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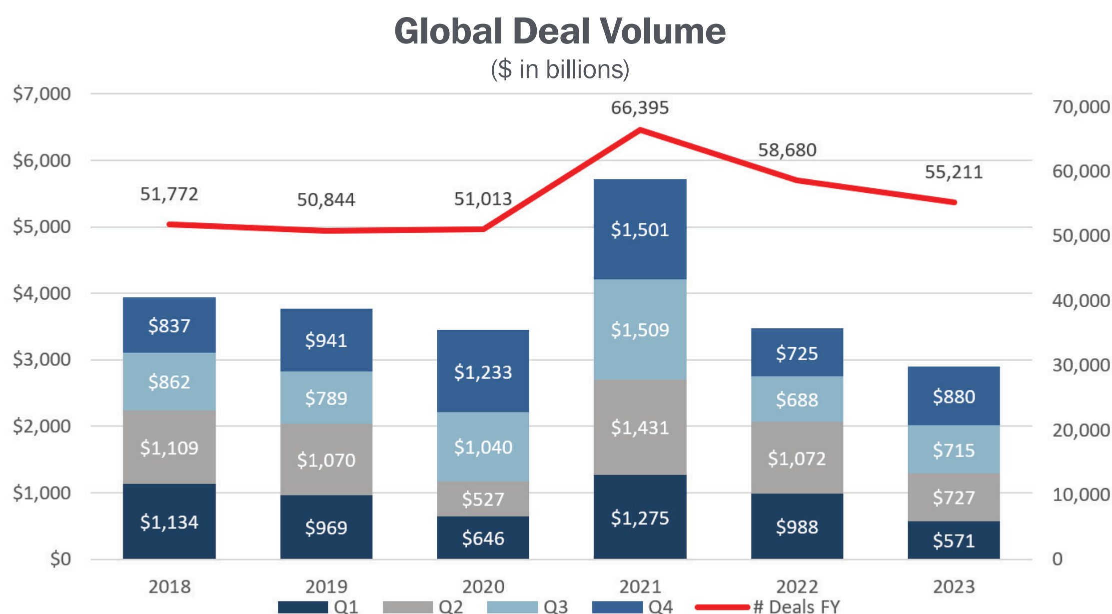
Cravath Quarterly Review

M&A, ACTIVISM AND CORPORATE GOVERNANCE

01

Mergers & Acquisitions

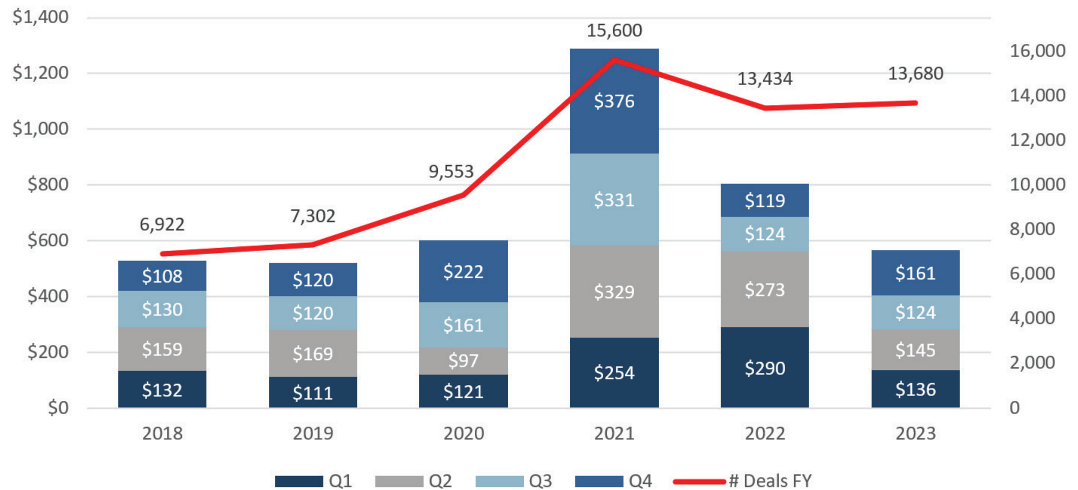
TRENDS[1]



SOURCE Refinitiv, An LSEG Business.

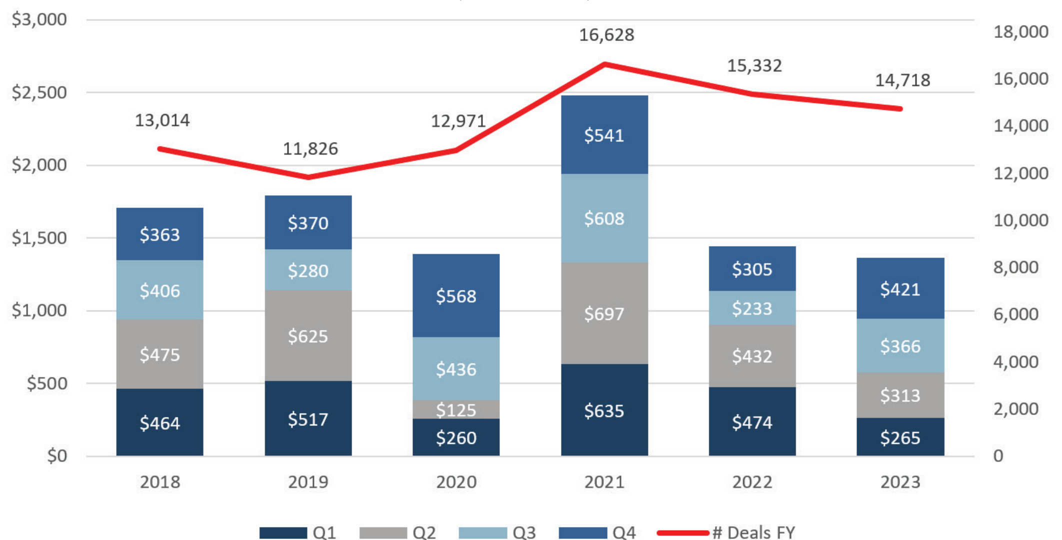
Q4 2023: M&A Activity Falls, Announced Deal Volume Below $1 Trillion for Sixth Consecutive Quarter

In 2023, global M&A activity totaled ~$2.9 trillion, a decrease of ~17% compared to 2022 and the second-largest year-over-year percentage decline since 2018. Q4 2023, with announced deal volume of $880 billion, marked the sixth consecutive quarter to fall below $1 trillion in announced deal volume. There were approximately 55,000 deals announced in 2023, a year-over-year decrease of ~6% compared to 2022.



SOURCE Refinitiv, An LSEG Business.

Private equity buyouts in 2023 reached $566 billion globally, a decrease of ~30% compared to 2022. However, there was a modest recovery in terms of the number of private equity-backed deals, with ~13,700 private equity-backed deals announced in 2023, slightly above the ~13,400 deals announced during 2022.



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Dealmaking Down Across All Regions

M&A activity for U.S. targets amounted to ~$1.4 trillion in 2023, a decrease of ~5% compared to 2022. M&A activity for European targets totaled $598 billion in 2023, a decrease of ~28% compared to 2022. In the Asia-Pacific region, dealmaking totaled $602 billion in 2023, a decrease of ~26% compared to 2022. Cross-border M&A activity totaled $954 billion in 2023, a decrease of ~13% compared to 2022.

LEGAL & REGULATORY DEVELOPMENTS

Cases

Q4 2023 featured a number of notable Delaware decisions and a notable decision from the Second Circuit relating to Delaware corporations.

COLON, ET AL. V. BUMBLE, INC., ET AL., C.A. NO. 2022-0824-JTL (DEL. CH. SEPT. 12, 2023).

In September 2023, the Delaware Court of Chancery granted a motion for summary judgment in favor of Bumble, Inc. ("Bumble"), rejecting a challenge to Bumble's certificate of incorporation, which provided certain specified holders of Bumble's Class A common stock with 10 votes per share (as opposed to the one vote per share to all other holders of Class A common stock).

In connection with the initial public offering of Bumble in 2021, Bumble implemented an "Up-C" dual-class share structure with Class A common stock having both economic and voting rights and Class B common stock having only voting rights. Bumble's certificate of incorporation also provided that each Class A common stock carried one vote, unless such common stock was held by a "Principal Stockholder"—a group that included Bumble's founder and sponsor—in which case such share of Class A common stock carried 10 votes per share. The plaintiffs sued, alleging that the differential "identity-based" voting rights within the Class A common stock violated Sections 151(a) and 212(a) of the Delaware General Corporation Law ("DGCL"), which provide that voting rights are an attribute of a class of stock and that by default, unless otherwise specified in the certificate of incorporation, each share carries one vote.

In granting Bumble's motion for summary judgement, the Court held that nothing in Section 151(a) or 212(a) "requires that the charter frame the voting power . . . in terms of a specific number of votes per share" and noted that Section 151(a) contemplates that class attributes, including voting rights, can depend on facts ascertainable outside of the certificate of incorporation, such as the identity of the stockholder.

ARCHKEY INTERMEDIATE HOLDINGS INC. V. MONA, C.A. NO. 2021-0383-JTL (DEL. CH. OCT. 3, 2023).

In October 2023, the Delaware Court of Chancery issued an opinion clarifying the distinction between an "expert determination" and an "arbitration" in connection with a dispute over the post-closing purchase price adjustment provision of a purchase agreement, which provided that disputes over the purchase price adjustment would be submitted to an "Independent Accountant", who shall "act as an arbitrator".

In finding that the purchase price dispute mechanism constituted an "expert determination" as opposed to an "arbitration", the Court found that, notwithstanding the reference to the Independent Accountant acting "as an arbitrator", the language and structure of the purchase price adjustment provision, read as a whole, "establishe[d] an intent to provide for an expert determination, not an arbitration". To support this finding, the Court noted,

among other things, that the dispute mechanism provision granted a degree of authority to the independent accountant that was insufficient to trigger arbitral doctrines and that in order for the provision to have been interpreted as providing for arbitration it would have had "to do more, such as by specifying a sponsoring arbitral organization and designating a set of arbitral rules".

SUNDER ENERGY, LLC V. JACKSON, ET AL., C.A. NO. 2023-0988-JTL (DEL. CH. NOV. 22, 2023).

In November 2023, the Delaware Court of Chancery rejected Sunder Energy, LLC's ("Sunder") efforts to enjoin Tyler Jackson, one of Sunder's five co-founders, from allegedly breaching certain restrictive covenants in Sunder's LLC agreement that Sunder claimed were binding on Jackson, as a holder of incentive units in Sunder.

In reaching this decision, the Court first found that the restrictive covenants in this case were not valid contractual obligations because the managing members had not provided adequate notice to Jackson, in breach of their fiduciary duty of disclosure. Furthermore, the Court noted that even if the restrictive covenants were valid contractual obligations, they would be unenforceable as they were overly broad in contravention of relevant Delaware law. Moreover, although the LLC agreement expressly stated that any covenant found to be overbroad should be narrowed so as to be enforceable, the Court declined to "blue-pencil" (*i.e.*, modify) any of the restrictive covenants to narrow their scope, reasoning that if overbroad covenants can be blue-penciled in such a manner, employers would enjoy a "no-lose" scenario and have no incentive to draft properly narrowed covenants.

IN RE: NINE WEST LBO SEC. LITIG., 87 20-3257-CV (L) (2ND CIR. 2023).

In November 2023, the Second Circuit partially revived certain fraudulent transfer claims arising from the Chapter 11 proceedings of Nine West Holdings, Inc. (including its predecessor Jones Group, Inc., "Nine West"), holding that the Bankruptcy Code's "safe harbor" provision for settlement payments made by a financial institution did not apply to approximately $80 million of payments to executives and employees in respect of restricted shares that were processed by a payroll provider.

At issue were two sets of transfers made in connection with the 2014 acquisition by Sycamore Partners of Nine West:
(1) approximately $1.1 billion deposited with Wells Fargo, in its capacity as paying agent, for distribution to Nine West's shareholders (the "shareholder transfers"); and
(2) approximately $80 million that was paid to Nine West's directors, officers, and employee shareholders through Automated Data Processing, Inc., Nine West's payroll services provider (the "payroll transfers").

The district court granted defendants' motions to dismiss, applying a "contract-by-contract" analysis, whereby the district court reasoned that because Wells Fargo acted as Nine West's agent in the shareholder transfers, it must be considered Nine West's agent for every transfer arising out of the acquisition agreement, including the payroll transfers. On appeal, the Court rejected the district court's "contract-by-contract" analysis, and instead adopted a "transfer-by-transfer" analysis, which it reasoned comported better with the language, structure and purpose of the safe harbor provision.

Applying the "transfer-by-transfer" analysis, the Court held that Wells Fargo was engaged to effectuate payments to shareholders in a leveraged buyout and acted as Nine West's agent in those shareholder transfers, but not the payroll transfers. With respect to the payroll transfers, the Court reviewed the record to find that Wells Fargo did not make the payments and held that Wells Fargo's role was insufficient to find that it acted as Nine West's agent as a matter of law. Accordingly, the Court vacated the district court's judgment to the extent it dismissed the fraudulent transfer claims relating to the payroll transfers. The Court affirmed the district court's determination that the shareholder transfers fell under the safe harbor.

PARAGON TECHS. INC. V CRYAN, ET AL., C.A. NO. 2023-1013-LWW (DEL. CH. NOV. 30, 2023).

In November 2023, the Delaware Court of Chancery denied an application by Paragon Technologies, Inc. ("Paragon") for a preliminary injunction to require the board of directors of Ocean Powers Technology ("OPT"), a renewable energy company, to permit Paragon's director nominees to stand for election and to exempt Paragon from OPT's net operating loss ("NOL") poison pill.

In May 2023, Paragon, OPT's largest stockholder, sent OPT a letter expressing concern about OPT's financial condition and requesting the appointment of three nominees to OPT's board. In response, OPT amended the advance notice provisions of its bylaws to include, among other things, more stringent disclosure requirements for director nominees, and adopted an NOL poison pill (the "NOL Plan").

In July 2023, Paragon launched a proxy contest and sought an exemption from the NOL Plan's ownership limitation. In August 2023, Paragon submitted a notice to OPT (the "Notice") of its intention to nominate five director candidates for election to the OPT board. Following two deficiency letters from OPT and two supplements to the Notice from Paragon, the OPT board rejected the Notice for having failed to comply with OPT's advance notice bylaws and denied Paragon's NOL Plan exemption request. In response, Paragon sued OPT's board for breach of its fiduciary duties.

Ruling in favor of OPT, the Court concluded that Paragon failed to demonstrate its entitlement as a matter of law. The Court first noted that "[a]t a minimum, factual disputes exist concerning Paragon's compliance" with the advance notice provisions of OPT's bylaws.

The Court then reviewed whether the OPT board's decision to reject the Notice was unreasonable under *Unocal*, which assesses whether a board's response when faced with a threat to an important corporate interest is reasonable. The Court held that the amended bylaws were not unreasonable because OPT presented some evidence that it amended the bylaws to align with the universal proxy rules recently adopted by the U.S. Securities and Exchange Commission ("SEC"). While conceding that some of the shortcomings identified in Paragon's Notice by OPT were "nitpicky" or "suspect" and may have been pretextual, the Court maintained that, given the numerous factual disputes, the record did not support holding that the OPT board breached its fiduciary duties in rejecting the Notice.

The Court also considered whether the OPT board had reasonable grounds to conclude that a threat to its NOLs existed and whether its response was reasonable, and found that the board reasonably concluded that Paragon's exemption request, if granted, could have presented material financial risk to the company.

02

Antitrust

POLICY DEVELOPMENTS

Merger Guidelines Issued by FTC and DOJ[2]

On December 18, 2023, the Department of Justice Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC" and, together with the DOJ, the "Agencies") issued finalized Merger Guidelines (the "Merger Guidelines"), which modified the draft guidelines released in July 2023 (the "Draft Guidelines") and replaced the 2010 Horizontal Merger Guidelines (the "2010 HMGs") and the 2020 Vertical Merger Guidelines. Like all previous versions, the Merger Guidelines are not binding law but reflect how the Agencies apply Section 7 of the Clayton Act and other antitrust laws applicable to mergers.

The Merger Guidelines embody the ongoing shift in the interpretation of the antitrust laws and their application by the Agencies to mergers, including a broad conception of competitive harms and skepticism of justifications espoused by parties in support of transactions. The departure from the 2010 HMGs is thematically consistent with a number of recent enforcement actions by the Agencies, in particular by the FTC. The key highlights include:

- Lower thresholds for structural presumptions of harm (which has the effect of broadening the scope of potentially problematic transactions);
- Additional focus on non-economically verifiable means of identifying a lessening of competition;
- Increased emphasis on non-price harms;
- Expanded liability for vertical and other nonhorizontal transactions;
- Elevating theories of lessened competition that have not been focal points of enforcement in recent decades (potential competition, nascent competitors, conglomerate mergers, labor effects, etc.); and
- De-emphasis of defenses to liability.

ENFORCEMENT

In December 2023, the FTC and DOJ's Antitrust Division (the "Division") released their Hart-Scott-Rodino ("HSR") Annual Report for the fiscal year 2022 data on the HSR Premerger Notification Program.[3] In 2022, 3,152 transactions were reported under the HSR Act. Of the 3,152 transactions reported, 47 transactions or 1.6% of all HSR reportable transactions were subject to a second request.

The report also contained information about merger enforcement actions by the Agencies in 2022. The FTC brought 24 merger enforcement challenges in 2022, 11 in which it issued final consent orders; seven in which the transaction was abandoned or restructured as a result of an antitrust investigation; and six in which the FTC initiated administrative or federal court litigation.[4] The DOJ worked to block 24 merger transactions in 2022, six in which the DOJ filed a lawsuit in federal court; four others in which the Division filed a complaint and settlement simultaneously; 10 in which the parties abandoned the transaction in the face of questions from the Division; and six others in which the parties changed the structure of their transaction such that the Division chose not to pursue an enforcement action.[5]

Federal Trade Commission

In December 2023, the FTC and the State of California moved to dismiss their case challenging John Muir Health's ("John Muir") proposed transaction to acquire sole ownership of San Ramon Regional Medical Center, LLC ("San Ramon Medical") from current majority owner Tenet Healthcare Corporation after the parties terminated the deal.[6] In November 2023, the FTC had sued to block John Muir's proposed acquisition, alleging the deal would "eliminate head-to-head competition between John Muir and nearby San Ramon Regional Medical", both healthcare providers.[7]

In December 2023, the FTC sued 7-Eleven, alleging the convenience store chain violated a 2018 FTC consent order by acquiring a fuel outlet in St. Petersburg, Florida without providing the Commission prior notice.[8] The FTC is seeking a civil penalty for a four-year violation period. 7-Eleven thus faces a maximum penalty of over $77 million.[9] The consent order that 7-Eleven allegedly violated stems from 7-Eleven's $3.3 billion acquisition of more than 1,000 retail fuel outlets with attached convenience stores from Sunoco in 2018.[10]

In December 2023, the Fifth Circuit issued an opinion *Illumina, Inc. v. FTC*, No. 23-60167 (5th. Cir. 2023), finding that there was substantial evidence supporting the FTC's ruling that the deal was anticompetitive, but also finding that the FTC used the wrong legal standard in part of its analysis.[11] Soon after the Fifth Circuit's opinion, Illumina decided to unwind its acquisition of Grail, which concluded the FTC's March 2021 challenge to Illumina's acquisition of Grail.

In December 2023, the FTC sued to block Sanofi's acquisition of an exclusive license to Maze's Phase 2-ready developmental drug, alleging the deal "would eliminate a nascent competitor poised to challenge Sanofi's monopoly in the Pompe disease therapy market".[12] Soon after, Sanofi announced it would terminate its agreement with Maze.[13]

In December 2023, the U.S. District Court for the Southern District of New York granted the FTC's request to preliminarily enjoin IQVIA Holdings Inc.'s ("IQVIA") acquisition of Propel Media, Inc. ("PMI").[14] Soon after, IQVIA abandoned its proposed acquisition of PMI.[15] In July 2023, the FTC had sued to block IQVIA's acquisition of Propel Media, alleging "that the proposed acquisition would give IQVIA a market-leading position in programmatic advertising for health care products, namely prescription drugs, to doctors and health care professionals."[16]

03

Activism[17]

Observations regarding activist activity levels in 2023 include:

- Activism in 2023 slightly exceeded 2022's active pace with ~260 new campaigns globally, representing a ~5% increase from 2022 and the highest period of activist activity over the past five years.
- Although the ~115 new campaigns launched in the United States in 2023 represented a ~15% decrease from 2022, they represented the largest regional share of global activist activity at ~45% of all new campaigns.
- Activist activity in Europe in 2023 held steady with ~45 new campaigns launched in Europe in 2023 (~15% of all new campaigns), which represented a ~5% decrease from 2022.
- Increased activist activity outside the United States and Europe in 2023 helped to offset the decreased activist activity in the United States and Europe. The ~100 new campaigns launched outside the United States and Europe in 2023 (~40% of all new campaigns) represented a ~50% increase from 2022.

04

Tax

PILLAR TWO

The Organisation for Economic Co-operation and Development's Pillar Two rules are set to take effect for taxable periods starting in 2024 in the European Union as well as several non-European Union jurisdictions, including Japan, South Korea and the United Kingdom. As part of a widely agreed-upon framework for international taxation of multinational enterprises ("MNEs"), the rules are expected to be implemented in approximately 140 jurisdictions over the next few years. The United States has not adopted the Pillar Two rules.

Pillar Two imposes a 15% global minimum tax on MNEs with more than €750 million in annual consolidated revenues. It achieves this by creating a minimum tax regime that, in order of priority: first, allows the jurisdiction in which a "constituent entity" of an MNE does business to bring the effective tax rate of the entity to 15% in that jurisdiction; second, imposes a "top-up" tax on the ultimate parent entity of the MNE (or another parent entity, if the ultimate parent entity is resident in the United States or another jurisdiction that has not adopted Pillar Two) to increase the effective tax rate for each jurisdiction up to 15%; and third, requires other entities in the relevant corporate group (*e.g.*, sister entities) to pay a similar top-up tax if no parent entity resides in a jurisdiction that has adopted Pillar Two. The first and second rules are beginning to take effect in 2024 in the jurisdictions that have so far implemented Pillar Two, and the third rule is set to take effect in such jurisdictions for taxable periods starting in 2025.

Pillar Two will affect how MNEs assess potential M&A transactions. For instance, a merger could push the newly combined group over the €750 million threshold, thereby subjecting the group to Pillar Two and, in such cases, Pillar Two may favor private equity acquirers, as their portfolio investments are not aggregated for purposes of testing the €750 million threshold. A spin-off could also alter the application of the Pillar Two rules in various ways depending on the separate revenues and effective tax rates of the former parent and spun-off entity. Finally, the Pillar Two top-up taxes do not apply if the "blended" effective tax rate of all constituent entities in the same jurisdiction is at least 15%. Accordingly, a low-tax target may be valued differently by an acquirer without any (or only low-tax) presence in the target's jurisdiction than by an acquirer with a sufficiently high-tax presence to offset the target's low effective tax rate, thereby avoiding the Pillar Two top-up taxes.

These types of questions will require significant due diligence and tax planning, which may be difficult to complete as part of an expedited M&A process.

05

Corporate Governance

PROXY ADVISOR UPDATE

Glass Lewis Policy Guidelines Updates[18]

On November 16, 2023, Glass Lewis & Co. ("GL") updated its policy guidelines which are effective for shareholder meetings held on or after January 1, 2024. Noteworthy updates included:

- Material Weaknesses*:* GL will consider recommending that shareholders vote against all members of a company's audit committee where a material weakness is identified and a company has not taken appropriate steps toward remediation. GL explained that audit committees must "ensure that material weaknesses are remediated in a timely manner and that companies disclose remediation plans that include detailed steps to resolve a given material weakness".[19]

- Cyber Risk Oversight*:* In instances where a cyber-attack has occurred and the board's oversight, response or disclosures related to cybersecurity are either insufficient or not provided to shareholders, GL may recommend voting against the relevant directors. GL now views cyber risk as material for all companies. The update to GL's policy comes in response to the SEC approving final rules that require companies to disclose cybersecurity incidents within four days of determining they are material and provide annual disclosures regarding a company's cybersecurity risk management, strategy and governance.
- Board Oversight of Environmental and Social Issues*:* GL now believes that a board's role in overseeing environmental and social risk should be designated and codified in its governing documents.
- Board Accountability for Climate-Related Issues*:* GL may recommend voting against directors responsible for a company failing to provide disclosures in accordance with the recommendations of the Task Force on Climate-related Financial Disclosures. GL may similarly recommend voting against directors who fail to disclose explicit and clearly defined board-level oversight responsibilities for climate-related issues. GL will now apply its updated policy to a broader number of companies, including those where emissions represent a financially material risk.
- Clawback Provisions*:* GL now believes that beyond meeting listing requirements, an effective clawback policy should grant companies the power to claw back incentive compensation in instances where there is sufficient evidence of problematic decisions or actions where the consequences of such decisions or actions have not yet been reflected in incentive payments and where recovery is warranted. Instances where a company has decided not to recover incentive compensation may negatively affect GL's recommendation on executive compensation if a company does not sufficiently disclose its rationale for doing so.
- Interlocking Directorships*:* GL clarified that it assesses interlocking directorships on a case-by-case basis and evaluates other similar interlocking relationships as well, including, among other things, interlocks between close family members of executives or directors.

SEC UPDATES

SEC Announces a New Intake System for Rule 14a-8 Submissions and Related Correspondence[20]

On November 7, 2023, the SEC Division of Corporation Finance announced a new intake system for companies' requests for no-action to exclude proposals and related correspondence. The Division of Corporation Finance will now only accept 14a-8 no-action requests and related correspondence submitted using an online shareholder proposal form.[21] The staff will no longer accept these items through email.

Fifth Circuit Vacates the SEC's New Share Repurchase Disclosure Modernization Rule[22]

On May 3, 2023, the SEC adopted final rules which add or update a number of disclosure requirements relating to an issuer's repurchase of its registered equity securities. On October 31, 2023, the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") issued an opinion in *Chamber of Commerce of the USA v. SEC*, granting a petition for review of the Share Repurchase Disclosure Modernization Rule.[23] The Fifth Circuit held that the "SEC acted arbitrarily and capriciously . . . when it

failed to respond to petitioners' comments and failed to conduct a proper cost-benefit analysis", thereby violating the Administrative Procedure Act.[24] The ruling gave the Commission 30 days to correct defects within the rule.

On November 22, 2023, the Commission issued an order staying the Share Repurchase Disclosure Modernization Rule pending further Commission action.[25] On December 1, 2023, the SEC's Office of General Counsel submitted a letter to the Fifth Circuit communicating that the Commission was unable to correct defects within the Share Repurchase Disclosure Modernization rule by the November 30, 2023 deadline.[26] On December 19, 2023, the Fifth Circuit issued an order vacating the Share Repurchase Modernization Rule.[27] In light of the new rule being vacated, registrants are reminded that the prior rules regarding disclosure of share repurchases, which were rescinded by the SEC as part of adopting the new rules, are now back in effect.

SEC Cybersecurity Rules Go into Effect[28]

After December 18, 2023, all U.S. public companies, including foreign private issuers (but excluding smaller reporting companies, which have until June 15, 2024), must begin complying with the SEC's final rules regarding disclosure of cybersecurity risk management, strategy, governance and related incidents. As a reminder, the rules require: (i) current reporting of cybersecurity incidents determined to be material; and (ii) annual reporting of companies' processes to identify, assess and manage cybersecurity risks, as well as management's role in assessing and managing, and the board's role in overseeing, such risks. A full discussion of the new rules can be found in the Cravath Client Memo on the subject.[29]

SEC Adopts Amendments to the Rules Governing Beneficial Ownership Reporting[30]

On October 10, 2023, the SEC adopted rule amendments (the "Beneficial Ownership Amendments") governing beneficial ownership reporting under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934 (the "Exchange Act"). The Beneficial Ownership Amendments were proposed in order to promote greater visibility into the ownership shares of public companies by requiring market participants to provide more timely information on their positions. In summary, the Beneficial Ownership Amendments:

- shorten the deadlines for initial filings and amendments to Schedules 13D and 13G beneficial ownership reports;
- require that the filings be made using a structured, (XML-based) machine-readable data language;
- clarify the application of Section 13(d) and Section 13(g) of the Exchange Act to certain derivative securities; and
- provide guidance on the application of the existing statutory language to the circumstances under which two or more persons may be deemed to have formed a "group" subject to beneficial ownership reporting obligations.

Additional information about the Beneficial Ownership Amendments can be found in the Cravath Client Memo on the subject.[31]

DOJ and SEC Provide Guidance on Cybersecurity Disclosure Delays[32]

Pursuant to the SEC's cybersecurity reporting rules, companies may request to delay otherwise required disclosure if the U.S. Attorney General determines that public disclosure of the incident poses a substantial threat to public safety or national security.

On December 12, 2023, the Department of Justice (the "DOJ") released guidelines outlining the process by which the U.S. Attorney General will determine disclosure delay requests. Most notably, the DOJ clarified that the primary inquiry is whether the public disclosure (and not the underlying cybersecurity incident) poses a threat to public safety and national security. The guidelines noted that companies typically will be able to disclose material information related to a cybersecurity incident at a level of generality without providing compromising details. However, under certain circumstances, such disclosure could still pose a threat to public safety and national security. If the U.S. Attorney General determines that a disclosure delay is merited, the company will have an additional 30 days for disclosure, and in certain cases the U.S. Attorney General may grant subsequent periods of delay if the risk to public safety and national security continues to exist.

On December 14, 2023, the SEC published four Compliance and Disclosure Interpretations ("CDIs") relating to the public safety and national security exception to cybersecurity reporting. For more information, the CDIs are available here.

- CDI Question 104B.01 provides that registrants must file the Item 1.05 Form 8-K within four business days of determining a cyber incident to be material, unless the U.S. Attorney General notifies the SEC in writing of its determination that public disclosure of the incident threatens public safety or national security before the Form 8-K due date.
- CDI Question 104B.02 notes that registrants must file the Item 1.05 Form 8-K within four business days following the expiration of a permitted delay period (or any extension thereof).
- CDI Question 104B.03 clarifies that if the U.S. Attorney General determines, during a permitted delay period, that disclosure of the incident no longer threatens public safety or national security and notifies the SEC and the registrant of its new determination, the registrant must file the Item 1.05 Form 8-K within four business days of receiving such notification.
- CDI Question 104B.04 explains that Item 1.05 does not preclude registrants from consulting with the DOJ, the FBI or any other federal government agencies regarding a cybersecurity incident at any time, including before materiality is determined, and such consultation alone would not render an incident material.

SEC Brings Enforcement Action on Cybersecurity Practices and Disclosures[33]

In October 2023, the SEC initiated an enforcement action against SolarWinds Corporation ("SolarWinds") and its chief information security officer, Timothy G. Brown, alleging they defrauded investors and failed to disclose known cybersecurity risks. In December 2020, SolarWinds announced that it was the target of a two-year-long cyberattack and that its custom IT systems were compromised. This announcement caused SolarWinds's stock price to drop approximately 25% in two days and approximately 35% in the next two weeks.

The SEC allegations focus on SolarWinds disclosure only of generic risks related to its cybersecurity practices and failure to disclose specific risks related to the ongoing cyberattack. Of note, the SEC also charged Brown with personal liability, alleging that Brown had knowledge of SolarWinds' cybersecurity vulnerabilities and inadequate public disclosures but failed to take corrective actions. The complaint seeks permanent injunctive relief, disgorgement of profits and civil penalties from the company and a bar from acting as director or officer of other companies against Brown.

SEC Releases Fall 2023 Regulatory Flexibility Agenda[34]

On December 6, 2023, the Commission released its Fall 2023 Regulatory Flexibility Agenda ("Reg Flex Agenda"). Notably, Reg Flex Agenda postponed the expected adoption of the final climate disclosure rules until April 2024, more than a year past the initial proposed timeline for adoption. Other topics with expected April 2024 action dates include:

- adoption of final rules on SPACs (final rules adopted by the SEC January 24, 2024);
- adoption of 14a-8 shareholder proposal rule amendments for domestic issuers;
- proposal of amendments to Regulation D including updates to the accredited investor definition; and
- proposal of human capital management disclosure rules.

In addition, the proposal of corporate board diversity rules has an expected action date of October 2024.

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

2 For additional information, please see Cravath, Swaine & Moore LLP, *Merger Guidelines Issued by FTC and DOJ* (December 22, 2023), https://www.cravath.com/a/web/k7dsnskhVheySnSMe79UAZ/8vfdeB/merger-guidelines-issued-by-ftc-and-doj.pdf.

3 FTC and DOJ's Antitrust Division, *Hart-Scott-Rodino Annual Report Fiscal Year 2022*, https://www.ftc.gov/system/files/ftc _ gov/pdf/FY2022HSRReport.pdf.

4 Press Release, *FTC, DOJ Issue Fiscal Year 2022 Hart-Scott-Rodino Notification Report*, FTC (December 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-doj-issue-fiscal-year-2022-hart-scott-rodino-notification-report.

5 FTC and DOJ's Antitrust Division, *Hart-Scott-Rodino Annual Report Fiscal Year 2022*, https://www.ftc.gov/system/files/ftc _ gov/pdf/FY2022HSRReport.pdf.

6 Press Release, *Statement Regarding the Termination of John Muir's Takeover of San Ramon Regional Medical Center from Tenet Healthcare,* FTC (December 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-termination-john-muirs-takeover-san-ramon-regional-medical-center-tenet.

7 Press Release, *FTC Sues to Block John Muir Health's Takeover of San Ramon Regional Medical Center,* FTC (November 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-sues-block-john-muir-healths-takeover-san-ramon-regional-medical-center.

8 Press Release, *FTC Sues 7-Eleven for Anticompetitive Acquisition in Violation of 2018 Consent Order,* FTC (December 4. 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-sues-7-eleven-anticompetitive-acquisition-violation-2018-consent-order.

9 *Id.*

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