Cravath Quarterly Review
M&A, Activism and Corporate Governance
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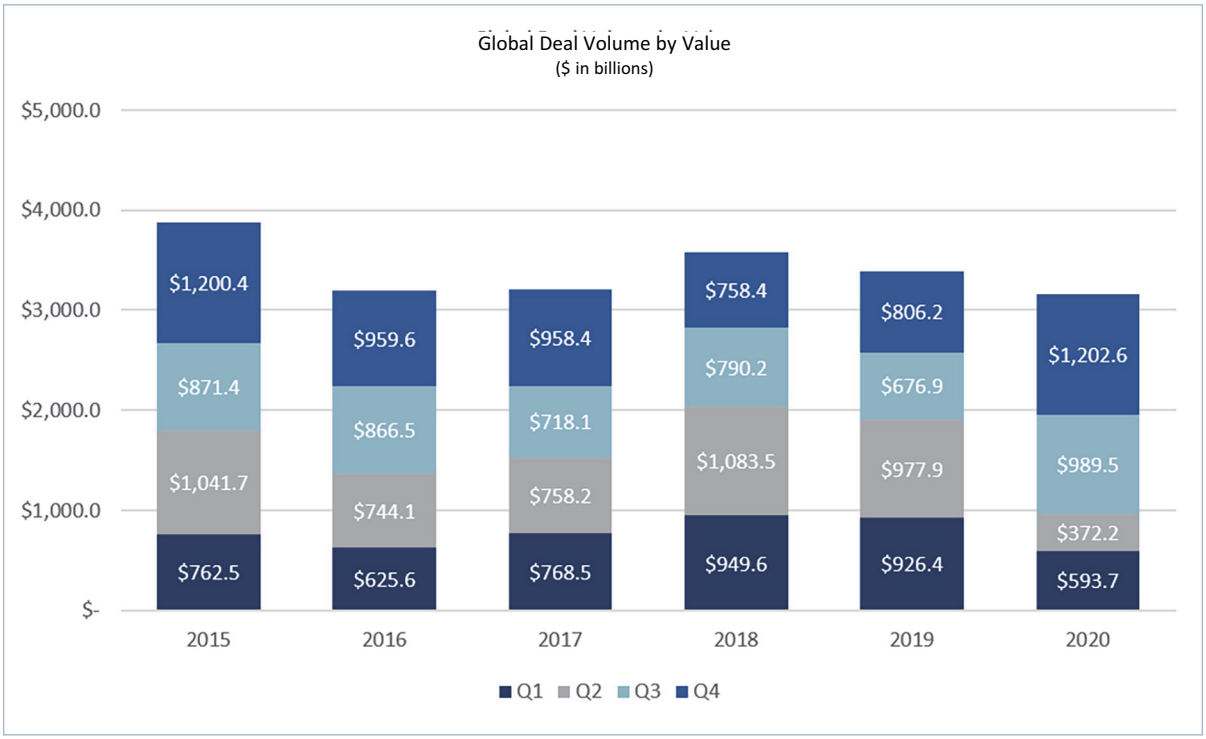
Mergers & Acquisitions

TRENDS[1]

Continuing the resurgence in global M&A activity in Q3 2020, Q4 2020 had the highest announced quarterly deal value since Q2 2007, with $1.2 trillion in deal value announced in Q4 2020. Despite a strong second half of the year, the subdued first half of 2020 resulted in an overall year-on-year decline by deal value of ~6.6%, compared to 2019. The U.S. market continued its strong performance from Q3 2020 with 1,471 deals worth $545 billion announced in Q4 2020, which is the highest value for a quarter in the U.S. since 2001. While North America saw a ~22.6% decrease in deal value in 2020 compared to 2019, Europe kept pace with 2019 (increase of ~5.6%) and the Asia Pacific region (excluding Japan) saw an increase of ~26.1% in deal value compared to 2019. Private equity recorded its highest market share of M&A activity since 2001, and accounted for almost one-fourth of all deals by volume in 2020. In terms of sector activity, the Technology, Media, and Telecommunications, Energy, Mining and Utilities, and Industrial and Chemicals sectors were the most active by deal value.

Q4 2020 Continued Strong Global M&A Activity Rebound in Q3

The two strong consecutive quarters, Q3 2020 and Q4 2020, led to $2.2 trillion in global announced deal values in the second half of the year, one of the highest half-year figures in terms of deal value in the last 15 years. September was the single most active month in 2020, with $415.6 billion in global deal value announced. In terms of deal activity for the year, global deal activity declined by value from $3.4 trillion in 2019 to $3.2 trillion in 2020 (a decline of ~7%) and declined by deal count from 20,767 in 2019 to 17,545 in 2020 (a decline of ~16%). While total global deal count decreased compared to 2019, deals of $5 billion or greater increased year-over-year from 91 in 2019 to 111 in 2020. Out of those 111 deals, 79 occurred in the second half of the year.



Source: Mergermarket

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

Decrease in Overall 2020 Cross-Border M&A Activity, but Impact Varied by Region

Cross-border M&A activity was down ~14.2% year-over-year by value, with $1.3 trillion recorded in 2020. Latin America saw some of the greatest declines in cross-border activity—inbound activity decreased ~68.8% year-over-year and outbound activity decreased ~79.6% year-over-year. While Europe saw an overall increase in M&A activity (~5.6% increase by value compared to 2019), most of the activity was conducted internally. Foreign investment into Europe represented ~15% of Europe's deal volume in 2020 and was one of the lowest volume shares in the last decade. In the Asia Pacific region (excluding Japan), M&A activity generated $725.7 billion in deals in 2020, a ~26.1% increase year-over-year. Inbound activity in the region increased ~10.3% and outbound activity decreased ~24.4%, each compared to 2019. In Japan, overall M&A activity increased ~60.9% by value compared to 2019, driven primarily by large domestic deals. Inbound activity increased ~6.4% by value, with U.S. buyers accounting for ~79.8% of such inbound activity, and outbound activity decreased ~62.2% by value compared to 2019. In the Middle East & Africa region, inbound activity decreased ~41.6% by value and represented one of the lowest amounts of foreign investment in the region in the last five years. Outbound M&A activity remained roughly the same (increase of ~5.3% by value) compared to 2019.

Strong Year for Private Equity Despite Global Pandemic

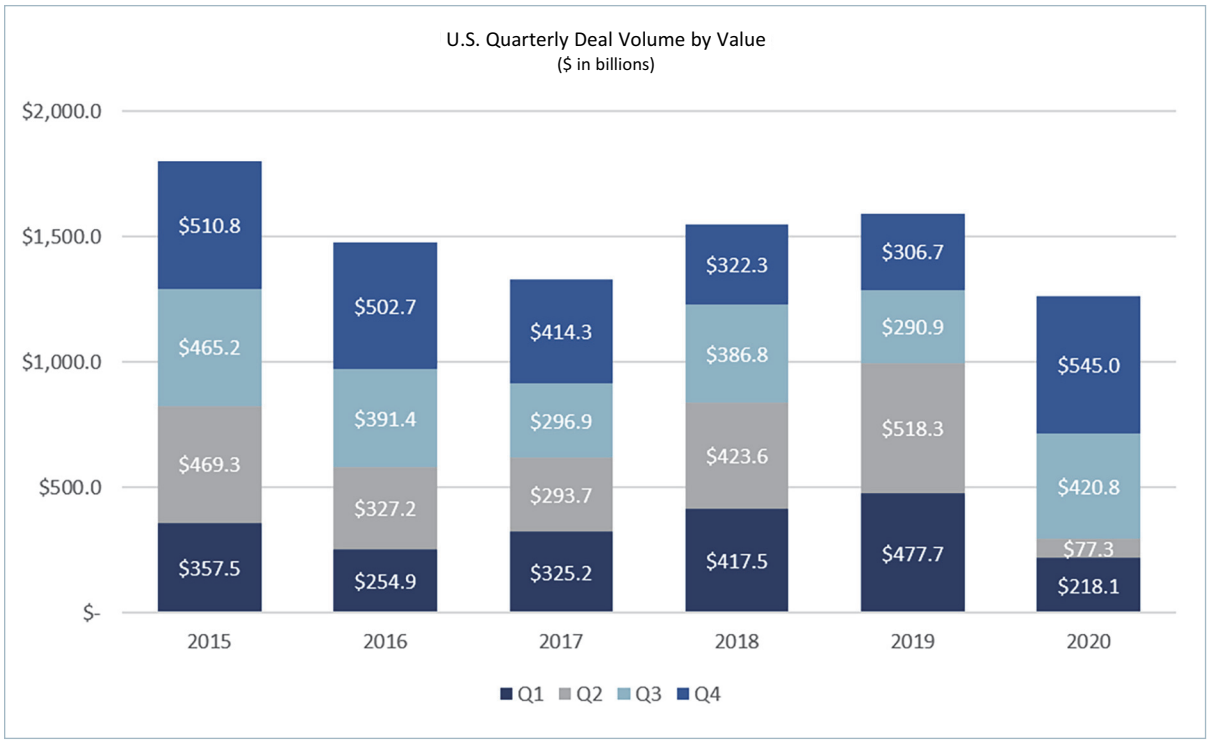
Despite a substantial decline in activity in Q2 2020 amid the social and economic disruption caused by the COVID-19 pandemic, private equity deal value in FY 2020 rose to its highest annual value since the global financial crisis ($608.7 billion) thanks to strong activity in H2 2020 ($370 billion), reflecting a ~3% increase compared to 2019. In terms of deal count, private equity buyouts declined ~7% from 3,789 in FY 2019 to 3,509 in 2020, while overall M&A activity by volume declined by ~19%. As a result, private equity buyouts made up ~25% of overall deal count in FY 2020, the highest annual figure since 2001. Although it was expected that valuations would fall due to the COVID-19 pandemic, the median EBITDA buyout multiple for private equity deals in FY 2020, at 12.1x, remained around the same level as FY 2019.

On a regional basis, Europe enjoyed strong buyout activity in FY 2020, totaling $205.2 billion across 1,415 deals, the highest annual value since 2007, accounting for ~24% of total European M&A value in FY 2020 and ~21% of the total annual deal count, representing the highest shares in value and volume since 2006. In the United States, buyout activity increased in value to $249.1 billion compared to $240 billion in FY 2019, representing the highest annual value since 2007. In Japan, buyout activity in FY 2020 totaled $8.8 billion across 59 deals, a decline in value of ~27% compared to FY 2019.

U.S. M&A Market on Road to Recovery

After U.S. M&A activity slammed to a halt in Q2 2020 due to the COVID-19 pandemic, the U.S. M&A market came roaring back in H2 2020. Activity by value in Q3 2020 increased by over 400% compared to Q2 2020 with 1,289 deals worth $421 billion, and strong activity continued in Q4 2020 with 1,471 deals worth $545 billion, which is the highest value for a quarter since 2001. M&A activity for the year (5,243 deals worth $1.3 trillion) still ended down ~16% by deal count and ~21% by value compared to FY 2019 (6,239 deals worth $1.6 trillion).

Due to the general slowdown in the U.S. M&A market, which started in the second half of 2019, and the COVID-19 pandemic, there were no megadeals (deal value of at least $10 billion) in the United States in H1 2020, which had not happened since 2010. However, 10 megadeals worth a combined $153.7 billion were announced in Q3 2020, and an additional 10 megadeals worth $184.5 billion were announced in Q4 2020.



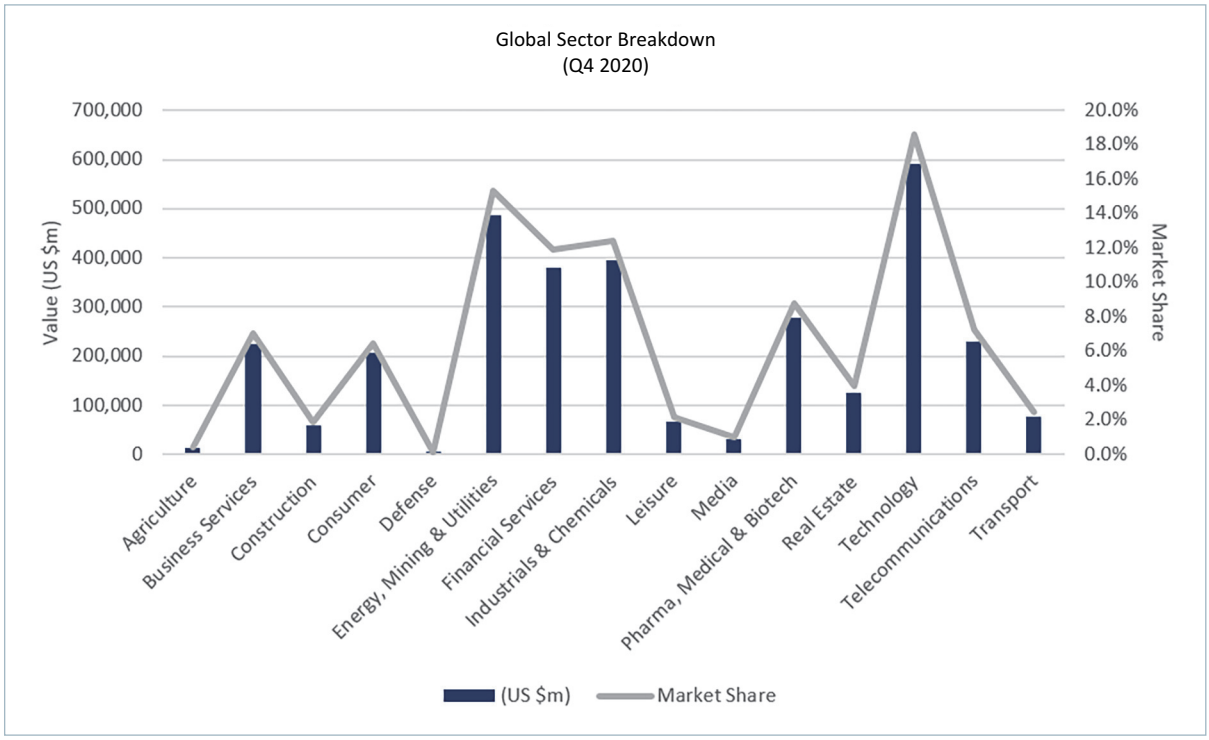
Source: Mergermarket

Dramatic Rise in Special Purpose Acquisition Companies ("SPACs")

In 2020, there was a surge in SPAC activity in the United States, with 248 SPAC IPOs in FY 2020 that raised a combined $82.4 billion, a six-fold increase in value compared to FY 2019 ($13.4 billion across 59 IPOs). SPACs have also been targeting larger deals, with the average acquisition size increasing to $1.39 billion in 2020, up from an average of $92 million in 2012. The largest SPAC deal in 2020 was the $16 billion acquisition of United Wholesale Mortgage by Gores Holding IV, which was announced in September 2020 and which listed on the New York Stock Exchange in January 2021.

Major Activity in Certain Sectors

In terms of global deal value, the Technology, Media, and Telecommunications sector was the most active in 2020, posting ~$851.8 billion worth of deals, accounting for ~26% of global deal value and including two of the five largest deals this year— Nippon Telegraph and Telephone Corporation's $40.4 billion acquisition of a 33.79% stake in NTT DoCoMo Inc. and NVIDIA Corporation's $38.5 billion acquisition of SVF Holdco (UK) Limited. The Energy, Mining and Utilities sector was second, featuring ~$ 477.7 billion worth of deals and accounting for ~14% of global deal value in 2020, of which China Oil & Gas Pipeline Network Corporation's $49.1 billion acquisition of the oil and gas pipeline assets of PetroChina Company Limited was the largest deal of the year. Industrials and Chemicals, Financial Services and Pharma, Medical and Biotech were the three other most active sectors worldwide, featuring ~$394 billion, ~$379 billion and ~$279 billion worth of deals, respectively.



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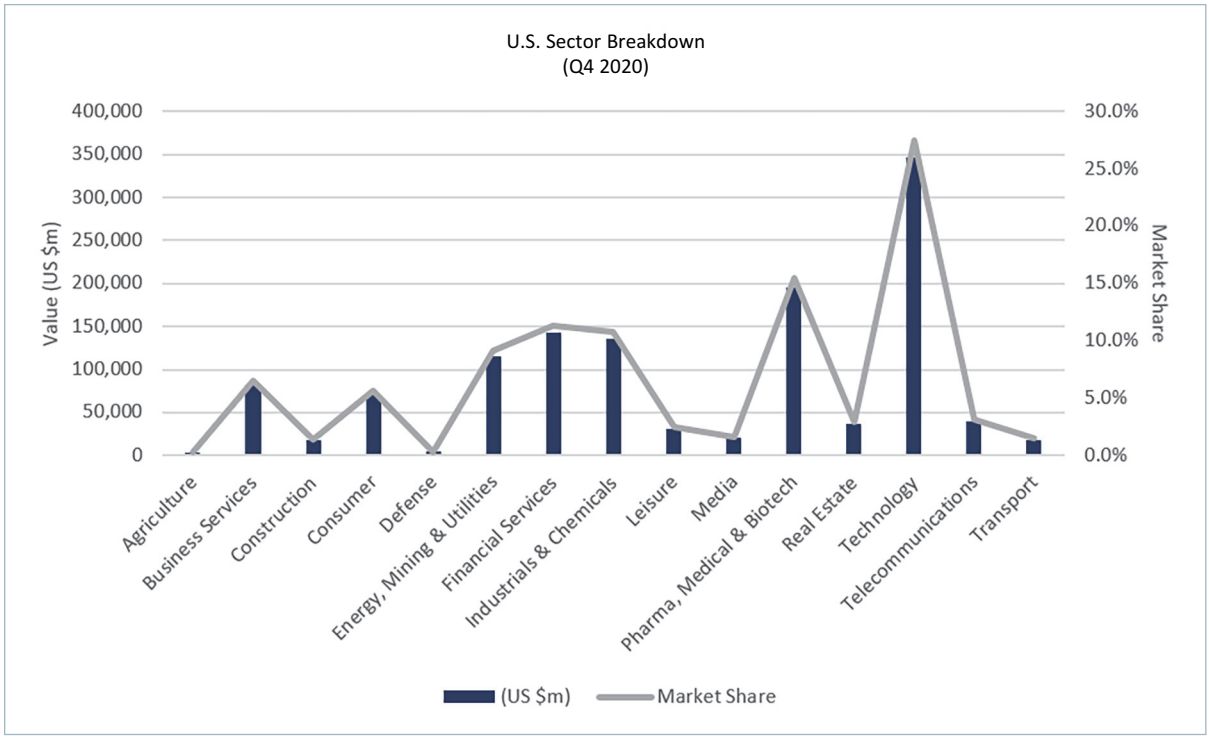

Source: Mergermarket

LEGAL DEVELOPMENTS

Cases

Q4 2020 featured a number of notable U.S. cases in the M&A space.

In re: Mindbody Inc. Shareholders Litigation, C.A., No. 2019-0442-KSJM (Del. Ch. Oct. 2, 2020)

In this case, the Delaware Court of Chancery denied a motion to dismiss breach of fiduciary claims against Richard Stollmeyer, the CEO and Chairman of Mindbody, Inc. ("Mindbody"), and Brett White, the CFO and COO of Mindbody, in connection with Mindbody's $1.9 billion take-private sale to Vista Equity Partners ("Vista"), noting that the transaction was subject to enhanced scrutiny under the standard set forth in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* ("*Revlon*").

The court explained that the paradigmatic *Revlon* claim involves a conflicted fiduciary who is insufficiently checked by the board and who tilts the sale process toward his own personal interests in ways inconsistent with maximizing stockholder value. The court held that the allegations of the complaint filed by the plaintiffs supported a reasonable inference that Stollmeyer was conflicted because he had an interest in near-term liquidity and an expectation that he would receive post-merger employment based on his statements and his interactions with Vista. The court also concluded that the complaint adequately alleged that Stollmeyer tilted the sale process in Vista's favor by: "(a) lowering guidance to depress Mindbody's stock and make it a more attractive target at a time Vista was looking to acquire Mindbody and (b) providing Vista with timing and informational advantages over other bidders", including by limiting the diligence materials made available to other potential bidders during the 30-day go-shop period under the merger agreement and failing to disclose its fourth quarter results to potential bidders other than Vista. The court further held that the plaintiffs had adequately alleged that Stollmeyer was "a conflicted fiduciary [who] failed to disclose material information to the board", namely, Stollmeyer's alleged conflicts in the sale process and communications with Vista. The court rejected an argument by the defendants that dismissal was appropriate under *Corwin v. KKR Financial Holdings LLC*, which gives business judgment rule deference when a transaction "is approved by a fully informed, uncoerced vote of the disinterested stockholders", because the plaintiffs had alleged sufficient facts that the stockholder vote was not fully informed, including that Mindbody failed to disclose its fourth quarter results, which exceeded Mindbody's lowered guidance for the fourth quarter, to the stockholders before the vote on the merger. The court also denied the motion to dismiss the breach of fiduciary duty claim against White, noting that the plaintiffs adequately pled a claim for breach of the duty of care in his capacity as an officer because he allegedly acted with gross negligence and was at least recklessly indifferent to the steps Stollmeyer had taken to tilt the sales process in Vista's favor.

In re: Solera Insurance Coverage Appeals, C.A. No. N18C-08-315 (Del. Oct. 23, 2020)

In this case, the Delaware Supreme Court reversed a Delaware Superior Court ruling and held that Solera Holdings Inc. ("Solera") could not pursue coverage under its directors' and officers' insurance policies for costs of an appraisal action with respect to the buyout of Solera by Vista. The Delaware Superior Court had ruled that the appraisal action constituted a "securities claim" (defined in Solera's directors' and officers' insurance policies as a claim for any "actual or alleged violation of any federal, state or local statute, regulation or rule or common law regulating securities") because the alleged failure to pay fair value for a company's shares constituted a "violation" of law. In reversing the Superior Court's decision, the Supreme Court held that the underlying appraisal action did not involve an allegation of wrongdoing, as the word "violation" implied, and therefore did not constitute a "securities claim". The Supreme Court agreed with the insurers that an appraisal action is a "neutral proceeding" that is "not designed to address alleged wrongdoing" and reiterated that an appraisal action should not be considered an action for breach of fiduciary duty.

AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC, C.A. No. 2020-0310-JTL (Del. Ch. Nov. 30, 2020)

In this case, the Delaware Court of Chancery ruled that the COVID-19 pandemic did not constitute a material adverse effect in connection with the sale of Strategic Hotels & Resorts ("Strategic"), a subsidiary of Dajia Insurance Group ("Dajia"), to a subsidiary of Mirae Asset Financial Group ("Mirae"), because the material adverse event definition in the sale agreement excluded "natural disasters and calamities", but held that the responses of Dajia to the pandemic constituted a breach of the ordinary course covenant. Therefore, the court held Mirae was not obligated to close the transaction and was entitled to the return of its $582 million deposit from Dajia and $3.7 million in transaction expenses, in addition to attorneys' fees and court costs.

In September 2019, Mirae entered into an agreement to acquire Strategic from Dajia for $5.8 billion. On April 17, 2020, the scheduled

closing date, Mirae refused to close, asserting that Dajia had failed to satisfy all of the closing conditions. Dajia filed suit seeking specific performance, following which Mirae filed counterclaims seeking determinations that Dajia (i) failed to satisfy conditions to closing, (ii) breached its express contractual obligations, (iii) breached implicit obligations supplied by the implied covenant of good faith and fair dealing and (iv) committed fraud.

Following a five-day trial, the court found in a 243-page post-trial ruling that Mirae was contractually entitled to terminate the sale agreement. The court held that, while Dajia did not suffer a material adverse event under the sale agreement as the COVID-19 pandemic fell within an exception related to "natural disasters and calamities", it had breached certain covenants under the agreement, including the commitment that the business of Strategic and its subsidiaries would be conducted "only in the ordinary course of business, consistent with past practice in all material respects" and the covenant to deliver title in a way that allowed for Mirae to obtain title insurance. The court held that, even though the COVID-19 pandemic warranted the extensive changes made to the operations of the hotels owned by Strategic, existing Delaware law did not permit reasonable departures from the ordinary course of operations where the seller had committed to operate "only in the ordinary course of business, consistent with past practice in all material respects".

In addition, the court found that Dajia had not been forthcoming about a series of disputes with Hai Bin Zhou, a "shadowy and elusive figure" who had conducted a fraudulent property deed scam in connection with some of the properties that were to be transferred and brought litigation in California and Delaware to enforce fraudulent arbitration awards based on a forged arbitration agreement. The court stated that "[d]espite seeking emergency relief from three courts because of the threat that Hai Bin Zhou's activities posed to the [t]ransaction, [Dajia] did not disclose anything to Mirae. Instead, the lawyers for Mirae's financing syndicate discovered the proceedings just as Mirae was attempting to secure financing." The court concluded that the title and insurance issues were not resolved prior to the proposed closing date and indicated that Dajia may well have engaged in fraud in connection with the deeds by failing to timely and adequately disclose the breadth of Hai Bin Zhou's efforts. The court also concluded that Mirae had not breached its obligation to use "commercially reasonable efforts" to facilitate resolution of the title issues and that, even if it had, it was not Mirae's actions, but Dajia's fraudulent acts, that caused the failure of the condition. As a result, the court found that Mirae validly exercised its right to terminate the sale agreement and was entitled to the return of its deposit plus interest and transaction-related expenses plus its attorneys' fees and court costs.

SECTION 220 OF THE DGCL

Two recent decisions from the Delaware courts have reaffirmed that Section 220 of the Delaware General Corporation Law ("DGCL") will be interpreted to grant pre-complaint discovery to stockholders who may be preparing for litigation with respect to alleged breaches of fiduciary duty.

***AmerisourceBergen Corp. v. Lebanon County Employees' Retirement Fund, et al., C.A. No. 2019-0527-JTL* (Del. Dec. 10, 2020)**

In this case, the Delaware Supreme Court upheld the Court of Chancery's decision[2], ruling that with respect to a books and records demand under Section 220 of the DGCL, a stockholder is not required to identify specific objectives or courses of actions it will take if the books and records confirm a suspicion of wrongdoing. The court further held that a stockholder need not establish that the wrongdoing is "actionable", although it stated that actionability could be a relevant factor in considering the legitimacy of the stated purpose. The Court reaffirmed "the 'credible basis' test as the standard by which investigative inspections under Section 220 are to be judged", holding that "[t]o obtain books and records, a stockholder must show, by a preponderance of the evidence, a credible basis from which the Court of Chancery can infer there is possible mismanagement or wrongdoing warranting further investigation".

***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. Nov. 24, 2020)**

In this post-trial ruling, the Delaware Court of Chancery required Gilead Sciences Inc. ("Gilead") to produce most of the books and records demanded by plaintiffs in five cases under Section 220 of the DGCL in order to investigate potential anti-competitive wrongdoing, kickback schemes and patent infringement by Gilead allegedly tied to potentially costly enforcement actions, mass tort claims and other controversies involving Gilead's HIV drug development and marketing. Gilead opposed the demands on the grounds that the

[2] A summary of the Chancery Court's decision can be found in the Q1 2020 issue of the Cravath Quarterly Review: M&A, Activism and Corporate Governance.

stockholders' basis to suspect such wrongdoing—unproven allegations in other lawsuits—was inadequate to justify inspection of its books and records. The court rejected Gilead's arguments, concluding that the investors (i) had presented a credible basis for their requests, (ii) had shown that they were pursuing their own interests rather than those of their attorneys and (iii) had standing to seek the requested information. The court noted that Gilead's conduct "exemplified the trend of overly aggressive litigation strategies by blocking legitimate discovery, misrepresenting the record, and taking positions for no apparent purpose other than obstructing the exercise of plaintiffs' statutory rights". Therefore, the court sua sponte granted leave for the plaintiffs to seek an order compelling Gilead to pay the plaintiff's attorneys' fees related to the litigation, citing a "massive resistance" by defendant corporations to Section 220 demands.

TRENDS

COVID-19 Related M&A Litigation

Since the onset of the COVID-19 crisis, there have been a number of lawsuits relating to attempts by buyers to delay or terminate pending M&A transactions on grounds related to COVID-19. Out of 12 closely watched COVID-19 related M&A cases filed in 2020, only one case—*AB Stable VIII LLC*, as discussed above—has reached a decision. Three are still ongoing and one has been stayed pending a party's bankruptcy hearing. The parties in the other seven cases reached mutual agreement, with two transactions terminated and five transactions completed with modified terms.

The commonly cited grounds in these cases have been breaches of interim operating covenants, breaches of access provisions (both related to access to information and also physical access to properties and employees) and material adverse effect claims asserting inability of the seller to perform its obligations under the transaction agreement (where the material adverse effect definition in such agreements contains such a prong). Pure business material adverse effect claims have been rare, and, as discussed above, the Delaware Court of Chancery's decision in the *AB Stable VIII LLC* case confirms that broad carve outs can capture the effects of COVID-19, which may further reduce the frequency of such arguments.

SPAC Litigation

As described above, there was a surge in SPAC activity in 2020. There have already been a number of lawsuits related to SPAC transactions and it seems likely that the number of lawsuits will continue to increase over time. Certain aspects of SPAC transactions make them unique litigation targets, including the expedited timeline for the "de-SPAC" transactions (the consummation of a merger pursuant to which the target becomes a public company) and the incentives for SPAC sponsors to consummate a merger. SPAC shareholder litigation tends to arise when a deal is abandoned or there is a share price drop after the de-SPAC transaction.

Many of the recent cases related to SPAC transactions have alleged inadequate, false or misleading disclosures in securities filings. Interestingly, some of the key cases to watch, including those related to the transactions through which Nikola Corporation, MultiPlan Corporation, Akazoo S.A. and Triterras, Inc. became public companies, were initiated after short sellers released certain negative information about the companies. The resolution of these cases, and other ongoing cases (including the cases related to the de-SPAC transactions of Waitr Holdings Inc., CarLotz, Inc. and QuantumScape Corporation) may prove helpful in identifying future trends related to SPAC-related disclosures. In addition, de-SPAC transactions are not immune from the same strike suits that most public-company M&A deals attract, and observers should expect an increase in the number of strike suits challenging the adequacy of de-SPAC transaction proxy disclosures.

Outside of the federal securities context, shareholders could also bring state law fiduciary duty claims alleging breaches of the duties of care or loyalty to the SPAC shareholders (other than the SPAC sponsor) or to the SPAC itself. The potential for differing incentives between the SPAC sponsor, on the one hand, and ordinary SPAC shareholders, on the other, makes breach of fiduciary duty claims a possible litigation threat.

REGULATORY DEVELOPMENTS

Antitrust

DOJ's Challenge of Visa's Acquisition of Plaid

On November 5, 2020, the U.S. Department of Justice Antitrust Division ("DOJ") filed a complaint in the U.S. District Court for the Northern District of California to block Visa Inc.'s $5.3 billion acquisition of Plaid Inc. based on a "nascent competitive threat" theory of harm.[3] The complaint alleged that Visa is a monopolist in the U.S. market for "online debit

[3] News Release, "Justice Department Sues to Block Visa's Proposed Acquisition of Plaid", dated November 5, 2020, available at https://www.justice.gov/opa/pr/justicedepartment-sues-block-visas-proposed-acquisition-plaid.

transactions" and that Plaid is poised to enter that market, posing a significant threat to Visa's monopoly. The complaint quoted numerous Visa internal documents, up to the highest levels of the company, to demonstrate that the acquisition was an "insurance policy" to protect against Plaid's "threat to [Visa's] important US debit business".

Notably, the DOJ sued under both Section 7 of the Clayton Act, which governs anticompetitive acquisitions, and Section 2 of the Sherman Act, for illegal maintenance of monopoly, with similar allegations that the acquisition would "eliminate the nascent but significant competitive threat" posed by Plaid and "further entrench Visa's monopoly". The complaint alleged that Visa's elimination of a "disruptive and innovative competitor" would result in higher prices for online debit transactions, would result in less innovation and would further raise "the already high entry barriers faced by competitors seeking to enter or expand into online debit payments, further entrenching Visa's monopoly power in online debit".

On January 12, 2021, Visa and Plaid announced the termination of the proposed transaction, citing the challenge raised by the DOJ, and reached an agreement with the DOJ to dismiss the DOJ's suit in connection with the proposed transaction.

FTC Sues Facebook for Illegal Monopolization

On December 9, 2020, the U.S. Federal Trade Commission ("FTC") filed a complaint in the U.S. District Court for the District of Columbia alleging that Facebook, Inc. ("Facebook") has illegally maintained its monopoly in the market for "personal social networking services" through a years-long course of anticompetitive conduct.[4] The complaint followed a lengthy investigation in cooperation with a coalition of attorneys general of 46 states, the District of Columbia and Guam, and alleged that Facebook has engaged in a systematic strategy, including its 2012 acquisition of up-and-coming rival Instagram, its 2014 acquisition of the mobile messaging app WhatsApp and the imposition of anticompetitive conditions on software developers, to eliminate threats to its monopoly. The complaint alleged that this course of conduct harms competition, deprives users of personal social networking of increased choice, quality and innovation, and deprives advertisers of the benefits of competition. The FTC is seeking a permanent injunction that could, among other things, (i) require divestitures of assets, including Instagram and WhatsApp, (ii) prohibit Facebook from imposing anticompetitive conditions on software developers and (iii) require Facebook to seek prior notice and approval for future mergers and acquisitions.

Tax and Executive Compensation

Final Section 162(m) Regulations

On December 18, 2020, the Internal Revenue Service ("IRS") issued final regulations (the "Final Regulations") under Section 162(m) of the Internal Revenue Code (the "Code"), as amended by the 2017 Tax Cuts and Jobs Act (the "TCJA"). Section 162(m) limits the deductibility of compensation paid in any year to certain public company executives to $1 million. The TCJA made several significant amendments to Section 162(m), including eliminating the qualified performance-based compensation exception and expanding the scope of covered employees and companies subject to the deductibility limit. The Final Regulations are generally consistent with the IRS's 2019 proposed regulations and, in the context of mergers and acquisitions, will limit a buyer's ability to deduct compensation paid to senior target company executives, following an acquisition, who are considered "covered employees".[5]

Activism[6]

In January 2021, Lazard released its 2020 Review of Shareholder Activism, which offers key observations regarding activist activity levels and shareholder engagement from 2020.

Key findings / insights from the report include:

- Global activist activity saw a sharp rebound in Q4 2020, with 57 new campaigns launched (an increase of ~128% compared to Q3 2020);
- Despite low global activity levels in the first three quarters of 2020, the number of new campaigns launched was only ~13% down from 2019;
- While the number of campaigns initiated in 2020 in the U.S. was down ~34% compared to 2019, new campaigns initiated in Europe and the Asia Pacific region were up ~21% and ~11%, respectively, compared to 2019;

[4] News Release, "FTC Sues Facebook for Illegal Monopolization", dated December 9, 2020, available at https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

[5] The Final Regulations are available at https://www.govinfo.gov/content/pkg/FR-2020-12-30/pdf/2020-28484.pdf.

[6] Activism data from Lazard, 2020 Review of Shareholder Activism, 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 (select campaigns with market capitalizations less than $500 million at the time of announcement were also included during the COVID-19 pandemic-induced market downturn); companies that are spun off as part of the campaign process are counted separately.

- Generally in line with prior years, 131 board seats were won by activists in 2020;
- In 2020, M&A was the most common activist objective, comprising 41% of campaigns; and
- The adoption of poison pills surged in the U.S., with 96 adopted in 2020 versus 30 in 2019.

Q4 2020 Featured Strong Activist Activity

After a slow Q3 2020, global activist activity saw a sharp rebound in Q4 2020, with 57 new campaigns launched, compared to 25 campaigns in Q3 2020. As a result, the number of new campaigns launched in 2020 was only down ~13% (182 campaigns launched in 2020 compared to 209 campaigns launched in 2019) and new capital deployed was only down ~6% ($39.6 billion deployed in 2020 compared to $42.3 billion deployed in 2019). With 16 campaigns launched, Elliott was the most prolific activist in 2020. Starboard came in second, with six campaigns launched, less than half the number of campaigns launched by Elliott. First-time activists represented ~30% of campaigns launched, generally in line with prior years.

In terms of board seats, 54 companies were targeted for board seats in 2020, down from 66 companies in 2019, but the number of board seats won by activists in 2020 was 131 board seats, up from 122 board seats in 2019. Out of the 131 board seats, 24 (or ~18%) were won through proxy contests and the remaining 107 through settlements. Starboard won 24 board seats in 2020, with Elliott coming in second, with 13 board seats won. By contrast to new directors in the S&P 500, directors appointed from activist campaigns were generally non-diverse. While up from ~7% in 2019, only ~11% of directors from activist campaigns in 2020 were ethnically diverse, compared to ~22% of new directors in the S&P 500. Female directors consisted of only ~24% of new directors appointed from activist campaigns in 2020 (no change from 2019), compared to ~47% of new directors in the S&P 500.

U.S. Activism, Down for the Year, Rebounds Significantly in Q4 2020

The number of U.S. activist campaigns in 2020 represented a multi-year low as a proportion of global activity, amounting to only ~45% of global activism by campaigns initiated, down from ~59% in 2019. In 2020, 80 campaigns were launched, down ~34% compared to 2019, and 82 companies were targeted, down ~25% compared to 2019. However, 30 new campaigns were launched in Q4 2020, representing a ~200% increase from Q3 2020 and ~37% of total U.S. activity in 2020. Companies with market capitalizations greater than $25 billion accounted for ~20% of the campaigns launched in Q4 2020, up from ~2% of campaigns in H1 2020.

In Europe, 68 campaigns were launched in 2020, representing a ~21% increase over 2019, thanks to a strong Q4 2020, during which 22 campaigns were launched. Notably, small to mid-cap companies of market capitalizations between $2 billion and $5 billion were increasingly targeted in 2020, accounting for ~31% of European activity in 2020 compared to the annual average of ~19% from 2017 to 2019. In Europe, institutional shareholders and occasional activists became increasingly vocal in 2020, accounting for ~48% of campaigns compared to the 2018 and 2019 average of ~27%, whereas established activists accounted for ~35% of campaigns in 2020, down from an average of ~62% in 2018 and 2019.

Key Trends in 2020

In 2020, ~41% of campaigns launched in 2020 had an M&A objective, thanks to ~47% of Q4 2020 campaigns and ~50% of Q3 2020 campaigns having an M&A objective, up from ~34% in H1 2020. This was consistent with multi-year averages but down from ~47% in 2019. 2020 saw private equity firms continue to adopt more aggressive public postures. For example, there were a few notable instances of private equity firms increasing their actions in public markets, such as (i) KKR filing a 13D at Dave & Busters in January and later receiving board representation, (ii) Cerberus publicly calling for changes at Commerzbank, including board representation for itself, (iii) New Mountain Vantage publicly calling for changes at Virtusa and receiving a board seat and (iv) Cannae Holdings, in conjunction with Senator Investment Group, launching a proxy fight for nine Board seats at CoreLogic following the rejection of a takeover bid in September and ultimately winning three board seats. 2020 also saw activist hedge funds take advantage of SPACs as a new source of capital, such as (i) Hudson Executive Capital registering a SPAC to acquire a company in the financial technology space in May 2020, (ii) Pershing Square raising a record $4 billion in a SPAC IPO in July and (iii) Starboard raising a $360 million SPAC in September. The adoption of poison pills surged in 2020, with 96 pills adopted in 2020 versus 30 in 2019, with most pills adopted during the height of market dislocation in H1 2020.

Select Campaigns/Developments

Company	Market Capitalization ($ in billions)[7]	Activist	Development / Outcome
Cracker Barrel Old Country Store, Inc.	$2.8	Biglari Capital Corp.	• In August 2020, Biglari, with a stake of ~8%, announced it had notified Cracker Barrel of its intent to nominate one director nominee, Raymond Barbrick, at the upcoming 2020 annual meeting. Over the past decade, Biglari has been an active critic of Cracker Barrel and, among other things, has nominated directors for election to the Cracker Barrel board in at least three prior annual meetings and called a special meeting to vote on a non-binding resolution that Cracker Barrel pursue a sale transaction. • At the November 2020 annual meeting, all of Cracker Barrel's director nominees were re-elected. The activist nominee, Mr. Barbrick, was not elected to the board.
CoreLogic, Inc.	$5.4	Cannae Holdings, Inc. and Senator Investment Group LP	• In August 2020, CoreLogic announced that it called a special meeting, to vote on the activist group's proposals to remove nine (out of 12) current directors and nominate the group's nine directors for appointment to the board. • At the November 2020 special meeting, CoreLogic's shareholders voted to remove three current directors and to replace them with three of the activist group's nominees. • Later that month, the activist group delivered a request to CoreLogic to set a record date in connection with a potential solicitation of written consents to remove and replace directors. The activist group noted that this ensures that they can act promptly by written consent should there be any unexplainable delays in its sale process or if they learn the CoreLogic board is not acting in the best interests of shareholders.
Exxon Mobil Corporation	$172.9	Engine No. 1 Management LLC; D.E. Shaw & Co.	• In December 2020, Engine No. 1 announced an intention to nominate four director nominees for election to Exxon's board (there were 10 directors at the time of the announcement) and announced that the California State Teachers' Retirement System ("CalSTRS") has informed Engine No. 1 that CalSTRS intends to support such individuals if they are nominated. In its letter, Engine No. 1 laid out its plan to reenergize Exxon, including, among other things, refreshing the board, imposing greater long-term capital allocation discipline, implementing a strategic plan for sustainable value creation (including significant investment in clean energy) and overhauling management compensation. • News media reported that D.E. Shaw sent a letter to Exxon in that same week asking Exxon to cut its capital expenditure and other spending to improve performance and maintain its dividend, among other requests. • In January 2021, Engine No. 1 announced that it had formally nominated four director nominees for election at Exxon's 2021 annual meeting.
Public Storage	$39.1	Elliott Management Corporation	• In December 2020, Elliott disclosed that it had nominated six individuals for election to the board of trustees at Public Storage's 2021 annual meeting (there were 13 trustees at the time of the announcement). Public Storage announced on the previous day that three trustees will retire from the board effective December 31, 2020 and that the board had appointed three new independent trustees to replace the outgoing trustees, effective January 1, 2021. • In January 2021, Public Storage entered into a settlement agreement with Elliott pursuant to which, among other things, Public Storage agreed to appoint two of Elliott's nominees to the board and form a new "Long Term Planning Committee" of the board, which will initially include the two Elliott nominees as members.
Alkermes plc	$3.3	Elliott Management Corporation	• In December 2020, Alkermes announced that it had entered into a settlement agreement with Elliott, pursuant to which, among other things, Alkermes and Elliott agreed to identify a mutually agreeable director to be appointed to the board prior to March 31, 2021. Alkermes also agreed to form a new board committee to oversee achievement of profitability targets and implementation of cost-optimization activities, including the potential monetization of non-core assets. • Alkermes announced that on the previous day two directors notified the company of their decision to resign effective as of the 2021 annual meeting and that the board elected two new directors to the board.
Intel Corporation	$202.4	Third Point LLC	• In December 2020, news media reported that Third Point, with a roughly $1 billion stake in Intel, sent a letter to the company urging the company to explore strategic alternatives, among other actions. On the same day, Intel issued a press release that it welcomed input from all investors regarding enhanced shareholder value and that it looked forward to engaging with Third Point. • In January 2021, Intel announced that CEO Bob Swan will leave the company in February, with VMWare CEO Pat Gelsinger replacing Mr. Swan. Third Point CEO Daniel Loeb responded positively on social media to the change.

[7] Market capitalization as of campaign announcement.

Corporate Governance

PROXY ADVISORY UPDATES

In November 2020, Deutsche Börse, an international exchange organization and market infrastructure provider, announced that it will acquire an approximately 80% stake in Institutional Shareholder Services ("ISS"), valuing ISS at $2.275 billion for 100% of the business. Genstar Capital and current management will continue to hold an approximately 20% stake in ISS. The deal is expected to close in the first half of 2021, subject to customary closing conditions and regulatory approvals.

Also in November 2020, ISS and Glass Lewis published updates to their proxy voting polices for the 2021 proxy season. Included below is a summary of key updates to voting policies covering the United States from both proxy advisory firms.

ISS Benchmark Policy Updates[8]

- **Diversity:** ISS is adopting a new voting policy with respect to racial and ethnic diversity in U.S. boards. In 2021, ISS research reports will highlight Russell 3000 or S&P 1500 company boards with no apparent racial or ethnic diversity, and beginning in 2022, ISS will generally recommend voting against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) where the board has no apparent racially or ethnically diverse members, unless there was racial or ethnic diversity on the board at the preceding annual meeting and the board makes a firm commitment to appoint at least one racially or ethnically diverse member within one year. In addition, since the previously announced transitional period related to its board gender diversity policy has ended, ISS will generally recommend voting against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) of Russell 3000 or S&P 1500 companies where there are no women on the board, unless there was a woman on the board at the preceding annual meeting and the board makes a firm commitment to return to a gender-diverse status within one year.

- **Governance Failures:** ISS updated its policy to clarify that a board's demonstrably poor risk oversight of environmental and social issues, including climate change, is an example of failure of risk oversight that could result, under extraordinary circumstances, in a recommendation to vote against or withhold from individual directors, committee members or the entire board.

- **Poison Pills:** ISS clarified that it will generally recommend voting against or withhold from all nominees (except new nominees, who will be considered on a case-by-case basis) if the company adopted a poison pill, whether short-term or long-term, that has a deadhand or slowhand feature. A deadhand provision mandates that a poison pill can be terminated only by a majority of the directors who adopted it, such that even if the board is replaced by shareholders in a proxy fight, the poison pill cannot be redeemed. A slowhand provision is one where such redemption restriction applies only for a period of time.

- **Board Refreshment:** ISS's current policy to generally recommend against age limits will continue, but ISS will now take a case-by-case approach with respect to term limits.

- **Advance Notice:** ISS's updated policy with respect to advance notice requirements for shareholder proposals or nominations states that a reasonable window for such proposals or nominations is no earlier than 120 days prior to the anniversary of the prior year's meeting and that a reasonable window is no shorter than 30 days from the beginning of the notice period.

- **Exclusive Forum Provisions:** ISS will generally recommend voting for federal forum selection provisions that specify "the district courts of the United States" as the exclusive forum for federal securities laws matters, but will recommend voting against provisions that identify a particular federal district court. ISS will generally recommend voting for exclusive forum provisions that specify courts located within Delaware for corporate law matters for Delaware corporations and will vote on a case-by-case basis for other states. ISS will generally recommend voting against provisions that specify a state other than the state of incorporation or that specify a particular local court within the state.

- **Virtual Shareholder Meetings:** ISS will generally support management proposals allowing for virtual shareholder meetings so long as they do not preclude in-person meetings and will vote on a case-by-case basis for shareholder proposals concerning virtual-only meetings.

[8] ISS, *Americas Proxy Voting Guidelines Updates for 2021* (November 12, 2020); https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf.

- **Shareholder Proposals:** ISS clarified that the company's disclosure regarding gender, race or ethnicity pay gap policies or initiatives compared to its industry peers and local laws regarding categorization of race and/or ethnicity and definitions of ethnic and/or racial minorities are factors that will be taken into account when evaluating requests for reports on a company's pay data or policies with respect to gender or race/ethnicity pay gaps. ISS is also adopting a new policy that it will vote on a case-by-case basis on requests for reports on a company's use of mandatory arbitration on employment-related claims or requests for a report on polices and oversight to prevent workplace sexual harassment.

ISS's policy updates are effective for shareholder meetings on or after February 1, 2021.

Glass Lewis Policy Guidelines Updates[9]

- **Diversity:** Beginning in 2021, Glass Lewis will note as a concern boards with fewer than two female directors. In 2021, Glass Lewis's voting recommendations will be based on the current requirement of at least one female board member but, beginning in 2022, Glass Lewis will generally recommend voting against the nominating committee chair of a board with six or more members if the board has fewer than two female directors. Glass Lewis will also recommend in accordance with board composition requirements set forth in applicable state laws when they come into effect. In addition, beginning in 2021, Glass Lewis's reports for companies in the S&P 500 index will include its assessment of the company's disclosure related to board diversity, board skills and the director nomination process. While Glass Lewis will not make voting recommendations solely on the basis of such assessment, such assessment will help inform Glass Lewis's evaluation of a company's overall governance and may be a contributing factor in its recommendations when additional board-related concerns have been identified.

- **Board Refreshment:** Glass Lewis will note as a potential concern companies where the average tenure of non-executive directors is 10 years or more and no independent directors have joined the board in the past five years. While Glass Lewis will not make voting recommendations solely on this basis, such lack of board refreshment may be a contributing factor in recommendations when additional board-related concerns have been identified.

- **Environmental and Social Risk Oversight:** Glass Lewis updated its guidelines and will note as a concern S&P 500 companies that do not provide clear disclosure concerning board-level oversight over environmental and/or social issues. Beginning in 2022, Glass Lewis will generally recommend voting against the governance committee chairs of such companies who fail to provide explicit disclosure concerning the board's role in overseeing these issues.

- **SPACs:** Glass Lewis added a new section explaining its approach to SPACs, including its generally favorable view of proposals seeking to extend business combination deadlines as well as its approach to determining the independence of board members at a post-combination entity who previously served as executives of the SPAC. Glass Lewis will generally consider such directors to be independent absent any evidence of an employment relationship or continuing material interest in the post-combination entity.

- **Voting Results Disclosure:** Glass Lewis will recommend voting against the governance committee chair when a detailed record of proxy voting results from the last annual meeting has not been disclosed, including companies incorporated in foreign jurisdictions where such disclosure may not be a legal requirement.

- **Compensation:** Glass Lewis has codified certain additional factors that it will consider when assessing a company's short-term incentive plan, including clearly disclosed justifications to accompany any significant changes to the plan structure as well as any instances in which performance goals have been lowered from the previous year. Additional factors that Glass Lewis will consider when assessing long-term incentive plans include inappropriate performance-based award allocation or any decision to significantly roll back performance-based award allocation.

Glass Lewis's new policies are effective for meetings held on or after January 1, 2021.

[9] Glass Lewis, *2021 Proxy Paper, Guidelines, An Overview of the Glass Lewis Approach to Proxy Advice, United States* (November 24, 2020); https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf.

Asset Manager 2021 Priorities

State Street's 2021 Proxy Voting Agenda[10]
On January 11, 2021, State Street CEO Cyrus Taraporevala published his annual letter to board members of companies within the State Street portfolio outlining State Street's stewardship priorities for 2021 which will be the systemic risks associated with climate change and a lack of racial and ethnic diversity.

Mr. Taraporevala reiterated State Street's focus on environmental, social and governance ("ESG") issues and reminded board members of State Street's prior announcement that State Street would be voting against companies in the bottom 10% of State Street's ESG scoring system (its R-Factor™, or Responsibility Factor) that could not articulate a plan to improve their scores. Companies interested in receiving their R-Factor scores can submit an email request to State Street.

State Street will continue its engagement with companies on physical impacts and other climate risks. Mr. Taraporevala announced that, in 2021, State Street also will focus on companies especially vulnerable to transition risks associated with climate change.

On the topic of racial and ethnic diversity, Mr. Taraporevala announced that (1) in 2021, State Street will vote against the chair of the nominating and governance committee at S&P 500 and FTSE 100 companies that do not disclose the racial and ethnic compositions of their boards, (2) in 2022, State Street will vote against the chair of the compensation committee at S&P 500 companies that do not disclose their EEO-1 Survey (a compliance survey mandated by federal statute and regulations requiring company employment data to be categorized by race/ethnicity, gender and job category) responses and (3) in 2022, State Street will vote against the chair of the nominating and governance committee at S&P 500 and FTSE 100 companies that do not have at least one director from an underrepresented community.

Blackrock 2021 Stewardship Expectations and CEO Letter[11]
In December 2020, BlackRock published its annual report on stewardship expectations for 2021. The report focused on shareholder proposals, climate risk, key stakeholder interests, diversity and lobbying:

- **Shareholder proposals:** BlackRock noted that it sees voting on shareholder proposals as playing an increasingly important role in its stewardship efforts around sustainability. Where it agrees with the intent of shareholder proposals addressing material business risks and if it determines that management could do better in managing and disclosing those risks, BlackRock will support such shareholder proposals.

- **Climate risk:** BlackRock noted that it will ask explicitly that companies in its "focus universe" (which, beginning in 2021, has been expanded to more than 1,000 companies) disclose "a business plan aligned with the goal of limiting global warming to well below 2 degrees Celsius, consistent with achieving net zero global [greenhouse gas] emissions by 2050".

- **Key stakeholder interests:** BlackRock will ask that companies report on how they have determined their key stakeholders and considered their interests in decision making and will ask that companies address the adverse impacts that could arise from their business practices and mitigate material risks with appropriate due diligence processes and board oversight.

- **Diversity, equity and inclusion:** BlackRock will ask companies in the United States to disclose the diversity of their workforce as well as the actions they are taking to advance diversity, equity and inclusion, and support an engaged workforce. It noted that it expects U.S. boards to have, in addition to other aspects of diversity, at least two women directors and that it intends to increase voting action against boards not exhibiting diversity in 2022.

- **Lobbying:** BlackRock will now ask companies to confirm, through engagement or disclosure, that their corporate political activities are consistent with the companies' public statements on material and strategic policy issues, and will expect companies to monitor the positions of any trade associations of which they are members for consistency.

[10] Cyrus Taraporevala, *CEO's Letter on Our 2021 Proxy Voting Agenda* (January 11, 2021); https://www.ssga.com/us/en/institutional/ic/insights/ceo-letter-2021-proxy-voting-agenda.

[11] BlackRock, *Our 2021 Stewardship Expectations* (December 2020); https://www.blackrock.com/corporate/literature/publication/our-2021-stewardship-expectations.pdf. Larry Fink, Larry Fink's 2021 letter to CEOs (January 2021); https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

In January 2021, BlackRock CEO Larry Fink published his annual letter to CEOs. Consistent with the themes outlined in BlackRock's annual report on stewardship expectations, Mr. Fink's letter focused on climate risk and related disclosures and shareholder interests.

Mr. Fink repeated a point he made last year, that "climate risk is investment risk" and added that "climate transition presents a historic investment opportunity". He wrote that BlackRock is asking companies to disclose a plan for how their business model will be compatible with a net zero economy (one where there is net zero greenhouse gas emissions) and is asking that companies disclose how this plan is incorporated into their long-term strategies and reviewed by their boards of directors. He noted that BlackRock strongly supports moving to a single global standard for disclosure and, while the world moves toward a single standard, continues to endorse reporting that is aligned with Task Force on Climate-related Financial Disclosures ("TCFD") and Sustainability Accounting Standards Board ("SASB") standards.

Mr. Fink also stated that "being connected to stakeholders – establishing trust with them and acting with purpose – enables a company to understand and respond to the changes happening in the world". He noted that companies that can show their purpose in delivering value to their customers, employees and communities are better able to compete and deliver long-term, durable profits. Mr. Fink also said that, as companies issue sustainability reports, disclosures on talent strategy should fully reflect long-term plans to improve diversity, equity and inclusion, as appropriate by region.

Vanguard Statements and Boardroom and Workforce Diversity[12]

In December 2020, Vanguard published two Investment Stewardship Insights on the topic of board and workforce diversity. While it noted that it does not advocate for one-size-fits-all mandates and that its process is flexible and evaluates companies on a case-by-case basis, Vanguard funds may vote against directors at companies where "progress on board diversity falls behind market norms and expectations". Vanguard also expressed its view that human capital management matters are critical to a company's long-term success and that companies that fail to include a wider array of individuals in its workforce put their long-term success in jeopardy.

Other ESG Updates

International Financial Reporting Standards ("IFRS") Consultation Paper on Sustainability Reporting[13]

In September 2020, the IFRS Foundation published a consultation paper to determine whether there is a need for global ESG standards, whether the IFRS Foundation should play a role with respect to such standards and what the scope of that role might be, including whether the IFRS Foundation should create a new Sustainability Standards Board ("SSB"). Among other questions, the consultation paper sought stakeholder comment as to whether, if the IFRS Foundation were to establish an SSB, (i) the SSB should take a "climate-first" approach, initially developing climate-related financial disclosures before potentially broadening its remit to other areas of ESG reporting; (ii) whether an SSB should commence with a "single-materiality" approach, with standards that focus on whether a disclosure is financially material to investors, or a "double-materiality" approach, which would, in addition to financial materiality, take into account the impact of the reporting entity on the broader environment and (iii) whether the information disclosed in response to SSB standards should be auditable or subject to external assurance. The comment period for the consultation paper closed on December 31, 2020.

Merger of International Integrated Reporting Council ("IIRC") and SASB[14]

In November 2020, two leading providers of voluntary ESG reporting frameworks, IIRC and SASB, announced their intention to merge into a unified organization, the Value Reporting Foundation, which will maintain the Integrated Reporting Framework of ESG standards. The merger is expected to be completed by mid-2021.

BlackRock 2020 Global Sustainable Investing Survey[15]

In December 2020, BlackRock published its first sustainable investing survey of 425 investors from 27 countries, representing an estimated $25 trillion of assets under management. Some key findings from the survey include:

[12] Vanguard, *Vanguard Investment Stewardship Insights – A continued call for boardroom diversity* (December 2020); https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/ISBOARD_122020.pdf. Vanguard, *Vanguard Investment Stewardship Insights – Diversity in the workplace* (December 2020); https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/ISWORK_122020.pdf.

[13] IFRS, *Consultation Paper and Comment Letters: Sustainability Reporting* (September 2020); https://www.ifrs.org/projects/work-plan/sustainability-reporting/comment-letters-projects/consultation-paper-and-comment-letters/.

[14] *SASB, IIRC and SASB announce intent to merge in major step towards simplifying the corporate reporting system* (November 25, 2020); https://www.sasb.org/wp-content/uploads/2020/11/IIRC-SASB-Press-Release-Web-Final.pdf.

[15] BlackRock, *Sustainability goes mainstream, 2020 Global Sustainable Investing Survey* (December 3, 2020); https://www.blackrock.com/corporate/literature/publication/blackrock-sustainability-survey.pdf.

- Over half of global respondents (54%) consider sustainable investing to be fundamental to investment processes and outcomes.
- Respondents plan to double sustainable assets under management in the next five years, increasing from an average of 18% of assets under management to an average of 37% by 2025.
- Over half of global respondents (53%) cited poor quality or availability of ESG data as the biggest barrier to deeper or broader implementation of sustainable investing.
- 88% of global respondents ranked environment as the priority most in focus when comparing ESG factors.
- Among the global respondents, the most popular approaches to sustainable investing are integrating ESG into their investment decisions (75%) followed by utilizing exclusionary screens as a key mechanism for expressing their sustainability principles (65%).

Unilever To Seek Shareholder Approval for Climate Transition Action Plan[16]

On December 14, 2020, Unilever announced its intention to seek a non-binding advisory vote on the company's climate transition action plan at its 2021 annual meeting. This is the first time a major global company has voluntarily committed to putting such a plan to a shareholder vote. Unilever intends to share its plan with its shareholders in the first quarter of 2021, ahead of its annual meeting in May, and will seek an advisory vote every three years on any material changes to the plan going forward.

Diversity

Nasdaq Proposed New Listing Requirements[17]

On December 1, 2020, Nasdaq filed a proposal with the SEC to adopt new listing requirements related to board diversity and disclosure. If approved by the SEC, the new listing rules would require Nasdaq-listed companies to report on their board composition regarding diversity. In addition, companies would be required to have, or explain why they do not have, at least two diverse directors, including one who self-identifies as female and one who self-identifies as either an underrepresented minority or LGBTQ+. Nasdaq-listed companies will have one year from the date of the SEC's approval of the rule to comply with the reporting requirement and will be expected to have at least one diverse director within two years of the SEC's approval. Depending on listing tier, companies will be expected to have two diverse directors within four or five years of the SEC's approval.

SEC Personnel Announcements

On January 18, 2021, then-President-elect Joseph R. Biden, Jr. announced that he intends to nominate Gary Gensler to serve as Chair of the SEC. Mr. Gensler previously served as Chair of the U.S. Commodity Futures Trading Commission during the Obama administration. On January 21, 2021, the SEC announced President Biden's designation of Allison Herren Lee as Acting Chair of the SEC (pending Senate confirmation of Mr. Gensler as Chair). It is expected that ESG matters will be a priority of the SEC under the Biden administration. In the press release announcing her designation, Acting Chair Lee stated: "[d]uring my time as Commissioner, I have focused on climate and sustainability, and those issues will continue to be a priority for me." Both Acting Chair Lee and Commissioner Caroline Crenshaw have pushed for the SEC to act to require additional ESG disclosures. In November 2020, in a joint dissent by Commissioners Lee and Crenshaw on the SEC's Amendments to Modernize and Enhance Management's Discussion and Analysis and Other Financial Disclosures (the "Amendments"), Commissioners Lee and Crenshaw criticized the Amendments' failure to address ESG issues and signaled their intent to "address climate, human capital and other ESG risks" noting that "[t]here's no time to waste in setting to ourselves to this task, and we look forward to rolling up our sleeves to establish requirements for standard, comparable, and reliable climate, human capital, and other ESG disclosures." In addition to pursuing policy related to ESG, it is expected that under the Biden administration the SEC may seek rulemaking related to the disclosure of political donations, more aggressively use enforcement powers and complete the implementation of certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

On February 1, 2021, the SEC announced that John Coates will serve as Acting Director of the agency's Division of Corporation Finance and announced that Satyam Khanna will serve as Senior Policy Advisor for Climate and ESG in the office of Acting Chair Allison Herren Lee.

[16] Unilever, *Unilever to seek shareholder approval for climate transition action plan* (December 14, 2020); https://www.unilever.com/news/press-releases/2020/unilever-to-seek-shareholder-approval-for-transition-action-plan.html.

[17] Nasdaq, *Nasdaq to Advance Diversity Through New Proposed Listing Requirements* (December 1, 2020); https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01.