Cravath Quarterly Review
M&A, Activism and Corporate Governance

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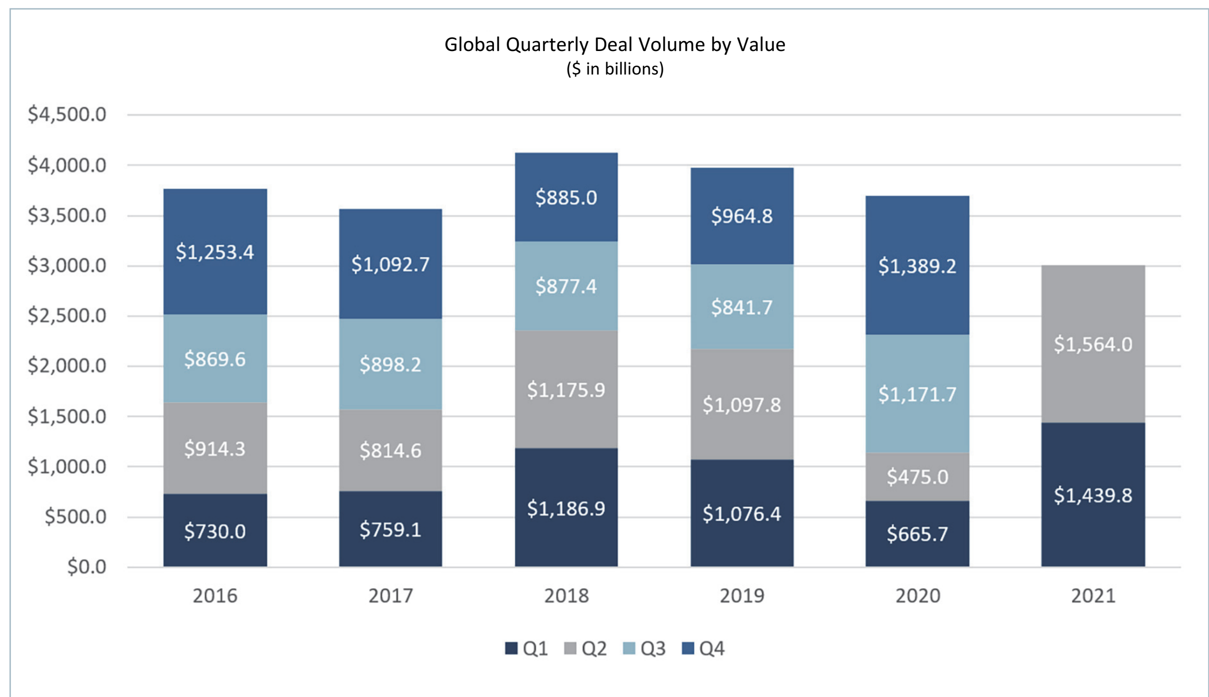
Mergers & Acquisitions

TRENDS[1]

After the strongest quarter in global M&A activity in over a decade during Q1 2021, global M&A momentum continued in Q2 2021, with almost $1.6 trillion in announced deal value, bringing total deal value recorded since the beginning of 2021 to roughly $3 trillion and making H1 2021 the most active half-year on record.[2] The strength of Q2 2021, combined with depressed M&A activity during Q2 2020 caused by the COVID-19 pandemic, resulted in an overall year-over-year increase by deal value of ~230% compared to Q2 2020. Private equity continued the strong momentum from the beginning of the year with $265.4 billion overall buyout value in Q2 2021, the highest quarterly value since the global financial crisis. In terms of industry activity, the technology sector saw $466.1 billion worth of deals recorded in Q2 2021, surpassing the $364.6 billion recorded in Q1 2021.



Source: Dealogic

Q2 2021 Continued Strong Global M&A Momentum from Q1 2021

Q2 2021 continued the global M&A momentum from Q1 2021, with almost $1.6 trillion in announced deal value, an increase of ~230% relative to Q2 2020. Q2 2021 marked the fourth consecutive quarter to surpass $1 trillion in deal value. The first half of 2021 set a record high for deals greater than $2 billion, with 143 such deals recorded in Q2 2021 and 161 such deals recorded in Q1 2021.

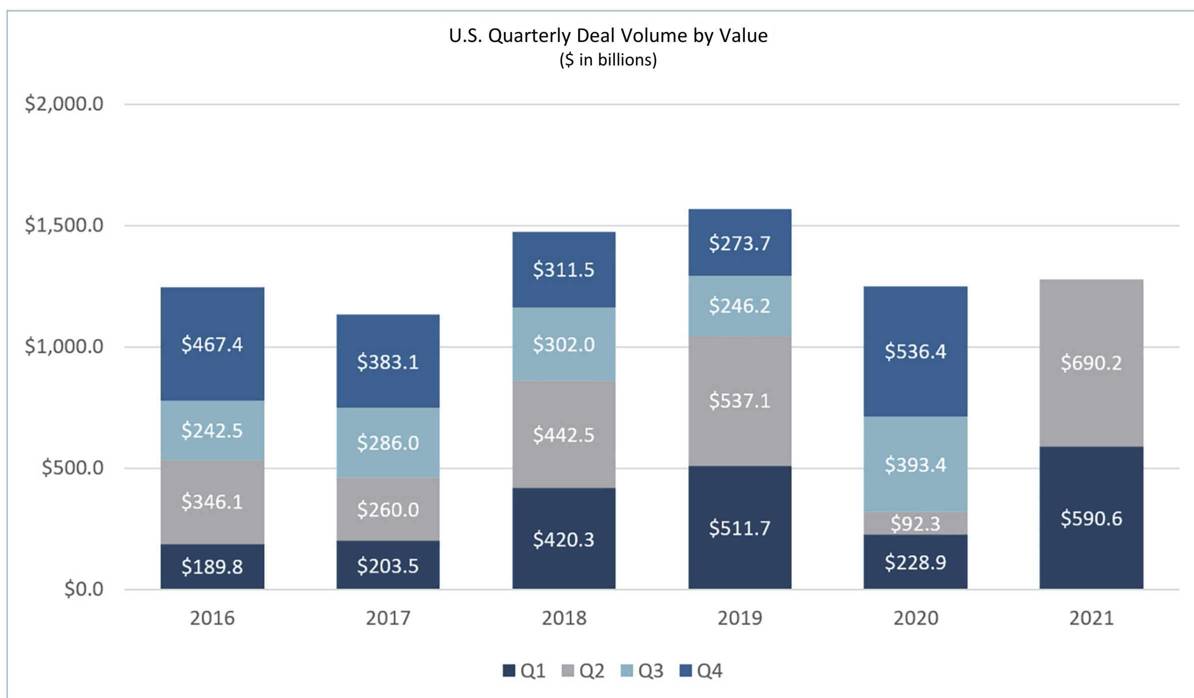
The U.S. market continued its strong performance from Q1 2021 into the second quarter, with U.S. M&A activity in the first half of 2021 increasing ~37.8% by value compared with the second half of 2020. Other regions also saw year-over-year increases by deal value compared to H1 2020, including Europe, which had an ~81.1% increase in deal value, the Asia Pacific region (including Japan), which had an ~82.3% increase in deal value despite only an ~1.2% increase in the number

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

[2] Dealogic began recording M&A data in 2000.

of transactions, and Japan, which had an ~18% increase in deal value.

In H1 2021, 362 special purpose acquisition companies ("SPACs") raised $99.5 billion through SEC-registered IPOs; however, SPAC IPO issuances dropped significantly in April, with 64 issuances raising $12.5 billion in Q2 2021 compared to 298 issuances raising $87.0 billion in Q1 2021.[3] In the United States, SPACs were involved in $379 billion in deal value across 155 deals during H1 2021, while in Europe, total SPAC acquisitions reached $41.2 billion across 13 deals during H1 2021.



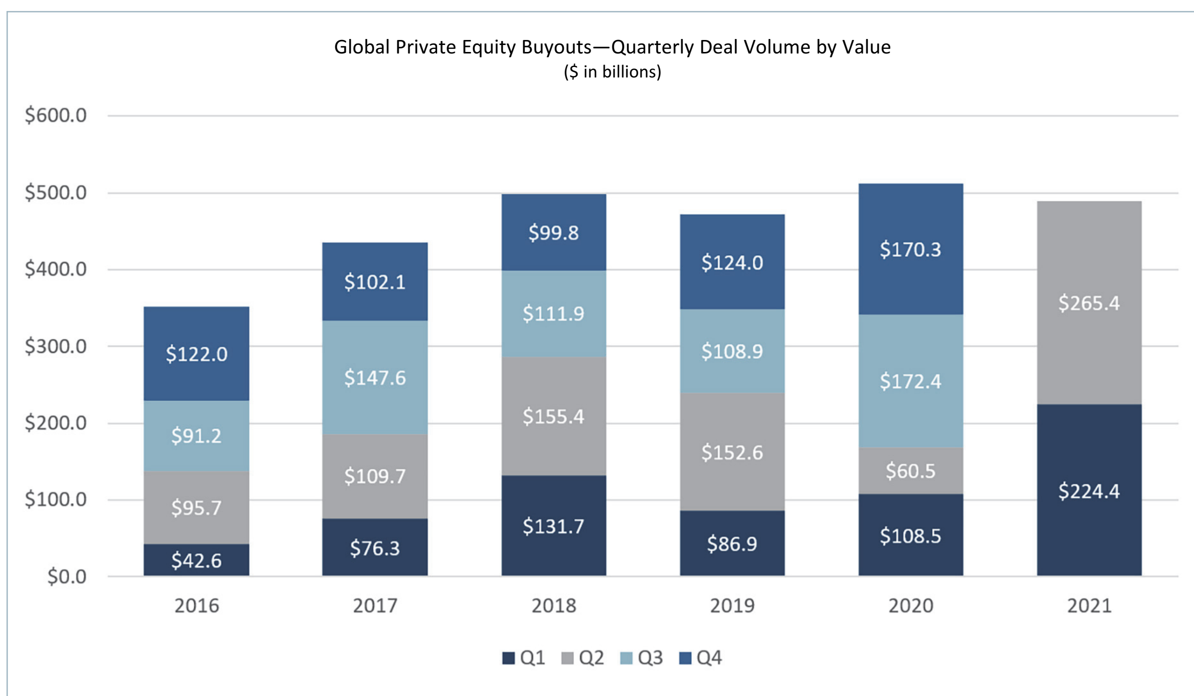
Source: Dealogic

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

Private equity buyouts accounted for $265.4 billion in deal value during Q2 2021 across 530 buyouts globally, resulting in the strongest quarter for private equity buyouts by deal value since Q2 2007. The first half of 2021 was the highest half-year on record with a total buyout value of $489.9 billion across 1,107 deals, including the largest leveraged buyout since November 2006 in the $30 billion acquisition of Medline Industries, Inc. by The Blackstone Group Inc., Carlyle Group Inc., Hellman & Friedman LLC and GIC Private Limited. Exit activity in H1 2021 saw the highest H1 figures on record since 2000, with $396.5 billion across 597 exits. In Q2 2021, exit activity amounted to $208.8 billion, which included the $21 billion acquisition by Thermo Fisher Scientific Inc. of PPD, Inc. from Hellman and Friedman LLC, Carlyle Group, GIC Private Limited and the Abu Dhabi Investment Authority.

In the United States, H1 2021 saw a total of 344 leveraged buyouts worth a combined $162.1 billion and representing over 10% of all U.S. acquisitions by deal count. Sponsor-backed deals also continued to serve as an important driver of European M&A, accounting for $225 billion in H1 2021 compared to $262.4 billion in full year 2020.

[3] According to data from Deal Point Data.



Source: Dealogic

Strong Quarter for Cross-Border M&A Activity, Especially in Europe

After declines during 2020, H1 2021 saw an increase of ~95% by deal value relative to H1 2020 with $862.8 billion in cross-border M&A activity, representing the highest level recorded for a half-year period since 2018 and accounting for almost one-third of total deal value.[4]

Fueled in part by cross-border transactions, European M&A continued its strong start to 2021 into the second quarter, bringing total deal count in H1 2021 to 5,374 and total deal value to $720.5 billion, an increase of ~81.1% compared to the $397.8 billion recorded in H1 2020. Cross-border activity in Europe during the first half of the year increased compared with the same period in 2020, with six of the largest 10 deals involving a non-European acquiror. Foreign cross-border M&A investment into Europe during H1 2021 was $181.5 billion across 747 deals, which represented ~25% of Europe's deal value in H1 2021, up from ~22% during H1 2020. European outbound cross-border M&A activity during H1 2021 was $182.1 billion, an ~3.5x increase relative to H1 2020.

Increase in Deal Activity in the Technology Sector

In terms of global deal value, the technology sector led the way in Q2 2021, posting $466.1 billion worth of deals and accounting for ~30% of global deal value. The shift towards transactions in this sector was notable, increasing ~28% from $364.6 billion in Q1 2021. In H1 2021, dealmaking in the technology sector totaled $830.6 billion, surpassing full year 2020 activity of $816.5 billion. The technology sector also accounted for ~31% of all private equity-backed deals in H1 2021, with 342 buyout deals at a total deal value of $107.8 billion. In Europe, technology remained the most active sector, with 1,553 deals announced in H1 2021, accounting for over 30% of total deal activity in the region. In particular, e-commerce saw a surge of activity in H1 2021, with almost $30 billion spent on e-commerce and online marketplace companies compared to $10.6 billion in full year 2020. In the Asia Pacific region during H1 2021, deal value in the technology sector increased ~2.5x year-over-year to $154.4 billion across 1,242 deals.

[4] According to data from Refinitiv.

LEGAL & REGULATORY DEVELOPMENTS

Cases

Q2 2021 featured a number of notable Delaware decisions regarding fiduciary duties and M&A contractual disputes.

***Snow Phipps Group, LLC v. KCAKE Acquisition, Inc.*, C.A. No. 2020-0282-KSJM (Del. Ch. Apr. 30, 2021).**

In this post-trial decision, the Delaware Court of Chancery held that an acquisition vehicle owned by Kohlberg & Company, LLC ("Kohlberg") was required to consummate its purchase of cake-decorating supply company DecoPac Holdings Inc. ("DecoPac") from Snow Phipps Group, LLC ("Snow Phipps"), rejecting Kohlberg's claims that the COVID-19 pandemic resulted in a material adverse effect ("MAE"), that the steps taken by DecoPac to respond to the pandemic breached the ordinary course covenant and that Kohlberg's lack of debt financing prevented specific enforcement.

On March 6, 2020, the parties entered into a stock purchase agreement (the "SPA"), and Kohlberg signed a binding debt commitment letter (the "DCL"). On April 8, 2020, after reviewing less than a month of post-pandemic sales data, Kohlberg notified Snow Phipps of its intention not to close on the deal, and on April 20, 2020, Kohlberg purported to terminate the SPA, pointing to its failure to obtain debt financing and alleging that DecoPac had suffered an MAE, violated the bring-down condition and breached the ordinary course covenant.

DecoPac sued for specific performance of the SPA and damages. After an expedited trial, the Court found that DecoPac did not experience an MAE because any decrease in earnings was not durationally significant and that, even if DecoPac had experienced an MAE, such an MAE would have been subject to the SPA's carveouts for effects related to orders by government entities that did not disproportionately affect DecoPac in comparison to other businesses in its industry. With respect to the SPA's ordinary course covenant, the Court found that DecoPac's decisions to draw on its revolver and engage in cost-cutting measures were not inconsistent with past practice in response to decreased production and that, even if DecoPac had breached the ordinary course covenant, Kohlberg did not comply with the SPA's mandatory notice and cure provisions. Having found no breach of the closing conditions, the Court turned to remedies. The SPA conditioned the availability of specific performance on Kohlberg's debt financing having been fully funded. Nonetheless, the Court held that the prevention doctrine provided a basis for specifically enforcing the SPA because Kohlberg had failed to use its reasonable best efforts to obtain financing by relying on its own "draconian" forecast of DecoPac's performance, thereby breaching the SPA, and such breach contributed materially to Kohlberg's failure to obtain the debt financing. Although the SPA provided that specific performance, if awarded, would be the "sole and exclusive remedy", the Court asked for supplemental briefing on whether Snow Phipps should be awarded prejudgment interest on the deal price at the legal rate from the outside closing date of May 4, 2020.

Following the ruling, the parties stipulated dismissal of their claims and closed the transaction.

***In re Pattern Energy Group Inc. Stockholders Litigation*, C.A. No. 2020-0357-MTZ (Del. Ch. May 6, 2021).**

In this pleading-stage decision, the Delaware Court of Chancery denied in part and granted in part a motion to dismiss claims for breach of fiduciary duty against certain officers and directors of Pattern Energy Group Inc. ("Pattern Energy"), Riverstone Holdings LLC ("Riverstone") and two entities controlled and operated by Riverstone (collectively, "Developer") in connection with the go-private sale of Pattern Energy, finding that the stockholders brought reasonably conceivable claims that the deal was tilted toward an inferior bid.

Since its formation, Developer had been Pattern Energy's primary supplier, and Developer's and Pattern Energy's management teams had largely overlapped. In 2013, Riverstone took Pattern Energy public but retained a 67.9% interest. Over the next four years, Riverstone gradually reduced its interest in Pattern Energy to 0% but retained a consent right over Pattern Energy's ability to enter into certain M&A transactions. In June 2018, Riverstone met with its investment bank to consider taking Pattern Energy private, and the Pattern Energy board formed a special committee of independent directors. As part of the contemplated sale, Riverstone intended that any purchaser would acquire both Pattern Energy and Developer. In March 2019, Brookfield Asset Management Inc. ("Brookfield") proposed a combination of Pattern Energy with a Brookfield portfolio company, which Brookfield purported to structure in a way that would avoid Riverstone's consent right. One month later, Pattern Energy's CEO met with Canada Pension Plan Investment Board ("CPPIB"), an investor in Riverstone, to discuss a transaction combining Pattern Energy and Developer, but the CEO did not disclose the meeting to the special committee. CPPIB subsequently made an offer, and over the next six months, the special committee and management negotiated with CPPIB, Brookfield and two other parties before accepting CPPIB's offer, which gave Pattern Energy a lower valuation than Brookfield's bid.

In resolving the motion to dismiss, the Court declined to scrutinize the transaction under the entire fairness standard of review, because (i) even if Pattern Energy's CEO had engaged in an undisclosed meeting with CPPIB,

the meeting did not materially affect the sales process and (ii) a control group among Developer, Riverstone and Pattern Energy was not reasonably conceivable at the pleading stage. The Court also declined to apply the business judgment rule through *Corwin* cleansing on the basis that the transaction was not approved by a fully informed, uncoerced vote of the disinterested stockholders, because a large Pattern Energy stockholder had purchased its interest one month before signing as preferred equity that carried an obligation to vote in favor of any M&A transaction proposed by the Pattern Energy board. Applying the enhanced scrutiny standard of review, the Court found that it was reasonably conceivable that Pattern Energy's directors and certain of its officers committed (in the case of the directors, nonexculpated) breaches of fiduciary duty by permitting management to run the process, preferring CPPIB's offer despite Brookfield's more advantageous bid and relying on Riverstone's consent right to discourage a transaction that did not include Developer, finding it reasonably conceivable that Riverstone's consent right "loomed" over the special committee and potential buyers throughout the sales process. The Court also held that the complaint pled a claim for tortious interference against Riverstone and left its decision regarding whether Riverstone and Developer aided and abetted breaches of fiduciary duty in abeyance pending a later determination of whether Riverstone and Developer were part of a control group.

***Manichaean Capital, LLC v. Exela Technologies, Inc.*, C.A. No. 2020-0601-JRS (Del. Ch. May 25, 2021).**
In this pleading-stage decision, the Delaware Court of Chancery, among other rulings, denied a motion to dismiss certain veil-piercing claims against the parent and subsidiaries of SourceHOV Holdings, Inc. ("SourceHOV") brought by stockholders attempting to enforce an appraisal decision. The plaintiffs were petitioners in an underlying appraisal action that resulted in a determination that the fair value of a merger involving SourceHOV was significantly greater than the deal price. However, before that determination had been made, SourceHOV's new parent entered into an agreement with SourceHOV's subsidiaries to divert their receivables directly to another subsidiary of the parent and away from SourceHOV. As a result, SourceHOV had allegedly become insolvent, and the plaintiffs were unable to collect on the appraisal judgment.

The Court held that the plaintiffs' allegations supported their request for relief in the form of veil-piercing to access the assets of SourceHOV's new parent. As an issue of first impression, the Court also held that the plaintiffs' allegations supported a remedy of "outsider reverse veil-piercing", *i.e.*, piercing the corporate veil downward and accessing the assets of SourceHOV's subsidiaries to satisfy the judgment. In reaching this result, the Court considered the customary veil-piercing factors as well as eight additional factors specific to outsider reverse veil-piercing, including, among other things, the overlapping personnel, officers, directors and office space of SourceHOV and its subsidiaries; the allegations that the managers of the SourceHOV subsidiaries knew that the receivables agreement would leave SourceHOV inadequately capitalized; the unlikelihood that reverse veil-piercing would adversely affect the expectations of any other possible owners of SourceHOV or its subsidiaries; and the amount of control exercised by SourceHOV's parent over SourceHOV's subsidiaries.

***In re Tilray, Inc. Reorganization Litigation*, C.A. No. 2020-0137-KSJM (Del. Ch. June 1, 2021).**
In this pleading-stage decision, the Delaware Court of Chancery, among other rulings, denied a motion to dismiss claims for breach of fiduciary duty against the directors of Tilray, Inc. ("Tilray") and its controlling stockholder, Privateer Holdings, Inc. ("Privateer"), on account of a corporate reorganization that was structured to avoid capital gains tax after Tilray went public. Three of the directors (the "Founders") formed Privateer to facilitate investments in the cannabis industry. The Founders subsequently formed Tilray, which became the first cannabis company to complete a public offering on a U.S. stock exchange. The Founders held 70% of Privateer's voting power, and Privateer in turn held 75% of the economic interests in Tilray and 90% of Tilray's voting power. In response to Tilray's soaring valuation after the company went public, the Founders retained financial advisors to explore ways to reorganize the business so that they could avoid federal tax consequences resulting from capital gains. To that end, the company entered into a two-step transaction in which Privateer spun off each of its portfolio companies except for Tilray, and Tilray canceled Privateer's Tilray stock and issued Tilray stock to Privateer's stockholders.

The Court held that the complaint pled an actual agreement among the Founders that was sufficient to form a control group based on allegations including, among other things, that the Founders held a joint interest in avoiding tax liability; the Founders shared office space and were former classmates, long-time friends, Privateer's co-founders and Tilray's co-managers; the proxy statement issued in connection with the transaction used the term "Founders" to refer to them collectively; the Founders jointly retained tax advisors; and the Founders referred to themselves as a voting block in negotiations and were treated similarly under the transaction agreements. Applying the entire fairness standard of review, the Court held the complaint sufficiently pled claims for breaches of fiduciary duty and rejected the defendants' argument that pleading a self-dealing transaction requires pleading not only an exclusive benefit to the fiduciary, but also a specific harm to minority stockholders causally connected to such benefit.

Appraisal
Q2 2021 also featured a notable decision regarding the appraised value of a company.

***In re Appraisal of Regal Entertainment Group*, C.A. No. 2018-0266-JTL (Del. Ch. May 13, 2021).**
In this post-trial decision, the Delaware Court of Chancery determined the fair value of the Class A shares of Regal Entertainment Group ("Regal") at the time it was acquired by Cineworld Group plc ("Cineworld"), adding 2.6% to the original offer price, based in part on a decrease in the U.S. corporate tax rate between signing and closing. Cineworld informally reached an agreement with Regal on the deal price of $23.00 per share in early November 2017, and signing occurred on December 4, 2017. The purchase agreement included a post-signing go-shop and a two-tiered termination fee that, at its highest, amounted to less than 3%. Three weeks after the signing, Congress reduced the U.S. corporate tax rate from 35% to 21%. The acquisition closed on February 28, 2018. The petitioners properly asserted their appraisal rights and argued for a $33.83 per-share price based on a discounted cash flow methodology.

The Court found that the petitioners' proposed discounted cash flow model for determining Regal's fair value was not as reliable as other indicators of fair value because it relied on projections that the evidence showed were overly optimistic. The Court also found that Regal's unaffected trading price, which the respondents proposed, was not as reliable as other indicators of fair value because Regal had a controlling stockholder whose block sales created an overhang on the Regal stock price, making it possible that Regal's stock was in a "trough" leading up to the sale.

The Court concluded that the deal price minus the value arising out of the transaction was the most reliable indicator of fair value, because the sales process at issue was no worse than processes described in other appraisal decisions where the Delaware Supreme Court had held that such indicator was the most reliable indicator of fair value. The Court calculated a total of $6.99 per share in operational synergies and financial savings arising from the transaction and held that 54% of such amount was captured by Regal's shareholders, relying on the median capture in transactions surveyed by an M&A report published by Boston Consulting Group. After deducting the value arising out of the transaction captured by Regal's stockholders, the Court added back $4.37 per share as a conservative estimate of the increase in value of Regal's shares between signing and closing as a result of the decrease in the corporate tax rate. The Court rejected the respondents' argument that the lack of any bid in the go-shop process called for a smaller tax-related adjustment, reasoning that other considerations may have dissuaded bidders, including antitrust risk and the fact that any increase in value likely was available to all bidders and could thus have resulted in a common value auction.

SPACs

SEC Enforcement
In response to the surge in IPOs by SPACs, on May 26, 2021, Securities and Exchange Commission ("SEC") Chair Gary Gensler stated he had asked staff from the Corporation Finance, Examinations and Enforcement divisions to consider recommendations for possible rules or guidance in this area.[5] Chair Gensler questioned whether SPAC retail investors are appropriately protected and receive accurate and necessary information regarding both the IPO of the SPAC as well as the business combination between the SPAC and its target. Pointing to a recent study from Standard Law School and New York University School of Law,[6] Chair Gensler suggested that the costs and dilution generated by SPACs, often born by the retail public, make them less efficient than traditional IPOs, cutting against the agency's "mission to maintain fair, orderly, and efficient markets".

The SEC has increasingly been investigating SPACs and companies that have gone or plan to go public via a de-SPAC transaction. For example, on July 13, 2021, the SEC announced charges against blank-check company Stable Road Acquisition Company, its sponsor, its CEO, the SPAC's proposed target Momentus Inc. and the target company's founder and former CEO for misleading claims with respect to the target company's technology and national security risks associated with its founder and former CEO.[7] While the target company's founder and former CEO continues to litigate the claims, the other parties settled

[5] Testimony, Gary Gensler, *Testimony Before the Subcommittee on Financial Services and General Government, U.S. House Appropriations Committee*, SEC (May 26, 2021), https://www.sec.gov/news/testimony/gensler-2021-05-26.

[6] See Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, Yale Journal On Regulation (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720919.

[7] Press Release, *SEC Charges SPAC, Sponsor, Merger Target, and CEOs for Misleading Disclosures Ahead of Proposed Business Combination*, No. 2021-124, SEC (July 13, 2021), https://www.sec.gov/news/press-release/2021-124.

with the SEC for $8 million in penalties, tailored investor protection undertakings and the SPAC sponsor's forfeiture of the founder's shares it stands to receive if the merger, currently scheduled for August 2021, is consummated.

Legislative Developments

On April 29, 2021, Senator John Kennedy introduced the Sponsor Promote and Compensation Act, which would require the SEC to issue rules requiring enhanced disclosures for SPACs during the IPO and de-SPAC transaction stages, including disclosures of: (1) the amount of cash per share expected to be held by the SPAC immediately before the merger under various redemption scenarios; (2) any side payments or agreements to pay sponsors, SPAC investors or private investors in public equity for their participation in the de-SPAC transaction, including any rights or warrants to be issued post-transaction and the dilutive impact of those rights or warrants; and (3) any fees or other payments to the sponsor, underwriter or any other party, including the dilutive impact of any warrant that remains outstanding after SPAC investors redeem their shares in connection with the de-SPAC transaction.[8]

In May 2021, the House Committee on Financial Services released draft legislation that would amend the Securities Act of 1933 and the Securities Exchange Act of 1934 (the "Exchange Act") to specifically exclude all de-SPAC transactions from the Private Securities Litigation Reform Act's ("PSLRA") safe harbor for forward-looking statements.[9] This draft legislation comes after then-Acting Director of the Division of Corporation Finance John Coates issued a public statement explaining that the PSLRA's safe harbor may not apply to de-SPAC transactions, as described in our newsletter last quarter.[10]

Litigation

The increased prevalence of SPACs and growing scrutiny at the SEC has caused the increase in SPAC-related litigation to continue in 2021, with shareholders filing class action lawsuits in state and federal courts alleging primarily breaches of fiduciary duty and violations of federal securities laws.

- ***State Court***
  There has been an uptick in complaints filed in New York state court alleging that SPAC directors breached their fiduciary duties. A significant number of these cases have been voluntarily dismissed following supplemental disclosures and the payment of mootness fees.[11] Plaintiffs also continue to bring SPAC-related claims in Delaware, seeking the application of "entire fairness" review. For example, in March and April 2021, investors in the SPAC Churchill Capital Corp. III ("Churchill") asserted that Churchill's directors, officers and controlling stockholders breached their fiduciary duties in connection with Churchill's de-SPAC merger with MultiPlan Corp. ("MultiPlan").[12] According to the complaints, Churchill's sponsors failed to disclose serious weaknesses in MultiPlan's business, including that the company was losing its largest customer, who was in the process of creating a competitor business. The plaintiffs also claim that the SPAC appointed the sponsor's investment vehicle as a financial advisor to the transaction and paid it a large advisory fee. The plaintiffs ask the court to "make clear that the boards of SPACs . . . are subject to the same level of fiduciary duty review applicable to any other Delaware corporation", and suggest that future SPAC sponsors should "choose to mitigate avoidable conflicts by structuring entities that better protect public stockholders".

- ***Federal Court***
  In addition to claims under state-law breach of fiduciary duty theories, plaintiffs continue to bring federal securities law claims relating to SPACs and de-SPAC transactions. For example, on May 28, 2021, an investor filed suit in the United States District Court for the Eastern District of New York against Virgin Galactic Holdings Inc. ("Virgin Galactic") alleging violations of Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 thereunder.[13] The complaint focuses on the 9% decrease in Virgin Galactic's stock price shortly after the SEC's April 12, 2021 guidance on the accounting treatment

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[8] Sponsor Promote and Compensation Act, S. 1504, 117th Cong. (2021).

[9] To amend the Securities Act of 1933 and the Securities Exchange Act of 1934 to exclude certain special purpose acquisition companies from safe harbor for forward-looking statements, and for other purposes, H.R. ____, 117th Cong. (2021), https://financialservices.house.gov/uploadedfiles/5.24_bills-117pih-hr____.pdf.

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

[11] See Alison Frankel, *The New 'Deal Tax': SPAC Defendants Are Paying Plaintiffs Lawyers to Drop N.Y. State Suits*, Reuters (May 5, 2021, 5:20 PM EDT), https://www.reuters.com/business/legal/new-deal-tax-spac-defendants-are-paying-plaintiffs-lawyers-drop-ny-state-suits-2021-05-05/.

[12] Complaint, *In re Multiplan Corp. Stockholders Litigation*, Consol. C.A. No. 2021-300-LWW (Del. Ch. Apr. 9, 2021); Complaint, *Amo v. Multiplan Corp.*, C.A. No. 2021-0258-MTZ (Del. Ch. Mar. 25, 2021).

[13] Complaint, *Lavin v. Virgin Galactic Holdings, Inc.*, No. 21-cv-03070 (E.D.N.Y. May 28, 2021).

for warrants issued by SPACs, when Virgin Galactic announced it was rescheduling the reporting of its first quarter financial results and would restate its financial statements. The complaint asserts that Virgin Galactic failed to disclose that for accounting purposes the SPAC's warrants were required to be treated as liabilities rather than equities; that Virgin Galactic had deficient disclosure controls and procedures and internal control over financial reporting; that Virgin Galactic thus improperly accounted for SPAC warrants that were outstanding at the time of the business combination; and, as a result of the foregoing, that Virgin Galactic's public statements were materially false and misleading.

Antitrust

White House Policy

On July 9, 2021, President Biden issued the Executive Order on Promoting Competition in the American Economy (the "Promoting Competition Order"), an expansive agenda that requires over 70 initiatives by more than a dozen federal agencies to target barriers to competition. The Promoting Competition Order announces a policy of enforcement focused on labor, agriculture and healthcare markets as well as dominant internet platforms.[14] Further emphasizing a "whole-of-government" approach also employed by the Biden administration in combatting climate change, the Promoting Competition Order establishes a White House Competition Council that will consist of the heads of numerous agencies and will be tasked with developing procedures and best practices for cooperation and coordinated responses to overconcentration, monopolization and unfair competition across the federal government.

Of particular relevance to merger analysis, the Promoting Competition Order directs the Attorney General and Chair of the Federal Trade Commission (the "FTC") to, among other things, review and consider revisions to the horizonal and vertical merger guidelines and calls on the Department of Justice (the "DOJ") and the FTC to enforce antitrust laws vigorously. Following the issuance of the Promoting Competition Order, FTC Chair Lina Khan and the Acting Assistant Attorney General of the DOJ Antitrust Division issued a joint statement, indicating that the agencies plan soon to jointly launch a review of the merger guidelines "to determine whether they are overly permissive" and "with a goal of updating them to reflect a rigorous analytical approach consistent with applicable law".[15]

Legislative Developments

U.S. Congress

Several new antitrust bills have been introduced in Congress in recent months. On June 11, 2021, a bipartisan group of lawmakers announced a package of legislation consisting of five bills,[16] four of which are specifically focused on "dominant online platforms"[17]:

- The Platform Competition and Opportunity Act targets anticompetitive mergers and would prohibit acquisitions of competitive threats by dominant platforms as well as acquisitions that expand or entrench their market power.[18] The bill specifies that competition includes competition for user attention and that an acquisition resulting in access to additional data can, without more, increase market position.

- The Ending Platform Monopolies Act would eliminate the ability of dominant platforms to leverage their control across multiple business lines to self-preference and disadvantage competitors.[19] Under the bill, it would be unlawful for a dominant platform to own, control or have a beneficial interest in a business that uses the platform for the sale or provision of products or services, or that sells a product or service that the platform requires as a condition for access to the platform. In addition, the platforms would be prohibited from owning businesses that create conflicts of interest, such as by creating the "incentive and ability" for the platform to advantage its own products over competitors. The bill also would prohibit officers, directors and employees of dominant

[14] Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

[15] Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (July 9, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant.

[16] Press Release, Rep. David Cicilline, *House Lawmakers Release Anti-Monopoly Agenda for "A Stronger Online Economy: Opportunity, Innovation, Choice"* (June 11, 2021), https://cicilline.house.gov/press-release/house-lawmakers-release-anti-monopoly-agenda-stronger-online-economy-opportunity.

[17] For a platform to be covered by the legislation, the company must have a market capitalization of at least $600 billion, have more than 50 million active monthly users or 100,000 monthly active business users and be a "critical trading partner" that has the ability to restrict or impede another business' access to customers or services.

[18] Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021).

[19] Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021).

platforms from serving as an officer, director, employee or other affiliate of a company formerly owned or controlled by the platform.

- The American Choice and Innovation Online Act targets self-preferencing by dominant platforms and would prohibit discriminatory conduct, including anything that advantages the platform's own products, services or lines of business over those of another business user; excludes or disadvantages the products, services or lines of business of another business user relative to those of the platform or discriminates among similarly situated business users.[20]

- The Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act would establish interoperability and data portability requirements for large platforms that would allow users to move their data to other services.[21]

- The Merger Filing Fee Modernization Act, which passed in the U.S. Senate on June 8, 2021 and was introduced in the House as part of this legislative package, decreases the filing fees under the Hart-Scott-Rodino Act for small mergers, raises the fees for large mergers and requires the fees to be adjusted annually based on changes in the Consumer Price Index.[22]

This above legislation accompanies multiple other antitrust bills that have been introduced by Republican lawmakers this quarter, including: (a) the Tougher Enforcement Against Monopolies Act, which would impose a market share-based merger presumption, increase filing fees for large mergers, consolidate antitrust enforcement at the DOJ and codify the consumer welfare standard in order to make it harder to justify anticompetitive conduct; (b) the State Antitrust Enforcement Venue Act of 2021, which would extend the carve-out from the Judicial Panel on Multidistrict Litigation process to antitrust enforcement actions brought by state attorneys general; (c) the Trust-Busting for the Twenty-First Century Act, which would ban any acquisitions by companies with a market capitalization of more than $100 billion (including vertical mergers) empower the FTC to designate dominant digital firms that would be prohibited from making acquisitions that exceed $1 million (to be adjusted annually based on changes in gross national product), amend the Clayton Antitrust Act of 1914 (the "Clayton Act") to abrogate any requirement to establish market shares or concentration where a preponderance of the evidence shows that the effect of an acquisition may be to substantially lessen competition and force any company that loses an antitrust lawsuit to forfeit profits made through those business practices; (d) the Bust Up Big Tech Act, which would ban major companies in the business of offering an online platform to connect third parties to search engines, marketplaces and exchanges from selling, advertising or promoting their own competing goods and services on their sites and creating anticompetitive conflicts of interest by providing online hosting and internet infrastructure services to third parties; and (e) the One Agency Act, which would consolidate the federal government's antitrust enforcement authority under the DOJ, which currently shares jurisdiction with the FTC.[23] The proposed bills would need to be passed by both the House and Senate and signed by President Biden before taking effect.

New York

On June 7, 2021, the New York State Senate passed the Twenty-First Century Anti-Trust Act, a significant amendment to New York's current state antitrust law.[24] If enacted, the law would create an "abuse of dominance" standard that broadly covers any conduct that limits the ability or incentive of actual or potential competitors to compete, both in markets for products or services as well as in labor markets. Companies are presumed dominant if they have more than a 40% share of a market in which they are a seller, or 30% of a market they participate in as a buyer. Pro-competitive effects would not be available as a defense to abuse of dominance allegations. The bill would

[20] American Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021).

[21] Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021, H.R. 3849, 117th Cong. (2021).

[22] Merger Filing Fee Modernization Act of 2021, H.R. 3843, 117th Cong. (2021); Merger Filing Fee Modernization Act of 2021, S. 228, 117th Cong. (2021).

[23] See Tougher Enforcement Against Monopolies Act of 2021, S. 2039, 117th Cong. (2021) (introduced by Senators Lee (R-UT) and Grassley (R-IA)); State Antitrust Enforcement Venue Act of 2021, S. 1787, 117th Cong. (2021) (introduced by Senator Lee (R-UT)); State Antitrust Enforcement Venue Act of 2021, H.R. 3460, 117th Cong. (2021) (introduced by Representative Buck (R-Colo.)); Trust-Busting for the Twenty-First Century Act, S. 1074, 117th Cong. (2021) (introduced by Senator Hawley (R-Mo.)); Bust Up Big Tech Act, S. 1204, 117th Cong. (2021) (introduced by Senator Hawley (R-Mo.)); One Agency Act, S. 633, 117th Cong. (2021)(introduced by Senator Lee (R-UT)); One Agency Act, H.R. 2926, 117th Cong. (2021) (introduced by Representative Johnson (R-LA)).

[24] Twenty-First Century Anti-Trust Act, N.Y.S. 933-A (Jan. 6, 2021).

also amend the state's current antitrust law to prohibit monopolization or attempted monopolization. Further, for transactions above a certain size, the bill would create an obligation to notify the New York Attorney General 60 days before closing.

Enforcement

On June 16, 2021, the DOJ filed a civil suit to block a proposed $30 billion merger of AON plc and Willis Towers Watson plc, the DOJ's first merger challenge under the Biden administration.[25] This quarter also saw a number of global enforcement actions against large technology companies, including (a) Alphabet Inc., which agreed to pay France's competition authority €220 million in one of the first antitrust cases globally that allege the company abused its leading role in the digital advertising sector; (b) Facebook, Inc., which is under investigation by the European Commission and UK Competition and Markets Authority over concerns that Facebook Marketplace unfairly distorts competition for classified ads; (c) Amazon.com, Inc., which faces a complaint from the Attorney General for the District of Columbia alleging the company wields monopoly power that has resulted in higher prices for consumers; (d) Apple, Inc., which faces antitrust charges by the European Commission on account of the company's App Store practices; and (e) Alibaba Group Holding Ltd., which was charged with a $2.75 billion fine after China's State Administration for Market Regulation found that the company prevented merchants from selling their goods on other shopping platforms.[26]

The FTC under the Biden Administration has begun to implement some policy changes related to antitrust enforcement. In June 2021, the FTC rescinded a 2015 policy statement that had previously constrained the agency's use of its authority to stop "unfair methods of competition" under Section 5 of the Federal Trade Commission Act of 1914 (the "FTC Act") only where such practices fell within the "rule of reason" framework applied to alleged violations of the Sherman Antitrust Act of 1890 and the Clayton Act. According to a statement issued by FTC Chair Lina Khan, the FTC plans to consider in the coming months "whether to issue new guidance or to propose rules that will further clarify the types of practices that warrant scrutiny under [Section 5 of the FTC Act]".[27] Although Section 5 of the FTC Act does not expressly apply to transactions, it remains to be seen whether and how this shift in policy could impact M&A transactions and merger analysis. On July 12, 2021, the FTC announced that the agenda for its July 21 open meeting will include a vote on whether to rescind a 1995 policy under which the FTC's merger settlement agreements do not require prior approval of future acquisitions except in narrow circumstances.[28]

Personnel Developments

On June 15, 2021, Lina Khan was confirmed as a Commissioner of the FTC. That same day, President Biden named Khan as Chair of the FTC.

On July 20, 2021, President Biden nominated Jonathan Kanter as Assistant Attorney General of the DOJ Antitrust Division. Kanter started his career as a staff attorney at the FTC before moving to private practice, where he represented companies raising antitrust complaints against large tech firms as a partner at two large law firms and, most recently, the founder of a boutique antitrust advocacy firm. The nomination requires Senate confirmation.

Bank M&A

Through the Promoting Competition Order (described above), President Biden has encouraged the Attorney General, in consultation with the Chairman of the Board of Governors of the Federal Reserve System (the "FRB"), the Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation and the Comptroller of the Currency, to review current practices and adopt a plan to revitalize

[25] Complaint, *United States v. AON*, No. 21-cv-01633 (D.D.C. June 16, 2021).

[26] See Press Release, *The Autorité de la concurrence hands out a €220 millions fine to Google for favouring its own services in the online advertising sector*, L'Autorité De La Concurrence (June 7, 2021), https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-hands-out-eu220-millions-fine-google-favouring-its-own; News Release, *Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook*, European Comm'n (June 4, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848; News Release, *CMA Investigates Facebook's Use of Ad Data*, UK Competition & Mkts. Auth. (June 4, 2021), https://www.gov.uk/government/news/cma-investigates-facebook-s-use-of-ad-data; News Release, *AG Racine Files Antitrust Lawsuit Against Amazon to End its Illegal Control of Prices Across Online Retail Market*, Off. of Att'y Gen. for D.C. (May 25, 2021), https://oag.dc.gov/release/ag-racine-files-antitrust-lawsuit-against-amazon; News Release, *Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers*, European Comm'n (Apr. 30, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061; Raymond Zhong, *China Fines Alibaba $2.8 Billion in Landmark Antitrust Case*, N.Y. Times (Apr. 9, 2021), https://www.nytimes.com/2021/04/09/technology/china-alibaba-monopoly-fine.html.

[27] *See* Press Release, *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act,* FTC (July 1, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under.

[28] Press Release, *FTC Announces Agenda for July 21 Open Commission Meeting,* FTC (July 12, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-announces-agenda-july-21-open-commission-meeting.

merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956 by January 5, 2022.[29]

Earlier this quarter, two significant bank mergers received approval from the FRB: (i) the acquisition of BBVA USA Bancshares, Inc. ("BBVA") by PNC Financial Services Group, Inc. ("PNC"),[30] which is reported to be the second largest bank acquisition since the 2008 global financial crisis,[31] and (ii) the acquisition of TCF Financial Corporation ("TCF") by Huntington Bancshares Incorporated ("Huntington").[32] These approvals raised a few notable points on the status of bank merger review guidelines, community investment, branch divestitures and diversity and inclusion ("D&I"). Concurrently with the PNC-BBVA approval, which is expected to result in a combined organization with approximately $556 billion in total assets, FRB Governor Lael Brainard issued a short statement noting that concentration in the $250 billion to $700 billion asset category of bank holding companies raises "some concerns" and suggesting that the FRB should revise its merger application and review process and standards.[33] Further, the PNC-BBVA merger was approved after PNC reached an agreement with the National Community Reinvestment Coalition ("NCRC") to invest $88 billion in low- and moderate-income communities over four years.[34] PNC's agreement with NCRC may be indicative of greater focus by the current administration on the role financial services policy can play to advance the needs of underserved people and communities. In the Huntington-TCF merger, Huntington agreed to the divestiture of 14 Huntington branches and five TCF branches. In response to comments criticizing the diversity of Huntington's management and suppliers, the FRB noted that the statutory factors evaluated as part of a merger application do not include consideration of a firm's D&I record with respect to its workforce and suppliers. These are the types of issues—*e.g.*, the balance between competition and needs of the community—that the agencies are likely to review as they seek to respond to the Promoting Competition Order.

Activism[35]

In July 2021, Lazard released its H1 2021 Review of Shareholder Activism, which offers key observations regarding activist activity levels and shareholder engagement in the first half of 2021.

Key findings/insights from the report include:

- The number of campaigns initiated globally in H1 2021 was in line with H1 2020, but Q2 2021 activity fell below multi-year levels.
- The number of board seats won in H1 2021 fell below H1 levels from the past three years, and proportionally fewer board seats are being won through proxy contests versus settlements.
- U.S. activity continues to remain elevated with an ~27% year-over-year increase in the number of campaigns initiated, but nonetheless remains below pre-pandemic levels.
- M&A persists as a primary campaign thesis, with ~44% of all activist campaigns initiated in H1 2021 focusing on an M&A thesis.
- ESG-related shareholder activism and "short activism" by activists targeting de-SPAC transactions continue to develop.

TRENDS

Global Campaign Activity in Line with H1 2020, But Q2 2021 Activity Falls

H1 2021 saw an ~6% year-over-year decrease in global campaign activity, with 94 new campaigns launched against 90 companies, and a ~29% year-over-year decrease in global capital deployment to $20 billion. The decrease was mostly concentrated in Q2 2021, which, when compared to three-year average Q2 levels, saw a ~44% decrease in the number of campaigns initiated to 39 and a ~58% decrease in capital deployed to $9.1 billion.

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[29] Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

[30] *The PNC Financial Services Group, Inc.*, FRB Order No. 2021-04 (May 14, 2021).

[31] Pete Schroeder, *Fed Approves Acquisition of BBVA's U.S. Banking Arm by PNC*, Reuters (May 14, 2021, 5:36 PM EDT), https://www.reuters.com/business/finance/fed-approves-acquisition-bbvas-us-banking-arm-by-pnc-2021-05-14/.

[32] *Huntington Bancshares Incorporated*, FRB Order No. 2021-07 (May 25, 2021).

[33] News Release, *Statement on PNC/BBVA Application by Governor Lael Brainard*, Fed. Res. Sys.(May 14, 2021), https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20210514.htm.

[34] News Release, *PNC Bank, NCRC Announce $88 Billion Community Investment Commitment* (Apr. 27, 2021), https://ncrc.org/pnc-bank-ncrc-announce-88-billion-community-investment-commitment/.

[35] Activism data from Lazard, H1 2021 Review Of Shareholder Activism (July 15, 2021), which includes all data for campaigns conducted globally by activists at companies with market capitalizations greater than $500 million at the time of campaign announcement; companies that are spun off as part of the campaign process are counted separately.

With 71 board seats won at 30 companies, H1 2021 fell below H1 levels from the past three years, during which the average number of board seats won was 94. Proportionately fewer board seats are being won through proxy contests, with only ~10% in H1 2021 compared to an average of ~18% in the first half of each of the past three years. Further, fewer board seats are being won after the proxy process[36] has been initiated, with only ~44% of board seats won during such period in H1 2021 compared to ~53% in 2020.

Elliot Management initiated the most campaigns in H1 2021 (six), followed by Oasis Management and BlueBell Capital Partners (four apiece). Ancora Advisors, Starboard Value and Lehigh Partners obtained the most board seats in H1 2021, winning eight, six and five seats, respectively. Approximately 44% of all activist campaigns in H1 2021 related to M&A, consistent with the historical average for the past four years of ~40%. Over half of the aggregate value of new activist positions in H1 2021 was targeted toward companies in the industrials (~18%), financial institutions (~18%) and retail (~15%) sectors, while activists' recent focus on targets in the technology sector continued to wane on a global basis, representing only ~10% of the aggregate value of new activist positions.

Regional Campaign Activity Remains Below Pre-Pandemic Levels

U.S. activity for H1 2021 increased ~27% year-over-year with 52 campaigns initiated against 55 companies, accounting for ~59% of campaigns initiated and ~44% of capital deployed globally. That said, consistent with global trends, the number of campaigns initiated decreased ~31% from the H1 average of the three years preceding the pandemic. While the end of 2020 saw a greater focus on U.S. companies with market capitalizations above $25 billion as campaign targets, activists have returned their focus to companies with market capitalizations of less than $2 billion, which in H1 2021 were targets in 44% of all new U.S. campaigns. In addition, U.S. campaigns continue to focus on companies in the technology and the power, energy and infrastructure sectors, but there has also been an increase in capital deployed against U.S. companies in the retail sector.

European activity during H1 2021 decreased ~40% year-over-year with 20 campaigns initiated against 21 companies, accounting for ~22% of campaigns initiated and ~29% of capital deployed globally. European companies with market capitalizations above $25 billion were the target of ~24% of European campaigns, an ~200% increase over the ~12% average between 2017 and 2020. European activity also saw significantly increased attention on the financial institutions and healthcare sectors, with each comprising ~24% of European campaigns in H1 2021, as well as significantly less attention on the industrials sectors, down from an average of ~25% of all campaigns between 2017 and 2020 to ~14% in H1 2021. Consistent with the trends described in our Q1 2021 newsletter, leading large-cap activists[37] continued to re-emerge in Europe throughout H1 2021, accounting for ~24% of European activity.

Japan saw 10 campaigns initiated in H1 2021, remaining one of the most targeted countries outside of the United States with ~26% of non-U.S. campaigns. As described below, H1 2021 witnessed multiple successful campaigns against Toshiba Corporation ("Toshiba"), which, according to Lazard, "is seen as a transformational event in Japanese activism history that may lead to further reform of Japan's corporate governance system".

Other Trends

As described in our newsletter last quarter, ESG-related activism continues to become increasingly prominent. Q2 2021 saw moderated inflows into U.S. "ESG Mandate" funds, but 2021 remains on track to exceed the record set in 2020.[38] In addition, as noted below, Engine No. 1 LLC ("Engine No. 1") won three of the four board seats of Exxon Mobil Corporation ("Exxon") that it challenged after running a campaign aimed at "long-term, sustainable value creation" through, among other means, "putting [Exxon] on a path to net zero total emissions by 2050".[39] In addition to the three seats won by Engine No. 1 in its campaign, Exxon also expanded its board to 12 members in March 2021 and added two new directors.

With respect to SPACs, H1 2021 saw several campaigns by short sellers against companies that had gone public through a de-SPAC transaction, including those launched by Hindenburg Research against DraftKings Inc., Clover Health Investments, Corp. and Lordstown Motors Corp.

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[36] As this term is used in Lazard, H1 2021 Review Of Shareholder Activism (July 15, 2021).

[37] Lazard, H1 2021 Review Of Shareholder Activism (July 15, 2021) defines "leading large-cap activists" to include Elliott Management, Third Point Management, ValueAct Capital, Trian Partners and Cevian Capital.

[38] Lazard, H1 2021 Review Of Shareholder Activism (July 15, 2021) uses the term "U.S. 'ESG Mandate' funds" to "comprise those with explicit ESG investment criteria".

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

Select Campaigns / Developments

Company	Market Capitalization ($ in billions)[40]	Activist	Development / Outcome
Exxon Mobil Corporation	$172.9	Engine No. 1 LLC	• In December 2020, Engine No. 1 sent a public letter to the Exxon board advocating for a strategic change toward a more sustainable business plan, including carbon emission reduction targets. The following month, Engine No. 1 nominated four independent candidates to the Exxon board. • In March 2021, Exxon expanded its then 10-member board by appointing two additional directors. • By May 2021, Institutional Shareholder Services Inc., the California State Teachers' Retirement System, the California Public Employees' Retirement System and the New York State Common Retirement Fund had also expressed support for Engine No. 1's nominees. • Two days before the Exxon annual meeting, the Exxon board announced that it intended to add two additional directors—after the annual meeting—to its already 12-member board. • In June 2021, Exxon announced that stockholders elected nine Exxon nominees and three Engine No. 1 nominees at the Exxon annual meeting.
Duke Energy Corporation	$78.8	Elliott Investment Management L.P.	• In May 2021, Elliott Investment Management L.P. issued a public letter advocating for a tax-free separation of Duke Energy Corporation into three regionally focused public companies.
Vivendi SE	$38.6	Bluebell Capital Partners; Artisan Partners LP; Third Point Management	• In May 2021, news outlets reported that Bluebell Capital Partners ("Bluebell") asked Vivendi SE ("Vivendi") to renegotiate the planned spinoff of Universal Music Group ("Universal"), contending that Vivendi could restructure the spinoff in a more tax-efficient manner that could result in a €3.3 billion cash dividend. • In June 2021, it was reported that Bluebell sent a letter to the Autorité des marchés financiers, asking the French stock market regulator to investigate the planned spinoff and alleging Vivendi did not disclose key terms of the deal to shareholders. • Later that month, Artisan Partners LP released a statement that echoed Bluebell's concerns and questioned Vivendi's plan to sell a 10% stake in Universal to a SPAC as "suboptimal capital allocation". In addition, news outlets reported that Third Point Management had acquired a substantial but undisclosed stake in Vivendi and was evaluating the proposed transaction. • At the stockholder vote at the end of June 2021, over 99% of Vivendi's shareholders approved the Universal spinoff.
Toshiba Corporation	$18.6	Effissimo Capital Management; Farallon Capital Management, LLC; Oasis Management LLC; 3D Investment Partners Pte Ltd.	• In February 2021, Effissimo Capital Management ("Effissimo") proposed an independent investigation into alleged irregularities surrounding the 2020 annual meeting of Toshiba. Toshiba stockholders approved the proposal the following month. • In April 2021, Toshiba announced it had received an unsolicited proposal from CVC Capital Partners Ltd. ("CVC") to take the company private. On April 12, 2021, Farallon Capital Management, LLC announced its support for privatization. The next day, news sources reported that Oasis Management LLC believed that CVC's offer was below fair value and urged Toshiba to seek other offers and set up a special committee to review the proposal. • On April 14, 2021, Toshiba's CEO resigned. On April 20, CVC decided to postpone its offer. Toshiba responded that the proposal was too vague and that the company preferred to remain public. On April 25, 3D Investment Partners Pte Ltd. ("3D") announced it had sent an open letter to the board urging it to welcome other suitors and review strategic alternatives. In May 2021, Toshiba appointed a financial advisor to work on a strategic review. • In June 2021, an external investigation found that Toshiba had colluded with the Japanese government to prevent foreign stockholders' influence at the company's 2020 annual meeting. 3D subsequently called for the resignation of the board chair and three other directors, two of whom resigned that same day. At Toshiba's annual meeting later that month, stockholders did not re-elect the board chair and another board nominee. The following day, another outside director resigned.
Box, Inc.	$3.4	Starboard Value LP	• In December 2020, Starboard Value LP ("Starboard") sent a private demand to the Box Inc. ("Box") board to immediately fire Box's co-founder and CEO. • In May 2021, Starboard nominated candidates to fill each of the seats that would be up for election at Box's annual meeting, including the seat of the co-founder and CEO. • Later that month, Box announced that it closed a $500 million investment led by KKR & Co. Inc. ("KKR") and added a KKR partner to Box's board. Starboard responded by demanding to inspect Box's books and records related to the transaction, contending that it was self-interested. Box denied the request as overbroad and failing to articulate a credible basis for any wrongdoing.

[40] Market capitalization as of campaign announcement according to FactSet.

Corporate Governance

TRENDS FROM 2021 PROXY SEASON[41]

Director Elections and Say-on-Pay Proposals

Although shareholder support for directors remains strong, at an average of ~95% (on par with 2020 and 2019), the number of directors receiving less than 90% shareholder support has significantly increased. As of mid-June 2021, 759 candidates (or ~4.9% of all candidates) received between 50% and 80% support, which is an increase of ~12.1% over the same statistic reported in mid-2020, while 44 candidates (or ~0.3% of all candidates) failed to receive at least 50% shareholder support, which is an increase of ~29% over the same statistic reported in mid-2020. Similarly, while say-on-pay proposals continued to receive strong support at an average of ~91% (on par with 2020 and 2019), there was an increase of ~29% in the number of failed say-on-pay votes over the same statistic reported in mid-2020.

Volume of Shareholder Proposals and Settlements

Although the number of shareholder proposals that will have reached a vote is on par with 2020 and 2019, 2021 saw an increase of ~10% in the total volume of shareholder proposals submitted when compared to the two prior years (861 proposals in 2021, 789 proposals in 2020 and 778 proposals in 2019). This difference is largely attributable to an increase in settlements, with ~31.1% of shareholder proposals in 2021 voluntarily withdrawn, representing an increase of ~76% over the percentage of shareholder proposals withdrawn in 2020. Approximately 16% of shareholder proposals received no-action relief, which is on par with the ~15.7% of proposals in 2020 and the ~14.8% of proposals in 2019.

The prevalence of settlements is notable in the context of environmentally-focused proposals, 82 of which were withdrawn, almost double the number observed in 2020. Of those withdrawn, 33 related to reporting on climate change, 15 related to greenhouse gas emissions, nine related to reporting on plastic pollution, eight related to product safety/toxicity/public health, seven related to reporting on climate lobbying, four related to deforestation, three related to environmental policies/community impact/pollution, two related to sustainability reporting and one related to establishing a board committee on sustainability.

Support for Shareholder Proposals

As of mid-June 2021, 66 shareholder proposals had passed in 2021, already topping the 56 proposals passed in all of 2020 and the 61 proposals passed in all of 2019. While all categories of shareholder proposals are seeing greater support, the increase is most apparent in the context of environmental proposals. Based on Georgeson's projections, environmental proposals will have received average support of ~39% this year, compared to ~31% in 2020; social proposals will have received average support of ~35% this year, compared to ~31% in 2020; and governance proposals will have received average support of ~37% this year, compared to ~32% in 2020.

As of mid-June 2021, 12 environmental shareholder proposals had passed out of the 33 put to a vote, reflecting a passage rate of ~36%, more than double the passage rate for such proposals in 2020. Of the proposals that passed, two related to deforestation, four related to greenhouse gas emissions, four related to reporting on climate lobbying, one related to reporting on climate change and one related to reporting on plastic pollution. Moreover, these proposals are receiving significant shareholder support. For example, a shareholder proposal aimed at reducing plastic pollution at Dupont de Nemours, Inc. passed with ~81% shareholder support, whereas a substantively similar proposal received support from only ~6% of the company's shareholders in 2019. Environmental proposals at General Electric Company and Bunge Limited received nearly unanimous support after the boards of each company recommended shareholders vote in their favor. In addition, key institutional investors are acting on their statements to increasingly support ESG proposals, including BlackRock, Inc., which supported ~75% of environmental and social shareholder proposals in the first quarter of 2021.

[41] Unless otherwise indicated, data in this section is taken from Georgeson, An Early Look at the 2021 Proxy Season (June 15, 2021). This section also relies on Georgeson's categorization of shareholder proposals as "environmental", "social" or "governance". Note that the numbers in this section pertaining to the 2021 proxy season reflect the analysis of voting results of Russell 3000 companies who have held their annual meetings through early June 2021. Because the 2021 proxy season is not yet complete and there may be gaps in available data, some of the data may not comprehensively represent the entire 2021 proxy season.

An emerging effort to require companies to hold an annual advisory "say-on-climate" vote, giving shareholders a chance to weigh in on climate strategy, has gained traction this proxy season, though no shareholder-sponsored "say-on-climate" proposals have received majority support this year. While ISS has yet to take a position on such proposals,[42] Glass Lewis has generally recommended against proposals requesting companies to adopt a "say-on-climate" policy. Both advisors are committed to evaluating climate proposals on a case-by-case basis. Glass Lewis has warned of potential unintended consequences of these proposals, where investors without the necessary expertise might approve climate strategies that are out of alignment with broader climate goals, or where shareholders are asked to approve a company's overall business strategy in a single vote and unintentionally sign off on certain aspects of strategic plans without a complete analysis of their effects.[43]

Diversity, Lobbying and Political Contributions

As of mid-June 2021, 18 of ~100 shareholder proposals focused on social issues passed, of which three related to reporting on board diversity, four related to political contributions, four related to reporting on diversity, equity and inclusion efforts or other workforce matters, two related to the disclosure of EEO-1 data and one related to reporting on human rights risks in operations and supply chain. The percentage of workforce diversity-related shareholder proposals that received majority shareholder support increased by 50%. The Office of the New York City Comptroller has made a push this year to encourage companies to disclose EEO-1 data, and the 2021 proxy season has brought a transition from a minority to a majority of companies within the S&P 100 disclosing such data. There appears to be continued investor focus on companies' political contributions and lobbying efforts. The volume of shareholder proposals related to such matters remains on par with 2020, and as of mid-June 2021, four proposals related to political contributions and four proposals related to lobbying efforts have passed out of the 46 voted or to be voted upon in 2021, compared with six political contributions proposals and two political lobbying proposals passed as of June 2020 during last year's proxy season. While none of the eight racial equity audit proposals put to a vote received majority support, half received support in excess of 36%.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG) UPDATES

White House Policy

On April 22, 2021, President Biden announced a new target to reduce economy-wide net U.S. greenhouse gas pollution by 2030 to 50–52% of 2005 levels.[44] On May 20, 2021, President Biden issued the Executive Order on Climate-Related Financial Risk (the "Climate-Related Financial Risk Order"), directing his administration to develop a sweeping strategy to measure, mitigate and disclose climate-related risks for public and private financial assets.[45] Key federal agencies will be required to embed climate risk considerations into government spending and oversight. Among other things, the Climate-Related Financial Risk Order encourages financial regulators to assess climate-related financial risk and asks the Treasury Secretary to work with the Financial Stability Oversight Council, the Treasury Department, the SEC and the Commodity Futures Trading Commission to issue a report within 180 days on recommendations to reduce risks to financial stability. The report will include, among other things, discussion of the necessity to enhance climate-related disclosures by regulated entities to mitigate climate-related financial risk to the financial system or assets. The Climate-Related Financial Risk Order also directs the development of recommendations for improving how federal financial management and reporting can incorporate climate-related financial risk as it relates to federal lending programs and requires consideration of new climate-related disclosure requirements for major federal suppliers to ensure that major federal agency procurements minimize those risks.

Legislative Developments

On May 12, 2021, the House Financial Services Committee advanced the Climate Risk Disclosure Act, which would direct the SEC to issue rules within two years that would require every public company to disclose direct and indirect greenhouse gas emission, the total amount of fossil fuel-related assets it

[42] Institutional Shareholder Services, United States: Procedures & Policies (Non-Compensation) Frequently Asked Questions (Apr. 21, 2021), https://www.issgovernance.com/file/policy/active/americas/US-Procedures-and-Policies-FAQ.pdf.

[43] Glass Lewis, Courteney Keatinge, *Say on Climate Votes: Glass Lewis Overview* (Apr. 27, 2021), https://www.glasslewis.com/say-on-climate-votes-glass-lewis-overview/.

[44] Press Release, *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*, The White House (Apr. 22, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/.

[45] Exec. Order No. 14,030, 86 Fed. Reg. 27,967 (May 20, 2021).

owns or manages, how its valuation would be affected if climate change continues at its current pace or if policymakers successfully restrict greenhouse gas emissions to meet the 1.5 degrees Celsius goal of the Paris Agreement and its risk management strategies related to the physical risks and transition risks posed by the climate crisis.[46]

On April 21, 2021, the House Financial Services Committee passed the Improving Corporate Governance Through Diversity Act, which would require public companies to annually disclose the voluntarily self-identified gender, race, ethnicity and veteran status of their board members, board nominees and executive officers, as well as any plan to promote racial, ethnic and gender diversity.[47] The bill would require the Treasury Department to report annually to the SEC on best practices and compliance, and the SEC would be required to establish a Diversity Advisory Group to report on strategies to increase diversity among board members.

Statements from the SEC

On May 13, 2021, Chair Gensler suggested that ESG will be a top priority and early focus of his tenure and that the agency has plans to propose a new rule requiring new workforce data, climate-related and other ESG-related disclosures for public companies.[48] The new human capital disclosures could include data on issues related to workforce diversity, part-time versus full-time workers and employee turnover. On June 23, 2021, Chair Gensler discussed the SEC staff's progress on preparing recommendations on mandatory company disclosures on climate risk and human capital, noting that the SEC had received more than 400 unique comment letters regarding certain climate-related disclosures.[49]

Recent remarks by SEC Commissioners shed light on the ongoing dialogue within the agency regarding ESG-related disclosures.

- On April 16, 2021, Commissioner Hester Peirce issued a statement in which she argued that a global standard for disclosure of specific ESG metrics would "homogenize" and "constrain" decision making and "displac[e] the insights of the people making and consuming products and services".[50] She stressed that ESG factors, unlike financial accounting, do not lend themselves to a common set of comparable metrics and that the U.S. regulatory scheme should not follow Europe's approach, both with respect to its concept of "double materiality" as well as its stakeholder focus.
- On May 24, 2021, Commissioner Allison Herren Lee addressed "myths and misconceptions" regarding materiality in the ESG context and made the case for ESG-related disclosure rules, arguing that there is currently neither a general requirement to reveal all material information nor a duty to disclose climate-related matters and, even if there were such a duty to disclose, management, lawyers and auditors can get the determination of materiality wrong, necessitating specific guidelines that elicit information that is material to investors. On June 28, 2021, Commissioner Lee discussed key steps boards can take to position themselves as ESG leaders, including enhancing board diversity, increasing board expertise on ESG-related matters and tying executive compensation to certain ESG metrics.[51]
- On June 3, 2021, Commissioner Elad Roisman discussed the potential costs of a new ESG disclosure regime and proposed ways to mitigate such costs, including scaling new disclosure requirements and phasing in the new regime to lighten the burden on smaller companies, allowing issuers flexibility in sources and methodologies, creating a safe harbor and requesting the disclosures be furnished to the SEC instead of filed.[52] On June 22, 2021, Commissioner Roisman discussed whether there is material, ESG-related information necessary for informed investment decisions that investors are not receiving, the expertise the SEC would need to adequately consider the materiality of

[46] Climate Risk Disclosure Act of 2021, H.R. 2570, 117th Cong. (2021).

[47] Improving Corporate Governance Through Diversity Act of 2021, H.R. 1277, 117th Cong. (2021).

[48] See Katanga Johnson, *U.S. SEC Chair Planning New Workforce Data Disclosures for Public Companies*, Reuters (May 14, 2021, 12:32 PM EDT), https://www.reuters.com/business/sustainable-business/us-sec-chair-planing-new-workforce-data-disclosures-public-companies-2021-05-13/; Dean Seal, *Gensler Says Climate Disclosure Rules Among 'Top Priorities'*, LAW360 (May 13, 2021, 9:25 PM EDT), https://www.law360.com/articles/1384626.

[49] Speech, Gary Gensler, *Prepared remarks at London City Week*, SEC (June 23, 2021), https://www.sec.gov/news/speech/gensler-speech-london-city-week-062321.

[50] Public Statement, Hester M. Peirce, *Rethinking Global ESG Metrics*, SEC (Apr. 14, 2021), https://www.sec.gov/news/public-statement/rethinking-global-esg-metrics.

[51] Speech, Allison Herren Lee, *Climate, ESG, and the Board of Directors: "You Cannot Direct the Winds, But You Can Adjust Your Sails"*, SEC (June 28, 2021), https://www.sec.gov/news/speech/lee-climate-esg-board-of-directors.

[52] Speech, Elad L. Roisman, *Putting the Electric Cart before the Horse: Addressing Inevitable Costs of a New ESG Disclosure Regime*, SEC (June 3, 2021), https://www.sec.gov/news/speech/roisman-esg-2021-06-03.

environmental and social disclosures and various considerations around relying on third parties to develop and maintain ESG disclosure standards.[53]

SEC REGULATORY AGENDA

On June 11, 2021, the U.S. Office of Information and Regulatory Affairs released the Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions, which includes a list of regulatory actions the SEC plans to take in the near and long terms.[54] In addition to rules related to SPACs and ESG-related disclosure, as described earlier in this newsletter, the SEC's agenda also signals potential rulemaking on topics such as proxy voting advice, Rule 10b5-1 plans and universal proxy cards. In addition, the SEC appears to be revisiting the requirements governing shareholder proposals under Rule 14a-8, which the SEC had amended in September 2020; investor groups have since challenged the 2020 rule as arbitrary and capricious and in excess of the SEC's statutory authority.[55] Commissioners Peirce and Roisman criticized the agenda as representing "the regrettable decision to spend [the SEC's] scarce resources to undo a number of rules the Commission just adopted".[56]

Proxy Advisory Rules

On June 1, 2021, Chair Gensler directed the SEC's Division of Corporation Finance to review its interpretations and guidance adopted in 2019 and rules adopted in 2020 concerning proxy voting advice.[57] Under the 2019 interpretation, voting advice from proxy firms is considered a solicitation under federal proxy rules and thus subject to the anti-fraud provisions. The 2020 rules codified this 2019 interpretation, required proxy advisers to provide more disclosures on potential conflicts of interest and increased the ability of companies to review and respond to proxy firms' recommendations before shareholders vote. The Division of Corporation Finance will not recommend enforcement action against proxy advisors based on these policies while they remain under review.[58] Commissioners Peirce and Roisman criticized Chair Gensler's decision, stating that circumstances had not changed since the rules were adopted to justify a reconsideration and, because proxy firms are not required to comply with the rules until December 1, 2021, there is insufficient data or experience to evaluate how they work in practice.[59]

Rule 10b5-1 Plans

On June 7, 2021, Chair Gensler announced he had asked SEC staff to make recommendations on how to revise the rules governing Rule 10b5-1 plans.[60] Pointing to "cracks" in the insider trading regime, Gensler suggested four areas for reform: (1) mandating four- to six-month cooling-off periods after an insider or company adopts a Rule 10b5-1 plan before the first trade can be made, (2) imposing limitations on when and how Rule 10b5-1 plans can be canceled, (3) developing mandatory disclosure requirements regarding Rule 10b5-1 plans and (4) placing limits on the number of Rule 10b5-1 plans insiders can adopt.

Universal Proxy Cards

On May 6, 2021, the SEC reopened the comment period on proposed rules for the use of universal proxy cards.[61] In 2016, the SEC proposed amendments and new rules to, among other things, require the use of universal proxy cards in contested director elections (*i.e.*, requiring both company and dissident nominees to appear on the same proxy card to permit shareholders to vote for a mix of directors from each state). The proposed rules would prescribe certain filing, notice and solicitation requirements of registrants and dissidents when using universal proxy cards as well as formatting and other requirements. The comment period on the proposal closed in early 2017 and has not been finalized. The

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[53] Speech, Elad L. Roisman, *Can the SEC Make ESG Rules that are Sustainable?*, SEC (June 22, 2021), https://www.sec.gov/news/speech/can-the-sec-make-esg-rules-that-are-sustainable.

[54] Press Release, *SEC Announces Annual Regulatory Agenda*, No. 2021-99, SEC (June 11, 2021), https://www.sec.gov/news/press-release/2021-99?utm_medium=email&utm_source=govdelivery.

[55] Complaint, *Interfaith Center on Corporate Responsibility v. SEC*, No. 21-cv-01620 (D.D.C. June 15, 2021).

[56] Public Statement, *Moving Forward or Falling Back? Statement on Chair Gensler's Regulatory Agenda*, SEC (June 14, 2021), https://www.sec.gov/news/public-statement/moving-forward-or-falling-back-statement-chair-genslers-regulatory-agenda?utm_medium=email&utm_source=govdelivery.

[57] Public Statement, Gary Gensler, *Statement on the Application of the Proxy Rules to Proxy Voting Advice*, SEC (June 1, 2021), https://www.sec.gov/news/public-statement/gensler-proxy-2021-06-01.

[58] Public Statement, *Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b), 14a-9*, SEC (June 1, 2021), https://www.sec.gov/news/publicstatement/corp-fin-proxy-rules-2021-06-01.

[59] Public Statement, Hester M. Peirce & Elad L. Roisman, *Response to Chair Gensler's and the Division of Corporation Finance's Statements Regarding the Application of the Proxy Rules to Proxy Voting Advice*, SEC (June 1, 2021), https://www.sec.gov/news/public-statement/peirce-roisman-response-statements-application-proxy-rules-060121.

[60] Speech, Gary Gensler, *Prepared Remarks CFO Network Summit*, SEC (June 7, 2021), https://www.sec.gov/news/speech/gensler-cfo-network-2021-06-07.

[61] Reopening of Comment Period for Universal Proxy, 86 Fed. Reg. 24,364 (May 6, 2021) (to be codified at 17 C.F.R. pt. 240).

SEC reopened for comment all aspects of the 2016 proposal as well as several new questions, including whether the proposed rule changes should be extended to registered investment companies and business development companies and whether dissidents should be required to solicit more than a majority of the voting power of shares entitled to vote. The comment period ended on June 7, 2021.

PERSONNEL DEVELOPMENTS

Division of Corporation Finance

On June 14, 2021, the SEC announced that Renee Jones, a Boston College Law School professor, was named Director of the Division of Corporation Finance and that John Coates, who had been the division's Acting Director, was named SEC General Counsel.[62] In a 2017 law review article, Jones argued for a reconsideration of the regulatory framework that had allowed for the prevalence of "unicorns", or privately held companies with market valuations of $1 billion or more, on the grounds that they had become too large to be constrained by venture capital investors yet beyond the scrutiny of public securities markets.[63] She has called on the SEC to study the impact of dual class capitalization and suggested that sunset provisions for super-voting shares would protect investor influence over fundamental corporate decisions.[64]

Division of Enforcement

On June 29, 2021, the SEC announced that Gurbir S. Grewal, the Attorney General of the State of New Jersey, had been appointed Director of the Division of Enforcement, effective July 26, 2021.[65] As New Jersey's attorney general, Grewal oversaw prosecutions relating to predatory lending in the automobile industry, overcharges in connection with credit card fees, opioids and gun control. Grewal previously prosecuted cybercrime and white-collar cases as Chief of the Economic Crimes Unit of the U.S. Attorney's Office for the District of New Jersey and served in the Business and Securities Fraud Unit of the U.S. Attorney's Office for the Eastern District of New York.

Public Company Accounting Oversight Board

On June 4, 2021, the SEC announced it had removed William D. Duhnke III as Chairman of the Public Company Accounting Oversight Board (the "PCAOB"), designated Duane M. DesParte, who has served as a member of the PCAOB since 2018, to serve as Acting Chairperson and intended to seek candidates to fill all five board positions.[66] News outlets subsequently reported that Duhnke is under investigation by the SEC for potential rule violations with respect to his handling of internal complaints.[67] Former Chair Jay Clayton similarly oversaw the appointment of an entirely new board in 2017. Commissioners Peirce and Roisman issued a strong rebuke of Chair Gensler's decision, attempting to distinguish it from the 2017 replacements and criticizing the move as lacking a "fair process, fully-informed deliberation, and equanimity" and setting a "troubling precedent".[68] On June 22, 2021, Acting Chairperson DesParte announced that his staff would reassess the PCAOB's stakeholder engagement efforts and revisit the structure and membership of the PCAOB's advisory groups.[69]

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

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[62] Press Release, *Renee Jones to Join SEC as Director of Corporation Finance; John Coates Named SEC General Counsel*, No. 2021-101, SEC (June 14, 2021), https://www.sec.gov/news/press-release/2021-101.

[63] Renee M. Jones, *The Unicorn Governance Trap*, 166 U. Pa. L. Rev. Online 165 (2017).

[64] Renee M. Jones, *Written Testimony Before the House Financial Services Committee Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets* (Sept. 11, 2019).

[65] Press Release, *SEC Appoints New Jersey Attorney General Gurbir S. Grewal as Director of Enforcement*, No. 2021-114, SEC (June 29, 2021), https://www.sec.gov/news/press-release/2021-114.

[66] Press Release, *SEC Announces Removal of William D. Duhnke III from the Public Company Accounting Oversight Board; Duane M. DesParte to Serve as Acting Chair*, SEC (June 4, 2021), https://www.sec.gov/news/press-release/2021-93.

[67] See Dave Michaels & Jean Eaglesham, *SEC Investigating Former Chair of Auditing Industry Regulator*, Wall St. J. (June 17, 2021), https://www.wsj.com/articles/sec-investigating-former-chair-of-auditing-industry-regulator-11623943373.

[68] Public Statement, Hester M. Peirce & Elad L. Roisman, *Statement on The Commission's Actions Regarding the PCAOB*, SEC (June 4, 2021), https://www.sec.gov/news/public-statement/peirce-roisman-pcaob-2021-06-04.

[69] Public Company Accounting Oversight Board, *PCAOB Acting Chairperson Announces Reassessment of Stakeholder Engagement, Advisory Groups* (June 22, 2021), https://pcaobus.org/news-events/news-releases/news-release-detail/pcaob-acting-chairperson-announces-reassessment-of-stakeholder-engagement-advisory-groups.