021 saw a slight uptick in European campaigns compared to Q1 2021 and Q2 2021.
- M&A has persisted as a primary campaign thesis for 2021, and scuttling or sweetening an announced transaction remained the most prominent demand.
- Only two board seats were won in Q3 2021, an unusually low number after a relatively active H1 2021 (during which 71 seats were won).

TRENDS

Global Campaign Activity Down in Q3 2021 Compared to Q1 2021 and Q2 2021 and Board Seats Won Were Unusually Low

Q3 2021 saw 29 campaigns initiated, down from 39 in Q2 2021 and 55 in Q1 2021, but up ~12% from the 26 campaigns initiated in Q3 2020. 123 new campaigns have been initiated globally in 2021, in line with the first three quarters of 2020 but below historical averages. The beginning of Q4 may signal a strong end to the year, with 7 campaigns initiated in October 2021 thus far. Q3 2021 saw a dip in capital deployed in new campaigns at $8.5 billion, compared to $9.1 billion in Q2 2021 and $10.9 billion in Q1 2021; however, when comparing year-over-year, Q3 2021 represented an ~72% increase over the $4.7 billion in capital deployed in Q3 2020.

Board seats won in Q3 2021 were at an unusually low level, with only two new seats won. 73 board seats have been won so far this year as of October 2021, a decrease of ~28% year-over-year. As discussed in our Q2 2021 newsletter, proportionally fewer board seats are being won through proxy contests, with only seven board seats won through proxy contests during the first three quarters of 2021, representing ~10% of the total seats won during that period, which tracks below the average for the past three years, during which the average number of seats won through proxy contests was ~18%.

After a slower start to 2021, Elliott Investment Management L.P. (together with its affiliates, "Elliott") doubled its 2021 campaigns in Q3 2021, initiating six new campaigns and, as of publication of this newsletter, bringing its 2021 total to 12—more than double the number of campaigns of the next most active activist, Bluebell Capital Partners Limited ("Bluebell") (which has initiated five). First-time activists initiated ~27% of campaigns during the first three quarters of 2021, in line with historical averages. Approximately 55% of all activist campaigns during the first three quarters of 2021 have related to M&A, up from ~44% in H1 2021 and ~40% in 2020, and generally above historical levels. Scuttling or sweetening an announced transaction remained the most prominent M&A demand, accounting for ~53% of M&A-related campaigns during the first three quarters of 2021.

Regional Campaign Activity Continues to Rebound in the U.S. and Sees Marginal Increases in Europe

U.S. activity during the first three quarters of 2021 increased ~27% year-over-year, with 66 campaigns initiated against 63 companies, accounting for ~54% of global campaigns during the first three quarters of 2021 (compared to ~45% in 2020) and ~48% of global capital deployed (compared to ~41% in 2020). U.S. companies with market capitalizations of less than $2 billion remain

[33] Activism data from Lazard, Q3 2021 Review Of Shareholder Activism (Oct. 19, 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 and select campaigns with market capitalizations less than $500 million at time of announcement included during the COVID-19 pandemic-induced market downturn; companies that are spun off as part of the campaign process are counted separately.

the primary focus of activists, accounting for ~39% of U.S. campaigns launched in the first three quarters of 2021. Q3 2021 saw an increase in activity targeting the financial institutions sector, accounting for ~16% of U.S. activity during the first three quarters of 2021, versus ~11% in H1 2021 and ~4% historically.

While activity in Europe has slowed relative to 2020, 13 campaigns were initiated against nine companies in Q3 2021, exceeding levels during each of Q1 2021 and Q2 2021 (which, combined, saw 20 campaigns targeting 21 companies) and signaling a potential end-of-year uptick. European companies with market capitalizations above $25 billion have been the target of ~26% of European campaigns in the first three quarters of 2021, double the ~13% average between 2017 and 2020. European activists increased their focus on the financial institutions sector and healthcare sector, with ~26% and ~21% of European activity, respectively, during the first three quarters of 2021, compared to the ~14% and ~6% averages, respectively, over the period from 2017 to 2020. Consistent with the first two quarters of 2021, leading large-cap activists continued to re-emerge in Europe through Q3 2021, accounting in total for ~24% of European activity during the first three quarters of 2021.

Other Trends

As described in our Q1 and Q2 2021 newsletters, ESG-related activism continues to become increasingly prominent. After Engine No. 1 LLC's ("Engine No. 1") successful proxy contest in Q2 2021 against Exxon Mobil Corporation, the activist reportedly had "cordial" discussions with representatives of Chevron Corporation regarding the company's emissions reduction strategy. Engine No. 1 has also reportedly built a stake in General Motors Company ("GM") and expressed support for GM management's actions relating to increased electric vehicle production and GM's long-term strategy.

ESG-related themes were also featured in two notable European campaigns launched in Q3 2021. In August 2021, Causeway Capital Management LLC, Rolls-Royce Holdings plc's largest investor, called on the company's incoming Chairwoman to refresh the board of directors and examine whether the board had the right expertise to face the challenges ahead for the company, including the company's plan to transition to net zero carbon emissions by 2050. Additionally, in September 2021, Enkraft Capital GmbH sent a letter to the CEO of RWE AG ("RWE") pushing RWE to accelerate its planned transition to clean power by separating its brown coal operations, arguing that RWE was "no longer investable" to ESG investors because of its coal activities (despite an ongoing pivot toward renewable energy) and that accelerating this transition could make RWE a more attractive ESG investment and help close the valuation gap between RWE and pure-play renewable companies.

Inflows into ESG-related funds continued at a record-breaking pace. From January 2020 through August 2021, inflows for U.S. "ESG Mandate" funds[34] approximated $113.1 billion, whereas the cumulative inflows into U.S. ESG Mandate funds from January 2018 through December 2019 were only $34.4 billion. In August 2021, the assets under management of U.S. ESG funds reached $428 billion, $294 billion of which was being managed by active-style funds.

[34] Lazard, Q3 2021 Review Of Shareholder Activism (Oct. 19, 2021) uses the term "U.S. 'ESG Mandate' funds" to "comprise those with explicit ESG investment criteria".

Select Campaigns / Developments

Company	Market Capitalization ($ in billions)[35]	Activist	Development / Outcome
GlaxoSmithKline plc	$99.6	Elliott Advisors (UK) Limited; Bluebell Capital Partners Limited	• In July 2021, Elliott sent a public letter to GlaxoSmithKline plc (“GSK”), stating it had taken a “significant” position in the company and making several recommendations, including that the company replace members of the board and management, increase the portion of compensation plans linked to financial targets, increase profitability targets and sell its consumer healthcare business instead of proceeding with a planned spinoff. • The following day, GSK released a public statement rejecting Elliott’s recommendations. • In September 2021, news outlets reported that Bluebell had taken a small stake in GSK and had sent a letter to the non-executive chairman demanding that the company replace the CEO, increase the board’s scientific expertise and actively seek buyers for the consumer healthcare business. In October 2021, Bluebell reportedly sent a subsequent letter demanding that the company replace the chairman.
Duke Energy Corporation	$78.8	Elliott Investment Management L.P.	• In May 2021, Elliott issued a public letter advocating for a tax-free separation of Duke Energy Corporation (“Duke”) into three regionally focused public companies. • In July 2021, Elliott issued another public letter calling on Duke to enhance the board’s independence, improve operational performance and enhance value in certain divisions of the company and attain a premium valuation. • That same day, Duke responded by dismissing the letter as an “attempt to push [Elliott’s] short-term agenda at the expense of long-term shareholder value” and other stakeholders.
Citrix Systems Inc.	$12.9	Elliott Investment Management L.P.	• In September 2021, news outlets reported that Elliott had acquired an approximately 10% stake in Citrix Systems Inc. (“Citrix”) and asked to work with the company to improve its valuation. Elliott previously took a stake in Citrix in 2015 and held a board seat until April 2020. • One week later, it was reported that Citrix was working with advisers to explore a potential sale of the company.
Box, Inc.	$3.4	Starboard Value LP	• In July 2021, Starboard Value LP (“Starboard”) nominated three director candidates for election to the Box Inc. (“Box”) board at Box’s 2021 annual meeting, at which three directors were up for election. • In August and September 2021, Institutional Shareholder Services Inc. recommended shareholders vote for two of Box’s nominees and withhold votes on the third, Glass Lewis & Co. recommended shareholders vote in favor of one of Starboard’s nominees and Egan-Jones Proxy Services recommended shareholders vote in favor of all of Starboard’s nominees. • In September 2021, Box announced that shareholders voted at the annual meeting to re-elect all three of Box’s nominees.

[35] Market capitalization as of campaign announcement according to Bloomberg.

Corporate Governance

PROXY SEASON / PROXY ADVISOR UPDATES

Results of Institutional Shareholder Services' ("ISS") Annual Policy and Climate Surveys

On October 1, 2021, ISS announced the results of its annual global benchmark policy survey as well as a separate climate survey.[36]

The benchmark policy survey is part of ISS's annual process to solicit feedback on areas of potential policy changes for 2022 and beyond. This year's survey received 409 responses, comprising 159 responses from investors, 246 responses from non-investors (*e.g.*, public corporations, board members of public corporations, advisors to public corporations and others) and four responses from non-profit or academic organizations. Key findings from the survey for global and U.S.-focused respondents include:

- **Executive compensation (Global):** 86% of investor respondents and 73% of non-investor respondents indicated that non-financial ESG metrics are an appropriate way to incentivize executives. 52% of investor respondents and 27% of non-investor respondents indicated support for such ESG metrics only if they are specific and measurable.

- **Racial equity audits (Global):** The 2021 proxy season saw a new kind of shareholder proposal that asked for companies to commission an independent audit to assess for potential racial bias throughout their business practices. 44% of investor respondents and 18% of non-investor respondents indicated that most companies would benefit from third-party racial equity audits, regardless of company-specific factors (such as whether a company has had racial equity controversies). 47% of investor respondents and 54% of non-investor respondents indicated that whether a company would benefit from a third-party racial equity audit depends on company-specific factors.

- **Virtual-only meetings (Global):** Investor respondents indicated that the top three most concerning practices related to a company's virtual-only meetings were (1) unreasonably curating questions, (2) the inability to ask live questions at the meeting and (3) question and answer opportunities not being provided. 70% of investor respondents indicated that problematic practices related to virtual meetings could warrant votes against directors, whereas 65% of non-investor respondents indicated that votes against directors would *not* be warranted.

- **Pre-2015 governance provisions (U.S.):** Since 2015, ISS policy in the United States has been to recommend votes against directors of newly public companies that have certain governance provisions (such as multiple classes of stock with unequal voting rights, a classified board or supermajority voting requirements to amend governance documents); however, companies that became public prior to 2015 were exempted from the policy. 94% of investor respondents and 57% of non-investor respondents voted in favor of ISS reconsidering whether to issue adverse voting recommendations for the companies that were previously exempted from the policy.

- **SPACs & proposals with conditional poor governance provisions (U.S. and Canada):** Current ISS policy is to evaluate SPAC transactions on a case-by-case basis, with one of the main drivers being the market price relative to the redemption value of the SPAC shares; however, ISS is considering changing its policy to generally favor supporting such transactions due to the mechanics of SPACs and SPAC investor voting practices over recent years. Responses on the survey indicated that most institutional investors did not own SPACs. Among those that did, there was a preference not to change ISS's policy. A strong majority of investors and non-investors indicated that, where a SPAC transaction's closing is conditioned on the approval of other ballot items, such as poor governance provisions, they would support the transaction but not the other ballot items.

[36] ISS, 2021 Global Benchmark Policy Survey (October 1, 2021), available at https://www.issgovernance.com/file/publications/2021-global-policy-survey-summary-of-results.pdf; ISS, 2021 Global Policy Survey – Climate (October 1, 2021), available at https://www.issgovernance.com/file/publications/2021-climate-survey-summary-of-results.pdf.

The climate survey received 329 responses, comprising 164 responses from investors, 152 responses from public corporations and other non-investors and 13 responses from non-profits/academics. Key findings from the survey include:

- **Climate-related board accountability:** 88% of investor respondents and 75% of non-investor respondents indicated that they expect a company that is considered to be a strong contributor to climate change to be providing clear and detailed disclosure. Other than detailed disclosure, the other minimum expectations that were popular among investor respondents were demonstrating *improvement* in disclosure and performance, declaring a long-term ambition to be in line with Paris Agreement goals, disclosing a strategy and capital expenditure program in line with Paris Agreement goals and showing that corporate and trade association lobbying activities are in line with Paris Agreement goals.

- **Market scope of expectations:** 33% of investor respondents and 28% of non-investor respondents indicated that they preferred to see minimum expectations with respect to climate-related board accountability to be the same regardless of company contribution to climate change. 53% of investor respondents and 44% of non-investor respondents indicated that there should be some level of expectations on all companies, but that such expectations should be lower for companies that are not as strongly contributing to climate change.

- **"Say on climate" shareholder proposal requests:** Answers were split in sentiment regarding when "say on climate" shareholder proposals (requesting a regular advisory vote on a company's climate transition plan) would warrant shareholder support. Among five possible choices, the answer with the highest support from investor respondents (42%) was that such proposals should always warrant shareholder support, even if the board is managing climate risk effectively, whereas the highest response from non-investors (38%) was that such proposals should be case-specific and would be warranted only when the company's climate transition plan or reporting fell short.

Form N-PX Amendments

On September 29, 2021, the SEC proposed amendments to Form N-PX reports, in which funds are required to disclose how they voted on proxy proposals relating to investments they hold.[37] In an effort to make the filings easier to analyze, the proposed rule would require funds to, among other things, tie the description of each voting matter to the issuer's form of proxy and categorize each matter by type to help investors identify votes of interest and compare voting records. Funds would also be required to disclose how their securities lending activity impacted their voting. Further, the rulemaking would require institutional investment managers to disclose how they voted on "say-on-pay" matters.

OTHER ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG) UPDATES

Climate-Related Disclosures

On July 28, 2021, in remarks before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar, SEC Chair Gary Gensler confirmed that rules requiring climate change-related disclosures are forthcoming, with a proposal potentially going to the SEC by the end of 2021, and offered some insight into the direction the agency is headed.[38] Chair Gensler explained that the top priorities in drafting the rules will be ensuring that climate-related disclosures are comparable, consistent and decision-useful. With respect to comparability, Chair Gensler has requested the staff consider whether disclosures should be included in Annual Reports filed on Form 10-K. Decision-useful disclosures, he explained, would avoid boilerplate text and include both qualitative information on climate risks, such as how a company's leadership manages climate risks and opportunities and how these factors feed into the company's strategy, as well as quantitative information, such as metrics related to greenhouse gas emissions, financial impacts of climate change and progress towards climate-related goals. Chair Gensler suggested that, under the new rules, companies might be required to disclose Scope 1, Scope 2 and potentially Scope 3 emissions,[39] to explain what they mean by "net zero" if they make such a commitment to emissions reductions and to disclose scenario analysis for the effects

[37] Enhanced Reporting of Proxy Votes by Registered Management Investment Companies and Reporting of Executive Compensation Votes by Institutional Investment Managers, 86 Fed. Reg. 57,478 (Oct. 15, 2021) (to be codified at 17 C.F.R. pts. 232, 240, 249, 270 and 274).

[38] Speech, Gary Gensler, *Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar*, SEC (July 28, 2021), https://www.sec.gov/news/speech/gensler-pri-2021-07-28?utm_medium=email&utm_source=govdelivery.

[39] Scope 1 greenhouse gas emissions are direct emissions from sources owned or controlled by the registrant. Scope 2 greenhouse gas emissions are emissions associated with the registrant's purchase of electricity, heat or cooling. Scope 3 greenhouse gas emissions are all emissions the registrant impacts in its supply and value chain, including from third-party assets not owned or controlled by the registrant, such as suppliers and customers.

of future climate change. He also mentioned that the staff is considering industry-specific rules, such as for the banking, insurance or transportation sectors. While indicating support for disclosures inspired by the Taskforce on Climate-Related Financial Disclosures, Chair Gensler indicated that the SEC will write its own rules with a regime "for our markets".

In mid-September 2021, it became clear that the SEC's Division of Corporation Finance had sent a number of comment letters to issuers with comments on climate-related disclosures (or the lack thereof). On September 22, 2021, the SEC published a sample letter illustrating the types of comments it had made.[40] The sample letter contains comments regarding compliance with the topics addressed in the SEC's 2010 Guidance Regarding Disclosure Related to Climate Change and requests additional information or revised disclosures in Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") and Risk Factors. The MD&A requests largely focus on the material impacts on companies from pending or existing climate-change laws, from floods or other physical effects of climate change and from indirect consequences of regulations or business trends stemming from climate change. For example, the letter asks companies to revise their disclosure to identify material past and future capital expenditures for climate-related projects and quantify any material increased compliance costs related to climate change. With respect to risk factor disclosure, the letter requests information regarding the material effects of transition risks related to climate change that may affect the company's business, financial condition and results of operations, such as policy and regulatory changes that could impose operational and compliance burdens, market trends that may alter business opportunities, credit risks or technological changes, as well as material litigation risks related to climate change and the potential impact to the company. The letter also asks companies to explain why they chose to provide more expansive climate-related disclosure in their corporate social responsibility reports than in their SEC filings, a common practice in the market.

"Say on Climate"

In August 2021, the Children's Investment Fund Foundation (the "CIFF") and The Children's Investment Fund ("TCI") revised their "say on climate" strategy for U.S.-listed companies to no longer seek annual advisory votes.[41] The organizations initially launched the "say on climate" campaign in October 2020 to push companies to hold annual advisory votes on companies' climate transition plans. While CIFF and TCI plan to continue to engage with European and Australian companies to give shareholders a chance to weigh in on climate strategy, they will discontinue such engagements with U.S.-listed companies. So far in 2021, management "say on climate" proposals have received over 93% support, while shareholder proposals seeking the adoption of advisory climate votes at U.S.-listed companies have received an average of 33.5% support. As discussed in our Q2 2021 newsletter, institutional investors have been hesitant to support "say on climate" shareholder proposals and have been evaluating them on a case-by-case basis.

Nasdaq Diversity Rules

On August 6, 2021, the SEC approved new listing rules submitted by The Nasdaq Stock Market LLC ("Nasdaq") to advance board diversity among Nasdaq-listed companies through a "comply or disclose" framework and greater transparency in board diversity statistics.[42] Under the board diversity rules, each Nasdaq-listed company, subject to certain exceptions, will be required to publicly disclose in an aggregated form information on the voluntary self-identified gender and racial characteristics and LGBTQ+ status of the company's board of directors. Further, each Nasdaq-listed company, subject to certain exceptions, must have, or explain why it does not have, at least two members of its board of directors who are diverse, including at least one director who self-identifies as female and at least one director who self-identifies as an underrepresented minority or LGBTQ+. Certain Nasdaq-listed companies will also be provided with one year of complimentary access to a board recruiting service, which will provide access to a network of diverse board candidates for companies to identify and evaluate. The rules provide for transition periods for companies to comply with the new requirements and phase-in periods for companies newly listing on the exchange.

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[40] *Sample Letter to Companies Regarding Climate Change Disclosures*, SEC (Sept. 2021), https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures#_ftnref1.

[41] *'Say on Climate' Campaign Revises US Engagement Strategy*, Proxy Insight Ltd (Aug. 18, 2021), https://www.proxyinsight.com/members/ViewNews.aspx?mode=1&neid=41579.

[42] Order Approving Proposed Rule Changes to Adopt Listing Rules Related to Board Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, SEC Release No. 34-92590 (Aug. 6, 2021), https://www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf.

ESG Ratings

On July 26, 2021, the International Organization of Securities Commissions ("IOSCO"), the international body of securities regulators, published a consultation report proposing recommendations to mitigate risks associated with ESG ratings and data products (*i.e.*, tools to screen companies for ESG performance), and to address some of the existing challenges faced by ESG providers and users of, and companies subject to, ESG ratings and data products.[43] The report highlights various shortcomings in the largely unregulated space, such as a lack of clarity and alignment on definitions, including on what ratings or data products intend to measure; a lack of transparency about the methodologies underpinning these tools; and conflicts of interest where the providers of ESG ratings and data products perform consulting services for companies that are the subject of such ESG ratings or data products. In the report, IOSCO encourages regulators to focus greater attention on the use of these platforms and services and the activities of providers in their jurisdictions.

Earlier in July 2021, in a speech before the Asset Management Advisory Committee, SEC Chair Gensler discussed the lack of standardized meanings in the context of sustainability-related investing.[44] Chair Gensler has asked the SEC staff to consider recommendations about whether fund managers and third-party ratings providers should disclose the criteria and underlying data they use when, for example, they describe something as "green" or "sustainable", make assertions about the greenhouse gas emissions or water sustainability of their underlying assets or screen out certain industries. He has also asked the staff to "take a holistic look" at naming conventions and revisit Rule 35d-1 under the 1940 Act, also known as the "Names Rule".

INSIDER TRADING

Enforcement

On August 17, 2021, the SEC charged a former employee of Medivation Inc. ("Medivation") with insider trading based on purchases of a third-party company's shares in advance of Medivation's announcement that it would be acquired by Pfizer Inc. ("Pfizer"), a case that could have implications for how companies choose to draft their insider trading policies going forward.[45] According to the complaint, the then-head of business development at Medivation purchased short-term, out-of-the-money stock options in Incyte Corporation ("Incyte") a few days before the announcement that Pfizer would acquire Medivation at a significant premium. The employee allegedly purchased the options within minutes of learning highly confidential information concerning the merger, in violation of Medivation's insider trading policy that expressly forbade employees from using confidential information acquired at Medivation to trade in the securities of any other publicly traded company. According to the complaint, the employee knew that investment bankers had cited Incyte as a comparable company in discussions with Medivation, and he anticipated that the acquisition of Medivation would lead to an increase in Incyte's stock price. Following the announcement of Medivation's acquisition, Incyte's stock price increased by approximately 8%.

Rule 10b5-1 Plans

On September 9, 2021, the SEC's IAC adopted the Investor as Owner subcommittee's recommendations on rules around Rule 10b5-1 plans.[46] Under the recommendations, the IAC is advising that the SEC require a "cooling off" period of at least four months between the adoption or modification of a Rule 10b5-1 plan and the execution of the first trade under the newly adopted or newly modified plan. The committee also recommended prohibiting overlapping plans so that a single person or entity may not have more than one Rule 10b5-1 plan at a time. The IAC also adopted various recommendations regarding plan reporting and disclosure, including advising the SEC to (i) require electronic submission of Form 144; (ii) require enhanced public disclosure of Rule 10b5-1 plans, including proxy statement disclosure of the number of shares covered under Rule 10b5-1 plans by each named executive officer and of the total number of shares covered under "corporate" Rule 10b5-1 plans, as well as timely disclosure

[43] *Environmental, Social and Governance (ESG) Ratings and Data Products Providers Consultation Report,* IOSCO (July 26, 2021), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD681.pdf.

[44] Public Statement, Gary Gensler, *Prepared Remarks Before the Asset Management Advisory Committee*, SEC (July 7, 2021), https://www.sec.gov/news/public-statement/gensler-amac-2021-07-07.

[45] Complaint, *SEC v. Panuwat*, No. 4:21-cv-06322 (N.D. Cal. Aug. 17, 2021).

[46] *Draft Recommendation of the Investor as Owner Subcommittee of the SEC Investor Advisory Committee Regarding Rule 10b5-1 Plans* (Aug. 26, 2021), https://www.sec.gov/spotlight/investor-advisory-committee-2012/draft-recommendation-of-the-iao-subcommittee-on-10b5-1-plans-082621.pdf.

on Form 8-K of the adoption, modification or cancellation of Rule 10b5-1 plans and the number of shares covered; (iii) enhance disclosure of Rule 10b5-1 trades, including certain modifications to Form 4; and (iv) ensure all companies with any securities listed on U.S. exchanges (which would include foreign private issuers) are subject to Form 4 reporting requirements. The recommendations are generally consistent with prior public statements made by Chair Gensler on the topic of potential reforms to Rule 10b5-1 plans.

Form 8-K Trading Gap

In July 2021, the 8-K Trading Gap Act, which originally passed in the House in January 2020 but did not advance in the Senate, was reintroduced in the House and Senate. Under the proposed legislation, the SEC would be required to issue rules that prohibit officers and directors of reporting companies from trading securities in anticipation of a current report on Form 8-K.[47] Under such rules, reporting companies would be required to establish and maintain policies, controls and procedures that are reasonably designed to prohibit their executive officers and directors from purchasing, selling or otherwise transferring any equity security of the issuer, directly or indirectly, during a certain time period before a Form 8-K is filed. With respect to an event described in sections 1 through 6 of Form 8-K (*i.e.*, disclosures regarding the registrant's business and operations, financial information, securities and trading markets, matters related to accountants and financial statements, corporate governance and management and asset-backed securities), the prohibition would apply to the period between the date of the event and the date on which the issuer files or furnishes the related Form 8-K. With respect to an event described in section 7 or 8 of Form 8-K (*i.e.*, disclosures pursuant to Regulation FD and other events), the prohibition would apply between the date on which the issuer determines that the issuer will disclose the event and the date on which the issuer files or furnishes the related Form 8-K. Certain transactions, such as transactions that occur automatically or are made pursuant to an advance election, would be exempt from the requirements.

Related Party Transactions

On August 19, 2021, the New York Stock Exchange ("NYSE") filed an immediately effective rule change restoring a transaction value and materiality threshold for related party transactions that require independent director review.[48] The rule change aimed to address concerns raised by NYSE-listed companies following previous amendments to the listing standard approved by the SEC earlier this year. In April 2021, the SEC had approved changes proposed by NYSE to its approval procedure for and definition of related party transactions.[49] Under the previously approved rules, related party transactions, which require prior review by the company's audit committee or independent body of the board for potential conflicts of interest, were defined as transactions required to be disclosed pursuant to Item 404 of Regulation S-K or, with respect to foreign private issuers, Item 7.B of Form 20-F without, however, Item 404's $120,000 transaction value threshold and Item 7.B's materiality threshold, which serve to exclude small and nonmaterial transactions from the disclosure requirement. NYSE has now reinstated those thresholds so that the scope of related party transactions subject to independent director review is aligned with the SEC disclosure rules.

Personnel Developments

On August 23, 2021, two members of the Public Company Accounting Oversight Board (the "PCAOB"), Rebekah Goshorn Jurata and Megan Zietsman, announced they would resign on the earlier of October 1, 2021 or the date of the appointment of new PCAOB members.[50] These resignations followed a shake-up of the PCAOB that began in June 2021, when the SEC announced it had removed the PCAOB chairman and intended to seek candidates to fill all five board positions, as discussed in our Q2 2021 newsletter.

On August 25, 2021, the SEC announced the appointment of Barbara Roper as Senior Advisor to the Chair, stating that she will focus "on issues relating to retail investor protection, including matters relating to policy, broker-dealer oversight, investment adviser oversight, and examinations".[51] Roper is the Director of Investor Protection for the Consumer Federation of America, where she has worked for 35 years.

[47] 8-K Trading Gap Act of 2021, S. 2360, 117th Cong. (2021); 8-K Trading Gap Act of 2021, H.R. 4467, 117th Cong. (2021).

[48] The New York Stock Exchange LLC, Form 19b-4, File No. SR 2021-43 (filed Aug. 19, 2021).

[49] Order Approving NYSE Proposed Rule Changes Relating to Shareholder Approval Requirements and Related Party Transactions, Release No. 34-91471 (Apr. 2, 2021).

[50] *Joint Public Statement by Board Members Rebekah Goshorn Jurata and Megan Zietsman,* PCAOB (Aug. 23, 2021), https://pcaobus.org/news-events/speeches/speech-detail/joint-public-statement-by-board-members-rebekah-goshorn-jurata-and-megan-zietsman.

[51] Press Release, *Chair Gensler Announces Addition of Barbara Roper to Senior Staff*, No. 2021-165 (Aug. 25, 2021), https://www.sec.gov/news/press-release/2021-165?utm_medium=email&utm_source=govdelivery.

On September 27, 2021, the SEC announced that Erik Gerding, a professor at the University of Colorado Law School, had been named Deputy Director, Legal and Regulatory Policy, for the Division of Corporation Finance.[52] Gerding's book *Law, Bubbles, and Financial Regulation,* published in 2014, examines how asset price bubbles can lead to the failure of financial regulation.

On September 28, 2021, the SEC announced that Commissioner Dan Berkovitz of the Commodity Futures Trading Commission ("CFTC") had been named SEC General Counsel, and John Coates, who had been serving as SEC General Counsel since June 2021, would return to teaching at Harvard University.[53] Prior to his appointment to the CFTC, Berkovitz was the co-chair of the futures and derivatives practice at WilmerHale.

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.

[52] Press Release, *Erik Gerding joins Division of Corporation Finance as Deputy Director, Legal and Regulatory Policy*, No. 2021-197 (Sept. 27, 2021), https://www.sec.gov/news/press-release/2021-197.

[53] Press Release, *Dan Berkovitz Named SEC General Counsel; John Coates to Leave SEC,* No. 2021-198 (Sept. 28, 2021), https://www.sec.gov/news/press-release/2021-198.