Cravath Quarterly Review

M&A, Activism and Corporate Governance

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Q3 2020

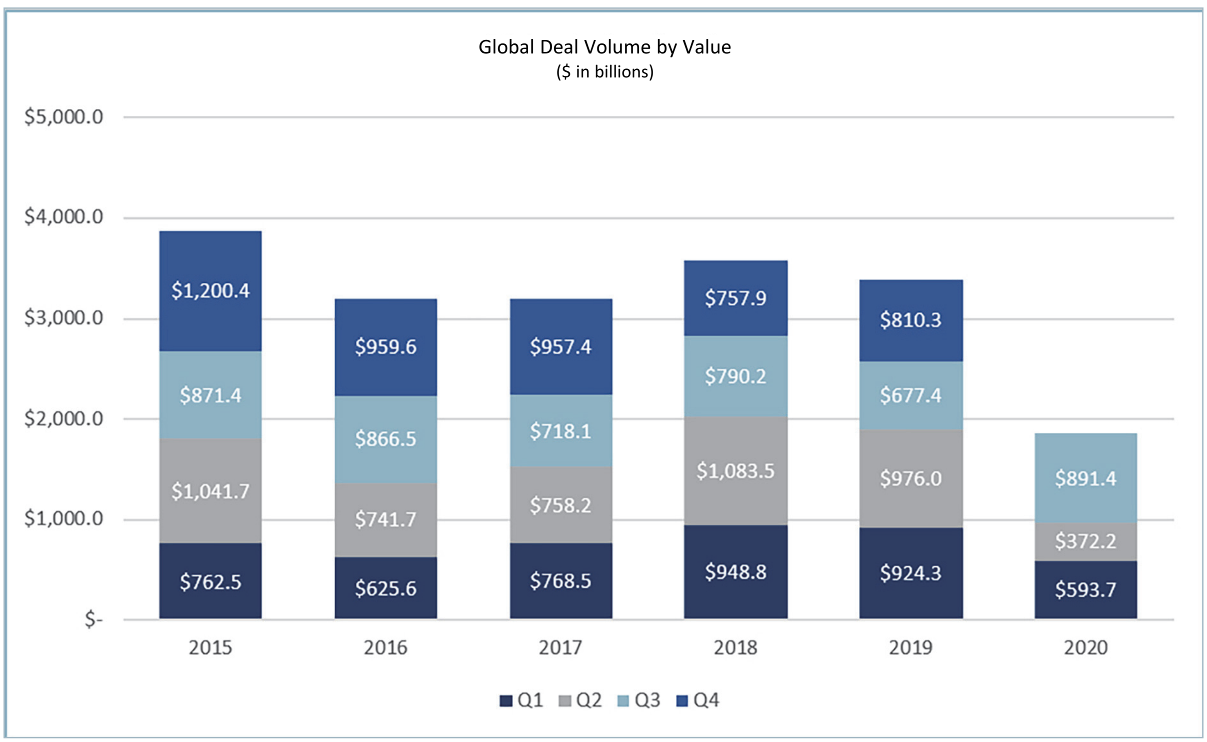
Mergers & Acquisitions

TRENDS[1]

After a slow first half of 2020, Q3 2020 saw a dramatic resurgence in global M&A activity driven by large and complex deals. The U.S. market saw one of the largest jumps in deal values, with a total deal value of $402.2 billion in Q3 2020, up ~425% quarter over quarter from Q2 2020. Europe and Asia-Pacific both saw significant increases in overall deal values; those increases were driven by large deals as there was an overall decrease in total deal volume. Year to date, private equity accounted for almost one-fifth of all deals by volume. In terms of sector activity, the Technology, Media & Telecom, Energy, Mining & Utilities and Industrial and Chemicals sectors were the most active, by deal value. It remains to be seen how these trends may be impacted by an increase in COVID-19 cases in the United States and renewed shutdowns in various European countries, as well as the results of the recent elections in the United States.

Dramatic Resurgence in Global M&A Activity in Q3 2020

Q3 2020 saw an overall ~140% quarter-over-quarter increase in global deal value to $891.4 billion, up from $372.2 billion in Q2 2020. This increase was driven by an increase in large deals (deals with disclosed values of $5 billion or more), which were up ~256% quarter over quarter and totaled $451.3 billion over 32 transactions in Q3 2020. However, the increased activity in Q3 2020 was not enough to make up for the slow first half of the year that was dragged down by the COVID-19 pandemic. Through the first three quarters of 2020, M&A activity totaled $1.86 trillion in value, compared to $2.58 trillion over the same period in 2019, a ~28% decline. Deal count year-to-date has similarly decreased to 11,214 from 15,306 over the same period in 2019, a ~27% decline.



Source: Mergermarket

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

Increased Cross-Border Activity in Q3 2020 Compared to Q2 2020

Compared to $223.5 billion of cross-border activity recorded in Q2 2020, Q3 2020 saw an increase in deal value for cross-border deals of ~33% to $296.9 billion. However, Q1-Q3 2020 cross-border M&A activity by deal value, at $711.7 billion, was still ~36% lower than the same period in 2019 due to the reduced deal value in Q2 2020 resulting from the COVID-19 pandemic. Latin America continued to see continued depressed inbound activity and recorded $7.4 billion in Q1-Q3 2020 inbound activity, down ~81% compared to the same period in 2019. In the Asia Pacific region, inbound M&A activity into China for Q1-Q3 2020 totaled $39.2 billion, which exceeded outbound transaction value of $10.5 billion and reversed the direction of investment flows compared to the same time period in 2019 when inbound activity ($25.1 billion) was behind outbound activity ($40.1 billion). The Middle East and Africa region did not see much recovery in Q3 2020, as only 57 deals which totaled $6.2 billion were announced in the region in Q3 2020, the lowest quarterly value since Q3 2015. A significant decrease in foreign investment into the region contributed to this decreased activity. Inbound M&A into the Middle East and Africa region totaled $2.3 billion across 21 deals, after achieving at least $10 billion in six of the prior ten quarters. Investment from Europe accounted for 12 of those deals.

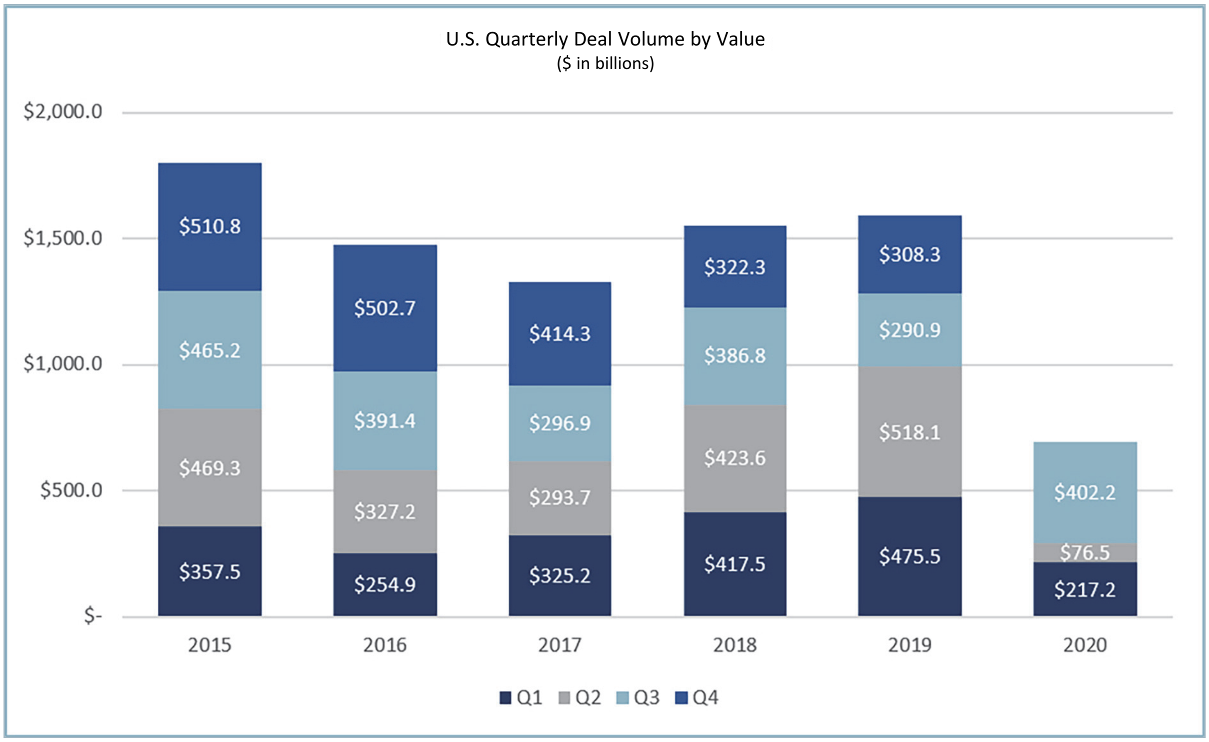
Strong Private Equity Activity Increases Global Market Share to All Time High

An abundance of dry power enabled private equity to take advantage of the downturn due to the impact of the COVID-19 pandemic, resulting in 700 deals (compared to 638 in Q2 2020) worth $140.9 billion, a ~46% increase in total deal value over Q2 2020. As a result, private equity activity increased its global market share by volume to 20%, the highest quarterly figure on record. On a regional basis, Europe enjoyed strong buyout activity, with deals totaling $44 billion in Q3 2020, including KKR and Ardian's $3.8 billion acquisition of Elsan and EQT's $1.5 billion acquisition of Idealista. Private equity buyouts accounted for ~28% of total European M&A activity by value for the year, the highest figure on record. However, overall global private equity buyout activity for the year was down ~14% by deal value compared to the same period in 2019, which is not surprising given the overall reduction in M&A activity year-to-date due to the COVID-19 pandemic.

U.S. M&A Market Rebounds Sharply

After seeing dramatic declines in Q2 2020 due to the COVID-19 pandemic, deal activity rebounded sharply in Q3 2020, featuring $402.2 billion worth of deals across 1,036 transactions, a ~425% increase by value and a ~22% increase by deal count relative to Q2 2020, and a ~38% increase by value and a ~37% decrease by deal count over Q3 2019. However, activity through the first three quarters of 2020 remained down ~46% by value and ~30% by deal count compared to the same period in 2019.

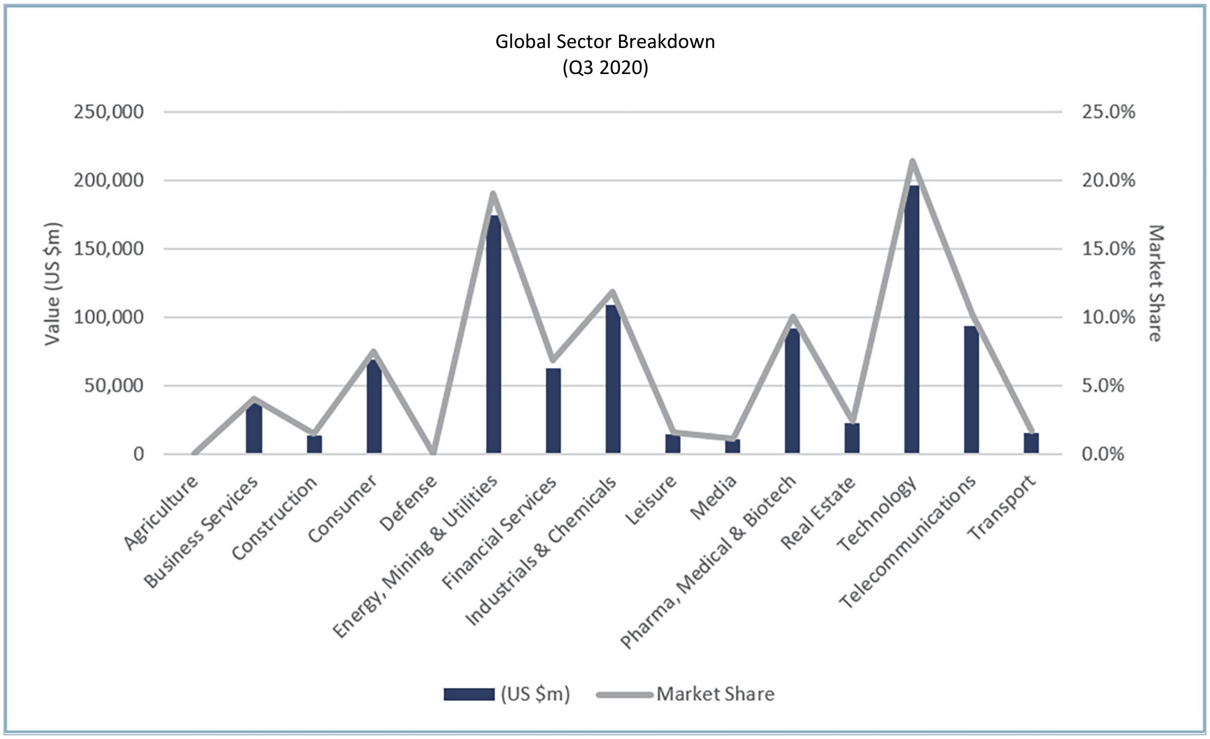
Nineteen deals each worth at least $5 billion were announced in Q3 2020, and accounted for a combined $217 billion of activity. The three largest U.S. deals announced this year were announced in Q3 2020, including 7-Eleven's proposed acquisition of Speedway for $21 billion, Analog Device's proposed acquisition of Maxim Integrated Products for $20.3 billion and Gilead Science's bid for Immunomedics for $19.4 billion. Corporate divestment activity through the first three quarters of 2020 was up in value by ~4% compared to the same period in 2019. In Q3 2020, 16 corporate divestitures worth a combined $7.3 billion were announced, the largest being Altice USA's sale of a 49.9% stake in its LightPath fiber enterprise business to Morgan Stanley Infrastructure for $1.6 billion.



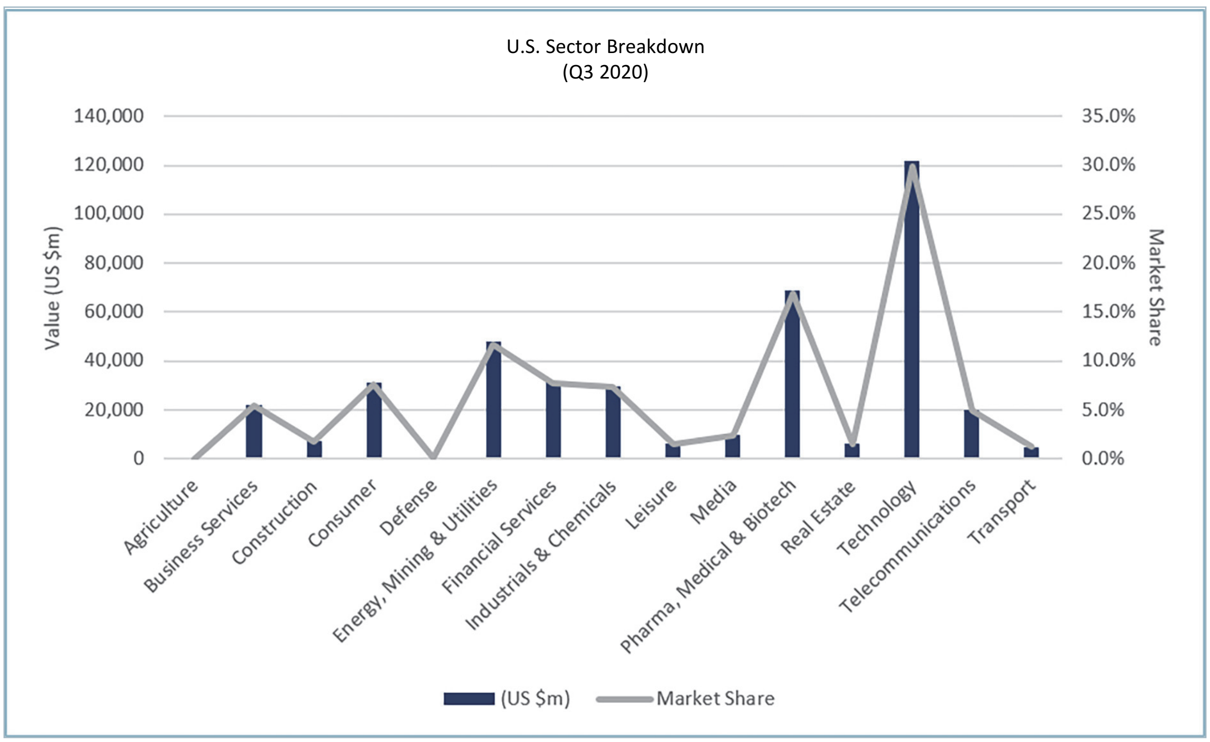
Source: Mergermarket

Major Activity in Certain Sectors

In terms of global deal value, the Technology, Media & Telecom sector led the way in Q3 2020, and posted $301.2 billion across 760 deals, with Nippon Telegraph and Telephone Corporation's $40.4 billion acquisition of a 33.79% stake in NTT DoCoMo, Inc. and NVIDIA Corporation's $38.5 billion acquisition of SVF Holdco (UK) Limited representing the largest deals in the sector. The Energy, Mining & Utilities sector came in second, featuring $168.6 billion across 286 deals, a ~115% increase in value and ~13% increase in deal count compared to Q2 2020. Notable deals in the Energy, Mining & Utilities sector included China Oil & Gas Pipeline Network Corporation's $49.1 billion acquisition of certain oil and gas assets of PetroChina Company Limited and a Chinese consortium's acquisition of a 48.74% stake worth $34.8 billion in China Oil & Gas Pipeline Network Corporation. The Industrial and Chemicals sector remained strong, and featured $101 billion worth of deals across 633 deals, a ~233% increase in value and ~23% increase in deal count compared to Q2 2020. In terms of activity through the first three quarters of 2020, the European Technology sector was particularly active, with $85.1 billion spent across 769 deals, making up ~19% of overall European deal count this year compared to ~14% of FY 2019. In the U.S. Technology sector, activity by value through the first three quarters of 2020 increased modestly compared to 2019, with 803 deals worth $197 billion in 2020 compared to 979 deals worth $180.5 billion in Q1-Q3 2019, making up 28% of all M&A activity in the U.S. by value in 2020 compared to 14% in Q1-Q3 2019.



Source: Mergermarket



Source: Mergermarket

LEGAL DEVELOPMENTS

Cases

Q3 2020 featured a number of notable cases in the M&A space.

***In re HomeFed Corp. Stockholder Litig., C.A. No. 2019-0592-AGB* (Del. Ch. July 13, 2020)**

In this case, the Delaware Court of Chancery found that Jefferies Financial Group, Inc. ("Jefferies"), the 70% stockholder of HomeFed Corporation ("HomeFed"), did not meet the prerequisites set forth in *Kahn v. M&F Worldwide Corp.* ("MFW") for business judgment review in connection with a squeeze-out merger of the minority stockholders. The Court found that MFW's requirements had not been met *ab initio* because Jefferies had engaged in "substantive economic negotiations" with HomeFed's largest unaffiliated stockholders before implementing MFW protections.

In September 2017, a HomeFed director wrote to Jefferies proposing a potential all-stock merger of HomeFed and Jefferies with a 2:1 exchange ratio, a proposal Jefferies subsequently relayed to Beck, Mack and Oliver LLC ("BMO"), HomeFed's second largest stockholder. In December 2017, HomeFed's board created a special committee of independent directors to investigate a potential transaction. In March 2018, Jefferies broke off discussions with the special committee and the special committee "paused" its process. Jefferies continued discussions with BMO and ultimately agreed on a 2:1 exchange ratio in February 2019, upon which the special committee reactivated its process and Jefferies formally proposed the transaction conditioned on approval by a special committee and a majority of the minority stockholders. Former minority stockholders filed a post-closing fiduciary suit against the special committee directors and Jefferies, which the defendants moved to dismiss on the basis that MFW applied and the transaction was therefore subject to business judgment review. The Court rejected the motion to dismiss and held that entire fairness review would apply because the transaction did not satisfy MFW's *ab initio* requirement.

The Court stated that, per the MFW framework, the business judgment rule is the appropriate standard of review for a squeeze-out merger by a controlling stockholder if the merger is conditioned *ab initio* upon both (i) "the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care" and (ii) "the uncoerced, informed vote of a majority of the minority stockholders." The Court found that Jefferies had failed to condition either the initial 2017 proposal or the 2019 proposal upon the dual MFW protections, noting that "the purpose of the words '*ab initio*,' and other formulations like it in the MFW decisions, require the controller to self-disable before the start of substantive economic negotiations, and to have both the controller and Special Committee bargain under the pressures exerted on both of them by these protections." The Court also noted its recent decision in *In re Dell Technologies Inc. Class V Stockholders Litigation*[2], "MFW's dual protections contemplate that the Special Committee will act as the bargaining agent for the minority stockholders, with the minority stockholders rendering an up-or-down verdict on the committee's work." The Court found that the plaintiffs had sufficiently alleged that Jefferies had engaged in "substantive economic discussion" with BMO before committing itself to the MFW protections, and by anchoring the negotiations, "undermined the Special Committee's ability to bargain effectively as the minority stockholders' agent."

***In re Coty Inc. Stockholder Litig., C.A. No. 2019-0336-AGB* (Del. Ch. August 17, 2020)**

In this case, the Delaware Court of Chancery refused to dismiss a consolidated investor suit against Coty Inc. ("Coty"), its directors and majority owner JAB Holding Co. and its affiliates ("JAB") alleging that JAB increased its stake in Coty from approximately 40% to 60% through a partial tender offer in an unfair process that was approved on unfair terms at the expense of minority stockholders, concluding that it was "reasonably conceivable" that the minority stockholders were harmed as a result of the tender offer. The plaintiffs also brought a derivative suit on behalf of Coty alleging that JAB breached obligations in a stockholders agreement to ensure the presence of independent directors on Coty's board and that Coty's directors caused and failed to remedy ongoing breaches of the stockholders agreement.

In 2019, JAB proposed a tender offer to acquire up to 150 million Coty shares, which would increase JAB's Coty stockholdings from approximately 40% to 60%. The proposal was conditioned on the independent directors of Coty (i) approving the tender offer and (ii) recommending that Coty's stockholders accept the tender offer. The Coty board of directors formed a special committee to evaluate the tender offer, but failed to determine

[2] A summary of the *In re: Dell Technologies Inc. Class V Stockholders Litigation* can be found in the Q2 2020 issue of the Cravath Quarterly Review: M&A, Activism and Corporate Governance.

the independence and disinterestedness of the members of the Special Committee from JAB, despite some members of the Special Committee having existing and prior professional and other relationships with JAB. The Special Committee did not engage in negotiations with JAB regarding the monetary terms of the tender offer, but agreed to (i) raise the minimum share tender condition so that if the tender offer was consummated, JAB would own at least 50.1% of the outstanding shares and (ii) enter into a stockholders agreement to protect Coty's minority stockholders, which included the requirement that no fewer than four directors who were disinterested from JAB and its affiliates be elected to the board and two additional new independent directors be added by September 30, 2019. Coty subsequently filed a recommendation statement recommending the tender offer, but omitted information regarding the professional history and relationships between JAB and the outside directors, including the members of the special committee. The tender offer closed, and JAB accepted for purchase the maximum 150 million shares. Subsequently, in September 2019 three new directors were added to the board, one of whom was not independent of JAB and the other two having strong ties to JAB and relationships with JAB managing partners.

The plaintiffs filed suit challenging the tender offer, then subsequently filed an amended complaint, asserting that (i) the defendant directors (a) "knowingly failed to adequately consider whether any member of the Special Committee was actually independent of JAB," (b) "intentionally submitted false Questionnaires concerning the independence of the Company's directors and officers, including the Special Committee members," and (c) "failed to disclose all material information concerning the Tender Offer and the conflicts of interest of the Special Committee members in the [Recommendation Statement]"; (ii) JAB breached its fiduciary duties in its capacity as Coty's *de facto* controlling stockholder because it "opportunistically timed and priced the Tender Offer so that it undervalued Coty and structured it in a coercive manner"; (iii) JAB breached the stockholders agreement by failing to elect independent directors; and (iv) the defendant directors breached their fiduciary duties by causing and failing to remedy the breaches under the stockholders agreement.

The defendants filed a motion to dismiss for failure to state a claim for relief. The Court rejected the defendants' motion to dismiss on all counts, noting that the plaintiffs had pled facts sufficient to support a reasonably conceivable claim. The Court additionally addressed the defendants' assertion that among other things that suit must be dismissed with regards to the remaining minority stockholders because the remaining stockholders had not suffered harm because they were not differently situated than they were before the tender offer given that JAB already had *de facto* control over Coty. In rejecting this argument, the Court cited the Delaware Supreme Court's ruling in *Paramount Communications Inc. v. QVC Network Inc.* ("Paramount"), which held that "[w]hen a majority of a corporation's voting shares are acquired by a single person or entity, or by a cohesive group acting together, there is a significant diminution in the voting power of those who thereby become minority stockholders." The Court emphasized the *Paramount* ruling that the price to be paid for such a loss of voting power "is usually a control premium which recognizes not only the value of a control block of shares, but also compensates the minority stockholders for their resulting loss of voting power." Given that the minority stockholders lost the ability to obtain a control premium in the future as a result of the tender offer, the Court found that it was "reasonably conceivable" that the minority stockholders were harmed as a result of the transaction.

RECENT TRANSACTIONS IMPACTED BY THE COVID-19 PANDEMIC

Tiffany & Co. v. LVMH Moët Hennessy-Louis Vuitton SE et al., C.A. No. 2020-0768-JRS (Del. Ch. Sep. 16, 2020)

On September 9, 2020, Tiffany & Co. ("Tiffany") filed suit in the Delaware Court of Chancery seeking specific performance against LVMH Moët Hennessy-Louis Vuitton SE and related entities ("LVMH") to take the necessary steps to obtain required antitrust clearances as promptly as practicable and close the $16.2 billion acquisition of Tiffany pursuant to the merger agreement entered into by the parties. Tiffany alleged that LVMH breached the regulatory efforts covenant in the merger agreement (which it alleged contained a "hell or high water" undertaking on the part of LVMH to obtain all required regulatory approvals) by failing to respond to information requests by competition authorities and failing to file merger-clearance applications. Tiffany also alleged that, after the initial onset of the pandemic, LVMH refused to formally request antitrust clearance in two jurisdictions and delayed the clearance process for more than nine months in two others, despite no substantive concerns from the relevant antitrust authorities.

On September 28, 2020, LVMH filed its counterclaim against Tiffany, asserted that it was not required to close the transaction because (i) Tiffany had suffered a "material adverse effect," (ii) Tiffany had materially breached its interim operating covenants and (iii) a legal restraint issued by a governmental entity precluded closing before the outside date of November 24, 2020. Among other arguments, LVMH argued that the material adverse effect definition in the merger agreement did not contain a carve-out for pandemics or other public health events and asserted that Tiffany's business had been "devastated" by the COVID-19 pandemic and that Tiffany was particularly "ill-suited" for the challenges ahead.

On October 28, 2020, Tiffany and LVMH entered into a settlement agreement in connection with the entry into an amended and restated merger agreement which reduced the purchase price by $3.50 per share (or approximately $430 million in total) and reduced closing conditionality, pursuant to which, among other things, each party was required to dismiss all claims that it brought in the litigation with prejudice and agree to a stipulated order of dismissal that dismisses all claims asserted by the parties with prejudice.

REGULATORY DEVELOPMENTS

Antitrust

DOJ Releases 2020 Merger Remedies Manual (September 3, 2020)

On September 3, 2020, the DOJ's Antitrust Division released the 2020 Merger Remedies Manual ("2020 Manual") providing a framework for the DOJ to structure and implement relief in merger cases.[3] The release of the 2020 Manual was expected after DOJ Assistant Attorney General Makan Delrahim announced in September 2018 that the division would withdraw the 2011 Policy Guide to Merger Guidelines and that the 2004 Policy Guide to Merger Remedies ("2004 Guide") would be in effect pending the release of an updated policy. The 2020 Manual updates the 2004 Guide.

The 2020 Manual outlines key principles that apply to the DOJ's implementation of remedies in all mergers reviewed by the DOJ, both horizontal and vertical. Consistent with the 2004 Guide, the 2020 Manual clearly states the DOJ's strong preference for structural remedies over conduct remedies because they are "clean and certain, effective, and avoid ongoing government entanglement in the market." Structural remedies are aimed at addressing the structure of the market and generally involve the sale of businesses or assets by the merging firms, while conduct remedies usually entail injunctive provisions that regulate the merged firm's post-merger conduct. The 2020 Manual states that stand-alone conduct remedies are appropriate only if the parties prove that (1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the competitive harm; and (4) the remedy can be enforced effectively. Conduct remedies may also be appropriate to facilitate structural remedies, such as in the case of temporary supply agreements or temporary limits on the merged firm's ability to re-hire employees if the divestiture involved a transfer of personnel. With respect to "fix-it first" remedies—where the parties implement a structural solution before the merger is consummated—the DOJ may "accept" such remedies (by forgoing to file a case and concluding its investigation without imposing further obligations on the parties) if the remedies eliminate the DOJ's anticipated competitive concerns and need to file a case.

In an update to the 2004 Guide, the 2020 Manual explicitly states that, in most merger cases, the parties must identify an acceptable buyer "upfront" and execute all purchase and ancillary agreements with that buyer before the DOJ enters into the consent decree. In limited circumstances, the DOJ may decide that an upfront buyer is not necessary, if the DOJ is satisfied that the package will sufficiently attract a buyer that will effectively preserve competition and there will be a sufficient number of acceptable potential buyers for the asset package.

Unlike the 2004 Guide, the 2020 Manual discusses the DOJ's interaction and collaboration with international and state antitrust authorities to structure remedies that are effective across jurisdictions and ideally do not conflict unnecessarily with the remedies of other jurisdictions. The 2020 Manual also explains that the DOJ may collaborate with other regulatory agencies in the case of merger remedies in a regulated industry.

[3] News Release, "Justice Department Issues Modernized Merger Remedies Manual", dated September 3, 2020, *available at* https://www.justice.gov/opa/pr/justice-department-issues-modernized-merger-remedies-manual.

FCPA

FCPA Resource Guide Second Edition (July 3, 2020)[4]

On July 3, 2020, the U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") released the second edition of their joint handbook, "A Resource Guide to the Foreign Corrupt Practices Act" (the "Guide"). The second edition provides, in particular, greater clarity on successor liability under the Foreign Corrupt Practices Act ("FCPA") in the M&A context.

The update now explicitly recognizes that while robust pre-acquisition due diligence is ideal, it may not always be possible or feasible. The Guide instructs that when deciding whether to take action against an acquiring company for violations of the predecessor, DOJ and SEC will chiefly consider the timeliness and thoroughness of the acquirer's post-acquisition due diligence and compliance integration, as well as any voluntary disclosure of wrongdoing uncovered post-acquisition. Further, the updated Guide notes that DOJ and SEC have seldom taken action against successor companies for the predecessor's violations.

The second edition of the Guide continues to place an emphasis on robust pre-acquisition due diligence and integration, retaining its original guidance on best practices to avoid successor liability in the M&A context. The Guide continues to recommend pre-acquisition risk-based anti-corruption due diligence; prompt integration of compliance policies and procedures; timely training of directors, officers, and employees of newly acquired entities; FCPA-specific audits of new businesses; and swift disclosure of any wrongdoing uncovered through due diligence of newly acquired or merged entities.

CFIUS

Final Rule on Mandatory Declarations (September 15, 2020)[5]

On September 15, 2020, the Treasury Department published in the Federal Register a final rule which, among other things, implemented changes to CFIUS's mandatory filing requirements. Under the final rule, which took effect on October 15, 2020, the mandatory filing requirement for certain transactions involving U.S. businesses that produce, design, test, manufacture, fabricate or develop one or more "critical technologies" will no longer be based upon a U.S. business's connection with one or more of 27 designated industries determined by reference to North American Industry Classification System codes. Rather, this mandatory filing requirement will be based on whether certain U.S. Government export control authorizations would be required to export, reexport, transfer (in country) or retransfer the critical technology of the U.S. business to certain transaction parties or their owners.

CFIUS Annual Report for Calendar Year 2019 (July 2020)

In July 2020, CFIUS published the unclassified version of its Annual Report to Congress for the calendar year 2019.[6] Key findings / insights from the report include:

- The number of filings reviewed by CFIUS in 2019 remained significant (231 notices and 94 declarations).
- Less than half of 2019 notices (113 notices, or approximately 49%) proceeded to the second-stage investigation period, representing a meaningful decrease from 2018, in which approximately 69% of notices proceeded to investigation.
- In 28 cases, or approximately 12% of 2019 notices, CFIUS cleared the transaction after adopting mitigation measures.
- Of the 94 declarations assessed by CFIUS in 2019, in 35 cases the transaction was approved, in 32 the parties were told that CFIUS was unable to complete action on the basis of the declaration (colloquially referred to as the "shoulder shrug" letter), in 26 the parties were asked to file a full notice, and in one case the declaration was withdrawn by the parties for business reasons.

Presidential Order Regarding TikTok (August 14, 2020)

On August 14, 2020, following a CFIUS investigation, the White House issued an order prohibiting the acquisition of musical.ly, an entity organized in the Cayman Islands ("Musical.ly"), by ByteDance Ltd., an internet technology company headquartered in Beijing ("ByteDance").

[4] Department of Justice; A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition; https://www.justice.gov/criminal-fraud/fcpa-resource-guide

[5] Office of Investment Security, Department of the Treasury; Provisions Pertaining to Certain Investments in the United States by Foreign Persons; https://www.federalregister.gov/documents/2020/09/15/2020-18454/provisions-pertaining-to-certain-investments-in-the-united-states-by-foreign-persons

[6] Committee on Foreign Investment in the United States, Annual Report to Congress Report Period: CY 2019; https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2019.pdf

As a result of the acquisition, which closed in late 2017, ByteDance merged its TikTok application with Musical.ly's social media application to create a single integrated social media app that has since been downloaded over 175 million times in the United States.

Notably, the Executive Order required ByteDance to divest not only Musical.ly's U.S. assets, but also "any tangible or intangible assets or property, wherever located, used to enable or support ByteDance's operation of the TikTok application in the United States, as determined by [CFIUS]," as well as "any data obtained or derived from TikTok application or Musical.ly application users in the United States." The Order gave ByteDance 90 days to complete the divestment (extendable by CFIUS for a period not to exceed 30 days).

The order—the seventh formal presidential prohibition in the history of CFIUS and the fourth of the Trump Administration—indicates CFIUS's continued focus on transactions involving China and sensitive personal data, as well as its willingness to unwind completed transactions that were not notified to CFIUS prior to closing.

Activism[7]

In October 2020, Lazard released its Q3 2020 Review of Shareholder Activism, which offers key observations regarding activist activity levels and shareholder engagements in the third quarter of 2020.

Key findings / insights from the report include:

- Q3 2020 represented the lowest level of quarterly activist activity since 2013, with only 24 campaigns launched globally in the quarter, down ~41% from Q2 2020 and down ~54% from Q3 2019;
- Despite decline in campaigns, activists are winning a similar number of board seats compared to prior years (100 board seats won through the first three quarters of 2020, compared to 98 in the same period in 2019);
- U.S. campaigns were down ~41% in Q3 2020 compared to Q2 2020 and down ~64% compared to Q3 2019 whereas European campaigns were consistent with Q2 2020 but down ~62% compared to Q3 2019; and
- Q3 2020 campaigns saw ~50% with an M&A objective, an increase compared to the ~34% through the first half of 2020.

Activist Activity Continued to be Subdued in Q3 2020

There were 24 campaigns initiated in Q3 2020, down from 41 campaigns initiated in Q2 2020 and down from 52 campaigns initiated in Q3 2019. New campaigns initiated saw a 2020 low in August, with only five new campaigns initiated that month. In terms of capital deployed in new campaigns, Q3 2020 saw the lowest amount of capital deployed in a quarter in the last five years, with $4.4 billion deployed in Q3 2020 (down 62% compared to $11.6 billion deployed in Q3 2019). Elliott remained the most prolific activist, with 11 campaigns initiated through the first three quarters of 2020, more than double the number of campaigns than the next most active activist through the same time period.

Through the first three quarters of 2020, activists won 100 board seats, generally in line with the 98 won during the same period in 2019. Sixty-five of the seats won through the first three quarters of 2020 were associated with campaigns initiated prior to 2020. Of those 100 board seats, 15% were won through

[5] Activism data from Lazard, *Review of Shareholder Activism – Q3 2020*, 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 (select campaigns with market capitalizations less than $500 million at the time of announcement were also included during the COVID-19 pandemic induced market downturn); companies that are spun off as part of the campaign process are counted separately.

proxy fights, which was generally consistent with prior years. Starboard and Elliott won the most board seats through the first three quarters of 2020, with 22 and 12 seats won respectively, and accounted for about one-third of all seats won.

U.S. Share of Global Activism Remains Historically Low

Q3 2020 saw U.S. share of global activity remain historically low, amounting to only ~42% of global activism by campaigns initiated, down from ~59% in 2019. In Q3 2020, 10 U.S. campaigns were initiated, representing a ~41% decline from Q2 2020 and a ~64% decline from Q3 2019, and aggregate capital deployed in Q3 2020 was $2.6 billion, representing a ~39% decline from Q2 2020 and a ~65% decline from Q3 2019. The decline was consistent across market capitalizations, but particularly severe for U.S. targets with market capitalizations greater than $10 billion, as only six new campaigns were launched against such targets in Q1-Q3 2020 compared to 19 in Q1-Q3 2019.

In Europe, Q3 2020 saw a dramatic reduction in new campaigns. Eight campaigns were launched in Q3 2020, which was consistent with Q2 2020 but down ~62% compared to Q3 2019, and aggregate capital deployed increased by ~2% from Q2 2020 but decreased ~63% from Q3 2019. Through the first three quarters of 2020, European campaigns targeted smaller companies, with ~64% of targets having market capitalizations below $5 billion. Overall, global campaigns through the first three quarters of 2020 against companies with market capitalizations above $10 billion decreased ~17% year-over-year. European activists in 2020 held larger positions (as percentages of ownership) compared to prior years, with ~28% of activists owning a stake greater than 10% compared to the average of ~13% across 2017-2019.

Effects of Evolving Market Conditions

In Q3 2020, ~50% of campaigns had an M&A objective, up from ~34% in H1 2020 and consistent with 2019, which coincided with a resurgence of M&A activity in Q3 2020. Furthermore, private equity firms continued to adopt more aggressive public postures as the activism environment continued to evolve. For example, there were a few notable instances of private equity firms increasing their actions in public markets, such as (i) Cerberus continuing its campaign at Commerzbank and claiming it had "serious doubts" about the newly appointed Chairman, (ii) New Mountain Vantage publishing a white paper and launching a proxy fight for Board representation at Virtusa in September and (iii) Cannae Holdings, in conjunction with Senator Investment Group, launching a proxy fight for nine Board seats at CoreLogic following the rejection of a takeover bid in September.

Modifications to existing laws proposed by U.S. regulators which would significantly lessen reporting requirements will, if adopted, make activist holdings less transparent. For example, the SEC proposed to increase the reporting threshold to file Form 13Fs from $100 million of assets under management to $3.5 billion. Further, the FTC and DOJ proposed changes to the antitrust premerger notification rules of the Hart-Scott-Rodino Act ("HSR") that would exempt activists from the existing $94 million reporting threshold for acquisitions of up to 10% of a target company's shares so long as the investor does not have certain competitively significant relationships with the company.

Select Campaigns/Developments

Company	Market Capitalization ($ in billions)[8]	Activist	Development / Outcome
Virtusa Corporation	$0.9	New Mountain Vantage Advisers LLC	• In June 2020, New Mountain Vantage, with a ~11% stake in Virtusa, announced it had nominated three candidates for election at the upcoming annual meeting. • In August 2020, both sides filed proxy statements and engaged in a proxy contest with respect to the director elections. • In September 2020, Virtusa announced it had entered into a definitive merger agreement to be sold in a transaction valued at approximately $2 billion. New Mountain Vantage issued a statement that it believed the transaction undervalued the company. • In October 2020, Virtusa and New Mountain Vantage entered into an agreement, whereby, among other things, Virtusa agreed to expand the board size by one director and appoint one of New Mountain Vantage's nominees to the board. In connection with that agreement, Virtusa and New Mountain Vantage also entered into a voting agreement whereby, among other things, New Mountain Vantage agreed to vote its shares in favor of the merger.
Cracker Barrel Old Country Store, Inc.	$2.8	Biglari Capital Corp.	• In August 2020, Biglari, with a stake of ~8%, announced it had notified Cracker Barrel of its intent to nominate one director nominee, Raymond Barbrick, at the upcoming 2020 annual meeting. Over the past decade, Biglari has been an active critic of Cracker Barrel and, among other things, has nominated directors for election to the Cracker Barrel board in at least three prior annual meetings and called a special meeting to vote on a non-binding resolution that Cracker Barrel pursue a sale transaction. • In September 2020, Cracker Barrel announced the expansion of the board and appointment of Gisel Ruiz, as part of the company's multiyear succession planning and refreshment process. Cracker Barrel also announced that its board determined not to nominate Mr. Barbrick for election to the board. • Both sides have filed proxy materials related to the proxy contest for board seats. The annual meeting is scheduled to be held in November 2020.
CoreLogic, Inc.	$5.4	Cannae Holdings, Inc. and Senator Investment Group LP	• In June 2020, Cannae and Senator Investment Group sent an unsolicited proposal to acquire CoreLogic in a transaction with an approximately $7 billion enterprise value. CoreLogic rejected the proposal a few weeks after receipt of the proposal. • In July 2020, the activist group started a process of calling a special meeting at which it planned to nominate nine independent directors to the board. • In August 2020, CoreLogic announced that it called a special meeting scheduled for mid-November 2020, to vote on the activist group's proposals to remove nine current directors, nominate the group's nine directors for appointment to the board and make certain amendments to CoreLogic's bylaws.
Toshiba Corporation	$15.1	Effissimo Capital Management Pte Ltd.	• In July 2020, news media reported that Effissimo Capital had nominated three director nominees for election at Toshiba's 2020 annual meeting. Effissimo Capital's nominees were not elected at the annual meeting. • In September 2020, Toshiba announced that, according to a report by its transfer agent, 1,139 voting cards were physically delivered before the cut-off time but not counted as validly exercised voting rights (the total number of voting rights in that meeting was 58,747). News media reported that Effissimo joined other investors in calling for an investigation into whether the meeting was conducted fairly.
MEDNAX, Inc.	$2.3	Starboard Value LP	• In February 2020, Starboard, with a ~8% stake in MEDNAX, announced that it had sent a letter to MEDNAX in November 2019 nominating eight director nominees for election at MEDNAX's 2020 annual meeting. • In July 2020, MEDNAX and Starboard entered into a settlement agreement pursuant to which, among other things, five MEDNAX directors (out of 11) were replaced with Starboard designees, one of whom became the chairman of the board.
e.l.f. Beauty, Inc.	$0.6	Marathon Partners Equity Management LLC	• In May 2020, Marathon filed a Schedule 13D on which it reported a ~5% stake in e.l.f. Beauty and that it engaged and planned to continue to engage with its board and management. Later that month, Marathon announced that it nominated three director nominees for election at e.l.f. Beauty's 2020 annual meeting. • In July 2020, e.l.f. Beauty and Marathon entered into a settlement agreement pursuant to which, among other things, e.l.f. Beauty expanded its board size by one and appointed a new director (who was not one of the three Marathon nominees) to its board.

[8] Market capitalization as of campaign announcement.

Corporate Governance

PROXY SEASON / PROXY ADVISOR UPDATES

Results of Institutional Shareholder Services' ("ISS") Annual Policy Survey[9]

On September 25, 2020, ISS announced the results of its annual global benchmark policy survey. The survey is part of ISS's annual process to solicit feedback on areas of potential policy changes for 2021 and beyond. This year's survey received 519 responses, comprising 175 responses from investors and 344 responses from non-investors (*e.g.*, public corporations, board members of public corporations, advisors to public corporations and others). Key findings from the survey for global and U.S. focused respondents include:

COVID-19 Related Questions (Global)

- **ISS policy guidance in response to COVID-19 pandemic:** 62% of investor respondents and 87% of non-investor respondents indicated that ISS should carry its policy guidance in response to the COVID-19 pandemic or similar guidance into 2021 and that ISS should continue to apply flexible approaches where warranted through at least the 2021 main proxy season.

- **AGM formats:** Almost 80% of investor respondents chose hybrid meetings (meetings with the possibility for stockholders to attend and participate in the meetings either in-person or remotely) as the preferred stockholder meeting format, while 58% of non-investor respondents indicated a preference for virtual-only or hybrid meetings.

- **Expectations regarding compensation adjustment:** 70% of investor respondents indicated that the COVID-19 pandemic's impact on the economy, employees, customers and communities and the role of government-sponsored loans and other benefits should be considered by boards and incorporated into compensation decisions to adjust pay and performance expectations, and should be clearly disclosed to stockholders. 53% of non-investor respondents indicated that the COVID-19 pandemic is different from prior market downturns and boards and compensation committees need flexibility to make reasonable adjustments to executive compensation.

- **Adjustments to short-term/annual incentive programs:** 51% of investor respondents and 54% of non-investor respondents indicated that, depending on the circumstances and the justification provided, it could be reasonable for companies to both (1) make mid-year changes to annual incentive metrics, performance targets and/or measurement periods to reflect changed economic realities and (2) suspend the annual incentive program and instead make one-time discretionary awards.

Non-COVID-19 Related Questions (Global)

- **Climate change risk:** When investor respondents were asked what actions are considered appropriate for stockholders to take if they considered a company to not be effectively reporting or address its climate risk, the top responses were to: (1) engage with the board and management about concerns (92%), (2) consider supporting related stockholder proposals seeking disclosure (87%) and (3) consider supporting related stockholder proposals seeking establishment of specific climate-related targets (84%). 75% of the investor respondents also responded that they would consider voting against directors deemed to be responsible for the poor climate change risk management. With non-investor respondents, engagement with the board and management was the top response, with 93% of the non-investor respondents favoring such approach.

- **Racial and ethnic diversity:** 73% of investor respondents indicated that all boards should disclose the demographics of their board members, including self-identified race and/or ethnicity. On the other hand, only 36% of non-investor respondents agreed with such approach. In terms of appropriate actions to take to encourage racial and/or ethnic diversity on boards, engagement with the board and management on the topic was the most popular choice among both investor respondents (85%) and non-investor respondents (92%).

[9] ISS, *2020 Global Benchmark Policy Survey* (September 25, 2020); https://www.issgovernance.com/file/publications/2020-global-policy-survey-summary-of-results.pdf.

ISS's Comment Period for 2021 Benchmark Voting Policy Changes[10]

Following the release of the 2020 policy survey results, ISS held its annual benchmark voting policy comment period from October 14, 2020 to October 26, 2020. Potential proposed key policy changes globally and in the United States include:

- **Board Diversity (U.S.):** ISS proposed adding a new policy to recommend voting against the chair of the nominating committee (or other relevant directors on a case-by-case basis) of Russell 3000 and S&P 1500 companies where there are no identified racially or ethnically diverse board members. Mitigating factors, such as the presence of a racial and/or ethnic minority on the board at the preceding annual meeting or a firm commitment to appoint at least one racial and/or ethnic director, would be taken into account.

- **Director Accountability (Global):** ISS proposed revising its policy related to director accountability for governance failure to explicitly note that significant risk oversight failures related to environmental and social concerns, including climate change, might, on a case-by-case basis, trigger vote recommendations against board members.

- **Exclusive Forum Provisions (U.S.):** ISS proposed updating its voting policy on exclusive forum clauses to recommend for a proposal with a federal forum provision that specifies a U.S. district court as the exclusive forum for claims arising under federal securities law and to recommend a vote against proposals with provisions that restrict the forum to a particular federal district court. In the absence of serious concerns about corporate governance or board responsiveness to stockholders, ISS, under the proposed policy, would generally recommend a vote for proposals with provisions that specify Delaware or the Delaware Court of Chancery as the exclusive forum for corporate law matters for Delaware corporations.
  For other states, ISS proposed that it would generally recommend voting against proposals with provisions that specify a state other than the state of incorporation as the exclusive forum for corporate law matters, or that specify a particular local court within the state. Adoption of such provisions without stockholder approval would generally be considered a one-time failure under the Unilateral Bylaw/Charter Amendments policy.

SEC Amendments Regarding Proxy Advisory Firms[11]

On July 22, 2020, the SEC adopted new amendments to the proxy rules, which were modified from the proposal issued in November 2019. The amendments revise the definition of "solicitation" in Exchange Act Rule 14a-1(l) to clarify that "proxy advice that makes a recommendation to a security holder as to its vote, consent or authorization on a specific matter for which security holder approval is solicited, and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sells such proxy voting advice for a fee" is considered a "solicitation" under the proxy rules. The proxy voting advice provided by a person who furnishes such advice only in response to an unprompted request will not be considered a solicitation.

The amendments generally provide that proxy advisory firms who seek to rely on certain exemptions from the proxy rules will need to (1) provide specified conflicts of interest disclosure in their proxy voting advice or in an electronic medium used to deliver such advice and (2) adopt and publicly disclose written policies and procedures that are reasonably designed to ensure that (a) registrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time such advice is delivered to the proxy advisory firm's clients and (b) the proxy advisory firms provide their clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding the proxy voting advice by registrants who are the subject of the advice, in a timely manner before the stockholder meeting.

The amendments also modify Rule 14a-9, the antifraud provision, to include examples of when failure to disclose certain material information in proxy voting advice could, depending on facts and circumstances, be considered misleading. The examples include material information regarding a proxy advisory firm's methodology, sources of information or conflicts of interest.

While the additional disclosure requirements with respect to qualifying for exemptions will not be effective until December 1, 2021, the amendments otherwise became effective on November 2, 2020. However, pursuant to the Congressional Review Act, the Office of

[10] ISS, *Proposed ISS Benchmark Policy Changes for 2021* (October 14, 2020); https://www.issgovernance.com/file/policy/proposed-benchmark-policy-changes-2021.pdf.

[11] SEC, *Exemptions from the Proxy Rules for Proxy Voting Advice (Release No. 34-89372)* (July 22, 2020); https://www.sec.gov/rules/final/2020/34-89372.pdf.

Information and Regulatory Affairs has designated the amended rules as a "major rule," as defined by 5 U.S.C. 804(2) and, accordingly, Congress could overturn the rule early in 2021. Notably, Commissioner Allison Lee, who was the only Democratic commissioner on the Commission in July, dissented from the adoption of the revised rules.

News media has reported that ISS intends to move forward with the lawsuit against the SEC, originally filed in October 2019 and stayed in January 2020 to give the SEC time to finalize the amendments, challenging the SEC's authority to regulate proxy advisory firms.

In addition, ISS announced in a letter sent to large cap issuers on November 2, 2020, that it is "altering its approach to providing draft proxy research reports for issuer review in the U.S. and, for shareholder meetings on or after January 1, 2021, will no longer provide draft reports to U.S. companies within the S&P 500."

SEC Amendments to Shareholder Proposal Rules[12]

On September 23, 2020, the SEC adopted amendments to the procedural requirements and resubmission thresholds related to shareholder proposals that are submitted pursuant to Rule 14a-8. The amendments will become effective on January 4, 2021, and will apply to any shareholder proposals submitted for annual or special meetings held on or after January 1, 2022. The key amendments include:

Tiered Ownership Thresholds

In order to be eligible to submit a proposal for inclusion in a company's proxy statement, the current ownership threshold requires a shareholder proponent to demonstrate continuous ownership of at least $2,000 or 1% of the company's securities for at least one year. Subject to a transition period for shareholder proponents who have continuously held at least $2,000 of a company's securities as of the effective date of the amendments, the amendments will require holding of:

- $2,000 of the company's securities for at least three years;
- $15,000 of the company's securities for at least two years; or
- $25,000 of the company's securities for at least one year.

In addition, shareholders will no longer be able to aggregate holdings for the purposes of meeting the amended ownership thresholds.

Documentation for Proposals Submitted by Representatives

The amendments will require that a shareholder proponent who elects to use a representative to submit a shareholder proposal provide documentation that will make clear that the representative is authorized to act on behalf of the shareholder proponent and provide a meaningful degree of assurance as to the shareholder's identity, role and interest in the proposal submitted. Such documentation will not be required where a shareholder proponent is an entity and the representative's authority to act on behalf of the shareholder proponent is apparent and self-evident.

Engagement Requirements

The amendments add requirements that a shareholder proponent include in the submitted proposal a statement that the shareholder proponent is available to meet with the company, either in person or via teleconference, no less than 10 calendar days or more than 30 calendar days, after the submission of such proposal, and must provide the shareholder proponent's contact information and specific days and times that the shareholder proponent (not the representative, if any) is available to discuss the proposal with the company. Co-filers, if any, will have to agree on the same dates and times or identify a single lead filer who will engage with the company on behalf of all co-filers.

One Proposal Limit

The amendments extend the one-proposal rule to "each person," as opposed to the current rule of "each shareholder." A shareholder proponent will not be allowed to submit a proposal in his or her name and simultaneously serve as a representative to submit a different proposal on behalf of another shareholder at the same meeting. Similarly, a representative will not be allowed to submit more than one proposal at the same meeting, even if the representative were submitting each proposal on behalf of different shareholders.

Resubmission Thresholds

The current rules provide that a shareholder proposal may be excluded from a company's proxy materials if it addresses substantially the same subject matter as a proposal submitted for a vote within the prior five calendar years and the prior proposals did not receive certain

[12] SEC, *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (Release No. 34-89964)* (September 23, 2020); https://www.sec.gov/rules/final/2020/34-89964.pdf.

levels of support. The amendments raise the level of support required to prevent exclusion and will allow exclusion if the most recent vote in the preceding three years was:

- Less than 5% of the votes cast, if previously voted on once (raised from 3%);
- Less than 15% of the votes cast, if previously voted on twice (raised from 6%); or
- Less than 25% of the votes cast, if previously voted on three or more times (raised from 10%).

SHAREHOLDER ENGAGEMENT UPDATES

BlackRock Investment Stewardship Reports

In July 2020, BlackRock released a report on its approach to sustainability.[13] The report focuses on BlackRock's use of engagement and voting practices and highlights its efforts in engaging on climate change issues and promoting transparency around climate change and other sustainability risks. In September 2020, Blackrock also released its Investment Stewardship 2020 Annual Report, which provides an overview of its engagements and voting activities during the 12 months ending June 30, 2020, and generally indicates record level of engagement.[14]

The reports highlighted increased engagement and accountability on many fronts. Overall engagements increased 48% in the 12 months ended June 30, 2020 compared to the 12-month period ended June 30, 2019. Engagements on environmental, social and governance topics increased 299%, 173% and 49%, respectively, over the same time periods.

In terms of board accountability, BlackRock voted against or withheld votes from more than 5,100 directors in 2020, which it noted was more than ever before. 2,800 different companies had one or more votes against directors (including abstentions). The top board quality concerns that resulted in votes against directors were director independence, insufficient progress on board diversity and overcommitted directors.

In the 12 months ended June 30, 2020, BlackRock voted against 8.3% of management proposals and voted in support of (or abstained from) 6.3% of stockholder environmental proposals, 6.7% of stockholder social proposals and 17.1% of stockholder governance proposals. BlackRock also identified 244 companies in 2020 that were not making sufficient progress integrating climate risk into their business models or disclosures. BlackRock took voting action against 53 of those companies and put the remaining 191 companies "on watch." These companies risk voting action against management in 2021 if the companies do not make significant progress.

Vanguard Investment Stewardship 2020 Annual Report[15]

In September 2020, Vanguard published its 2020 Investment Stewardship Annual Report which provides details on its engagement activities (including case studies), summaries of voting activities and the rationale for certain votes for the year ended June 30, 2020.

In the 12 months ended June 30, 2020, Vanguard engaged with approximately 790 companies. Key areas of focus were board composition and executive compensation, which accounted for 70% and 47% of engagements, respectively. In the year ended June 30, 2020, Vanguard voted on approximately 168,000 proposals globally. Vanguard was generally supportive of management proposals, voting "for" in 93% of proposals related to director elections, 91% of proposals related to executive compensation and 87% of governance-related management proposals.

Among other topics, the report emphasized Vanguard's focus on climate change risk and governance issues, boardroom diversity and sound compensation policies.

OTHER ENVIRONMENTAL, SOCIAL AND GOVERNANCE ("ESG") UPDATES

SEC Amendments to Regulation S-K[16]

On August 26, 2020, the SEC adopted amendments, effective November 9, 2020, to modernize certain disclosure requirements under Regulation S-K and make these disclosure requirements more principles-based. Among these amendments are changes to Item 101 (the description of business) that require

[13] SEC, *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (Release No. 34-89964)* (September 23, 2020); https://www.sec.gov/rules/final/2020/34-89964.pdf.

[14] BlackRock, *Investment Stewardship Annual Report* (September 2020); https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2020.pdf.

[15] Vanguard, *Investment Stewardship 2020 Annual Report* (September 2020); https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2020_investment_stewardship_annual_report.pdf.

[16] SEC, *Modernization of Regulation S-K Items 101, 103 and 105 (Release Nos. 33-10825; 34-89670)* (August 26, 2020); https://www.sec.gov/rules/final/2020/33-10825.pdf.

registrants to include, to the extent material to the understanding of the registrant's business, a description of the registrant's human capital resources, including human capital measures or objectives on which the registrant focuses in managing the business. The amendments enumerate non-exclusive examples of such human capital measures and objectives—they may include those related to attrition, development and retention of employees—but note that the disclosure should be tailored to the registrant's particular facts and circumstances, including with respect to its business model and workforce composition.

In addition, the amendments also increase the disclosure threshold for governmental environmental proceedings involving potential monetary sanctions from $100,000 to $300,000, but allow registrants to opt for a different threshold that is reasonably designed to result in disclosure of material environmental proceedings, provided that the registrants disclose such alternate threshold, which may not exceed the lesser of $1 million or 1% of the current assets of the registrant.

Corporate Sustainability Reporting[17]

On September 11, 2020, five framework- and standard-setting institutions—the CDP, the Climate Disclosure Standards Board, the Global Reporting Initiative, the International Integrated Reporting Council and the Sustainability Accounting Standards Board—issued a joint statement of intent to work together towards comprehensive corporate reporting. In the statement, among other things, they discuss the importance of recognizing various users and objectives of corporate sustainability disclosure and the resulting distinctive materiality concepts, and outline an approach to standard setting that would result in a globally agreed-upon set of sustainability topics and related disclosure requirements that can serve distinct materiality concepts. The statement did not include a timeline or targeted completion date but asked for engagement and feedback on the ideas presented.

DIVERSITY

Stockholder Derivative Lawsuits[18]

In July 2020, three stockholder derivative lawsuits were filed in California federal court against the directors and officers of Oracle Corporation, Facebook Inc. and Qualcomm Inc. These lawsuits, filed by the same lawyers, generally alleged that, the directors and certain officers breached their *Caremark* duty of oversight, authorized allegedly false statements in proxy statements relating to each company's emphasis on diversity, breached their fiduciary duties and overcompensated themselves at the expense of minority and female employees. The complaints included a variety of remedies, including the replacement of a number of current directors with Black and other minority directors, the creation of funds dedicated to hiring, promoting and retaining Black and other minority employees and the linking of compensation to achievement of diversity goals.

California Assembly Bill 979[19]

On August 31, 2020, the California State Legislature passed Assembly Bill 979, which was signed into law on September 30, 2020. The bill requires U.S. publicly held companies whose principal executive office is located in California to have at least one director from an underrepresented community, which is defined as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender" by December 31, 2021, and to have one to three directors from an underrepresented community depending on the company's board size, by December 31, 2022.

Assembly Bill 979 is modeled after Senate Bill 826, which requires publicly held companies whose principal executive office is located in California to have a minimum number of female directors on their boards of directors. Signed into law on September 30, 2018, Senate Bill 826 is currently the subject of litigation regarding its constitutionality. One of the groups that filed a lawsuit regarding Senate 826 Bill has already filed suit in California state court challenging Assembly Bill 979 on constitutional grounds.[20]

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[17] CDP, *et al.*, *Statement of Intent to Work Together Towards Comprehensive Corporate Reporting* (September 11, 2020); https://bit.ly/2Flu0Fb.

[18] Complaint, *Klein v. Ellison*, Case No. 20-cv-4439 (N.D. Cal. July 2, 2020); Complaint, *Ocegueda v. Zuckerberg*, Case No. 20-cv-04444 (N.D. Cal. July 2, 2020); Complaint, *Kiger v. Mollenkopf*, Case No. 20-cv-01355-LAB-MDD (S.D. Cal. July 17, 2020).

[19] AB-979, 2019-2020 Reg. Sess. (Ca. 2020).

[20] Complaint, *Robin Crest, et al. v. Alex Padilla, in his official capacity as Secretary of State of the State of California*, Case No. 20ST-CV-37513 (Ca. Super. Ct. September 30, 2020).

State Street Global Advisors Letter[21]

On August 27, 2020, State Street Global Advisors sent a letter to board chairs of public companies in its investment portfolio stating that, starting in 2021, State Street Global Advisors will ask those companies to articulate their "risks, goals and strategy as related to racial and ethnic diversity, and to make relevant disclosure available to shareholders." It noted that it is convinced that lack of diversity and inclusion poses risks to companies that boards and management should understand and manage. It asked that U.S. companies in its portfolio (and non-U.S. companies, to the greatest extent possible) provide specific commnuications regarding these topics in the areas of strategy, goals, metrics, board and board oversight. It also noted that, if required, it is prepared to use its proxy voting authority to hold companies accountable.

[21] Letter, State Street Global Advisors (August 27, 2020); https://www.ssga.com/library-content/pdfs/global/letterhead_racial_equity_guidance.pdf.