Cravath Quarterly Review
M&A, Activism and Corporate Governance

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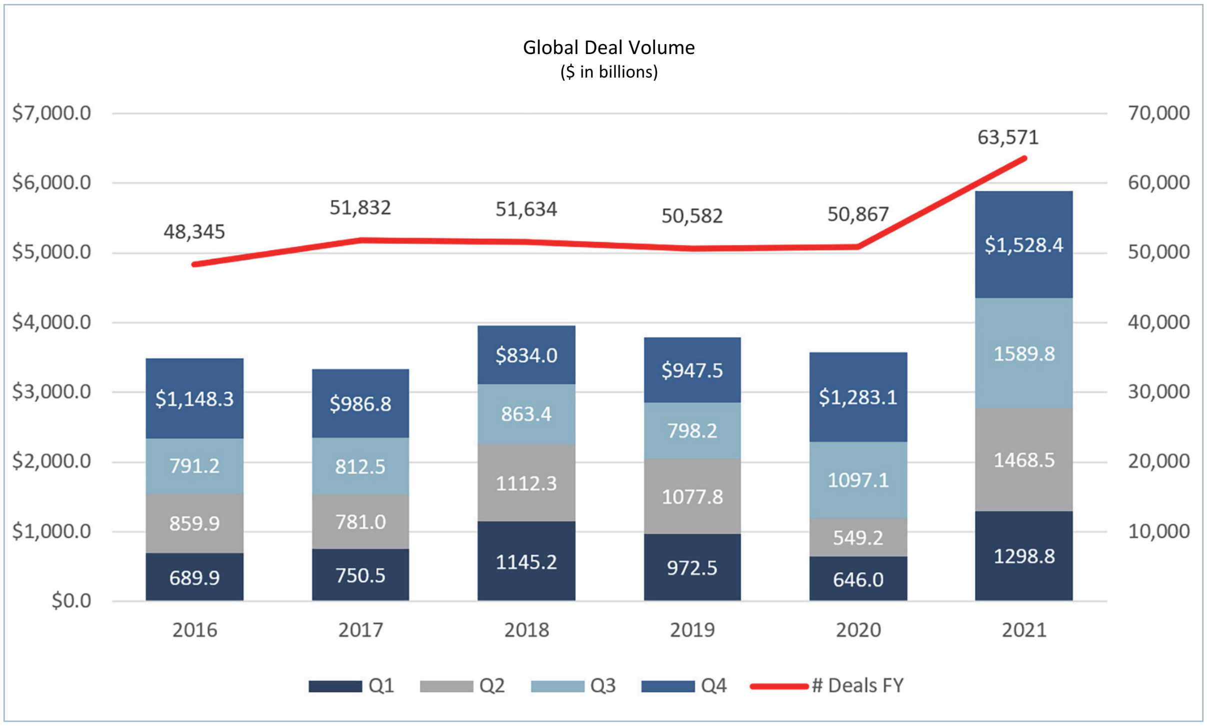
Q4 2021

Mergers & Acquisitions

TRENDS[1]



Source: Refinitiv, An LSEG Business.

2021: A Record Year for M&A

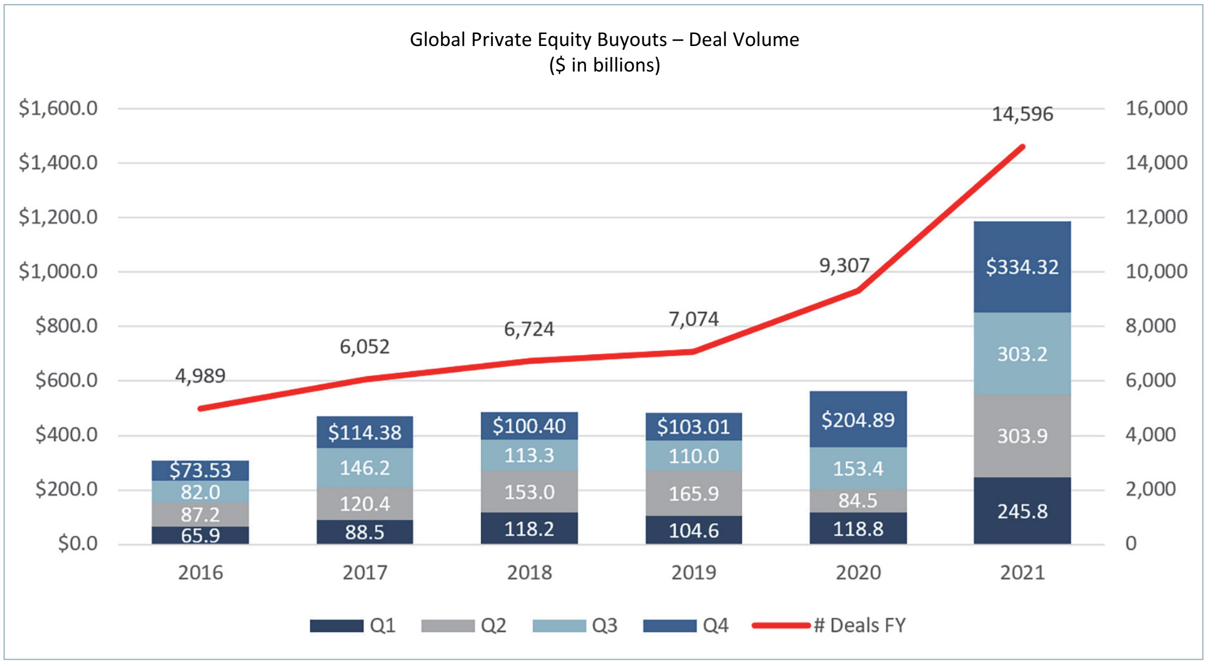
In 2021, global M&A activity totaled $5.9 trillion, an increase of ~64% compared with 2020 and the strongest annual period for M&A on record.[2] With $1.5 trillion in deals, Q4 2021 marked the sixth consecutive quarter to surpass $1 trillion in deal volume and ranked as the second largest quarter for global M&A on record. There were over 63,000 deals announced in 2021, an all-time high and an increase of ~24% compared to 2020.

The increase in deal volume and deal count in 2021 also saw an increase in deal size. In 2021, the total value of deals between $1 billion and $5 billion reached $1.9 trillion, an increase of ~115% compared to 2020 and an all-time high. 2021 saw a record 55 deals greater than $10 billion, totaling $1.1 trillion in value, a ~30% increase compared to 2020 and the highest period for deals of that size, by value, in two years.

Private-equity buyouts, which accounted for ~20% of M&A activity in 2021, reached $1.2 trillion in deal value, more than doubling 2020 levels. Over 14,500 private equity-backed deals were announced in 2021, an increase of ~56% compared to 2020. In 2021, special purpose acquisition vehicles ("SPACs") announced 335 de-SPAC transactions totaling $598.8 billion, or ~10% of total global M&A deal value.

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

[2] Refinitiv began keeping records in 1980.

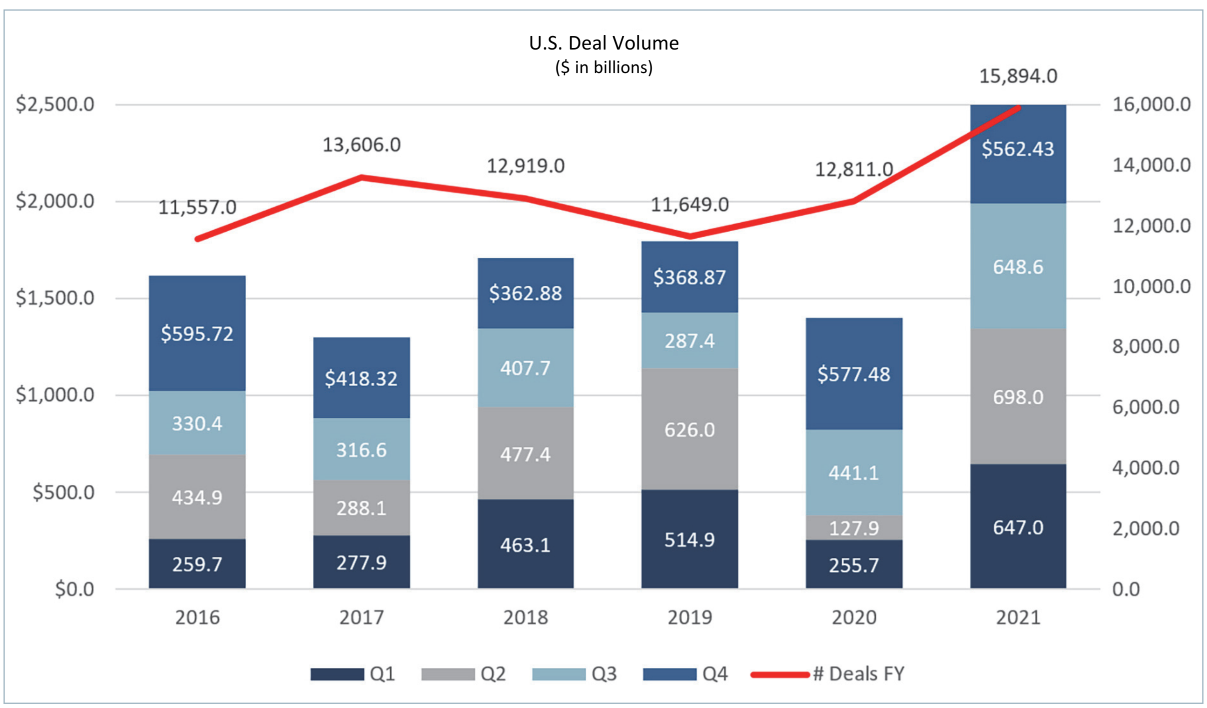


Source: Refinitiv, An LSEG Business.

Deal-Making At Record Levels Across All Regions

M&A activity for U.S. targets amounted to $2.6 trillion in 2021, an increase of ~82% compared to 2020 and the strongest annual period for U.S. deal-making on record. In 2021, U.S. M&A accounted for ~44% of overall deal-making worldwide, an increase from ~39% compared to 2020.

Deal activity was strong globally. M&A activity for European targets totaled $1.4 trillion in 2021, an increase of ~46% compared to 2020 and the highest in 14 years. In the Asia Pacific region, deal making totaled $1.3 trillion in 2021, a ~48% increase compared to 2020 and an all-time high. Similarly, in 2021, M&A activity in Australia reached a record $243.5 billion in announced deals, a three-fold increase from 2020 levels.

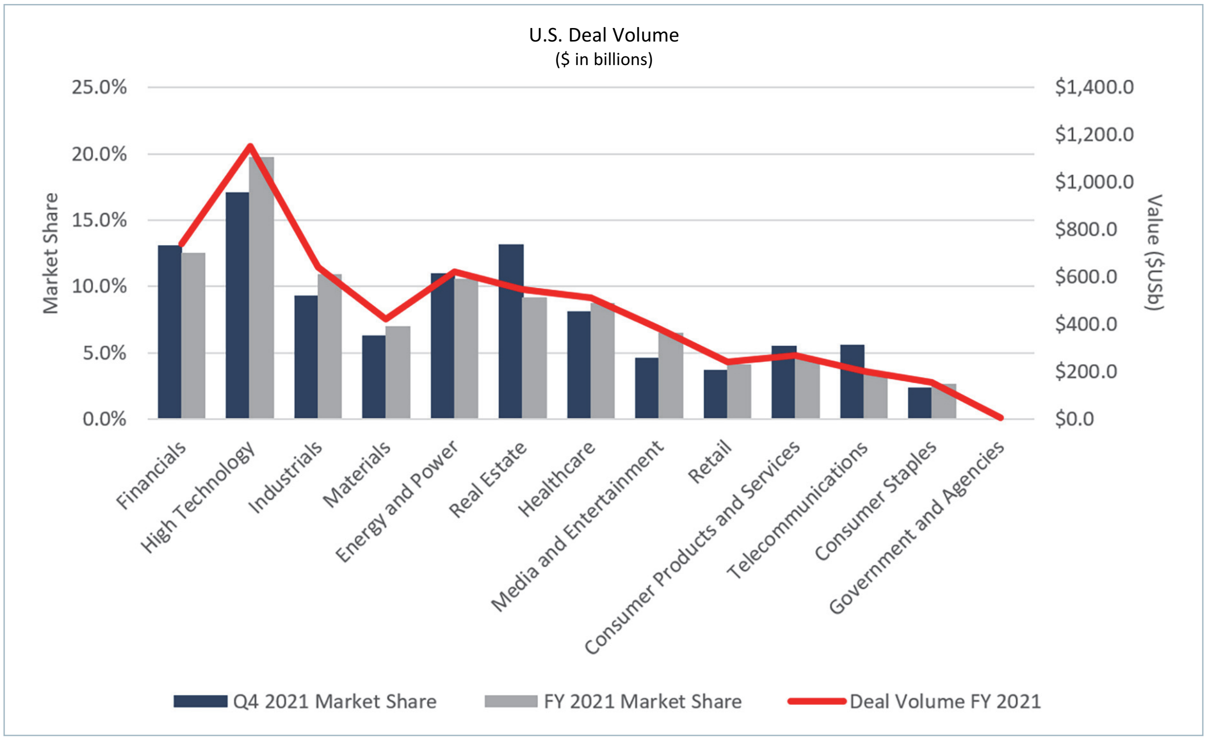


Source: Refinitiv, An LSEG Business.

All-Time Record for Tech M&A and Cross-Border Deals

M&A in the technology sector reached a record $1.1 trillion in 2021, representing an increase of ~71% compared to 2020 levels and accounting for ~20% of overall deal value. Moreover, the number of technology deals increased ~34% compared to 2020 levels. The financial and industrials sectors also saw increased deal making in 2021, with M&A in the financial sector accounting for ~13% of overall M&A, up ~59% from the share of overall M&A in 2020, and deals in the industrials sector accounting for ~11% of activity, a ~56% increase from the share of overall M&A in 2020.

2021 was also the strongest annual period for cross-border M&A on record, with $2.1 trillion in total activity, a ~68% increase compared to 2020. The technology, financials and industrials sectors collectively accounted for ~39% of cross-border deals during in 2021, up from ~38% in 2020.



Source: Refinitiv, An LSEG Business.

Deal Activity in the Financial Services Sector Remains Strong[3]

Global M&A activity in the financial services sector remained strong through 2021, and bank M&A hit record highs, although a number of deals announced in 2021 had yet to close as of year-end. Globally completed M&A deals in the financial services sector totaled over $554 billion in 2021, a ~7.9% increase from 2020, with over $456 billion of pending deals as of year-end. The value of completed global M&A activity in the bank sector slowed in 2021 with approximately $25.5 billion of deals, a more than ~73% decrease compared to 2020. However, as of December 31, 2021, there were around 152 deals totaling over $73 billion that had been announced but had not yet closed. In the United States, M&A activity in financial services also rose, totaling over $284 billion for 2021, a ~38.7% increase from 2020. As of December 31, 2021, there were 691 deals pending, totaling over $194 billion. As with global bank M&A activity, U.S. bank M&A activity also fell in 2021, with approximately $11.1 billion completed deals, a ~54% drop compared to 2020. However, there were around 82 deals totaling approximately $44.6 billion that had been announced in 2021 but that had not closed as of year-end.

[3] Data from Bloomberg.

LEGAL & REGULATORY DEVELOPMENTS

Cases

Q4 2021 featured a number of notable Delaware decisions regarding M&A contractual disputes and related matters.

Rosenbaum v. CytoDyn Inc., C.A. No. 2021-0728-JRS (Del. Ch. Oct. 13, 2021).

In this post-trial decision, the Delaware Court of Chancery refused to enjoin the decision by the CytoDyn Inc. ("CytoDyn") board of directors to exclude stockholder nominees from being considered at its annual meeting based on the failure of the stockholders' notice to comply with the advance notice provision in CytoDyn's bylaws. The Court of Chancery concluded that the CytoDyn board did not engage in manipulative or inequitable conduct.

On June 30, 2021, the plaintiffs, a group of dissident CytoDyn stockholders, sent notice of their proposed slate of candidates for election to CytoDyn's board (the "Nomination Notice"), which was received the day before the deadline under the advance notice provision of CytoDyn's bylaws. However, the Nomination Notice neglected to include certain information, including the supporting stockholders' names and a potential conflict of interest involving one of the plaintiffs. On July 30, 2021, CytoDyn sent a letter to the plaintiffs, rejecting their Nomination Notice and identifying several deficiencies. The plaintiffs then sent a response letter to CytoDyn on August, 11, 2021 (the "Response Letter"), which included information intended to cure any deficiencies in its Nomination Notice. The CytoDyn board also rejected the Response Letter as deficient, and declared that the plaintiffs had no right to nominate any candidates for election as directors. The plaintiffs filed suit, seeking a declaration that CytoDyn wrongfully rejected their Nomination Notice and a mandatory injunction compelling CytoDyn to allow the plaintiffs' nominees to stand for election.

In finding for the CytoDyn board, the Court of Chancery first affirmed that CytoDyn's advance notice bylaws "serve an indisputably legitimate purpose", were adopted on a "clear day" and were reasonable on their face since they required disclosure of vitally important information. The Court of Chancery noted that since CytoDyn's bylaws did not provide an express process by which stockholders could cure a deficient notice, the plaintiffs were "obliged to submit a compliant notice" given they "waited until the last minute". The Court of Chancery held that the plaintiffs instead had played "fast and loose" with respect to the Nomination Notice, omitting material information regarding supporting stockholders and conflicts of interest, and left "no time to fix the deficient disclosures". Ultimately, the Court of Chancery's decision was based on both the "fundamental nature of the omissions" in the Nomination Notice as well as the "eve of" timing of its submission.

The Court of Chancery also rejected the plaintiffs' argument that the enhanced scrutiny standard under *Blasius*[4] applied—which applies to a court's review of board actions taken for the primary purpose of interfering with stockholder voting rights—because there was no evidence of "manipulative conduct" by the board. The Court of Chancery noted that if the plaintiffs had submitted their Nomination Notice further in advance, they might have had a stronger case that the board's "prolonged silence" was evidence of "manipulative conduct". The Court of Chancery did not, however, automatically apply the business judgment rule, instead invoking *Schnell*[5] in observing that equitable relief might be appropriate if the plaintiffs show that an advance notice provision, as applied in the *particular circumstances*, denied stockholders a fair opportunity to nominate director candidates.

In re MultiPlan Corp. Stockholders Litigation, C.A. No. 2021-0300-LWW (Del. Ch. Jan. 3, 2022).

In this pleading stage decision, the Delaware Court of Chancery applied the entire fairness standard of review and found the plaintiffs, investors in Churchill Capital Corp. III ("Churchill"), a SPAC, had pleaded viable claims for breaches of the duty of loyalty as a result of both a misleading proxy statement as well as the conflicts involved in the transaction structure. This is the first case in which the Court of Chancery considered the application of Delaware's fiduciary duty doctrines and the appropriate standard of judicial review in the SPAC context.

After going public in February 2020 and raising $1.1 billion from investors at $10 per share, Churchill selected MultiPlan Corp. ("MultiPlan") as its merger target. In October 2020, a month after the merger closed, a report was released showing that UnitedHealth Group

[4] *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660 (Del. Ch. 1988).

[5] *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971).

Inc. ("UnitedHealth"), which was responsible for 35% of MultiPlan's revenues, had developed its own in-house data analytics platform that would eliminate its need for, and would compete with, MultiPlan's services. The proxy statement informing Churchill shareholders of the merger with Multiplan disclosed MultiPlan's reliance on a single customer as a major source of revenue but did not disclose the identity of UnitedHealth or that UnitedHealth was already in the process of creating its own competitor platform. In response to the report, the combined company's stock declined from $11.09 when the merger closed to $6.27 per share.

Investors in Churchill filed suit asserting that Churchill's directors, officers and controlling stockholders breached their fiduciary duties. 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, and contained misleading information with respect to the "extensive due diligence" performed by the Churchill board. The plaintiffs also claimed the merger merits entire fairness review on the grounds that the "massive windfalls" available to the SPAC's sponsor and members of the SPAC's board created a conflict of interest and the de-SPAC merger constituted a conflicted controller transaction. The plaintiffs asserted that the SPAC board was not independent because the directors were self-interested, had an equity interest in founder shares and were "beholden" to Michael Klein, the SPAC's founder and sponsor, lacking the incentive or power to act independently.

In denying the defendants' motion to dismiss the charges, the Court of Chancery found that Klein had a "special benefit" not shared with the public shareholders arising from the "(non-)value of his stock and warrants if no business combination resulted." Churchill's public stockholders would have received $10.04 per share if the SPAC failed to go through with a merger, but the sponsor would have received nothing. Therefore, the merger was valuable to the sponsor even if the shares of the post-merger company were worth less than $10.04, though for the public shareholders the merger was valuable only if the shares of the post-merger company were worth more than $10.04. As such, the Court of Chancery concluded that the de-SPAC transaction was a conflicted controller transaction, and, despite the SPAC shareholders' redemption rights in connection with the transaction, entire fairness was the appropriate standard of review. Separately justifying the application of entire fairness review, the Court of Chancery further found that a majority of the SPAC's board was conflicted because they were self-interested with respect to the transaction (based on their economic interests in founder shares in the SPAC) and not independent from Klein, given the scope of their economic, personal and employment relationships with him and vehicles controlled by him.

The Court of Chancery concluded that the failure to disclose that a significant MultiPlan customer was in the process of developing its own competing solution critically deprived the SPAC's public shareholders of the opportunity to make a fully informed decision as to the exercise of their redemption rights. The Court of Chancery, however, left open the possibility that it might have reached a different outcome had the disclosure been adequate and the plaintiffs' allegations rested solely on the premise that the fiduciaries were necessarily interested given the SPAC structure.

AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC, No. 71, 2020 (Del. Dec. 8, 2021).

In this decision, the Delaware Supreme Court upheld *en banc* the Delaware Court of Chancery's ruling that the COVID-19 pandemic did not constitute a "material adverse effect" ("MAE") in connection with the sale of 15 hotel properties from AB Stable VIII LLC ("AB Stable") to MAPS Hotel and Resorts One LLC ("MAPS"). As discussed in our Q4 2020 newsletter, after signing the deal, AB Stable made significant changes to its hotel operations in response to the pandemic without securing MAPS' consent, and various issues arose related to fraudulent deeds covering some of the hotel properties, prompting MAPS to call off the deal. After a trial, the Court of Chancery concluded that AB Stable had breached both the sale agreement's ordinary course covenant and the condition requiring title insurance for the hotel properties.

On appeal, the Supreme Court rejected AB Stable's argument that the ordinary course covenant did not preclude it from taking reasonable, industry-standard steps in response to the pandemic. The Supreme Court explained that while ordinary course covenants protect against a seller's misconduct between signing and closing, "the covenant in general prevents sellers from taking any actions that materially change the nature or quality of the business that is being purchased, whether or not those changes were related to misconduct." The Supreme Court also noted that the parties did not choose the actions of industry participants or "commercially reasonable" as the yardstick to measure the seller's actions, and that the condition was not drafted to only require AB Stable to use commercially reasonable efforts to operate in the ordinary course. According to the Supreme Court, the covenant's requirement that

AB Stable operate *only* in the ordinary course of business *with consistent past practice* in all material respects meant that its compliance is measured by AB Stable's operating history, not that of the industry in which it operates.

The Supreme Court also rejected AB Stable's argument that business changes in response to the pandemic could not violate the ordinary course covenant because the MAE definition specifically allocates pandemic risks to MAPS and, therefore, considering such actions a violation of the ordinary course covenant would improperly shift those risks onto AB Stable. The Supreme Court explained that the parties could have, but did not, restrict a breach of the ordinary course covenant to events that would qualify as an MAE, and stressed the different purposes of an ordinary course covenant and a MAE provision. The Supreme Court did not reach the issue of whether AB Stable also breached the title insurance condition.

The Williams Companies, Inc. v. Energy Transfer LP, C.A. No. 12168 (Del. Ch. Dec. 29, 2021).

In this post-trial decision, the Delaware Court of Chancery held that, at the time Energy Transfer LP ("ETE") terminated its merger with The Williams Companies ("Williams"), ETE had breached its ordinary course covenant and a number of interim operating covenants by issuing preferred convertible units in an offering that transferred wealth to ETE insiders (the "Preferred Offering"). The Court of Chancery ordered ETE to pay Williams a termination fee of $410 million, plus interest and fees, in accordance with the merger agreement.

ETE and Williams entered into a merger agreement in September 2015. Five months later, following a turn in the energy market, ETE completed the Preferred Offering without Williams' consent. ETE later terminated the transaction based on the failure of a closing condition related to the tax treatment of the transaction. Williams brought suit to force ETE to complete the merger, arguing that the company intentionally tried to undermine the deal.

The Court of Chancery considered two principal issues: first, whether ETE's violations of its interim operating covenants were excused under the "in all material respects" qualifier, and second, whether an exception to the interim operating covenants in ETE's disclosure letter would have nonetheless permitted the Preferred Offering.

First, the Court of Chancery pointed to recent decisions that have interpreted the qualifier "in all material respects" to be less onerous for the party asserting breach than the common law material breach standard. Applying that standard, the Court of Chancery held that the Preferred Offering was "hardly the type of picayune issue immaterial to a [m]erger" because it destroyed economic equivalence between the shares that Williams shareholders would receive in the merger and the units held by existing ETE unitholders.

The Court of Chancery then addressed ETE's argument that the Preferred Offering was permitted because ETE's disclosure letter allowed ETE to "make issuances of equity securities with a value of up to $1 billion in the aggregate" as an exception to the interim operating covenant prohibiting equity issuances by ETE. ETE argued that this exception applied to all of ETE's interim operating covenants, based on qualifying language in the disclosure letter providing that disclosure in one section would apply to others if "reasonably apparent" that such disclosure is relevant to another section. The Court of Chancery rejected this argument, holding that this common provision instead "excuses actions that would otherwise breach covenants where facially necessary to permit the activity provided by the provision—that is, where absent cross-sectional applicability an inconsistency in contractual terms would result". In finding for Williams, the Court of Chancery held that while both parties had a reasonable *argument* for cross-applicability and even though certain equity issuances were permitted under the exception in the disclosure letter, evidence clearly demonstrated that the parties' *intent* was for such exception to be limited and not to apply to the covenants which ETE violated, which were clearly in tension with the Preferred Offering.

Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP, C.A. No. 2018-0372-JTL (Del. Ch. Nov. 12, 2021).

In this post-trial opinion, the Delaware Court of Chancery ordered Loews Corporation ("Loews") to pay over $690 million in damages in connection with Loews' $1.56 billion take-private of Boardwalk Pipeline Partners ("Boardwalk"), finding that Loews breached Boardwalk's Master Limited Partnership ("MLP") agreement and engaged in willful misconduct that left it unprotected from the exculpatory provisions therein.

In 2005, Loews took Boardwalk public as a MLP after the Federal Energy Regulatory Commission ("FERC") implemented a regulatory policy that made MLPs an attractive investment vehicle for pipeline companies. Under Boardwalk's MLP agreement, a take-private of Boardwalk by Loews would be permitted if certain regulatory changes occurred that were reasonably likely to have a material adverse effect ("MAE") on Boardwalk's rates. However, before taking Boardwalk private, the MLP agreement required that Loews receive an opinion of legal counsel as to the MAE (the "Opinion Condition") and that Boardwalk's general partner deem the opinion acceptable (the "Acceptability Condition").

In 2018, FERC issued new tax policy guidance regarding MLPs that decreased the attractiveness of MLPs as an investment vehicle for pipeline companies, and the trading price of Boardwalk's common units subsequently declined. Loews then obtained an opinion from a law firm (the "Law Firm") to the effect that the FERC's proposals were reasonably likely to have a MAE on Boardwalk's rates. Boardwalk's general partner, which Loews controlled, deemed the Opinion acceptable, and Loews took Boardwalk private. Thereafter, holders of Boardwalk limited partnership units brought suit, accusing Loews of artificially driving down the share price of Boardwalk through well-timed public disclosures in order to take Boardwalk private.

The Court of Chancery held that the Opinion Condition was not satisfied because the Opinion had been "contrived" to reach the result that Loews wanted, which did not reflect a good faith effort to "discern the actual facts and apply professional judgment." The Court of Chancery criticized the Law Firm for improperly interpreting the Opinion Condition by opining in the face of significant uncertainty on key facts. The Court of Chancery noted that Loews opportunistically effected the take-private during a period of "maximum uncertainty" for the partnership and appeared to try to conceal its knowledge about how the uncertainty likely would be resolved.

The Court of Chancery further held that the Acceptability Condition was not satisfied. The condition did not specify whether the Boardwalk general partner's sole member (a Loews subsidiary, with a board comprised entirely on Loews appointees) or the Boardwalk general partner's board (with outside directors holding half the seats) should determine the acceptability of the Opinion. The Court of Chancery held that ambiguity in the MLP agreement had to be resolved in favor of the limited partners' interests because Loews had imposed and drafted the Acceptability Condition. The Court of Chancery also held the exculpation provision in the partnership agreement, which would generally protect the general partner from liability except in case of bad faith, fraud or willful misconduct, did not apply because its efforts to obtain the "sham opinion" constituted willful misconduct.

Golden Rule Financial Corporation v. Shareholder Representative Services LLC, No. 61, 2021 (Del. Dec. 3, 2021).

In this decision, the Delaware Supreme Court upheld the Delaware Court of Chancery's ruling denying a request by Golden Rule Financial Corp. ("Golden Rule") to continue using an incorrect application of an accounting standard for the purposes of calculating a purchase price adjustment, finding that a correct calculation of the seller's tangible net worth should take priority over a consistent use of a mistaken calculation.

On June 2, 2019, Golden Rule and Shareholder Representative Services LLC ("SRS"), representative of the former stockholders of USHealth Group Inc. ("USHealth"), entered into a purchase agreement in which Golden Rule would acquire USHealth. The purchase agreement included a mechanism for the purchase price to be adjusted upward or downward after closing based on USHealth's tangible net worth, to be calculated using the accounting standard ASC 606. The purchase agreement also stated that the purchase price adjustment would be prepared using "consistently applied" accounting principles. Golden Rule discovered that USHealth had incorrectly applied ASC 606 in preparation of the initial closing statement and that, using the correct application of the standard, the final purchase price would increase by several million dollars. Golden Rule accepted USHealth's initial calculation of the ASC 606 amount but informed SRS of the error in the initial closing statement. SRS asked Golden Rule to pay the higher price for USHealth and engaged an independent accounting firm to determine the final amount. Golden Rule brought suit, asking the Court of Chancery to find that the purchase agreement required a consistent, albeit inaccurate, application of ASC 606. The Court of Chancery disagreed with Golden Rule and the Supreme Court affirmed.

The Supreme Court explained that endorsing an incorrect application of ASC 606 would contravene "the parties' express agreement to apply ASC 606." The Supreme Court pointed to the specific references in the purchase agreement to the application of ASC 606, as opposed to the more general reference to the consistent application of accounting principles. The Supreme Court also rejected Golden Rule's argument that the purchase agreement and "quasi-estoppel" principles required the parties to adhere to the mistaken but consistent method, finding that both the plain language and structure of the agreement showed that the parties' intention was to implement the "correct approach".

***The Williams Cos. Inc. et al. v. Steven Wolosky et al,* No. 139, 2021 (Del. Nov. 3, 2021).**
In this decision, the Delaware Supreme Court upheld without elaboration the Delaware Court of Chancery's strike-down and injunction of a stockholder rights plan (the "Plan") adopted by The Williams Companies ("Williams") in 2020. As discussed in our Q1 2021 newsletter, in a post-trial ruling in February 2021, the Court of Chancery determined that although the Williams' board had conducted a good-faith, reasonable investigation into the Plan and the Plan itself was not coercive or preclusive, adopting the Plan was nonetheless a "disproportionate" response to what the Supreme Court deemed were abstract threats of activism during a time of market uncertainty and low stock price. In reaching its decision, the Court of Chancery specifically criticized the expansive nature of the acting-in-concert provision of the Plan adopted by the Williams board.

Delaware Court of Chancery Retirement
On January 13, 2022, Vice Chancellor Joseph R. Slights III announced his retirement from the Delaware Court of Chancery. Vice Chancellor Slights was sworn into the Court of Chancery bench in March 2016. Before joining the bench, he was a partner in the Delaware firm Morris James LLP, where he practiced corporate and business litigation and chaired the firm's alternative dispute resolution practice group. He had previously served a 12-year term as a Superior Court judge in Delaware.

SPACs

Regulation
On December 9, 2021, Securities and Exchange Commission ("SEC") Chair Gary Gensler delivered a speech at the Healthy Markets Association Conference that elaborated on how the SEC is exploring ways to reduce the risks faced by investors in SPACs.[6] In addition to emphasizing that the SEC would continue to take enforcement action when appropriate, Gensler explained that he has asked the SEC to consider rule-making recommendations in the following areas, among others:

- how to better align the legal treatment of SPACs and their participants with the investor protections provided in other IPOs, with respect to disclosure and marketing practices and obligations of gatekeepers (*e.g.*, auditors, brokers and underwriters);
- how investors might be better informed about the fees, projections, dilution and conflicts that may exist during all stages of SPACs, and how investors can receive those disclosures at the time they make their investment decisions;
- how to guard against improper conditioning of the market upon announcement of a SPAC transaction, such as by requiring more complete information at that time; and
- how to better align incentives between gatekeepers and investors, and how to address the status of gatekeepers' liability obligations.

Enforcement
On December 21, 2021, Nikola Corporation agreed to pay $125 million to the SEC to settle charges that it defrauded investors by misleading them about its products, technical advancements and commercial prospects.[7] The company, which did not admit or deny wrongdoing, also agreed to continue cooperating with the SEC's ongoing litigation and investigation into Trevor Milton, the company's founder and former CEO. According to the SEC's order, Milton made statements in tweets and media appearances that falsely gave investors the impression that the company had reached certain product and technological milestones, though the company had not yet produced a single commercial product. The order also establishes a fund to return the penalty proceeds to victim investors.

Legislation
On November 9, 2021, two pieces of legislation were introduced in the House of Representatives regarding SPACs.[8] The Holding SPACs Accountable Act of 2021 would amend the Securities Act of 1933 (the "Securities Act") and the Exchange Act of 1934 (the "Exchange Act") to exclude all SPACs from the safe harbor for

[6] Speech, Gary Gensler, *Remarks Before the Healthy Markets Association Conference* (Dec. 9, 2021), https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921.

[7] Press Release, *Nikola Corporation to Pay $125 Million to Resolve Fraud Charges*, No. 2021-267, SEC (Dec. 21, 2021), https://www.sec.gov/news/press-release/2021-267.

[8] Holding SPACs Accountable Act of 2021, H.R. 5910, 117th Cong. (2021); Protecting Investors from Excessive SPACs Fees Act of 2021, H.R. 5913, 117th Cong. (2021).

forward-looking statements. Currently, only forward-looking statements made in connection with the offering of securities by a "blank check company" are excluded from the safe harbor. The Securities Act defines a blank check company as "a development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person" that issues "penny stock." The proposed legislation would replace the term "blank check company" with "a development stage company that has no specific business plan or purpose or has indicated that its business plan is to acquire or merge with an unidentified company, entity or person." The Protecting Investors from Excessive SPACs Fees Act of 2021 would amend the Investment Advisers Act of 1940 and the Exchange Act to prevent investment advisers, brokers and registered representatives of brokers from recommending SPAC securities to a non-accredited investor unless the SPAC's promote or other economic compensation is less than 5% or the SPAC makes certain disclosures mandated by the SEC. The legislation would require the SEC to promulgate a rule requiring the disclosure by SPACs of compensation arrangements, such as a promote, granted to the SPAC sponsor when the arrangement would lead to dilutive effects affecting the SPAC's investors.

Antitrust

FTC Policy

On October 25, 2021, the Federal Trade Commission (the "FTC") issued a Statement on Use of Prior Approval Provisions in Merger Orders (the "2021 Prior Approval Policy Statement"), restoring its pre-1995 practice of routinely requiring prior FTC approval of future acquisitions for merging parties that pursue anticompetitive mergers.[9] The 2021 Prior Approval Policy Statement contains three key pronouncements. First, the FTC will "routinely requir[e] merging parties subject to a Commission order to obtain prior approval from the FTC before closing *any* future transaction affecting each relevant market for which a violation was alleged".[10] These prior approval provisions will cover deal activity of the merging parties for a minimum of 10 years. Second, the FTC reserves the right to employ "stronger relief" by imposing prior approval provisions that cover "product and geographic markets beyond just the relevant product and geographic markets affected by the merger".[11] Whether this stronger relief will be employed depends on a set of factors, including the nature of the transaction, the level of market concentration and the degree to which the transaction increases concentration, the degree to which one of the parties pre-merger likely had market power, the parties' history of acquisitiveness and any evidence of anticompetitive market dynamics. Third, the FTC will require buyers of divested assets "to agree to a prior approval for any future sale of the assets they acquire in divestiture orders" for a minimum of 10 years.[12] The FTC already has implemented its 2021 policy in the proposed order imposing strict limits on future acquisitions by DaVita, Inc. following its acquisition of the University of Utah Health's dialysis clinics.[13]

The 2021 Prior Approval Policy Statement follows the FTC's July 2021 decision, discussed in our Q3 2021 newsletter, to rescind its 1995 policy statement that had disposed of the requirement for companies that had previously consummated a merger subject to an FTC consent order to obtain prior FTC approval for any subsequent transaction over a *de minimis* threshold in the same product and geographic market for which a violation was alleged, outside of the merger clearance process under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

Merger Guidelines

On January 18, 2022, the FTC and the Antitrust Division of the U.S. Department of Justice (the "DOJ") launched a joint public inquiry to solicit input on ways to modernize federal merger guidelines to better detect and prevent anticompetitive transactions.[14] The inquiry seeks comments on developments in the modern economy and new evidence of

[9] Press Release, *FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers*, FTC (Oct. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive.

[10] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders at 1, FTC (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[11] *Id.* at 2.

[12] *Id.* at 2-3.

[13] Press Release, *FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah's Dialysis Clinics*, FTC (Oct. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following (DaVita required under the order to received prior approval from the FTC before acquiring any new ownership interest in a dialysis clinic anywhere in Utah for a period of 10 years).

[14] Press Release, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers*, FTC (Jan. 18, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers.

mergers' effects on competition to inform potential revisions to the merger guidelines.

Enforcement

On November 2, 2021, the DOJ filed a civil antitrust lawsuit in federal court to block Penguin Random House's proposed acquisition of Simon & Schuster.[15] The DOJ's complaint alleges that the acquisition would harm authors and result in lower advances by combining two publishers that are often the final bidders on the same books.[16] The case represents the most recent and high-profile example of the DOJ's focus on monopsony power in merger enforcement.[17] Trial is set to begin on August 1, 2022.

On November 23, 2021, the DOJ filed a civil antitrust lawsuit in federal court to block U.S. Sugar Corp.'s acquisition of Imperial Sugar Co.[18] The DOJ's complaint alleges that the acquisition would create a duopoly for sugar sales across the southeastern United States, straining supply chains and resulting in higher prices for sugar and staple food and beverage products.[19]

On December 2, 2021, the FTC filed an administrative action to block U.S. semiconductor chip supplier Nvidia Corp.'s $40 billion acquisition of U.K. chip design provider Arm Ltd.[20] The FTC's complaint alleges that because Arm's technology is a critical input that enables competition between Nvidia and its competitors in several markets, the proposed merger would give Nvidia the ability and incentive to use its control of this technology to undermine its competitors, reducing competition and ultimately resulting in reduced product quality, reduced innovation, higher prices and less choice. An administrative trial is scheduled to begin on August 9, 2022.

Personnel Developments

On November 16, 2021, Jonathan Kanter was confirmed as Assistant Attorney General for the DOJ's 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.

On December 1, 2021, the U.S. Senate Commerce Committee voted 14-14 on advancing President Biden's nominee to be the fifth FTC commissioner, Alvaro Bedoya, to the Senate floor. The deadlock necessitates an extra procedural vote by the full Senate, which will need united Democratic support to confirm Bedoya to the job. Bedoya is the Founding Director of the Center on Privacy and Technology at Georgetown University Law Center, where he is also a visiting professor. In 2016, Bedoya co-authored a comprehensive report on law enforcement face recognition and the implications for privacy, civil liberties and civil rights. He previously served as Chief Counsel of the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law.

CFIUS

Actions Regarding Excepted Countries

In early January, the U.S. Department of the Treasury ("Treasury") took three actions that will be welcome news to investors with close ties to Australia, Canada, New Zealand and the UK.

- First, Treasury published a final rule (the "Final Rule") modifying certain definitions in the regulations of the Committee on Foreign Investment in the United States ("CFIUS") relating to the exception from limited aspects of CFIUS's jurisdiction for foreign investors with close ties to countries identified by CFIUS as "eligible foreign states".[21]
  - Under CFIUS's current regulations, the exception for investors with close ties to eligible foreign states would expire on February 13, 2022, unless CFIUS makes certain determinations regarding the manner in which these countries utilize their own investment screening mechanisms

[15] Press Release, *Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster*, DOJ (Nov. 2, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon.

[16] Complaint, *United States v. Bertelsmann SE & Co.*, No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021).

[17] See, *e.g.*, Press Release, *Department of Justice Antitrust Division and Federal Trade Commission to Hold Workshop on Promoting Competition in Labor Markets*, DOJ (Oct. 27, 2021), https://www.justice.gov/opa/pr/department-justice-antitrust-division-and-federal-trade-commission-hold-workshop-promoting (announcing workshop on competition issues affecting labor markets including labor monopsony).

[18] Press Release, *Justice Department Sues to Block U.S. Sugar's Proposed Acquisition of Imperial Sugar*, DOJ (Nov. 23, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-us-sugar-s-proposed-acquisition-imperial-sugar.

[19] Complaint, *United States v. U.S. Sugar Corp.*, No. 1:21-cv-01644 (D. Del. Nov. 23, 2021).

[20] Press Release, *FTC Sues to Block $40 Billion Semiconductor Chip Merger*, FTC (Dec. 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger.

[21] *Certain Investments in the United States by Foreign Persons and Certain Transactions by Foreign Persons Involving Real Estate in the United States*, 87 Fed. Reg. 731 (Jan. 6, 2022) (to be codified at 31 C.F.R. pts. 800, 802).

and coordinate with the United States on investment security matters. The Final Rule, which is effective on February 4, 2022, maintains the current exception for these investors until February 13, 2023, on which date the exceptions would expire unless CFIUS has made the requisite determinations. The Treasury Department noted that the extension is "desirable given ongoing changes to foreign investment review regimes."[22]

- Second, Treasury announced CFIUS's decision to add New Zealand to the list of eligible foreign states based on, among other things, "its intelligence-sharing relationship with the United States and its collective defense arrangement and cooperation with the United States".[23] The addition of New Zealand—which joins Australia, Canada and the UK as eligible foreign states—results in the entire "Five Eyes" alliance enjoying special status under the CFIUS regulations.

- Finally, Treasury announced CFIUS's determination that each of Australia and Canada has established and is effectively utilizing its own investment screening mechanism and coordinating with the United States on matters relating to investment security. The fact that CFIUS did not make such a determination with respect to the UK suggests that the U.S. Government will be watching closely how Her Majesty's Government implements the UK National Security and Investment Act that entered into force on January 4, 2022.

As a result of these three actions, investors with close ties to New Zealand and the UK will be excepted from limited aspects of CFIUS's jurisdiction until at least February 13, 2023, and investors with close ties to Australia and Canada will benefit from such exception indefinitely, in each case absent further CFIUS action.

Magnachip Semiconductor Corporation

On December 13, 2021, Magnachip Semiconductor Corporation, a Delaware corporation listed on the New York Stock Exchange ("Magnachip"), and investment vehicles established by Wise Road Capital LTD, a China-based private equity fund ("Wise Road"), announced that they are withdrawing the CFIUS filing relating to their proposed $1.4 billion merger and terminating their previously announced definitive merger agreement.[24]

The parties indicated that the withdrawal of the CFIUS notice and the termination of the transaction resulted from their inability, "despite months of effort, to obtain CFIUS's approval" for the proposed merger.

As discussed in our Q3 2021 newsletter, Magnachip and Wise Road announced the proposed transaction in March 2021, and Magnachip—which conducts all of its semiconductor manufacturing and R&D activities in South Korea—initially indicated that it did not believe any U.S. regulatory approvals were required. The parties did not submit the transaction for CFIUS approval until CFIUS requested, in May 2021, that the transaction undergo a formal review.

The transaction is a reminder to market participants that: (1) if CFIUS has an unresolved national security concern with a transaction within its jurisdiction, CFIUS will seek to prohibit that transaction even if the target has only a limited nexus to the United States; and (2) CFIUS continues to devote significant resources to finding and addressing "non-notified" transactions of potential concern, including in the period between signing and closing.

Bank M&A

The political and regulatory environment for financial services M&A, and M&A for large banking organizations in particular, may create some headwinds leading into 2022. For example, the DOJ Antitrust Division in December 2021 announced it was seeking additional public comments on whether and how the division should revise the 1995 Bank Merger Competitive Review Guidelines.[25] In the announcement, the DOJ said, "The division will use additional comments to ensure that the Banking Guidelines reflect current economic realities and empirical learning, ensure Americans have choices among financial institutions, and guard against the accumulation of market power."

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[22] *Fact Sheet: Final Regulations Modifying the Definitions of Excepted Foreign State and Excepted Real Estate Foreign State and Related Actions,* U.S. Dep't of Treasury (Jan. 5, 2022).

[23] *Id.*

[24] Press Release, *Magnachip and Wise Road Capital Announce Withdrawal of CFIUS Filing and Mutual Termination of Merger Agreement,* Magnachip Semiconductor Corporation (Dec. 13, 2021).

[25] Press Release, *Antitrust Division Seeks Additional Public Comments on Bank Merger Competitive Analysis*, U.S. Dep't of Just. (Dec. 17, 2021), https://www.justice.gov/opa/pr/antitrust-division-seeks-additional-public-comments-bank-merger-competitive-analysis.

Given recent public events, the Federal Deposit Insurance Corporation ("FDIC") appears likely to initiate a public review of bank merger standards, and the Office of the Comptroller of the Currency ("OCC") may do so as well. Specifically, shortly before the DOJ's December announcement, two members of the FDIC board of directors, Consumer Financial Protection Bureau ("CFPB") Director Rohit Chopra and former FDIC Chairman Martin Gruenberg, announced a review of the FDIC's bank merger framework.[26] As the vote was not approved by FDIC's current Chairman (and its sole Republican member), Jelena McWilliams, and did not otherwise go through the agency's typical approval process, the current status of the FDIC's review is not clear.[27] After the vote, however, Chairman McWilliams announced that she will be resigning from the post effective February 4, 2022, and it is expected that Mr. Gruenberg will serve as acting chairman until a new chairman is confirmed by the Senate.[28] Moreover, the acting head of the OCC and FDIC board member, Michael Hsu, also voted for the review and explained that a review of the bank merger framework, which is also administered by the OCC, was important and timely.[29]

Activism[30]

In January 2022, Lazard released its *2021 Review of Shareholder Activism*, which offers key observations regarding activist activity levels and shareholder engagement in 2021.

Key findings/insights from the report include:

- 2021 culminated in a very active Q4, with 50 new campaigns launched, although the overall number of campaigns in 2021 was in line with 2020's slower pace relative to prior years.
- The number of U.S. campaigns increased ~14% year-over-year and U.S. activity represented ~55% of global activity (up from 45% in 2020).
- After a record 2020, Europe registered 50 new campaigns in 2021, down ~12% year-over-year but finishing strong in Q4 with 16 new campaigns.
- M&A has persisted as a primary campaign thesis for 2021, with opposition to an announced transaction being the most common theme.
- Although the 89 board seats secured by activists was lower than in previous years, 50 seats still remain "in play" heading into 2022, including a number of notable potential contests.
- The SEC's adoption of a universal proxy rule (discussed further below) is poised to lower barriers to entry for nominations from both traditional activists and other constituencies (*e.g.*, ESG activists and current or former employees).

[26] Rohit Chopra, *How Should Regulators Review Bank Mergers?*, CFPB (Dec. 9, 2021), https://www.consumerfinance.gov/about-us/blog/how-should-regulators-review-bank-mergers/

[27] Press Release, *FDIC Statement on CFPB Statement*, FDIC (Dec. 9, 2021), https://www.fdic.gov/news/press-releases/2021/pr21101.html; Jelena McWilliams, *A Hostile Takeover of the FDIC*, Wall Street Journal (Dec. 15, 2021), https://www.wsj.com/articles/hostile-takeover-fdic-board-rohit-chopra-michael-hsu-jelena-mcwilliams-abuse-power-11639432939?mod=opinion_lead_pos6.

[28] Press Release, *FDIC Chairman Jelena McWilliams Announces Her Resignation*, FDIC (Dec. 31, 2021), https://www.fdic.gov/news/press-releases/2021/pr21107.html.

[29] Press Release, *Acting Comptroller Issues Statement on RFI on Bank Mergers*, OCC (Dec. 14, 2021), https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-134.html.

[30] Activism data from Lazard, 2021 Review of Shareholder Activism (Jan. 19, 2022), which includes all data for campaigns conducted globally by activists at companies with market capitalizations greater than $500 million at the time of campaign announcement and select campaigns with market capitalizations less than $500 million at time of announcement included during the COVID-19 pandemic-induced market downturn; companies that are spun off as part of the campaign process are counted separately.

TRENDS

Global Campaign Activity Was Elevated in Q4 Despite Overall Slower Year, and Many Board Seats Are "In Play" Going Into 2022

Q4 2021 saw 50 campaigns initiated globally, up from 29 in Q3 2021 and 39 in Q2 2021. In 2021, 173 campaigns were initiated globally, which is in line with 2020 but below historical averages. Q4 2021 saw a spike in capital deployed in new campaigns, at $13.5 billion, compared to $8.5 billion in Q3 2021, $9.1 billion in Q2 2021 and $10.9 billion in Q1 2021. However, when comparing year-over-year, capital deployed by activists was generally flat, with $42 billion in 2021 and $40 billion in 2020.

While the 89 board seats secured by activists in 2021 was lower than in recent years, 50 seats remain "in play" going into 2022, including potential contests at Dollar Tree (11 seats), Southwest Gas (10 seats), Canadian National (four seats) and Huntsman (four seats). As discussed in our Q2 and Q3 2021 newsletters, proportionally fewer board seats are being won through proxy contests. Instead, over 90% of board seats secured by activists were through settlements as opposed to elections at a shareholder meeting, which is the highest level in recent years. Also of note, activist-appointed directors reflected greater gender diversity than in prior years and included more individuals outside of the public company executive or director ecosystem.

High-profile, established activists were responsible for a greater share of activity in 2021 relative to prior years. After a slower start to 2021, Elliott Investment Management L.P. noticeably outpaced its peers with a total of 17 campaigns (its most active year since 2018), 11 of which were launched in the second half of 2021. The second most active activist was Jana Partners with 7 campaigns launched. First-time activists initiated ~28% of campaigns during 2021, which is in line with historical averages.

Approximately 43% of all activist campaigns during 2021 were related to M&A, up from ~40% in 2020, and slightly above the average of ~39% in recent years. Opposition to announced deals was the most common M&A theme, accounting for ~19% of all activist campaigns. Campaigns seeking to sweeten transaction terms were more common, and achieved higher rates of activist success, than campaigns seeking to call off deals.

Regional Campaign Activity Continued to Rebound in the U.S.; Europe Saw Increase in Large Cap Activism

U.S. activity during 2021 rebounded from a 2020 drop with an increase of ~14% year-over-year, accounting for ~55% of global campaigns in 2021 (compared to ~45% in 2020) and ~49% of global capital deployed (compared to ~41% in 2020). U.S. companies with market capitalizations of less than $2 billion remained the primary focus of activists, accounting for ~35% of U.S. campaigns launched in 2021. While the technology sector remained a leading sector for capital deployment, retail and healthcare sectors together accounted for 29% of U.S. capital deployed in 2021, compared to only 9% historically.

After a record year for European campaign activity in 2020, campaigns in 2021 returned to more normalized levels, although the 16 campaigns in Q4 2021 came close to historic highs. European companies with market capitalizations above $25 billion were the target of ~26% of European campaigns in 2021, compared to ~16% in 2020. European activism was relatively diversified, with focuses on financial institutions, industrials and healthcare, accounting for ~24%, ~18% and ~14% of European activity, respectively, during 2021, compared to averages of ~14%, ~25% and ~6%, respectively, over the period from 2017 to 2020. Consistent with the first three quarters of 2021, leading large-cap activists continued to re-emerge in Europe through Q4 2021, accounting in total for ~26% of European activity in 2021.

Other Trends

As described in our prior newsletters, ESG-related activism continues to become increasingly prominent. ESG-related campaigns ranged from strategic maneuvers, such as Third Point urging Shell to separate its renewables and refining businesses, to more pointed criticisms intended to garner favor with index funds and other ESG-focused investors. Noticeably, ESG activism has been expanding beyond dedicated funds and ESG-first activists, such as Engine No. 1, Inclusive Capital and Impactive Capital, with blue-chip and traditional activists incorporating ESG into their 2021 campaigns.

Inflows into ESG-related funds continued at a record-breaking pace, with assets under management of U.S. ESG funds reaching $438 billion in November 2021, $295 billion of which was being managed by active-style funds.

SELECT CAMPAIGNS / DEVELOPMENTS

Company	Market Capitalization ($ in billions)[31]	Activist	Development / Outcome
Royal Dutch Shell plc	$187.9	Third Point LLC	• In October 2021, Third Point LLC ("Third Point") announced a new position in Royal Dutch Shell plc ("Shell"), writing in an open letter that it believed that Shell traded at a significant discount, despite strong strategic and financial positioning, because competing stakeholders created a conflicting, incoherent set of strategies for the company. Third Point called on Shell to spin off its Liquefied Natural Gas, Renewables and Marketing businesses. The next day, Shell defended its business model to reporters, arguing that its fossil fuels businesses were needed to fund the transition to cleaner forms of energy production.
Compagnie Financière Richemont S.A.	$75.7	Third Point LLC, Artisan Partners LP	• In November 2021, news outlets reported that Third Point and Artisan Partners LP ("Artisan") had built up stakes in Compagnie Financière Richemont S.A. ("Richemont") and begun exerting pressure on the luxury retailer to improve its performance. Artisan told news outlets that there was "significant unrecognized value" in the firm and noted Richemont's loss-making e-commerce business as a reason for its undervaluation.
Glencore plc	$62.6	Bluebell Capital Partners Ltd.	• In November 2021, Bluebell Capital Partners Ltd. sent a letter calling on Glencore plc to spin off its coal business, calling it a barrier for many investors who would not buy into a coal mining company and saying that "a clear separation between carbonized and de-carbonized assets is needed to increase shareholder value".
Toshiba Corporation	$18.8	3D Investment Partners Pte Ltd.	• In April 2021, Toshiba Corporation ("Toshiba") announced it had received an unsolicited proposal from CVC Capital Partners Ltd. to take the company private. • On April 25, 2021, 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 November 2021, Toshiba outlined a plan to break up the company into three separate companies focused on infrastructure, semiconductors and devices. • In response, 3D sent an open letter to the Toshiba board opposing the breakup plan, saying that 3D was skeptical that simply breaking up the company would resolve any of the company's underlying issues, and asking Toshiba to provide a more fulsome and compelling plan for the separation and to reconsider engaging in a process to take the company private.
Macy's Inc.	$7.0	Jana Partners LLC	• In October 2021, Jana Partners LLC made an investor presentation to Macy's Inc., asking the retailer to spin off its e-commerce business on the theory that it could be worth about $14 billion, double the company's market value at the time of announcement.

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

OTHER DEVELOPMENTS

SEC Mandates Use of Universal Proxy Cards in Contested Director Elections[32]

On November 17, 2021, the SEC adopted amendments to the existing proxy rules which will require the use of universal proxy cards by public companies and dissidents for contested director elections.[33] The proxy cards must contain both sets of director nominees, which would consequently allow for shareholders to vote on a combination of directors from the public company's nominee slate and the dissident's nominee slate. This new rule will become effective for meetings held on or after August 31, 2022 and will not apply to investment companies or business development companies.

BlackRock To Provide Institutional Investors with Voting Ability[34]

Beginning in 2022, BlackRock will provide its large institutional investors, typically pensions and endowments, with the option to cast the votes themselves for shares held directly or indirectly through their investments with BlackRock. This decision will allow certain significant investors to have voting power on over $2 trillion of assets managed by BlackRock, or about 40%, of all indexed equities that are BlackRock-managed. Effectively, large institutional investors will be able to vote on resolutions based on their own priorities, or follow those set by proxy advisory firms like ISS or Glass Lewis.

Corporate Governance

PROXY ADVISORY UPDATES

In October 2021, Glass Lewis announced the launch of an Equity Plan Advisory service through a new affiliate, Glass Lewis Corporate, LLC.[35] Glass Lewis Corporate will allow public companies to access advisors who can assist and guide in evaluating executive compensation and equity plans.

The National Association of Manufacturers ("NAM") announced in October 2021 that it had filed suit against the SEC for failing to enforce the final rule on proxy advisory firms adopted in 2020.[36] In June 2021, Chair Gensler had announced that the SEC was suspending enforcement of the rule pending additional review. Providing rationale for the NAM suit, NAM President and CEO Jay Timmons stated: "The SEC is changing course, attempting to suspend a commonsense rule that enhances transparency into the work of proxy advisory firms without any opportunity for public comment by the NAM or anyone else." NAM has asked for the court to set aside the SEC's suspension of enforcing the proxy advice rule.

In November and December 2021, Glass Lewis and Institutional Shareholder Services ("ISS") each published updates to their proxy voting policies for the 2022 proxy season. Included below is a summary of key updates to voting policies covering the United States from both proxy advisory firms.

ISS Benchmark Policy Updates[37]

- **Board Accountability on Unequal Voting Rights:** Beginning in 2023, ISS will generally recommend withholding or voting against directors, committee members or the entire board (except for new nominees who will be considered on a case-by-case basis) if the company utilizes a common stock structure with unequal voting rights. Limited exceptions

[32] Cravath, Swaine & Moore, *SEC Mandates Use of Universal Proxy Cards in Contested Director Elections* (November 30, 2021), https://www.cravath.com/a/web/8eGtn1viya2xZbKQGvbp3V/3sNPyr/sec-mandates-use-of-universal-proxy-cards-in-contested-director-elections.pdf.

[33] Press Release, *SEC Adopts New Rules for Universal Proxy Cards in Contested Director Elections* (November 17, 2021); https://www.sec.gov/news/press-release/2021-235.

[34] Wall Street Journal, *BlackRock Gives Big Investors Ability to Vote on Shareholder Proposal*, (October 7, 2021); https://www.wsj.com/articles/blackrock-gives-big-investors-ability-to-vote-on-shareholder-proposals-11633617321.

[35] Glass Lewis, *Glass Lewis Launched Equity Plan Advisory Service to Enable Public Companies to Design Plans in Line with Shareholder Expectations* (October 18, 2021); https://www.glasslewis.com/press-release-equity-compensation-plan-advisory.

[36] Press Release, *Manufacturers Fight SEC's About-Face on Proxy Advisory Rule* (October 13, 2021); https://www.nam.org/manufacturers-fight-secs-about-face-on-proxy-advisory-rule-15424.

[37] ISS, *Americas Proxy Voting Guidelines Updates for 2022* (December 7, 2021); https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf.

will pertain to newly public companies with a sunset provision set to expire in seven years, limited partnerships and operating partnership unit structure of REITs, companies where the unequal voting rights are *de minimis* or companies that offer sufficient protections for minority shareholders.

- **Say-on-Climate Management Proposals:** In 2021, there were more than two dozen management proposals requesting shareholder approval on either the company's climate transition action plan or climate reporting. ISS will recommend voting on a case-by-case basis on these say-on-climate management proposals, in particular, considering the completeness and rigor of such climate transition action plans. ISS will also take into account additional information from the company, when available, including: alignment with the Task Force on Climate-Related Financial Disclosure ("TCFD") recommendations and market standards, disclosure of GHG emissions, completeness and rigor of targets to reduce GHG emissions, third-party approvals of its targets being science-based, commitments to achieving "net-zero" emissions, any commitment to report on implementation of the plan, third-party assurances of its climate data, disclosure of lobbying activity and capital expenditures relevant to its plan, challenges to decarbonization that are industry-specific and its commitment, disclosure and performance compared to industry peers.

- **Say-on-Climate Shareholder Proposals:** In 2020 and 2021, shareholders started to ask companies to publish a climate action plan and submit it for a shareholder vote. ISS will recommend voting on a case-by-case basis on shareholder proposals that ask the company to disclose reports on GHG emission levels or reduction targets or to provide a climate transition action plan and allow for a shareholder vote. ISS will also take into account additional information from the company, including: completeness and rigor of its climate-related disclosure, its GHG emission performance, any violations, fines, litigation or controversies related to its GHG emissions and the burden or prescriptiveness of the proposal's request.

- **Board Gender and Racial/Ethnic Diversity:** ISS updated its policy of generally voting against or withholding from the chair or the nominating committee (or other directors on a case-by-case basis) when there are no women on the board to also apply to include companies that are not in the Russell 3000 and S&P 1500, beginning in 2023. In addition, ISS will now issue vote recommendations on the grounds of no apparent racially or ethnically diverse directors.

- **Board Accountability on Climate:** ISS is adopting a new policy for companies that are significant GHG emitters, generally voting against or withholding from the incumbent chair of the committee responsible for oversight (or other directors on a case-by-case basis) if ISS finds the company is not following minimum steps laid out by ISS. In particular, the minimum criteria that companies must comply with are detailing disclosure of climate-related risks and setting appropriate GHG emissions reduction targets. Following these criteria will demonstrate the company has taken minimum steps to understand, evaluate and prevent climate change-related risks for the company and the economy.

- **Capital:** ISS changed its voting policy on authorizations of common stock and preferred stock to differentiate between general and specific use authorizations of such capital and clarified the factors to be considered. For general authorization requests (*i.e.*, used for general corporate purposes), ISS will generally vote on a case-by-case basis after considering a number of factors, but clarified certain usages that will result in a vote against a proposed increase, and certain usages that will result in a vote for a proposed increase. For specific authorization requests (*i.e.*, used in connection with transactions like an acquisition, SPAC transaction or private placement), ISS will generally vote for a proposed increase.

- **Shareholder Proposals on Social Issues:** ISS will vote on a case-by-case basis for any shareholder proposals that ask a company to perform independent racial equity or civil rights audits and delineates factors (*e.g.*, company's current policies for addressing racial inequality and discrimination, any controversies, litigation or regulatory action involving racial inequity or discrimination, etc.) that will be taken into consideration in making the voting determination.

ISS's policy updates are effective for shareholder meetings on or after February 2, 2022, except for updates with a one-year transition period, which will become effective in 2023.

Glass Lewis Policy Guidelines Updates[38]

- **Multi-Class Share Structures with Unequal Voting Rights:** Glass Lewis will recommend voting against the governance committee chair if a company does not provide an adequate sunset period (seven years or less) for the multi-class share structure with unequal voting rights.

- **Board Gender Diversity:** For Russell 3000 companies, Glass Lewis will generally recommend voting against the nominating committee chair of a board with less than two gender diverse directors or the entire nominating committee of a board with no gender diverse directors. Beginning in 2023, Glass Lewis will move from the fixed number approach to a percentage approach and generally recommend voting against the nominating chair of a board with less than 30% gender diversity.

- **State Laws on Diversity:** When there are applicable state laws on gender diversity or underrepresented community diversity, Glass Lewis will generally recommend in conformity with mandated board composition requirements imposed by such laws.

- **Stock Exchange Diversity Disclosure:** To conform with Nasdaq's newly adopted board diversity and disclosure rule, for meetings held on or after August 8, 2022, Glass Lewis will recommend voting against the governance committee chair of a Nadsaq-listed company that has not provided the mandated board diversity disclosure.

- **Director Diversity and Skills Disclosure:** Beginning in 2022, Glass Lewis may recommend voting against the nominating committee and/or governance committee chair of S&P 500 companies that provide poor disclosure of director diversity and skills (*i.e.*, failing to provide disclosure in each category). For meetings held on or after January 1, 2023, Glass Lewis will generally recommend voting against the governance committee chair of S&P 500 companies that have not provided disclosure of individual or aggregate demographic diversity.

- **Environmental and Social Risk Oversight:** For Russell 1000 companies, Glass Lewis will note concern, and for S&P 500 companies, Glass Lewis will general recommend voting against the governance committee chair, if a company has no obvious disclosure of board-level oversight on environmental and social risks.

- **Committee Chairs:** Glass Lewis had clarified its approach to voting when a committee chair is not up for election due to a staggered board structure. If Glass Lewis has identified concerns in a committee, Glass Lewis will generally recommend voting against other committee members who are up for election if the committee chair is not.

- **SPACs:** Glass Lewis stated that if a company which has combined with a SPAC to go public adopts overly restrictive governance provisions and if prior to the company going public, the board adopted a multi-class share structure with unequal voting rights or anti-takeover provisions, Glass Lewis will generally recommend voting against all directors who were serving when the company went public, if the board (i) did not have a shareholder vote on such provisions prior to voting on the business combination; (ii) did not commit to having a shareholder vote on such provisions following the company going public; or (iii) did not include an adequate sunset period (seven years or less for the multi-class structure with unequal voting rights, three to five years for anti-takeover provisions). Glass Lewis believes a SPAC executive's role is to identify targets and consummate the transaction. As a result, Glass Lewis applies their stricter standard for company directorships and recommends voting against directors who serve as a SPAC executive while also serving as a director on five or more public company boards.

- **Age and Tenure Policies:** Glass Lewis will generally recommend voting against the nominating committee or governance committee chair of a board that waives its self-imposed age or tenure policy for two or more consecutive years, unless the board provides a valid justification (*e.g.*, consummation of a corporate transaction) for such waiver.

Glass Lewis's new policies are effective for meetings held on or after January 1, 2022, unless otherwise specified.

[38] Glass Lewis, *2022 Policy Guidelines, United States* (November 15, 2021); https://www.glasslewis.com/wp-content/uploads/2021/11/US-Voting-Guidelines-US-GL-2022.pdf.

ASSET MANAGER 2022 PRIORITIES

Blackrock 2022 Stewardship Expectations[39]

In December 2021, BlackRock published its annual report on stewardship expectations for 2022. The report focused on climate risk, board diversity, sustainability reporting and environmental, social and governance ("ESG") in executive compensation and changes to corporate risk.

- **Climate Risk:** BlackRock will continue to ask companies to disclose business plans that are net-zero aligned, *i.e.*, aligned with the global goal to reach net-zero GHG emissions by 2050. Additionally, BlackRock will encourage companies to create plans that are also aligned with the global goal to limit warming by 1.5°C and compatible with decarbonization pathways.

- **Board Diversity:** BlackRock noted that U.S. boards should be 30% diverse. BlackRock will also encourage board compositions consisting of two female directors and one underrepresented group director.

- **Sustainability Reporting:** BlackRock will continue to ask companies to disclose sustainability practices to investors. Standards used for such disclosures should include the TCFD framework and may also include Sustainability Accounting Standards Board ("SASB") industry-specific guidance or other industry- or company-specific standards.

- **ESG in Executive Compensation:** BlackRock notes that if executive compensation plans are comprised of any environmental, social or governance criteria, the targets should be in line with the company's strategic and business model and as rigorous and tied to company performance as are financial and operational metrics.

- **Changes to Corporate Form:** BlackRock will ask companies that plan to change their corporate form (*e.g.*, to a public benefit corporation or similar entity) to put such proposal to a shareholder vote and indicate how the change would impact shareholders and other stakeholders.

ESG UPDATES

ESG Consideration in Retirement Funds[40]

The Biden Administration has proposed a rule that would allow for funds to consider ESG in retirement saving plans. This would effectively negate a Trump-era rule that only permitted retirement plans to consider financial factors when making investment decisions. Acting Assistant Secretary for the Employee Benefits Security Administration Ali Khawar stated: "[a] principal idea underlying the proposal is that climate change and other ESG factors can be financially material and when they are, considering them will inevitably lead to better long-term risk-adjusted returns, protecting the retirement savings of America's workers." The comment period for the proposed rule closed on December 13, 2021.

IFRS Foundation Creates International Sustainability Standards Board[41]

In November 2021, the International Financial Reporting Standards ("IFRS") Foundation established the International Sustainability Standards Board ("ISSB"). The ISSB will be tasked with developing global sustainability disclosure standards and will work alongside the International Accounting Standards Board ("IASB") to ensure alignment between IFRS and new ISSB standards. However, the application of the sustainability disclosure standards developed by ISSB will not be linked to the application of IFRS accounting standards. Local jurisdictions will determine whether it will be mandatory for entities to report on the standards developed by ISSB, or can use the ISSB standards as a baseline for developing their own standards. ISSB also announced that by June 2022, ISSB will complete consolidating the Climate Disclosure Standards Board with the Value Reporting Foundation, the body that propounds the SASB reporting standards.

SEC UPDATES

SEC Staff Updates for Shareholder Proposals

On November 3, 2021, the Division of Corporation Finance updated its guidance for shareholder proposals under Rule 14a-8.[42]

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[39] BlackRock, *Investment Stewardship 2022 Policies Updates Summary* (December 2021); https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global-summary.pdf.

[40] News Release, *US Department of Labor Proposes Rule to Remove Barriers to Considering Environmental, Social, Governance Factors in Plan Management* (October 13, 2021); https://www.dol.gov/newsroom/releases/ebsa/ebsa20211013.

[41] Value Reporting Foundation, *IFRS Foundation Announces International Sustainability Standards Board* (November 3, 2021); https://www.valuereportingfoundation.org/news/ifrs-foundation-announcement.

[42] Cravath, Swaine & Moore, Staff Legal Bulletin No. 14L: More Evidence for the ESG Paradigm Shift (November 8, 2021), https://www.cravath.com/a/web/qF6wWkarshHXB3FJk8NMXR/3g3Yrg/staff-legal-bulletin-no-14l-more-evidence-for-the-esg-paradigm-shift.pdf.

In particular, the guidance indicates that there will be fewer grounds for excluding shareholder proposals based on the ordinary business exception of Rule 14a-8(i)(7) and the economic relevance exception of Rule 14a-8(i)(5).[43] Additionally, the Staff rescinded the prior SLBs 14I, 14J and 14K. These changes indicate an alignment with the SEC's and Chair Gensler's concentration on including ESG concerns in investment decisions.

On December 13, 2021, the Division of Corporation Finance announced that it is returning to its policy of providing written responses to shareholder proposal no-action requests.[44] It discontinued this practice in 2019 and in lieu of written letters, communicated most of its responses in the form of a chart on the Division's website. The Division noted that going back to its prior practice of responding with written letters, which will be posted on the Division's website, will allow for greater transparency to shareholders and companies.

SEC Staff Releases Accounting Guidance on "Spring-Loaded" Incentive Awards[45]

On November 29, 2021, the SEC Staff issued accounting guidance for share-based compensation awards granted prior to the release of a company's positive information (*e.g.*, earnings release, significant transaction), also referred to as "spring-loaded" incentive awards.[46] The new guidance indicates that companies must take into account the material nonpublic information known to the company about the positive developments when determining the accounting value of the "spring-loaded" incentive award. This guidance may have an impact on the size of "spring-loaded" grants, the valuation of awards and values used for compensation disclosure purposes and MD&A estimates. Companies may also be required to disclose how the adjustment of the award was calculated and how it differs from other share-based awards.

Comment Period Reopened for Rules on Clawbacks of Erroneously Awarded Compensation[47]

The SEC reopened the comment period for its proposal to implement provisions of Section 954 of the Dodd-Frank Act, which would require the national securities exchanges and national securities associations to create listing standards that would require issuers to establish a clawback policy for erroneously awarded compensation and disclose such policy. The comment period closed on November 22, 2021. In supporting the decision to reopen the comment period, SEC Chair Gensler noted: "I believe we have an opportunity to strengthen the transparency and quality of corporate financial statements as well as the accountability of corporate executives to their investors."

SEC Proposes to Amend Rule 10b5-1 and Issues Proposals for Rules Related to Disclosure of Insider Trading Policies and Compensatory Incentive Awards[48]

On December 15, 2021, the SEC issued proposed amendments to Rule 10b5-1 and the affirmative defense it provides against charges of insider trading and to Form 4 (which insiders must file to report their transactions in issuer securities) to include reporting of gifts within two days and to provide new disclosures about whether the insider's trades were made pursuant to a 10b5-1 trading plan.[49] The amendments to Rule 10b5-1 would include new requirements of a mandatory cooling-off period between the date of adoption of any Rule 10b5-1 trading plan and the start of trades pursuant to the plan (proposed to be 120 days for officers and directors and 30 days for issuers structuring a share repurchase plan under Rule 10b5-1). The amended rules, which are subject to a comment period prior to being finalized, would also prohibit having multiple, overlapping plans at one time and would require written certifications by the insider. The comment period for the proposed

[43] Announcement, *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)* (November 3, 2021); https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals.

[44] Announcement, *Announcement Regarding Staff Responses to Rule 14a-8 No-Action Requests* (December 13, 2021); https://www.sec.gov/corpfin/announcement/announcement-14a-8-no-action-requests-20211213.

[45] Cravath, Swaine & Moore, *SEC Releases Accounting Guidance on "Spring-Loaded" Incentive Awards* (December 8, 2021); https://www.cravath.com/a/web/bLp71G3T7fK3QywqkGAVmi/3u2eG8/sec-releases-accounting-guidance-on-spring-loaded-incentive-awards.pdf.

[46] Press Release, *SEC Staff Issues Accounting Guidance on "Spring-Loaded" Compensation Awards to Executives* (November 29, 2021); https://www.sec.gov/news/press-release/2021-246.

[47] SEC, *Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation* (October 14, 2021); https://www.sec.gov/rules/proposed/2021/33-10998.pdf. Statement of Chair Gary Gensler, *Statement on Rules Regarding Clawbacks of Erroneously Awarded Compensation* (October 14, 2021); https://www.sec.gov/news/public-statement/gensler-clawbacks-2021-10-14.

[48] Cravath, Swaine & Moore, *SEC Proposes Amendments to Rule 10b5-1 and New Rules for Disclosure of Issuer Share Repurchases* (December 28, 2021); https://www.cravath.com/a/web/tgFzzbJdGARm9919y8AXib/3waGp6/sec-proposes-amendments-to-rule-10b5-1.pdf.

[49] Press Release, *SEC Proposes Amendments Regarding Rule 10b5-1 Insider Trading Plans and Related Disclosures* (December 15, 2021); https://www.sec.gov/news/press-release/2021-256.

amendments to Rule 10b5-1 will run 45 days after the proposal has been published in the Federal Register. The SEC also proposed new disclosure requirements about companies' insider trading policies and more detailed information about compensatory option awards than currently required.

SEC Proposes New Form SR to Report Issuer Share Repurchases[50]

On December 15, 2021, the SEC proposed a new Form SR on which issuers would be required to report details about their share repurchases, including price and volume information as well as the timing of the issuer's repurchase.[51] Proposed Form SR, which is subject to a comment period prior to being finalized, would be due within one business day of an issuer's repurchase and would also require disclosure of information about:

- the objective and rationale of share repurchases, as well as process or criteria used to determine the amount of repurchased shares;
- policies and procedures relating to purchases or sales of the issuer's securities by officers and directors during a repurchase program;
- whether repurchases were made in reliance on the affirmative defense of Rule 10b5-1 or the safe harbor provided by Rule 10b-18; and
- if an officer or director purchased or sold any of the issuer's securities that are part of the repurchase program within 10 business days before or after the announcement of such program.

PERSONNEL ANNOUNCEMENTS

On December 20, 2021, Commissioner Elad Roisman announced his intention to resign as a SEC Commissioner by the end of January 2022.[52] Commissioner Roisman's term was set to expire in June 2023.

On November 5, 2021, the SEC announced that Nicole Creola Kelly will serve as the Chief of the SEC's Office of the Whistleblower.[53] Ms. Kelly was previously a Senior Special Counsel in the Office of the General Counsel and Counsel to former SEC Chair Mary Jo White and former SEC Commissioner Kara M. Stein.

On November 8, 2021, the SEC appointed Erica Y. Williams as Chair of the Public Company Accounting Oversight Board ("PCAOB") and Christina Ho, Kara M. Stein and Anthony (Tony) C. Thompson as Board members.[54] Ms. Ho and Ms. Stein began their service on the Board in November 2021. Duane DesParte will remain a Board member and continue serving as Acting Chair until Ms. Williams is sworn in. In the press release announcing these appointments, SEC Chair Gensler stated: "[w]ith these additions to the Board, the PCAOB will have the leadership to meet the mission given to it by Congress. Erica, Christina, Kara, and Tony have demonstrated deep commitment to public service. They will represent the interests of investors and the public at the PCAOB."

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.

[50] Cravath, Swaine & Moore, *SEC Proposes Amendments to Rule 10b5-1 and New Rules for Disclosure of Issuer Share Repurchases* (December 28, 2021); https://www.cravath.com/a/web/tgFzzbJdGARm9919y8AXib/3waGp6/sec-proposes-amendments-to-rule-10b5-1.pdf.

[51] Press Release, *SEC Proposes New Share Repurchase Disclosure Rules* (December 15, 2021); https://www.sec.gov/news/press-release/2021-257.

[52] Statement, *Statement of Commissioner Elad L. Roisman* (December 20, 2021); https://www.sec.gov/news/statement/roisman-20211220.

[53] Press Release, *Nicole Creola Kelly Named Chief of SEC Whistleblower Office* (November 5, 2021); https://www.sec.gov/news/press-release/2021-225.

[54] Press Release, *SEC Appoints New Chairperson and Board Members to the Public Company Accounting Oversight Board* (November 8, 2021); https://www.sec.gov/news/press-release/2021-228.