Cravath Quarterly Review

M&A, ACTIVISM AND CORPORATE GOVERNANCE

01

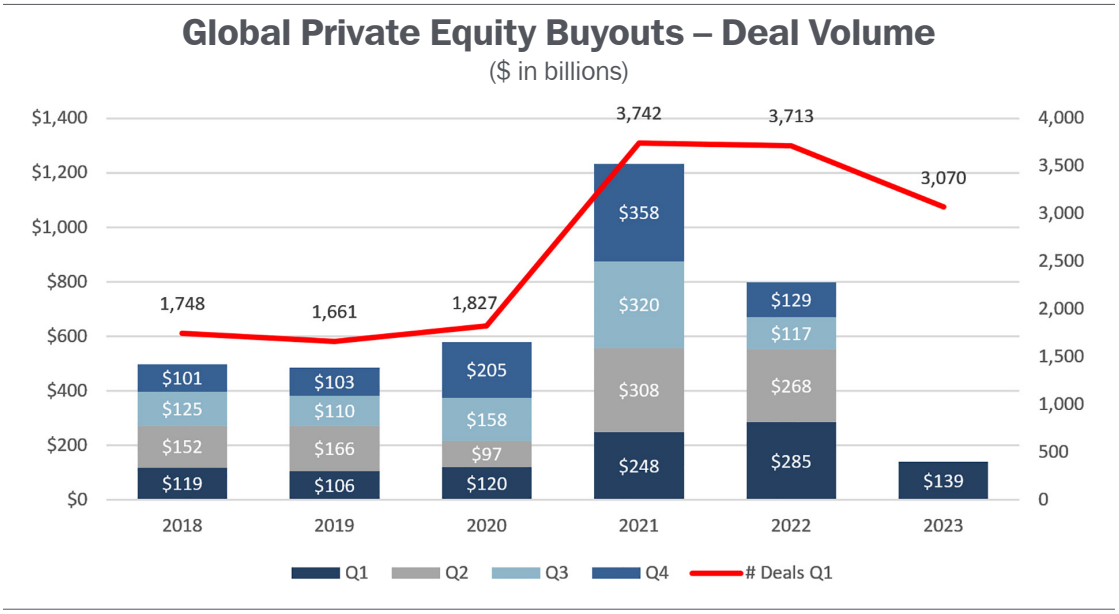
Mergers & Acquisitions

TRENDS[1]

SOURCE Refinitiv, An LSEG Business.

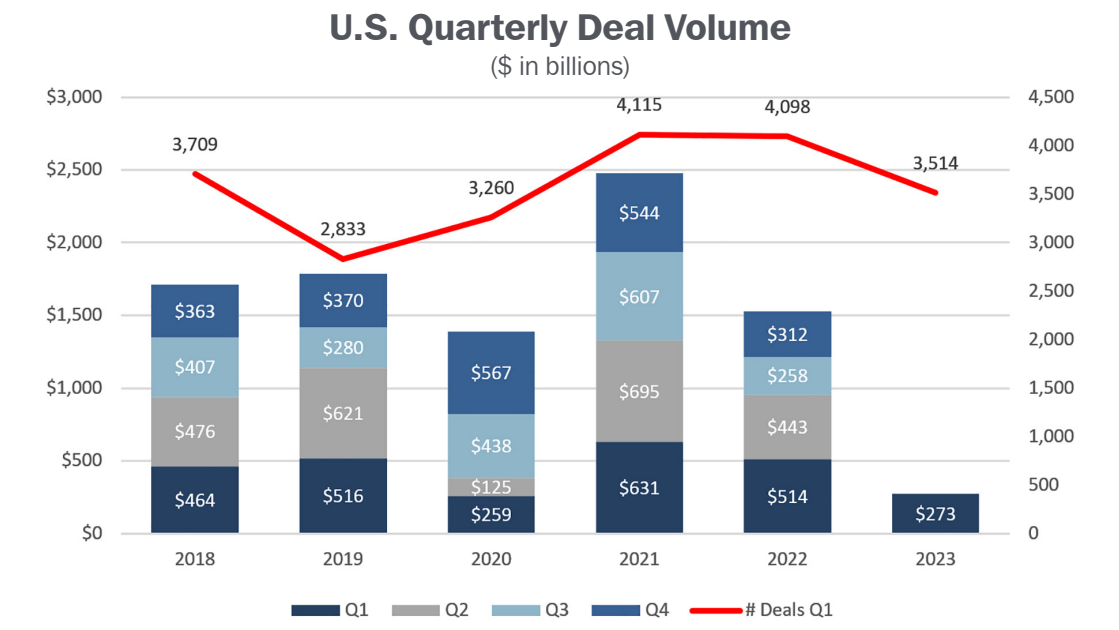
Q1 2023: M&A Activity Falls, Aggregate Deal Value Below $1 Trillion for Third Consecutive Quarter

Global M&A activity slowed in Q1 2023, with $580 billion in announced deal value, a decrease of ~44% compared to Q1 2022 and a decrease of ~23% compared to Q4 2022. Q1 2023 marked the third consecutive quarter to fall below $1 trillion in announced deal value. There were nearly 12,700 deals announced in Q1 2023, a decrease of ~17% compared to Q1 2022's nearly 15,300 deals.



SOURCE Refinitiv, An LSEG Business.

Private equity buyouts in Q1 2023 reached $139 billion globally, a decrease of ~51% compared to Q1 2022 and an increase of ~8% compared to Q4 2022. Nearly 3,100 private equity-backed deals were announced in Q1 2023, which represented a decrease of ~17% compared to Q1 2022's over 3,700 deals.



SOURCE Refinitiv, An LSEG Business.

Dealmaking Down Across All Regions

M&A activity for U.S. targets amounted to $273 billion in Q1 2023, a decrease of ~47% compared to Q1 2022 and a decrease of ~13% compared to Q4 2022. M&A activity for European targets totaled $90 billion in Q1 2023, a decrease of ~60% compared to Q1 2022 and a decrease of ~35% compared to Q4 2022. In the Asia-Pacific region, dealmaking totaled $145 billion in Q1 2023, a decrease of ~23% compared to Q1 2022 and a decrease of ~31% compared to Q4 2022. Cross-border M&A activity totaled $179 billion in Q1 2023, a decrease of ~46% compared to Q1 2022 but an increase of ~5% compared to Q4 2022.

LEGAL & REGULATORY DEVELOPMENTS

Cases

Q1 2023 featured a number of notable Delaware decisions.

IN RE MCDONALD'S CORPORATION STOCKHOLDER DERIVATIVE LITIGATION, C.A. NO. 2021-0324-JTL (DEL. CH. JAN. 26, 2023).

In January 2023, the Delaware Court of Chancery held for the first time that non-director corporate officers owe stockholders a fiduciary duty of oversight similar to the duties owed by directors under the *Caremark* doctrine.[2]

In *McDonald's*, stockholders brought a derivative action against the former Global Chief People Officer of McDonald's Corporation ("McDonald's") for a breach of the fiduciary duty of oversight, alleging that he failed to report upward red flags regarding sexual harassment and misconduct at McDonald's. The defendant moved to dismiss the complaint, contending that Delaware law does not impose a duty of oversight upon officers. The Court denied the defendant's motion and adopted the plaintiffs' reasoning when it held that the plaintiffs pleaded facts sufficient to support an inference that the defendant acted in bad faith by consciously ignoring red flags regarding sexual harassment, supporting the plaintiffs' claim that he breached his duty of oversight.

The Court advanced four rationales in support of its holding: (1) officers are best situated to gather information and provide timely updates to the Board; (2) Delaware law and other authorities have previously equated the fiduciary duties of officers with those of directors; (3) officers have duties as agents of the Board; and (4) the oversight duties of officers facilitate the Board's exercise of its oversight duties.

The Court noted that the oversight duties of officers may be narrower and more context-specific than those of directors, with officers generally being charged with monitoring and reporting red flags in their areas of responsibility as opposed to the corporation as a whole. However, the Court made clear that officers cannot consciously ignore red flags that are brought to their attention, even if outside their area of responsibility.

In a subsequent decision in March 2023, the Court dismissed all claims brought against the directors of McDonald's, including for alleged breaches of fiduciary duty. Applying the business judgment rule, the Court held that the directors did not breach their fiduciary duties when they took personnel actions in good faith in response to allegations of misconduct by company officers, even if those actions were, with the benefit of hindsight, overly lenient.

POLITAN CAPITAL MANAGEMENT LP V. KIANI ET AL., C.A. NO. 2022-0948-NAC (DEL. CH. FEB. 3, 2023).

In February 2023, the Delaware Court of Chancery, in a bench ruling, denied a partial motion to dismiss relating to claims that the directors of a public company breached their fiduciary duties by refusing to disable an onerous change-of-control provision in the company's employment agreement with its CEO.

The lawsuit, brought by Politan Capital Management LP ("Politan"), a stockholder of Masimo Corporation ("Masimo"), against Masimo and its directors, relates in part to the employment agreement between Masimo and its CEO (the "Employment Agreement"). The Employment Agreement included a change-of-control provision that would be triggered by a one-third turnover of Masimo's five-member classified Board in any two-year period unless the new directors were preapproved by a majority of the existing Board. Notably, the Employment Agreement prohibited the Board from preapproving any director nominee involved in a proxy contest. If the change-of-control provision in the Employment Agreement were triggered, Masimo's CEO would be entitled to immediate benefits vesting and other compensation collectively worth an estimated $913 million at the time of the complaint.

In denying the motion to dismiss with respect to the change-of-control provision, the Court focused on the effect of the provision on the Board's ability to exercise its statutory and fiduciary duties to Masimo's stockholders. Citing the magnitude of the consequences of triggering the provision, its apparent lack of valid corporate purpose and the manner in which it restricted the Board's discretion in connection with fundamental matters relating to stockholder franchise, the Court concluded it was reasonably conceivable that the provision amounted to an abdication of the Board's non-delegable duty to manage Masimo, which the Board did not have the authority to agree to, and was thus void under Delaware law.

The Court's ruling did not address additional claims brought by Politan related to the poison pill and amended advance notice bylaws that Masimo implemented one month after Politan disclosed an 8.4% ownership stake in Masimo and one week following discussions between Masimo and Politan regarding Board representation. However, two days after the Court's ruling on the change-of-control provision, Masimo reversed both the advance notice bylaw amendments and its adoption of a poison pill. Politan had contended that Masimo's amended bylaws contained the "most preclusive advance notice bylaws in Delaware history", requiring disclosure of, among other things, confidential information such as the names and addresses of its limited partners and information relating to its limited partners' and their family members' other investments.

IN RE MINDBODY, INC., STOCKHOLDER LITIGATION, C.A. NO. 2019-0442-KSJM (DEL. CH. MAR. 15, 2023).

In March 2023, the Delaware Court of Chancery, in a post-trial opinion, held the CEO of a target company liable under the *Revlon* doctrine for tilting the sale process in favor of a particular buyer.[3] The Court also held the CEO and the buyer jointly and severally liable for disclosure deficiencies in connection with the sale.

The *Mindbody* litigation arose out of the take-private acquisition of Mindbody, Inc. ("Mindbody") by Vista Equity Partners ("Vista") in 2019. In its decision, the Court found that Mindbody's CEO was under a "disabling conflict" because he had an interest in near-term liquidity and an expectation that he would receive post-transaction employment based on his statements and his interactions with Vista, that he took actions to tilt the sale process in favor of Vista and that Mindbody's Board was "in the dark" regarding these conflicts. Applying enhanced scrutiny review, the Court determined the CEO's conduct during the sale process fell outside the range of reasonableness.

In addition, the Court found that the CEO breached his duty of disclosure by withholding information about his interactions with Vista from the proxy materials. The Court also found that Vista aided and abetted that breach because Vista was contractually obligated to review the proxy materials and inform Mindbody of any material omissions. As a result of the disclosure deficiencies, the Court determined that the stockholder vote was not fully informed, and thus cleansing under the *Corwin* doctrine was unavailable to restore the business judgment rule.[4]

The Court awarded $1 per share in damages against the CEO on the *Revlon* claim and $1 per share in nominal damages for the disclosure claim, with the CEO and Vista jointly and severally liable (though the Court ruled that plaintiffs were only entitled to one recovery). The Court also considered plaintiffs' claim that Vista aided and abetted the *Revlon* claim, which the Court rejected on procedural grounds (plaintiffs failed to assert this claim until after trial, which the Court concluded was too late).

CFIUS

In February 2023, the Committee on Foreign Investment in the United States ("CFIUS") determined that the United Kingdom and New Zealand have established and are effectively utilizing their own robust programs to analyze foreign investments for national security risks.[5]

These determinations, which were widely anticipated, preserve the status of the UK and New Zealand as "excepted foreign states" and "excepted real estate foreign states" under the CFIUS regulations, meaning that certain investors with close ties to the UK and New Zealand will continue to be excepted from limited aspects of CFIUS's jurisdiction, absent further CFIUS action.[6] Specifically, such investors will be excepted from CFIUS's jurisdiction over certain non-controlling transactions and real estate transactions, and will not be subject to CFIUS's mandatory filing requirements. However, such investors will continue to be subject to CFIUS's jurisdiction for investments that result in foreign control of a U.S. business.

The list of excepted foreign states and excepted real estate foreign states consists of Australia, Canada, New Zealand and the UK, all partners of the "Five Eyes" intelligence alliance with the United States.[7]

Bank M&A

Q1 2023 events signaled continued headwinds for bank merger activity as federal banking regulators continued to consider revisions to the bank merger guidelines, which were last updated in 1995,[8] and communicated new concerns about whether certain large banks may have become "too big to manage".[9] In March 2023, state banking regulators appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver of Silicon Valley Bank ("SVB") and Signature Bank ("SB"), which sent shockwaves through the financial system. The FDIC is in the process of soliciting buyers for the remaining assets of SVB and SB that were not acquired by First-Citizens Bank & Trust Company and Flagstar Bank, N.A., respectively.[10] It remains to be seen exactly what impact these recent events will have on U.S. bank merger activity. Outside the United States, Swiss regulators orchestrated the takeover of Credit Suisse Group AG ("CS") by UBS Group AG ("UBS") in March 2023 in the face of CS's rapidly worsening financial condition.[11] UBS Chairman Colm Kelleher has announced that UBS intends to downsize CS's investment banking business, potentially signaling spin-offs, divestitures or other restructuring actions in the coming months.[12]

02

Antitrust

POLICY DEVELOPMENTS

FTC Bureau of Competition Director Comments on Merger Review and Clearance

In February 2023, Federal Trade Commission ("FTC") Bureau of Competition Director Holly Vedova discussed the FTC's increased skepticism toward divestitures, suggesting that the FTC staff will only recommend acceptance of divestitures that "allow the buyer to operate the domestic business on a standalone basis—quickly, effectively and independently, and with the same incentives and comparable resources as the original owner".[13] According to Vedova, FTC staff will no longer recommend more complex divestitures, such as sales of partial business units, divestitures requiring continuing relationships between the buyer and seller or those where there is no strong independent buyer.

In addition, Vedova noted that the revised merger guidelines will be released "in the coming months" and explained that, in the revised merger guidelines, the agencies would take a similar approach to the FTC's Section 5 Policy Statement by moving toward an "incipiency standard" and away from a rule of reason.[14] Vedova singled out digital markets, including "zero-price products, multi-sided markets, gatekeeper platforms, and data aggregation" as areas of focus for the new guidelines. She also noted "monopsony issues, including labor, [will] be discussed more prominently than in prior agency guidance". Finally, Vedova noted that the agencies are involved in a "top-to-bottom review of the information contained in the HSR form". She previewed that "[t]his effort will result in a commission rulemaking that modifies the merging parties' premerger notification obligations".

Annual HSR Notification Report

In February 2023, the FTC and the Department of Justice ("DOJ") released the 44th Annual Hart-Scott-Rodino Report (the "Report").[15] The Report presents data on the Hart-Scott-Rodino Act ("HSR") Premerger Notification Program for the period from October 1, 2020 to September 30, 2021. It disclosed that 3,520 mergers were reported to the agencies during this period—a two-fold increase over the prior period (October 1, 2019 to September 30, 2020). The agencies granted early termination of the HSR review period 417 times, a 50% decrease from the prior period, and issued 65 second requests, a 35% increase over the prior period. The agencies reported the following statistics concerning merger challenges:

	FTC	DOJ	TOTAL
Merger Challenges	18	14	32
Consent Decrees	5	9	14
Abandoned/ Restructured	7	3	10
Litigation	6	2	8

DOJ and FTC Scrutiny of Private Equity

In February 2023, DOJ Antitrust Division Civil Enforcement Director Ryan Danks singled out private equity firms as an area of focus for DOJ merger review and enforcement, noting that the DOJ plans to more closely scrutinize private equity acquisitions due to private equity firms' serial acquisition practices and the DOJ's view that private equity firms may facilitate consolidation.[16] Danks also noted that the DOJ will be increasingly skeptical of private equity firms as potential divestiture buyers.

In March 2023, Rahul Rao, the deputy director of the FTC's Bureau of Competition, stated that the FTC is focused heavily on reviewing private equity transactions, noting that, in the FTC's view, private equity firms' reliance on debt financing and cost-cutting has negative impacts on acquired companies' ability to compete.[17] Rao also called out private equity firms' strategy of engaging in "roll-up" transactions, whereby a firm makes a series of acquisitions in one industry, all of which fall below HSR reporting thresholds and avoid agency review. In addition, Catherine Reilly, the DOJ Antitrust Division's counsel for civil operations, stated that the DOJ shares the FTC's concerns, and further asserted that private equity firms are unlikely to represent "maverick" firms that promote competition in an industry.

Section 8 Interlocking Directorates

In March 2023, the DOJ announced that five directors had resigned from various corporate board positions and one entity declined to exercise board appointment rights in response to concerns by the Antitrust Division that their roles violated Section 8 of the Clayton Antitrust Act of 1914 ("Clayton Act"), which prohibits directors and officers from serving simultaneously on the boards of competing entities.[18] The DOJ noted that four of the five directors sat on the boards of competing entities as representatives of investment firms that held shares of those entities. Both the FTC and the DOJ have recently announced an intent to more carefully enforce Section 8 of the Clayton Act. This recent announcement follows the DOJ's October 2022 announcement that seven directors resigned from corporate board seats after DOJ investigations.

DOJ Scrutiny of Digital Platforms

In March 2023, Assistant Attorney General Jonathan Kanter noted that the DOJ planned to increase scrutiny of mergers relating to companies that operate digital platforms and asserted that "dominant platforms can build their market power and deepen competitive moats through strategic mergers and acquisitions (to block entry or the growth of rival) or through conduct that deprives rivals of the ability to achieve scale through competition on the merits".[19]

DOJ Withdraws Healthcare Policy Statements

In February 2023, the DOJ announced the withdrawal of three DOJ policy statements from 1993, 1996 and 2001 that condoned certain information sharing practices and mergers in the healthcare industry.[20] Specifically, the withdrawal of the 1993 policy statement eliminates an antitrust safety zone for hospital mergers in which one of the merging hospitals had fewer than 100 licensed beds and averaged fewer than 40 daily patients. Withdrawal of the policy statements will permit the DOJ and the FTC to challenge conduct and mergers that formerly fell within the safety zones outlined in these policy statements.

ENFORCEMENT

Federal Trade Commission

In January 2023, U.S. District Judge Edward Davila of the Northern District of California issued a decision declining to grant the FTC a preliminary injunction preventing Meta Platforms, Inc. ("Meta") from acquiring Within Unlimited, Inc. ("Within").[21] Meta operates the social media sites Facebook and Instagram, and markets and sells virtual reality hardware under the Oculus/Quest brands and the virtual reality app distribution platform Quest Store. Within sells virtual reality applications, including the fitness app Supernatural. Judge Davila found that the facts did not support the FTC's contention that Meta scrapped a plan to compete with

Within—and instead moved to acquire it—when it learned that Within was at risk of being acquired by Apple. Judge Davila also rejected the FTC's assertion that virtual reality fitness app developers viewed Meta as a potential entrant. However, Judge Davila accepted the FTC's contention that the "actual potential competition doctrine" remains good law. In February 2023, the FTC issued an order withdrawing the challenge and dismissing the complaint. In March 2023, FTC Commissioner Rebecca Kelly Slaughter explained that the FTC decided not to appeal the loss because, in the FTC's view, the decision contained beneficial legal reasoning on the vitality of the actual potential competition doctrine and that there was a risk of "making it worse at an appellate level". The actual potential competition doctrine holds that an acquisition of a participant in a concentrated market by a firm that does not compete in the market may be anticompetitive if the market is constrained by the perceived threat of entry by that competitor.

In February 2023, State University of New York Upstate Medical University and Crouse Health System, Inc. announced that they were abandoning their planned merger.[22] While the FTC had not challenged the merger outright, an FTC investigation was ongoing and the FTC had filed a public comment to the New York State Department of Health in opposition to the parties' request for a state-issued certificate that would have prevented the FTC from challenging the merger. In a statement, FTC Director of the Office of Policy Planning Elizabeth Wilkins said that "the deal presented substantial risk of serious competitive and consumer harm in the form of higher healthcare costs, lower quality, reduced innovation, reduced access to care, and depressed wages for hospital employees" and that "[i]t is very good news for patients and healthcare workers in upstate New York that this proposed merger is not going to happen".

In March 2023, the FTC voted 4-0 to block Intercontinental Exchange Inc.'s ("ICE") $13.0 billion proposed acquisition of Black Knight, Inc. ("Black Knight").[23] In an administrative complaint, the FTC asserted that Black Knight is ICE's top competitor, and that the merger would substantially reduce competition in the market for loan origination systems ("LOS"), where ICE and Black Knight hold the largest and second largest market share, respectively. The FTC further alleged a substantial reduction in competition in the market for certain ancillary services related to LOSs. Several days before the FTC lodged its challenge, ICE and Black Knight announced that they had agreed to divest Black Knight's LOS offering in the hopes of securing clearance for the deal. The FTC rejected this proposed remedy, noting that the prospective buyer lacks Black Knight's "ability, resources and incentive" to compete and that it would need to rely on Black Knight's ancillary services to support the LOS product. In April 2023, the FTC filed a complaint in the Northern District of California, seeking a temporary restraining order and preliminary injunction to block the transaction.[24]

DOJ Antitrust Division

In January 2023, the DOJ and 10 state attorneys general filed suit against Google LLC ("Google") in the Eastern District of Virginia for allegedly monopolizing the market for ad tech tools.[25] Similar to the FTC's pending suit against Meta for allegedly monopolizing the personal social networking market,[26] the DOJ's suit highlights acquisitions by Google that were cleared by regulators when they occurred, including ad tech firm DoubleClick in 2008 and ad tech firm supplier AdMeld in 2011. The complaint alleges that Google "has corrupted legitimate competition in the ad tech industry by engaging

in a systematic campaign to . . . neutralize and eliminate ad tech competitors, actual or potential, through a series of acquisitions". The complaint asserts numerous anticompetitive effects arising from Google's conduct, including higher prices for publishers and advertisers, reduced scale for competitors, reduced multi-homing, reduced choice and reduced innovation.

In February 2023, the DOJ announced that Tenaris, S.A. ("Tenaris") abandoned its planned $460 million acquisition of Benteler Steel & Tube Manufacturing Corp.'s ("Benteler") steel and tube manufacturing facility in Shreveport, Louisiana, in response to a DOJ investigation of the transaction.[27] Tenaris is a global manufacturer and supplier of steel pipes and related services, and Benteler is an international steel and tube production and engineering firm. The DOJ noted that the transaction "would have combined two domestic suppliers of seamless tubing and production casing, important types of steel pipe used in the extraction of oil and gas" and "increased concentration in an already concentrated industry, cementing Tenaris as the undisputed dominant player in the market".

In March 2023, the DOJ sued to block JetBlue Airways Corp.'s ("JetBlue") proposed $3.8 billion acquisition of rival Spirit Airlines, Inc. ("Spirit").[28] JetBlue is a low-cost carrier with hubs in New York City and Boston, and Spirit is an ultra-low-cost carrier with a primary hub in Fort Lauderdale. Both airlines primarily serve the continental U.S. and Latin America. In its complaint, filed in the District of Massachusetts, the DOJ asserted that the relevant product market is for air passenger service with relevant geographic markets based on specific origin-to-destination pairs. The DOJ contended that, if allowed to proceed, the merger would substantially lessen competition in these markets by eliminating competition between JetBlue and Spirit and result in increased ticket prices, less consumer choice and increased coordination among JetBlue and remaining competitors.

03

Activism[29]

In April 2023, Lazard released its Shareholder Activism Update: Early Look at 2023 Trends (the "Lazard Report"), which offers key observations regarding activist activity levels and shareholder engagement in the first quarter of 2023.

Key findings/insights from the Lazard Report include:

- Activism in Q1 2023 continued 2022's active pace with 69 new campaigns globally, representing a ~6% increase from Q4 2022 and the second-highest quarter of activist activity since 2019 (trailing only Q1 2022, which featured 73 new campaigns globally).
- U.S. activist activity declined in Q1 2023 but continued to represent the largest regional share of global activist activity at ~42% of all new campaigns. The 29 new campaigns launched in the United States in Q1 2023 represented a ~34% decrease from Q1 2022 and a ~28% decrease from Q4 2022.
- Increased activist activity in Europe and the Asia-Pacific region in Q1 2023 offset the decreased activist activity in the United States. The 21 new campaigns launched in Europe (~30% of all campaigns) represented the busiest first quarter on record, and one of the busiest quarters in recent years, in Europe. Q1 2023 also featured above-average activist activity in the Asia-Pacific region, which accounted for ~19% of all activist campaigns in Q1 2023 compared to a four-year average of ~14%.
- Companies with market capitalizations in excess of $50 billion were targeted more frequently in Q1 2023 than in any other quarter on record (~16% of unique companies targeted in Q1 2023), and ~36% of all activist campaigns in Q1 2023 were initiated at

companies that were targets of recent activist activity, continuing 2022 trends.

- Approximately 42% of all activist campaigns in Q1 2023 featured an M&A-related objective, up from ~32% in Q1 2022 but down from ~46% in Q4 2022. Divestitures and break-up transactions were the most common M&A-related objective, continuing a Q4 2022 trend. Industry consolidation and full company sales were the least common M&A-related objective, reversing a 2022 trend.
- During the period from September 1, 2022, when the universal proxy rules in the United States became effective, through March 31, 2023, activists pursued Board changes at a similar pace but launched ~46% fewer proxy fights compared to the period from September 1, 2021 through March 31, 2022. Activists also proposed smaller nominee slates, with ~50% of slates providing for one to two nominees during the period from September 1, 2022 through March 31, 2023 compared to ~31% during the period from September 1, 2021 through March 31, 2022. The number of Board seats won by activists during the period from September 1, 2022 through March 31, 2023 increased by ~16% but the number of seats remaining "in play" decreased significantly (down ~64% compared to the period from September 1, 2021 through March 31, 2022).

04

Corporate Governance

ASSET MANAGER 2023 PRIORITIES

Blackrock 2023 Investors Letter[30]

In March 2023, BlackRock, Inc. ("BlackRock") CEO Larry Fink published a letter to investors, combining his annual letter to CEOs and annual letter to shareholders of BlackRock in one statement. Fink touched on several risks to the U.S. financial system in his 20-page letter, noting that geopolitical tensions, the consequences of "easy money" stemming from fiscal and monetary policies in place since the Great Recession and global fragmentation would all likely result in persistent inflation and lower returns for investors. Additionally, Fink discussed several emerging hot topics of 2023, including the advancement of financial inclusion in emerging markets, the expansion of transparency in financial markets for investors through technology, the impact on capital markets due to the banking crisis, the tradeoff between price and security with regards to supply chains and the growing opportunity to invest in the global energy transition to a low-carbon economy.

Updates to Vanguard Voting Policy[31]

The Vanguard Group, Inc. ("Vanguard") updated its proxy voting policy for U.S. portfolio companies that became effective February 1, 2023. Changes include:

- Director capacity and commitments: Vanguard clarified that the overboarding policy limit of two public boards applies to all named executive officers, including a company's CEO. Additionally, Vanguard now explicitly identifies certain disclosures it finds helpful to include in a company's overboarding policy, such as the limits that are in place, any considerations and rationale

for nominees if they exceed the policy limits, an explanation of how the board settled on its policy and how frequently it is reviewed.

- Director and committee accountability: For certain governance concerns, Vanguard will now vote against relevant committee members instead of solely committee chairs or board leadership. For example, references to individual director accountability, such as board chair or lead independent director, are now replaced by references to all applicable committee members under circumstances such as: re-appointing directors who failed to receive majority support without resolving the underlying issue driving lack of shareholder support (all members of nominating committee), limiting shareholder rights (all members of nominating committee), voting against company's Say on Pay proposal in consecutive years (all members of compensation committee) and voting against an equity compensation plan (all members of compensation committee). Only when circumstances do not fall under the purview of a board committee will Vanguard vote against individual directors, such as lead independent director and/or board chair.
- Diversity and climate disclosure: Vanguard has removed previous reference to certain instances for which it would support specific board diversity-related shareholder proposals, including proposals seeking disclosure of a director's personal characteristics, proposals requesting adoption of diversity-related board policies and proposals which are not overly prescriptive pertaining to director-related skills or disclosures. Vanguard has instead added language noting the importance of compelling rationale and disclosures being provided by companies if they lack diversity, which may be reflective of an evolving policy position to review circumstances and actions of companies more holistically. In addition, Vanguard has removed references to situations in which it would support climate-related shareholder proposals, including proposals supporting goals or target-setting for relevant greenhouse gas emissions.
- Executive compensation: Vanguard clarified that it will generally support shareholder proposals that deal with severance or golden parachute agreements, unless they are excessive or unreasonable. Vanguard noted, for example, that severance payments that total more than 2.99 times salary plus targeted bonus and/or have single-trigger cash or equity payments would be considered excessive or unreasonable.
- Mergers, acquisitions and financial transactions: Vanguard clarified its position to support proposals in these areas based on the outlook of long-term shareholder value, specifically focusing on four key governance areas consisting of valuation, strategic rationale, board oversight of the transaction and the surviving entity's governance profile.

NYSE AND NASDAQ UPDATE

On October 26, 2022, the U.S. Securities and Exchange Commission (the "SEC") adopted a final rule, Rule 10D-1, implementing the clawback provisions mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The final rule required that national securities exchanges establish listing standards that require listed companies to develop and implement policies providing for the recovery of erroneously awarded incentive-based compensation received by current or former executive officers where such compensation is based on erroneously reported financial information and an accounting restatement is required (a "clawback policy"). National securities exchanges must have their applicable listing standards effective no later than November 28, 2023, and listed companies must

adopt a compliant clawback policy no later than 60 days following the effective date of the applicable listing standards (the current outside date is January 27, 2024) (the "Adoption Deadline"). On February 22, 2023, the New York Stock Exchange ("NYSE") and the Nasdaq Stock Market ("Nasdaq") filed rule proposals for clawback listing standards.[32]

- NYSE:[33] NYSE's proposal has the following features:
  - A NYSE listed company's failure to comply with its clawback policy "reasonably promptly" after a clawback obligation arises will result in:
    - Immediate suspension of trading; and
    - Immediate commencement of the delisting procedure.
  - The NYSE Listed Company Manual provides for two consecutive six-month cure periods during which the listed company's securities may continue to be traded despite failure to adopt a compliant clawback policy. However, NYSE retains discretion to initiate suspension and delisting procedures at any time following a listed company's failure to timely adopt a compliant clawback policy.
  - A listed company's failure to adopt a compliant clawback policy by the Adoption Deadline will trigger various notice requirements and a requirement that the listed company issue a press release disclosing the failure to timely adopt a clawback policy, the reason for such failure and, if known, the anticipated date on which a clawback policy will be adopted.
- Nasdaq:[34] A Nasdaq listed company that fails to (i) comply with its clawback policy "reasonably promptly" after a clawback obligation arises or (ii) adopt a compliant clawback policy by the Adoption Deadline must submit a compliance plan to Nasdaq, generally in accordance with Nasdaq's administrative processes and deadlines for similar corporate governance deficiencies, leaving up to 180 days to cure the deficiency. Nasdaq must issue a delisting letter immediately following such 180-day cure period if the listed company remains non-compliant.

SEC UPDATES

SEC Finalizes Rule Shortening the Securities Transaction Settlement Cycle[35]

On February 15, 2023, the SEC adopted final rules to shorten the standard settlement cycle for most broker-dealer transactions in securities from two business days after the trade date (T+2) to one (T+1). The compliance date for the final rules is May 28, 2024. The amended rules retain many of the same exceptions as the existing rules, including transactions involving exempted securities, government securities, municipal securities, commercial paper, bankers' acceptances, commercial bills and security-based swaps.

SEC Staff Posts New CDIs Related to Clawback Disclosure and Pay Versus Performance

The SEC's Division of Corporation Finance issued new clawback-related Compliance and Disclosure Interpretations ("CDIs") on January 27, 2023[36], and Pay Versus Performance CDIs on February 10, 2023[37]. Specifically, the Clawback Disclosure CDIs, 121H.01 – 121H.04, clarify the SEC's expectations regarding a set of new checkboxes that have been added to the cover pages of Form 10-K, Form 20-F and Form 40-F. The Pay Versus Performance CDIs, 128D.01 – 128D.13 and 228D.01 – 228D.02, address various topics under new Item 402(v) of Regulation S-K, including, among other things, calculating compensation actually paid, footnote

disclosure describing deductions, peer group presentation, the requirement of net income within the 402(v) table, company-selected measures and "bonus pools".

SEC Proposes Changes to Regulation S-P, Proposes New Cybersecurity Risk Management Rule and Reopens Comment Period for Proposed Cybersecurity Risk Management Rules and Amendments for Registered Investment Advisers and Funds

On March 15, 2023, the SEC took a number of steps related to cybersecurity, one of its top current priorities. First, the SEC proposed amendments to Section 248.30 of Regulation S-P that would, among other things, require broker-dealers, investment companies, registered investment advisers and transfer agents to adopt and maintain written policies and procedures to address unauthorized access of customer information; to provide notice, with certain exceptions, no later than 30 days after becoming aware of unauthorized access to individuals whose customer information was or is reasonably likely to have been accessed without authorization; and to require their service providers to take appropriate measures to protect customer information against unauthorized access. The public comment period will remain open until 60 days after the date of publication of the proposing release in the Federal Register.[38]

Also on March 15, 2023, the SEC proposed Rule 10 under the Securities Exchange Act of 1934, which would require broker-dealers, clearing agencies, national securities associations, national securities exchanges, transfer agents and other market participants to address their cybersecurity risks. Specifically, the proposal would require these entities to implement cybersecurity policies and procedures, review at least annually the effectiveness of such policies and notify the SEC of any significant cybersecurity incidents. The public comment period will remain open until 60 days after the date of publication of the proposing release in the Federal Register.[39]

Finally, the SEC reopened the comment period on proposed rules and amendments related to cybersecurity risk management and cybersecurity-related disclosure for registered investment advisers, registered investment companies and business development companies that were originally proposed by the SEC on February 9, 2022. The initial comment period ended on April 11, 2022. The SEC reopened the comment period in light of other regulatory developments regarding cybersecurity risk management, to allow interested persons additional time to analyze whether there would be any effects of other SEC proposals and disclosure that the SEC should consider.[40]

SAY ON FREQUENCY VOTE REMINDER

Many public companies will be required to include an advisory "say on frequency" proposal in their 2023 proxy statement. Public companies were first required in 2011 to hold a say on frequency vote to solicit their shareholders' advice on how often the company should hold a "say on pay" vote, as mandated by Dodd-Frank, with subsequent votes required at least once every six years following the prior say on frequency votes. For companies that held a say on frequency vote in 2017, the next required vote is required to be held in 2023.

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 Caremark Int'l, Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

3 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

4 *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015).

5 Press Release, *Treasury Takes Action Related to Excepted Foreign State and Excepted Real Estate Foreign States*, U.S. Department of the Treasury (Feb. 10, 2023), https://home.treasury.gov/news/press-releases/jy1262.

6 *Determination Regarding Excepted Foreign States*, 88 Fed. Reg. 9190 (Feb. 13, 2023). *See also Determination Regarding Excepted Real Estate Foreign States*, 88 Fed. Reg. 9190-9191 (Feb. 13, 2023).

7 *See* CFIUS Excepted Foreign States *available* at https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states.

8 In February 2023, in remarks delivered on behalf of Acting Comptroller of the Currency Michael J. Hsu at the Office of the Comptroller of the Currency ("OCC") Bank Merger Symposium, OCC Senior Deputy Comptroller and Chief Counsel Ben W. McDonough stated that the Herfindahl-Hirschman Index ("HHI"), the key metric used to assess market concentration before and after mergers, "might have become less relevant" given the growth in online and mobile banking and rise of nonbank competitors since the bank merger guidelines were last updated in 1995. Acting Comptroller of the Currency Michael J. Hsu Opening Remarks for the OCC Bank Merger Symposium (Feb. 10, 2023), https://www.occ.treas.gov/news-issuances/speeches/2023/pub-speech-2023-15.pdf. The HHI is relevant to the competition prong of the bank merger review framework and is based only on deposits, which has been criticized for not predicting competition across business lines.

9 Acting Comptroller of the Currency Michael J. Hsu Remarks at Brookings "Detecting, Preventing, and Addressing Too Big To Manage" (Jan. 17, 2023), https://www.occ.gov/news-issuances/speeches/2023/pub-speech-2023-7.pdf. Hsu stated that "[t]he most effective and efficient way to successfully fix issues at a [too-big-to-manage] bank is to simplify it – by divesting businesses, curtailing operations, and reducing complexity". The OCC is currently using a four-level escalation framework to address supervisory concerns and deficiencies at large banks. While there has not been a public divestiture order from the OCC, Hsu stated that simplification via divestiture, which is the fourth level of escalation, is "a viable option".

10 12 U.S.C. § 1823(c)(4)(G); Joint Statement by the Department of the Treasury, Federal Reserve, and FDIC (Mar. 12, 2023), https://home.treasury.gov/news/press-releases/jy1337.

11 FINMA approves merger of UBS and Credit Suisse (Mar. 19, 2023), https://www.finma.ch/en/news/2023/03/20230319-mm-cs-ubs.

12 Marion Halftermeyer, Myriam Balezou and Bloomberg, "UBS on Credit Suisse takeover: 'We will be de-risking a lot of the tricky businesses that we are inheriting'" (Mar. 19, 2023), https://fortune.com/2023/03/19/ubs-on-credit-suisse-takeover-we-will-be-de-risking-tricky-businesses-we-are-inheriting.

13 Holly Vedova, *Update from the FTC's Bureau of Competition*, FTC (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc _ gov/pdf/vedova-gcr-law-leaders-global-conference.pdf.

14 *Id.*

15 Hart-Scott-Rodino Annual Report: Fiscal Year 2021, FTC and DOJ (Feb. 2023), https://www.ftc.gov/reports/hart-scott-rodino-annual-report-fiscal-year-2021.

16 Anna Langlois, *DOJ official: private equity HSR compliance poses existential threat to enforcement*, GCR USA (Feb. 3, 2023), https://globalcompetitionreview.com/gcr-usa/article/doj-official-private-equity-hsr-compliance-poses-existential-threat-enforcement.

17 Matthew Perlman, *Private Equity Deals Getting Closer Antitrust Scrutiny*, Law360 (Mar. 30, 2023), https://www.law360.com/competition/articles/1592095/private-equity-deals-getting-closer-antitrust-scrutiny.

18 Press Release, *Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates*, DOJ (Mar. 9, 2023), https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal.

19 Assistant Attorney General Jonathan Kanter, Remarks at the Keystone Conference on Antitrust, Regulation & the Political Economy, DOJ (Mar. 2, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-keystone.

20 Principal Deputy Assistant Attorney General Doha Mekki, Remarks at GCR Live: Law Leaders Global 2023, DOJ (Feb. 2, 2023), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0.

21 *FTC v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023).

22 Press Release, *Statement of Elizabeth Wilkins, Director of the FTC's Office of Policy Planning, on the Decision of SUNY Upstate Medical University and Crouse Health System, Inc. to Drop Their Proposed Merger*, FTC (Feb. 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/statement-elizabeth-wilkins-director-ftcs-office-policy-planning-decision-suny-upstate-medical.

23 Press Release, *FTC Acts to Block Deal Combining the Two Top Mortgage Loan Technology Providers*, FTC (Mar. 9, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-acts-block-deal-combining-two-top-mortgage-loan-technology-providers.

24 Press Release, *FTC Staff Seeks Court Order Preventing ICE from Consummating its Acquisition of Rival Black Knight Pending Agency Administrative Challenge*, FTC (Apr. 10, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-staff-seeks-court-order-preventing-ice-consummating-its-acquisition-rival-black-knight-pending.

25 Press Release, *Justice Department Sues Google for Monopolizing Digital Advertising Technologies*, DOJ (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies.

26 Press Release, *FTC Sues Facebook for Illegal Monopolization*, FTC (Dec. 9, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

27 Press Release, *Benteler Steel & Tube Manufacturing Corp. Abandons Merger with Tenaris, S.A. After Justice Department Investigation*, DOJ (Feb. 6, 2023), https://www.justice.gov/opa/pr/benteler-steel-tube-manufacturing-corp-abandons-merger-tenaris-sa-after-justice-department.

28 Press Release, *Justice Department Sues to Block JetBlue's Proposed Acquisition of Spirit*, DOJ (Mar. 7, 2023), https://www.justice.gov/opa/pr/justice-department-sues-block-jetblue-s-proposed-acquisition-spirit.

29 Unless otherwise indicated, all data regarding activism is from Lazard, *Shareholder Activism Update: Early Look at 2023 Trends* (Apr. 18, 2023), https://www.lazard.com/research-insights/shareholder-activism-update-early-look-at-2023-trends, which includes data for campaigns conducted globally by activists at companies with market capitalizations greater than $500 million at the time of campaign announcement; companies spun off as part of campaign process counted separately. Four-year average data based on aggregate number of campaigns. Data regarding Board seats won represents Board seats won by activists in respective period, regardless of the period in which the campaign was initiated.

30 BlackRock, *Larry Fink's Annual Chairman's Letter to Investors* (Mar. 15, 2023), https://www.blackrock.com/corporate/investor-relations/larry-fink-annual-chairmans-letter.

31 Vanguard, *Proxy voting policy for U.S. portfolio companies* (Feb. 1, 2023), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/us _ proxy _ voting _ 2023.pdf.

32 Cravath, Swaine & Moore LLP, *NYSE and Nasdaq Propose Clawback Listing Standards* (Mar. 2, 2023), https://www.cravath.com/a/web/uPcsVmGc13JXnryDyHptUV/7xxWV5/nyse-and-nasdaq-propose-clawback-listing-standards.pdf.

33 Proposal, *New York Stock Exchange LLC Form 19b-4*, NYSE (Feb. 22, 2023), https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2023/SR-NYSE-2023-12.pdf.

34 Proposal, *The Nasdaq Stock Market LLC Form 19b-4*, NASDAQ (Feb. 22, 2023), https://listingcenter.nasdaq.com/assets/rulebook/NASDAQ/filings/SR-NASDAQ-2023-005.pdf.

35 Release No. 34-96930, *Shortening the Securities Transaction Settlement Cycle*, SEC (Feb. 15, 2023), https://www.sec.gov/rules/final/2023/34-96930.pdf.

36 Compliance and Disclosure Interpretations, *Exchange Act Rules*, SEC (last updated Jan. 27, 2023), https://www.sec.gov/divisions/corpfin/guidance/exchangeactrules-interps#121H.1.

37 Compliance and Disclosure Interpretations, *Regulation S-K*, SEC (last updated Feb. 10, 2023), https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp#128D.01.

38 Release No. 34-97141, *Proposed rule: Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Customer Information*, SEC (Mar. 15, 2023), https://www.sec.gov/rules/proposed/2023/34-97141.pdf.

39 Release No. 34-97142, *Proposed rule: Cybersecurity Risk Management Rule for Broker-Dealers, Clearing Agencies, Major Security-Based Swap Participants, the Municipal Securities Rulemaking Board, National Securities Associations, National Securities Exchanges, Security-Based Swap Data Repositories, Security-Based Swap Dealers, and Transfer Agents*, SEC (Mar. 15, 2023), https://www.sec.gov/rules/proposed/2023/34-97142.pdf.

40 Press Release, *SEC Proposes New Requirements to Address Cybersecurity Risks to the U.S. Securities Markets*, SEC (Mar. 15, 2023), https://www.sec.gov/news/press-release/2023-52.

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