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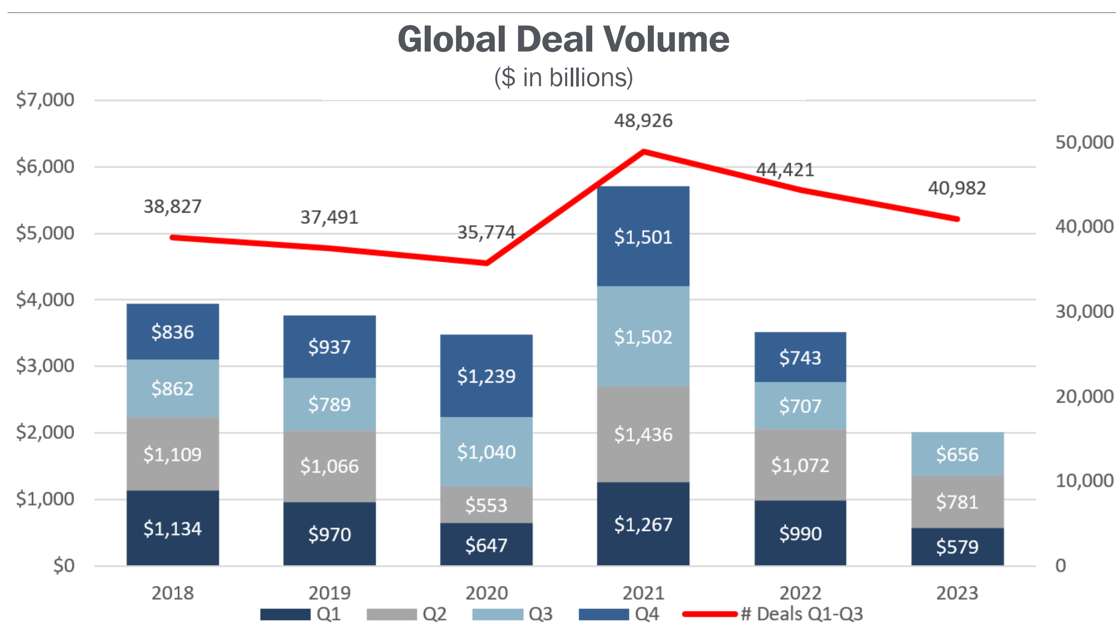
Cravath Quarterly Review

M&A, ACTIVISM AND CORPORATE GOVERNANCE

01

Mergers & Acquisitions

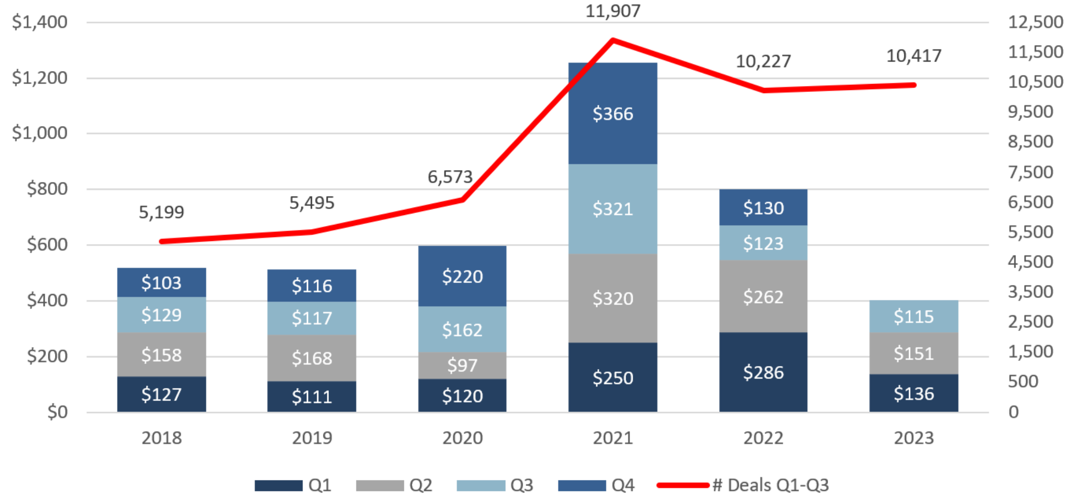
TRENDS[1]



SOURCE Refinitiv, An LSEG Business.

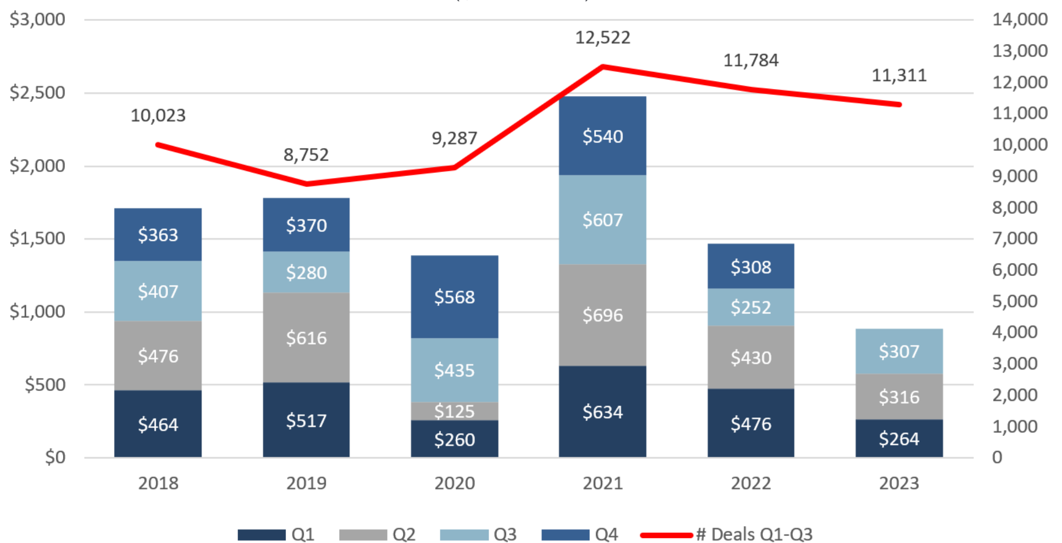
Q3 2023: M&A Activity Falls, Announced Deal Volume Below $1 Trillion for Fifth Consecutive Quarter

Global M&A activity slowed in the first nine months of 2023, with $2.0 trillion in announced deal volume, a decrease of ~27% compared to the first nine months of 2022 and a 10-year low for the first nine months of a year. Q3 2023, with announced deal volume of $656 billion, marked the fifth consecutive quarter to fall below $1 trillion in announced deal volume. There were approximately 41,000 deals announced in the first nine months of 2023, a year-over-year decrease of ~8% compared to the same period in 2022.



SOURCE Refinitiv, An LSEG Business.

Private equity buyouts in the first nine months of 2023 reached $403 billion globally, a decrease of ~40% compared to the first nine months of 2022. However, there was a modest recovery in terms of the number of private equity-backed deals, with slightly over 10,400 private equity-backed deals announced in the first nine months of 2023, slightly above the approximately 10,200 deals announced during the same period in 2022.



SOURCE Refinitiv, An LSEG Business.

Dealmaking Down Across All Regions

M&A activity for U.S. targets amounted to $887 billion in the first nine months of 2023, a decrease of ~23% compared to the first nine months of 2022. M&A activity for European targets totaled $392 billion in the first nine months of 2023, a decrease of ~45% compared to the first nine months of 2022. In the Asia-Pacific region, dealmaking totaled $460 billion in the first nine months of 2023, a decrease of ~26% compared to the first nine months of 2022. Cross-border M&A activity totaled $707 billion in the first nine months of 2023, a decrease of ~21% compared to the first nine months of 2022.

LEGAL & REGULATORY DEVELOPMENTS

Cases

Q3 2023 featured a number of notable Delaware decisions and a notable decision from California relating to Delaware corporations.

ANDERSON V. MAGELLAN HEALTH, INC., ET AL., C.A. NO. 2021-0202-KSJM (DEL. CH. JUL. 6, 2023).

In July 2023, the Delaware Court of Chancery issued a decision holding that, moving forward, supplemental disclosures obtained in stockholder litigation alleging inadequate or misleading disclosures in merger proxies must be "material" and not merely "helpful" in order to support a mootness fee award.

In *Magellan Health*, the fee dispute arose out of an effort by the stockholder plaintiff to enjoin the stockholder vote and merger between Magellan Health, Inc. ("Magellan") and Centene Corporation ("Centene"). Several confidentiality agreements between Magellan and other potential acquirors contained "don't ask, don't waive" standstill provisions, which prohibit a potential acquiror from making any public or private request that a target waive the standstill provisions obligating the acquiror from taking certain actions seeking to gain control of the target. The plaintiff alleged that the existence of these confidentiality agreements tainted the sale process and that the existence of these provisions was not adequately disclosed in the merger proxy. Shortly after filing the suit, the plaintiff agreed to dismiss his lawsuit as moot in exchange for Magellan agreeing to waive certain of the remaining "don't ask, don't waive" provisions and issuing certain supplemental disclosures providing further detail on these provisions. Plaintiff's counsel petitioned the Court for $1,100,000 in attorneys' fees and expenses, and Magellan countered that an award in the range of $75,000 and $125,000 was appropriate.

The Court considered whether the supplemental disclosures supported the petitioned fee award. Applying *Xoom*[2], where the Court had set the applicable standard as "helpful" and held that mootness fees "can be awarded if the disclosure provides some benefit to stockholders, whether material or not," the Court determined the supplemental disclosures were "marginally helpful" and awarded plaintiff's counsel $75,000, the lower end of Magellan's proposed fee range. However, the Court noted that *Xoom* could be construed to encourage plaintiffs' counsel to pursue meritless claims in the future, and thus held that, moving forward, supplemental disclosures must be "material" and not merely "helpful" in order for plaintiffs' counsel to recover attorneys' fees in mootness fee proceedings.

RAYMOND E. WINBORNE, ET AL. V. GODADDY, INC., C.A. NO. 2022-0497-JTL (DEL. CH. AUG. 24, 2023).

In August 2023, the Delaware Court of Chancery denied GoDaddy Inc.'s ("GoDaddy") motion to dismiss a derivative claim that alleged that its directors had committed waste and breached their fiduciary duties by approving in bad faith a payment of $850 million to settle liabilities under tax revenue agreements ("TRAs") that were valued at $175.3 million in GoDaddy's audited financial statements.

In connection with GoDaddy's IPO in 2015, which implemented an "Up-C" structure, GoDaddy entered into TRAs pursuant to which GoDaddy agreed to pay certain founding investors 85% of the tax savings arising from GoDaddy reducing its taxable income by using tax assets generated by such investors (which would occur if a founding investor exercised its conversion rights to receive a common share and sold such common share in excess of the IPO price, creating a step up in basis of GoDaddy's assets). In early 2020, GoDaddy formed a special committee of its board of directors to evaluate a potential buyout of the TRAs.

In reviewing the allegations of bad faith, the Court stated that the test at the pleading stage was whether the complaint alleged "a constellation of particularized facts which, when viewed holistically, support a reasonably conceivable inference that an improper purpose sufficiently infected a director's decision to such a degree that the director could be found to have acted in bad faith." Applying that test, the Court found that, considering the totality of the circumstances, the plaintiff's assertions collectively supported a pleading-stage inference that the directors approved the payment in bad faith. The Court noted that the stark contrast between the $175.3 million valuation and the $850 million payment was "so glaring" as to support an inference of bad faith on that basis alone. However, the Court also cited other allegations as supporting an inference of bad faith, including: (i) the CFO having given conflicting representations to the special committee and audit committee about the likelihood of needing to make TRA payments, (ii) the relevant projections having been prepared using assumptions that the special committee inferably knew were unrealistic, (iii) the special committee having ultimately failed to make a recommendation to the board, and the board having nevertheless approved the buyout during a thirty-minute meeting without such recommendation and without hearing directly from the special committee's financial advisor, (iv) the TRA buyout process allegedly having been started by the General Counsel, who stood to gain from the buyout and (v) the special committee directors' and financial advisor's ties to founding investors who stood to gain from the buyout.

26 CAPITAL ACQUISITION CORP. AND 26 CAPITAL HOLDINGS LLC V. TIGER RESORT ASIA LTD, ET AL., C.A. NO. 2023-0128-JTL (DEL. CH. SEPT. 7, 2023).

In September 2023, the Delaware Court of Chancery declined to grant a remedy of specific performance to a buyer seeking to compel a target to use its reasonable best efforts to close a de-SPAC transaction, notwithstanding express language in the transaction agreement establishing specific performance as the preferred remedy and an assumption that monetary damages would not be an adequate remedy.

Universal Entertainment Corporation, a Japanese gaming company ("Universal"), sought to take public its subsidiary Tiger Resorts Leisure & Entertainment, Inc., the owner of a casino located in the Philippines ("CasinoCo"), and explored listing opportunities, including in the United States. That exploration eventually led to Zama Capital, a New York-based hedge fund ("Zama"), which steered Universal towards a SPAC named 26 Capital Acquisition Corp. ("26 Capital"). Universal contracted with Zama to act as its exclusive advisor for the purposes of completing a de-SPAC transaction with 26 Capital. However, Universal alleged that, unbeknownst to Universal, Zama leveraged its exclusive relationship to secure a 60% ownership interest in 26 Capital and began to assist 26 Capital in negotiations against Universal.

Following the signing of the merger agreement, the Philippine Supreme Court issued a surprise order in favor of the former controlling stockholder, chairman and CEO of CasinoCo, who had been previously ousted from CasinoCo for alleged embezzlement. The order directed CasinoCo to "observe the status quo" prior to the

removal of the former controlling stockholder, which Universal interpreted as operating to prevent the closing of the pending de-SPAC. Further, the former controlling stockholder gained physical control of the casino property and forcibly ejected CasinoCo's existing management. Notwithstanding these events, Zama and 26 Capital pressed Universal to consummate the de-SPAC transaction, and ultimately filed suit seeking to compel CasinoCo to use reasonable best efforts to close the transaction.

In rejecting 26 Capital's request for an award of specific performance, the Court stated that, despite the parties' clear-day remedial preference for specific performance as set forth in the transaction agreement, the Court would only grant specific performance if the equities "clearly and convincingly favor that outcome." In determining that such standard was not met, the Court pointed to several factors: (i) the impracticality of enforcing a reasonable best efforts obligation on a Philippine corporation in Manila with a history of poor governance and a record of making "dodgy bargains" to secure local political intervention, (ii) the inability to impose coercive sanctions that could be deployed effectively in the Philippines, (iii) the potential that closing the transaction could violate an order of the Philippine Supreme Court and (iv) the "egregious" conduct of 26 Capital in secretly working with Zama as partners against Universal, despite Zama's role as Universal's exclusive advisor.

EPICENTRX, INC. ET AL. V. THE SUPERIOR COURT OF SAN DIEGO COUNTY, CT. NO. 37-2022-00015228 (CAL. CT. APP. 4TH DIST. 2023).

In September 2023, the California Fourth District Court of Appeals declined to order a San Diego trial court to dismiss a shareholder's suit brought by EpiRx against EpicentRx, a Delaware company, despite a forum selection clause provision in EpicentRx's certificate of incorporation and bylaws mandating that any dispute be litigated in the Delaware Court of Chancery. Agreeing with the trial court, the appeals court held that "enforcement of the forum selection clauses in EpicentRx's corporate documents would operate as an implied waiver of EpiRx's right to a jury trial—a constitutionally-protected right that cannot be waived by contract prior to the commencement of a dispute."

EpiRx, a minority shareholder of EpicentRx, sued EpicentRx and its directors for fraudulent concealment, promissory fraud, breach of contract, breach of fiduciary duty and violations of California's Unfair Competition Law, demanding a jury trial on all claims to which the right to a jury trial attached. EpicentRx and several related defendants moved to dismiss the complaint based on forum selection clauses in EpicentRx's certificate of incorporation and bylaws. The trial court declined to enforce the forum selection clauses and denied the motion to dismiss, finding that EpiRx was, under California law, "entitled to [a jury trial] as a matter of right on its fraud claims"—a fundamental right that could not be waived through a pre-dispute contractual agreement such as a certificate of incorporation or bylaw. The trial court further held that the forum selection clauses were tantamount to jury trial waivers because they required the parties to litigate their dispute in the Delaware Court of Chancery, which does not guarantee a right to a jury.

On appeal, the Court assumed that the forum selection clauses were valid under Delaware law, and then turned to California law to evaluate their enforceability. The Court explained that, while the party opposing enforcement of a forum selection clause ordinarily bears the "substantial" burden of proving why the clause should not be enforced, the burden is reversed when the claims at issue are based on unwaivable rights created by the California constitution and California state statutes, as was the case here. The Court stated that, when there is such a burden shift, the party seeking to enforce the forum selection clause bears the burden to show litigating the claims in the contractually designated forum would not

diminish in any way the substantive rights afforded under California law. Thus, because EpiRx demanded a jury trial and there was no dispute that it would be entitled to a jury trial in California and would not be entitled to a jury trial in the Delaware Court of Chancery, the Court determined that EpicentRx failed to satisfy its burden and that the trial court properly declined to enforce the forum selection clauses.

CFIUS

Annual Report for Calendar Year 2022

In August 2023, the Committee on Foreign Investment in the United States ("CFIUS") published the unclassified version of its Annual Report to Congress for the 2022 calendar year.[3] Key findings and insights from the report include:

- CFIUS reviewed 286 notices (*i.e.*, long-form filings) and 154 declarations (or short-form filings), or 440 total filings.[4] This is a slight increase over 2021's total of 436 filings (272 notices and 164 declarations).[5]
- Of the 154 declarations, CFIUS approved 90 (~58%) in the 30-day assessment period, down significantly from 2021 (~73%).[6] Further, CFIUS requested a notice in ~32% of the instances in which the parties initially filed a declaration, compared to ~18% in 2021.[7]
- Of the 286 notices CFIUS reviewed in 2022, 162 (~57%) went to the second 45-day investigation period.[8] This is a significant increase from 2021 (~48%).[9]
- CFIUS approved 41 notices (~14%) with mitigation, up from 2021 (~10%).[10]
- The number of "withdraw/re-files" was the highest in a decade at 68 notices in 2022 (~24%).[11] This is only a slight increase over 2021 (~23%) but is a particularly unwelcome figure for market participants who were hoping 2021 was an outlier.[12]

In a year that saw both the Russian invasion of Ukraine and the highest level of tension across the Taiwan Strait in decades, the latest annual report indicates that, in 2022, CFIUS's work was characterized by longer reviews, deeper scrutiny and the identification and mitigation of more national security concerns. Although the vast majority of transactions notified to CFIUS are still being approved—mostly without mitigation—the 2022 Annual Report suggests that CFIUS has realigned toward a more vigilant posture, with extended reviews and onerous inspection likely to continue for the foreseeable future.

Executive Order on Outbound Investment

Also in August 2023, President Biden issued a long-awaited Executive Order addressing national security concerns raised by certain U.S. outbound investments (the "Order").[13] Concurrently with the issuance of the Order, the U.S. Department of the Treasury ("Treasury") published an Advance Notice of Proposed Rulemaking (the "ANPRM") that provided initial details on the focus and scope of a new U.S. Government outbound investment program and sought public comment on various topics related to the implementation of the Order.[14] Key takeaways from the Order and the ANPRM include:

- A New National Emergency. The Order declares a new national emergency under the International Emergency Economic Powers Act relating to countries of concern exploiting U.S. outbound investments to develop sensitive technologies and products critical for military, intelligence, surveillance and cyber-enabled capabilities. Although the Order itself does not name specific countries, in an Annex to the Order the President identified only one country of concern: the People's Republic of China, including Hong Kong and Macau.

- Notifiable Transactions and Prohibited Transactions. The new outbound investment program will not establish a CFIUS-like screening mechanism whereby the U.S. Government reviews transactions on a case-by-case basis. Rather, the Order and the ANPRM envision a program containing two distinct parts: (1) certain outbound investment transactions will need to be notified to Treasury, via an online filing system, no later than 30 days following closing ("Notifiable Transactions"); and (2) U.S. persons will be prohibited from engaging in certain outbound investment transactions involving technologies and products that pose a particularly acute national security threat ("Prohibited Transactions").
- Short List of Technologies and Products (Initially). The Order identifies three categories of national security technologies and products for the new program: (1) semiconductors and microelectronics; (2) quantum information technologies; and (3) certain artificial intelligence systems. These were selected due to their critical role in accelerating the development of advanced military, intelligence, surveillance and cyber-enabled capabilities. Importantly, only a subset of technologies and products within these three categories will be subject to the new program, and technologies/products will be treated differently depending on their sensitivity.
- Not Likely to Become Effective until 2024. The ANPRM—which does not implement the Order and is not draft regulatory text—was open for comments until September 28, 2023. Treasury is now reviewing and assessing the feedback received prior to promulgating draft regulations. Those draft regulations will themselves be subject to public notice and comment before taking effect. As a result, the new regime is unlikely to become effective prior to 2024.

Second Annual CFIUS Conference

In September 2023, Treasury hosted the second annual CFIUS conference in Washington, D.C. The conference, which featured five panels with speakers from across the executive branch, included keynote remarks from Treasury Secretary Janet Yellen and Secretary of Homeland Security Alejandro Mayorkas. Thematically, the conference was consistent with the 2022 Annual Report. Namely, the U.S. Government is increasingly viewing CFIUS as a key tool in its national security toolbox, and it is engaged in an effort to "sharpen" the tool across all domains—from identifying non-notified transactions, to reviewing and investigating notified transactions, to monitoring and enforcing mitigation agreements.[15]

02

Antitrust

POLICY DEVELOPMENTS

Increased Focus on Labor Markets

In July 2023, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") announced proposed changes to the merger guidelines.[16] In September 2023, Assistant Attorney General ("AAG") for the Antitrust Division, Jonathan Kanter, explained in prepared remarks at the Fordham competition law institute's international antitrust law and policy conference that under the new guidelines, "the agencies will evaluate the impact of a merger on labor as a stand-alone basis to challenge a transaction."[17]

Further demonstrating the agencies' increased focus on labor markets, in August 2023, the FTC and the U.S. Department of Labor ("DOL") signed a new memorandum of understanding ("MOU") to strengthen DOL and FTC cooperation and coordination in information sharing, investigations and enforcement activity in an effort to promote competitive U.S. labor markets.[18] The FTC and

the DOL agreed to collaborate by sharing information, conducting cross-training for staff at each agency, and partnering on investigative efforts within each agency's authority.[19] The MOU does not create legally binding obligations on these agencies, contractually or otherwise. The MOU is part of the FTC's broader initiative to use the agency's full authority to protect workers and to scrutinize mergers that may harm competition in U.S. labor markets.[20]

ENFORCEMENT

Federal Trade Commission

In August 2023, the FTC announced that medical device maker CooperCompanies Inc. ("CooperCompanies") terminated its $875 million acquisition of Cook Medical Holdings, LLC's reproductive health business. The FTC had not yet challenged the acquisition, but stated that the decision by CooperCompanies to terminate the transaction came "following a full-phase investigation" by FTC staff. The FTC also noted that the decision to abandon the proposed acquisition ensures that critical reproductive health markets remain competitive and "is a win for patients."[21]

Also in August 2023, the FTC voted 3-0 to accept the proposed consent order to resolve antitrust concerns surrounding Intercontinental Exchange, Inc.'s ("ICE") proposed $13.1 billion acquisition of Black Knight, Inc. ("Black Knight"), combining two dominant residential mortgage loan origination systems ("LOS") and product, pricing and eligibility engine ("PPE") providers.[22] The proposed transaction raised significant competitive concerns with the FTC relating to the price and quality of residential mortgage origination software throughout the U.S. Under the terms of the proposed order, Black Knight's Optimal Blue business and Empower business, along with certain related products, will be divested to Constellation Web Solutions Inc. ("Constellation"), a provider of mortgage-related tools and software. The proposed consent order contains additional requirements, such as the FTC's prior approval, for the next 10 years, for reacquiring any divested asset or an interest in a loan origination system business, and prior notice before acquiring an interest in a PPE business, and facilitating Constellation's hiring of certain employees not already included in the divestitures and the appointment of a monitor to oversee compliance with the proposed consent order. These requirements and prohibitions are consistent with the FTC merger clearance settlement elements under the Biden administration.[23]

In September 2023, the FTC voted 3-0 to accept the proposed consent order to resolve antitrust concerns surrounding Amgen Inc.'s ("Amgen") $27.8 billion proposed acquisition of Horizon Therapeutics plc. ("Horizon"), allowing the transaction to close.[24] The FTC had filed suit in Illinois federal court in May 2023 seeking a temporary restraining order and a preliminary injunction to block the acquisition—the largest in Amgen's history—alleging the deal could harm future competition for certain biologic drugs. Under the terms of the consent order, Amgen is prohibited from leveraging its drug portfolio to foreclose or disadvantage competitors to Tepezza or Krystexxa for 15 years. The proposed consent order also requires the FTC's prior approval for the acquisition of any product or business interest involved in the manufacture or sale of any drug, or the pre-commercial development of any drug in development (under certain circumstances), indicated to treat thyroid eye disease or chronic refractory, until December 31, 2032, and appointment of a monitor to oversee compliance with the proposed consent order.[25]

Also in September 2023, the FTC sued U.S. Anesthesia Partners, Inc. ("USAP"), the dominant provider of anesthesia services in Texas, and private equity firm Welsh, Carson, Anderson & Stowe ("Welsh"), alleging the two companies executed a multi-year anticompetitive scheme to consolidate anesthesiology practices in Texas,

drive up the price of anesthesia services provided to Texas patients, and boost their own profits.[26] The FTC states in the complaint that, since its creation in 2012, USAP has acquired more than a dozen anesthesiology practices in Texas and allegedly raised the acquired group's rates to USAP's higher rates, resulting in a substantial mark-up for the same doctors as before.

In October 2023, the FTC voted 3-0 to approve a final consent order concerning EQT Corporation's ("EQT") acquisition of certain natural gas assets from private equity firm Quantum Energy Partners, LP ("Quantum"), a direct competitor of EQT in the Appalachian Basin.[27] The proposed transaction would have made Quantum one of EQT's largest shareholders and granted Quantum the right to an EQT board seat, which the FTC alleged would violate the antitrust laws and harm competition in this industry.[28] The final consent order prohibits Quantum from occupying an EQT Board seat to prevent the formation of an interlocking directorate, requires Quantum to divest its EQT shares and prevents Quantum from acquiring additional EQT shares without FTC approval. The order also limits both current and future entanglements between the firms, including by requiring to unwind their existing joint venture and prohibiting the firms from entering into noncompete agreements other than those ancillary to the sale of a business, assets or company.[29] The FTC noted that the consent order "sets important Commission precedent on the application of Section 8 of the Clayton Act, Section 5 of the FTC Act, and the use of structural remedies to address these theories of harm."[30]

03

Activism[31]

Observations regarding activist activity levels in the first nine months of 2023 include:

- Activism in the first nine months of 2023 slightly exceeded 2022's active pace with ~180 new campaigns globally, representing a ~5% increase from the first nine months of 2022 and the second-highest first nine-month period of activist activity over the past five years.
- U.S. activist activity declined in the first nine months of 2023 but continued to represent the largest regional share of global activist activity at ~40% of all new campaigns. The ~80 new campaigns launched in the United States in the first nine months of 2023 represented a ~20% decrease from the first nine months of 2022.
- Activist activity in Europe also declined in the first nine months of 2023. The ~40 new campaigns launched in Europe in the first nine months of 2023 (~20% of all new campaigns) represented a ~5% decrease from the first nine months of 2022.
- Increased activist activity outside the United States and Europe in the first nine months of 2023 helped to offset the decreased activist activity in the United States and Europe. The ~70 new campaigns launched outside the United States and Europe in the first nine months of 2023 (~40% of all new campaigns) represented a ~60% increase from the first nine months of 2022.

04

Corporate Governance

SEC UPDATES

SEC Adopts Cybersecurity Disclosure Rules for Public Companies[32]

On July 26, 2023, the Securities and Exchange Commission (the "SEC") adopted final rules regarding disclosure by public companies, including foreign private issuers ("FPIs"), of cybersecurity risk management, strategy, governance and related incidents. In particular, the final rules require (i) current reporting of material cybersecurity incidents 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.[33]

The final rules will require registrants to disclose on Item 1.05 of Form 8-K any cybersecurity incident they determine to be material and to describe the material aspects of the incident's nature, scope and timing, as well as its material impact or reasonably likely material impact on the registrant. The Form 8-K will generally be due four business days after a registrant determines that a cybersecurity incident is material (rather than the date on which the incident occurred or was discovered). The disclosure may be delayed if the United States Attorney General determines that an immediate disclosure would pose a substantial risk to national security or public safety.[34]

The SEC also adopted new requirements applicable to public companies' annual reports on Form 10-K (not quarterly reports or proxy statements) in Item 106 of Regulation S-K. Under Item 106(b), public companies must describe their processes, if any, for assessing, identifying and managing material risks from cybersecurity threats. In addition, companies must describe whether and how any risks from cybersecurity threats, including as a result of previous cybersecurity incidents, have materially affected or are reasonably likely to materially affect their business strategy, results of operations or financial condition. Under Item 106(c), companies must also describe the board's oversight of risks posed by cybersecurity threats and, if applicable, identify any board committee or subcommittee responsible for the oversight of such risks and describe the processes by which the board (or relevant committee) is informed about such risks. Further, companies must describe management's role in assessing and managing material risks posed by cybersecurity threats. The final rules require comparable disclosures by FPIs on Form 20-F for cybersecurity risk management, strategy and governance.[35]

Regarding the annual reporting requirements on Forms 10-K and 20-F, all companies must begin providing the applicable disclosures in annual reports for fiscal years ending on or after December 15, 2023. With respect to the current reporting requirements on Forms 8-K and 6-K, all companies other than smaller reporting companies must begin complying on or after December 18, 2023.[36] For more information on the cybersecurity disclosure rules, our memorandum describing this matter in more detail is available here.

Sample Letter from SEC Staff to Companies Regarding China-Specific Disclosures[37]

In July 2023, the SEC's Division of Corporation Finance released an illustrative letter containing sample comments that it may issue to companies based in, or with a majority of operations, in China. The Division of Corporation Finance focused on three areas related to disclosures specific to China:

- Companies identified as Commission-Identified Issuers under the Holding Foreign Companies Accountable Act ("HFCAA") must comply with the disclosure requirements under the HFCAA and Commission;

- Specific and prominent disclosure about material risks related to the role of China's government. In particular, the Division of Corporation Finance is seeking disclosure regarding any material impacts that intervention or control by China's government in the operations of these companies has or may have; and
- Material impacts of certain statutes, such as the Uyghur Forced Labor Prevention Act, which the Division of Corporation Finance specifically flags.

NASDAQ PROPOSED LISTING RULE CHANGE REGARDING REVERSE STOCK SPLITS[38]

On July 28, 2023, the Nasdaq Stock Market ("Nasdaq") proposed a rule change with the SEC that would establish listing standards related to notification and disclosure of reverse stock splits. Specifically, Nasdaq is proposing listing rules requiring a company conducting a reverse stock split to notify Nasdaq about certain details of the reverse stock split at least five business days (no later than 12:00 p.m. ET) prior to the anticipated market effective date, and to make public disclosure about the reverse stock split at least two business days (no later than 12:00 p.m. ET) prior to the anticipated market effective date.

DELAWARE GENERAL CORPORATION LAW AMENDMENTS[39]

On August 1, 2023, amendments to Section 242 of the Delaware General Corporation Law went into effect. Among other things, the amendments:

- eliminate the stockholder approval requirement for amendments to a Delaware corporation's certificate of incorporation to effect forward stock splits and proportionally increase authorized shares, provided that the corporation only has one class of stock outstanding and such class is not divided into series;
- reduce the stockholder vote threshold required to effect a reverse stock split or to increase or decrease the number of authorized shares of a class (other than in connection with forward stock splits), provided that the corporation is public with a class of securities listed on a national securities exchange;
- simplify the process for ratifying defective corporate acts; and
- establish an insolvency exception for sales of corporate assets.

CALIFORNIA CLIMATE RULES[40]

On September 12, 2023 and September 13, 2023, the California State Senate and State Assembly approved two bills, the "Climate Corporate Data Accountability Act" and "Climate-Related Financial Risk Act," which would require certain companies doing business in California to disclose greenhouse gas ("GHG") emissions and climate-related financial risks, with reporting obligations beginning in 2026.

Specifically, the Climate Corporate Data Accountability Act would require such companies with an annual revenue of over $1 billion to begin publicly disclosing their GHG emissions, with Scopes 1 and 2 GHG emissions to be reported annually starting in 2026 and Scope 3 in 2027. The Climate-Related Financial Risk Act would require companies doing business in California with an annual revenue in excess of $500 million to publicly disclose on its website, on or before January 1, 2026, and biennially thereafter, a report that discloses the company's climate-related financial risks and measures taken to reduce and adapt to such climate-related financial risks.

Governor Gavin Newsom signed the bills into law on October 7, 2023, at which point they became the most extensive set of mandatory climate disclosures in the United States. In his signing statements, however, Governor Newsom expressed concerns about the bills' financial impact and that the bills' timelines may be too abridged and directed continued attention to these matters by regulatory bodies.[41]

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 *In re Xoom Corp. S'holder Litig.*, 2016 WL 4146425 (Del. Ch. Aug. 4, 2016).

3 *See* Report, *Committee on Foreign Investment in the United States Annual Report to Congress, Report Period: CY 2022*, U.S. Department of the Treasury (August 2023), https://home.treasury.gov/system/files/206/CFIUS%20-%20Annual%20Report%20to%20Congress%20CY%202022 _ 0.pdf ("2022 Report").

4 2022 Report at 4, 19.

5 *See* Report, *Committee on Foreign Investment in the United States Annual Report to Congress, Report Period: CY 2021*, U.S. Department of the Treasury (August 2022), https://home.treasury.gov/system/files/206/CFIUS-Public-AnnualReporttoCongressCY2021.pdf ("2021 Report") at 4, 15.

6 2022 Report at 4; 2021 Report at 4.

7 2022 Report at 4; 2021 Report at 4.

8 2022 Report at 19.

9 2021 Report at 15.

10 2022 Report at 19; 2021 Report at 4.

11 2022 Report at 19.

12 2021 Report at 15.

13 88 CFR 54867.

14 88 CFR 54961.

15 *See* Remarks by Assistant Secretary for Investment Security Paul Rosen at the Second Annual CFIUS Conference, U.S. Department of the Treasury (September 2023), https://home.treasury.gov/news/press-releases/jy1732.

16 *See* Cravath, Swaine & Moore LLP, *New Merger Guidelines and Recent Merger-Related FTC and DOJ Announcements* (July 20, 2023), https://www.cravath.com/a/web/5ogProAXRw2Yvz4W9DKW8w/new-merger-guidelines-and-recent-merger-related-ftc-and-doj-announcements.pdf.

17 Speech, *Assistant Attorney General Jonathan Kanter Delivers Remarks at the Fordham Competition Law Institute's International Antitrust Law and Policy Conference*, FTC (September 22, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-fordham-competition-law# _ ednref17.

18 Press Release, *FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices*, FTC (September 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices.

19 *Id. See also* https://www.ftc.gov/system/files/ftc _ gov/pdf/23-mou-146 _ oasp _ and _ ftc _ mou _ final _ signed.pdf.

20 Press Release, *FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices*, FTC (September 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices.

21 Press Release, *Statement Regarding Termination of CooperCompanies' Attempted Acquisition of Cook Medical's Reproductive Health Business*, FTC (August 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/08/statement-regarding-termination-coopercompanies-attempted-acquisition-cook-medicals-reproductive.

22 Press Release, *FTC Secures Settlement with ICE and Black Knight Resolving Antitrust Concerns in Mortgage Technology Deal*, FTC (August 31, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-secures-settlement-ice-black-knight-resolving-antitrust-concerns-mortgage-technology-deal.

23 Bryan Koenig, *FTC OKs Deal Permitting NYSE Owner, Black Knight Merger*, Law360 (August 31, 2023, 8:02 p.m.), https://www.law360.com/articles/1717148.

24 Press Release, *Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition*, FTC (September 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

25 *Id.*

26 Press Release, *FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas*, FTC (September 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

27 Press Release, *FTC Approves Final Order to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal*, FTC (October 10, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-approves-final-order-prevent-interlocking-directorate-arrangement-anticompetitive-information?utm _ source=govdelivery ("FTC Press Release October 10, 2023").

28 Press Release, *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya In the Matter of EQT Corporation Commission File No. 221-0212*, FTC (August 16, 2023), https://www.ftc.gov/system/files/ftc _ gov/pdf/2210212eqtqepkhanstatement.pdf.

29 FTC Press Release October 10, 2023, at 31.

30 Press Release, *FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal*, FTC (August 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt.

31 All data regarding activism is sourced from FactSet and publicly available data and sources. Market data is as of November 7, 2023. All data is for campaigns conducted globally by activists at companies with market capitalizations greater than or equal to $500 million at the time of the campaign announcement.

32 Press Release, *SEC Adopts Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies, SEC* (July 26, 2023), https://www.sec.gov/news/press-release/2023-139.

33 Cravath, Swaine & Moore LLP, *SEC Adopts Cybersecurity Disclosure Rules for Public Companies* (August 1, 2023), https://www.cravath.com/a/web/xxpuiGVeEscjTxw6AoBMo6/82Prwe/sec-adopts-cybersecurity-disclosure-rules-for-public-companies.pdf.

34 Release Nos. 33-11216; 34-97989, *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure* (July 26, 2023), https://www.sec.gov/files/rules/final/2023/33-11216.pdf.

35 *Id.*

36 *Id.*

37 Sample Letter to Companies Regarding China-Specific Disclosures, SEC (July 2023), https://www.sec.gov/corpfin/sample-letter-companies-regarding-china-specific-disclosures.

38 Nasdaq Stock Market, Proposed Listing Rule Change (July 28, 2023), https://www.sec.gov/files/rules/sro/nasdaq/2023/34-98014.pdf.

39 Delaware Senate Bill 114, *An Act To Amend Title 8 of the Delaware Code Relating to the General Corporation Law*, 152nd General Assembly (2023), https://legis.delaware.gov/BillDetail?LegislationId=130325.

40 California Senate Bill 253, *Climate Corporate Data Accountability Act* (2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill _ id=202320240SB253; California Senate Bill 261, *Greenhouse gases: climate-related financial risk* (2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill _ id=202320240SB261.

41 Cravath, Swaine & Moore LLP, *California Legislature Passes and Governor Newsom Signs Landmark California Climate Bills* (October 9, 2023), https://www.cravath.com/news/california-legislature-passes-and-governor-newsom-signs-landmark-california-climate-bills.html.

Cravath, Swaine & Moore LLP

NEW YORK

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
T+1-212-474-1000
F+1-212-474-3700

LONDON

CityPoint
One Ropemaker Street
London EC2Y 9HR
T+44-20-7453-1000
F+44-20-7860-1150

WASHINGTON, D.C.

1601 K Street NW
Washington, D.C. 20006-1682
T+1-202-869-7700
F+1-202-869-7600

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