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Mark Zerdin

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UNITED STATES

Richard Hall and Mark I Greene[1]

I OVERVIEW OF M&A ACTIVITY[2]

The US M&A market in 2020 has been heavily affected by the covid-19 pandemic, resulting in the continuance of a trend of declining M&A activity that began in the second half of 2019. During 1H 2020, M&A deal value was US$358.9 billion across 2,435 deals, a decrease of 69.8 per cent in value and 25.8 per cent in volume compared to 1H 2019, and the lowest first-half period in terms of deal value since 2012. During Q1–Q3 2020, M&A deal value was US$770 billion across 3,539 deals, a decrease of 48.3 per cent in value and 27.7 per cent in volume compared to Q1–Q3 2019. As a result of the significant decrease in M&A activity in 1H 2020, US M&A accounted for 30 per cent of global M&A by value during 1H 2020, down from 55 per cent in 1H 2019, and the lowest level since database Refinitiv began tracking M&A data in 1980.[3]

The reduction in M&A activity during Q1–Q3 2020 largely tracked the progression of covid-19 in the US. While covid-19 was spreading rapidly throughout Asia and Europe during January and February of 2020, the severity of covid-19 in the US did not become apparent until mid- to late March.[4] M&A deal value in Q1 2020 was US$267.3 billion, which was a 26.9 per cent decrease from Q4 2019, and a 49.1 per cent decrease from Q1 2019. However, the 1,572 deals in Q1 2020 represented a decline of only 1.75 per cent relative to Q1 2019, and an increase of 4 per cent relative to Q4 2019, due to the strength of deal volume during January and February 2020. During Q2 2020, while much of the US population was under quarantine and the economy was largely shut down, M&A deal value

1 Richard Hall and Mark I Greene are corporate partners at Cravath, Swaine & Moore LLP. The authors would like to acknowledge the contributions of fellow partners Eric Hilfers, Len Teti and Margaret Segall and associates Benjamin Joseloff, Andrew Davis, Sally Ye, Samuel Blaustein, Kyle Jorstad, Kolja Ortmann and Brendon Rivard.

2 All data regarding M&A activity in this chapter is from Mergermarket as of October 2020, unless otherwise indicated. Mergermarket continuously updates its database, including for past periods, so the statistics cited in this chapter are subject to minor fluctuations over time, including relative to past Mergermarket publications. Deals with undisclosed values are included in the deal count statistics, but not the deal value statistics. Deal statistics refer to announced, rather than completed, deals. Unless otherwise noted, deal statistics refer to deals targeting US companies.

3 *Global Merger & Acquisitions Review*, First Half 2020, Financial Advisors, Refinitiv.

4 California was the first US state to issue a lockdown order on 19 March 2020, and most US states issued similar orders over the course of the subsequent two weeks. 'Stay-at-home orders across the country: what each state is doing – or not doing – amid widespread coronavirus lockdowns', NBC News, 25 March 2020, updated 29 April 2020, www.nbcnews.com/health/health-news/here-are-stay-home-orders-across-country-n1168736.

was US$91.6 billion across 863 deals, which represented an 86.2 per cent and a 65.7 per cent decrease in deal value relative to Q2 2019 and Q1 2020 respectively, and a 48.7 per cent and 45.1 per cent decrease in deal volume relative to Q2 2019 and Q1 2020 respectively. As the US population emerged from its lockdown and businesses began to reopen throughout the summer months, coupled with fiscal and monetary stimulus from the US government, US M&A markets dramatically rebounded to US$411.5 billion in value during Q3 2020, resulting in both an increase of 349 per cent in value relative to Q2 2020, and an increase of 35.4 per cent in value relative to Q3 2019. During Q3 2020, there were 1,104 deals, an increase of 30 per cent in volume relative to Q2 2020, although still a decrease of 31.5 per cent in volume relative to Q3 2019.

While there were declines in Q1–Q3 2020 across all deal sizes, large deals were impacted the most, demonstrated by the much larger year-over-year decline in deal value (48.3 per cent) relative to deal volume (27.7 per cent). During Q1–Q3 2020, there were 15 'mega-deals' valued at over US$10 billion, a decrease of 44.4 per cent relative to Q1–Q3 2019, and 64 deals valued at over $1 billion, a decrease of 35.4 per cent relative to Q1–Q3 2019. The average disclosed deal value decreased significantly during Q1–Q3 2020, from US$791.7 million in Q1–Q3 2019 to US$382.8 million in Q1–Q3 2020, a reduction of 55.6 per cent. Looking specifically at Q2 2020, when US dealmaking was the most impacted by covid-19, the average disclosed deal value was only US$311.7 million, owing to both the hesitancy by acquirors to engage in large, transformative M&A, and the reduction in equity valuations that accompanied the lockdowns. However, large deals began to return in Q3 2020 as business confidence improved.

Both strategic and financial M&A decreased significantly during Q1–Q3 2020. In Q1–Q3 2020, private equity buyouts accounted for US$148.1 billion in deal value across 896 deals, which were decreases of 31 per cent and 21.7 per cent respectively relative to Q1–Q3 2019. However, because private equity buyout activity decreased at a lesser rate than strategic M&A activity, private equity buyouts accounted for 19.2 per cent of total deal value in Q1–Q3 2020, the largest market share since 2007, and noticeably higher than the 12.4 per cent average market share for private equity buyouts as a percentage of deal value from 2014–2019. Likewise, private equity buyouts accounted for 25.2 per cent of deal volume during Q1–Q3 2020, relative to the average of 21.4 per cent from 2014–2019.

While the economic impact of covid-19 led to a surge in bankruptcy filings in the US during Q1–Q3 2020, especially in disproportionately impacted industries such as travel, leisure, retail and energy, through September 2020 both the amount and value of pending and completed bankruptcy and liquidation acquisitions, as well as publicly filed Section 363[5] asset sale agreements, remained at levels similar to recent non-recession years.[6] For comparison purposes, during the Great Recession that began in December 2007, significant increases in distressed M&A activity in the US did not occur until 2009, the second full year of the downturn.[7]

5 Section 363 refers to a section of the US Bankruptcy Code that facilities sales of assets by companies that have filed for bankruptcy protection.

6 'Analysis: There's No Spike in Distressed Acquisitions Yet', Bloomberg Law Analysis, Bloomberg Law, 8 September 2020.

7 id.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A in the US is governed by a dual regulatory regime, consisting of state corporation laws (e.g., the Delaware General Corporation Law) and the federal securities laws (primarily, the Securities Act of 1933 and the Securities Exchange Act of 1934).[8] The Securities and Exchange Commission (SEC) is the regulatory agency responsible for administering the federal securities laws. Certain federal securities laws apply in the context of a merger, including the federal proxy rules governing the solicitation of target shareholder approval and the tender offer rules in the context of an offer to purchase shares directly from shareholders of a publicly traded company. Furthermore, an acquisition or merger will implicate fiduciary duties, as developed and applied in the target company's state of incorporation. While state corporation laws applicable to M&A have a large degree of similarity across different states, state corporation laws do vary, especially with regard to the protections afforded to companies facing takeover threats.

Unlike most other jurisdictions, the US patchwork of federal and state M&A regulation is generally not focused on substantively regulating changes of control of target companies. Rather, US regulation focuses on disclosure, ensuring that target company shareholders have the time and information required to make a fully informed decision regarding accepting a tender offer or voting in favour of a merger. Exceptions to this general rule include, using Delaware law as an example, situations in which a company initiates a sales process and the company is 'in play', in which case Delaware courts will require the board of directors to achieve the highest price reasonably attainable under the circumstances,[9] and situations involving either a controlling shareholder or a conflicted board of directors, in which case Delaware courts will scrutinise the transaction to ensure that there was both a fair process and a fair price.[10]

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), an acquirer is normally required to make a filing with US antitrust authorities prior to completing an acquisition if the transaction size exceeds US$94 million (adjusted annually for inflation).[11] See Section IX for a discussion of recent M&A-related antitrust developments, trends and cases.

There is no general statutory review process governing foreign investment in the US. Under the Defense Production Act of 1950, as amended, however, the President, acting through the Committee on Foreign Investment in the United States (CFIUS), has the power to review certain investments by non-US persons in US businesses or US real estate for national security concerns.[12] Historically, filing a transaction with CFIUS was largely voluntary. Following the passage of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), however, certain transactions in which a non-US government has a substantial interest in the investor, or that involve a US business that deals with 'critical technology', must be filed with CFIUS at least 30 days before the completion of the transaction. Generally, parties notify CFIUS of a transaction by submitting a long-form filing referred

8 Securities Act of 1933, 15 USC § 77a (2015); Securities Exchange Act of 1934, 15 USC § 78a (2018).

9 See *Revlon, Inc v. MacAndrews & Forbes Hldgs, Inc*, 506 A2d 173, 182 (Del 1986).

10 See *Weinberger v. UOP, Inc*, 457 A2d 701, 711 (Del 1983).

11 HSR Threshold Adjustments and Reportability for 2020, Federal Trade Commission, 31 January 2020, www.ftc.gov/news-events/blogs/competition-matters/2020/01/hsr-threshold-adjustments-reportability-2020.

12 50 USC § 4565 (2018).

to as a notice. Upon accepting a notice, CFIUS begins a 45-day review period, which, if necessary, can be followed by a 45-day investigation period (with a possible 15-day extension) and a 15-day presidential review period. Following the passage of FIRRMA, instead of filing a notice, parties may choose to submit a short-form filing, referred to as a declaration that has a distinct process and timeline. Parties may also choose to file with CFIUS voluntarily if they believe that there is a high likelihood that CFIUS may subsequently identify a national security risk, as CFIUS may unilaterally initiate a review of a transaction that was not filed, even after the transaction is completed. If CFIUS identifies a risk arising as a result of a transaction, CFIUS may require that the parties implement mitigating measures, or refer the matter to the President, who may suspend or prohibit any investment referred by CFIUS that threatens to impair the national security of the US (including by unwinding transactions that have already been completed). See Section IV for a discussion of recent developments in CFIUS review and related executive actions.

There are also additional federal and state industry-specific statutes that may require advance notification of an acquisition to a governmental authority. Examples of regulated industries include airlines, broadcasters and electric and gas utilities.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Increased scrutiny on disclosure in non-controlling shareholder M&A transactions

The success of a claim that members of a board of directors have breached their fiduciary duties, or that a financial adviser has aided and abetted such a breach, is largely dependent upon the judicial standard of review applied to the relevant directors' actions. Under the business judgment rule, courts will not second-guess good faith decisions made by independent and disinterested directors unless they have acted with gross negligence. It is very difficult for a plaintiff to overcome the business judgment rule and demonstrate that directors have acted with gross negligence, so if the business judgment rule applies, a lawsuit challenging a transaction will generally be dismissed at the motion to dismiss stage.

In recent years, for M&A transactions not involving a controlling shareholder, Delaware courts have expanded the territory in which the business judgment rule applies. In 2015, the Delaware Supreme Court in *Corwin v. KKR Financial Holdings LLC* clarified that the voluntary approval of a merger (other than with a controlling shareholder) by fully informed, disinterested shareholders invoked the business judgment rule standard of review in post-closing damages actions.[13]

Subsequently, in 2016 and early 2017, Delaware courts applied *Corwin* to fiduciary duty cases in a manner that clarified and extended the application of the decision, but from mid-2017 to 2019, Delaware courts construed *Corwin* more narrowly, demonstrating the limits of *Corwin*'s reach.[14] In 2020, Delaware courts continued to limit the strength of *Corwin* by scrutinising the quality of the disclosure to shareholders, leading to findings that shareholder votes on mergers were not fully informed.

13 *Corwin v. KKR Fin Holdings LLC*, 125 A3d 304, 309-11 (Del 2015).

14 However, in one case in early 2019, the Delaware Court of Chancery applied *Corwin* to dismiss a breach of fiduciary claim in connection with a merger, finding the disclosure to be adequate despite (i) the CEO making statements before and after the transaction that were more optimistic about the target company's

In *Salladay v. Lev*, in a take-private transaction where the board of directors was conflicted, the Delaware Court of Chancery denied a motion to dismiss and found that a 'majority-of-the-minority' shareholder vote did not cleanse the conflict under *Corwin*, and therefore that the business judgment rule did not apply, because the disclosure was materially incomplete and misleading.[15] The court highlighted two separate disclosure errors. First, in the Schedule 14D-9 disclosure filing, the seller disclosed that the private equity acquirors had a contractual right pursuant to a note purchase agreement to appoint a majority of the seller's board if the merger agreement were terminated, with such right subject to the NASDAQ listing requirements.[16] However, because a NASDAQ listing rule precluded disproportionate voting power, upon a termination of the merger agreement, the private equity acquirors would not have been able to appoint a majority of the board.[17] The court noted that while the Schedule 14D-9 included sufficient information for a diligent shareholder to realise that rejecting the merger would not result in a change of control of the board, it found that the statements in the Schedule 14D-9 'on their face' suggested that a rejection of the merger agreement would result in a contractual change of control; shareholders would have needed to evaluate the application of the NASDAQ rule and whether it would supersede the contractual right, and then find stock ownership numbers in the exhibits to complete the analysis.[18] The court explained that 'disclosure is inadequate if the disclosed information is 'buried', which provides a warning to deal counsel to ensure that material information is disclosed in a clear and forthright manner, especially information related to the consequences of a 'no' vote by shareholders.[19] Second, the court determined that the seller omitted disclosure about why it terminated two financial advisors during the course of the transaction, and that this information was material in that it provided a potential inference that the financial advisors were terminated because they would not provide fairness opinions under the existing terms of the merger.[20]

In *In re USG Corp S'holder Litig*, the Delaware Court of Chancery found that the shareholder vote was not fully informed because the board of directors of the seller believed that the seller's intrinsic value was US$50 per share, and on several occasions considered making this information public in order to defend against a hostile campaign at a lower price, but did not do so and ultimately approved the merger at US$44.[21] The court noted that the board's belief that the intrinsic value was substantially greater than the deal price was material to shareholders when evaluating the merger because the board had a precise view of the seller's intrinsic value and the proxy statement referred to the board's view of intrinsic

prospects than the projections in the disclosure; and (ii) the failure to disclose post-closing employment discussions between the buyer and the target company's management, which occurred after the merger agreement was signed but before the shareholder vote. *English v. Narang*, CA No. 2018-0221-AGB (Del Ch 2019).

15 *Salladay v. Lev*, 2020 WL 954032 (Del Ch 2020).

16 id. at 14.

17 id. at 15.

18 id.

19 id. at 13.

20 id. at 17.

21 *In re USG Corp S'holder Litig*, 2020 WL 5126671(Del Ch 2020).

value 15 times, yet chose not to disclose it.[22] However, the outcome may have been different had the board not implied in the disclosure that it had a precise view as to intrinsic value, as the court recognised that intrinsic value is generally a 'nebulous, even illusory, concept'.[23]

ii Interpretation of material adverse effect clauses

In October 2018, *Akorn, Inc v. Fresenius Kabi AG* marked the first time that a Delaware court found that a target company had suffered a material adverse effect (MAE) such that an acquirer could walk away from a deal.[24] In *Akorn*, in the five quarters following signing but prior to the termination of the merger agreement by the acquiror, Fresenius, Akorn's revenue was down between 25 per cent and 34 per cent each quarter, its operating income was down between 84 per cent and 292 per cent each quarter, and its earnings per share was down between 96 per cent and 300 per cent each quarter, in each case year-over-year.[25] With respect to the finding that Akorn had suffered a general MAE, the court called Akorn's dramatic downturn in performance 'durationally significant', having 'already persisted for a full year and show[ing] no sign of abating',[26] and noted that the problems were specific to Akorn rather than industry-wide.[27]

The court also found that Akorn's regulatory issues were significant. In reviewing whether Akorn had breached representations it made regarding its compliance with regulatory requirements and whether such a breach could reasonably be expected to result in an MAE, the court found that there was 'overwhelming evidence of widespread regulatory violations and pervasive compliance problems at Akorn'.[28] The court found the problems to be qualitatively and quantitatively significant, with the regulatory issues expected to result in a decline in value of Akorn of 21 per cent.[29]

However, in *Channel Medsystems v. Boston Scientific Corporation*, the next Delaware decision evaluating an acquiror's right to terminate a merger agreement pursuant to an MAE clause, the Delaware Court of Chancery illustrated that the decision in *Akorn* did not lessen the very high bar for demonstrating that an MAE has occurred, and confirmed that MAE claims are highly fact-specific.[30] In *Channel*, Channel Medsystems was a private medical device company with only one product in development, Cerene, which was seeking US Food and Drug Administration (FDA) approval.[31] One month after the merger agreement was signed, Channel discovered that one of its executives had stolen money and falsified expense reports and other documents, some of which related to Cerene's clinical trial and had been included in its FDA submission.[32] Channel conducted an internal investigation of the misconduct and determined that it did not impact the clinical trial or data, and submitted various reports and remediation plans to the FDA, which the FDA subsequently accepted.[33] Nonetheless, Boston

22 id. at 27, footnote 252.
23 id. at 20.
24 *Akorn, Inc v. Fresenius Kabi AG*, 2018 WL 4719347 (Del Ch 2018).
25 id. at 89.
26 id. at 137.
27 id. at 144.
28 id. at 163.
29 id. at 184.
30 *Channel Medsystems, Inc v. Boston Scientific Corporation*, 2019 WL 6896462 (Del Ch 2019).
31 id. at 1.
32 id. at 5-6.
33 id. at 6-12.

Scientific, the acquiror, terminated the merger agreement, claiming that Channel's breaches of the reps and warranties constituted an MAE.[34] The FDA ultimately approved Cerene within the timeframe contemplated by the merger agreement.[35] In finding that the breaches did not constitute an MAE, the court acknowledged the 'heavy burden' in proving an MAE, and performed a qualitative and quantitative analysis to determine whether an MAE had occurred.[36] Both of Boston Scientific's qualitative and quantitative arguments were connected to its contention that it would need to remediate and retest Cerene prior to placing it on the market.[37] The court was not convinced by either argument, among other reasons because Boston Scientific had to 'shift its strategy' once Cerene received FDA approval, and it could no longer argue that Channel's misconduct would jeopardise Cerene's chances of obtaining FDA approval, and because Boston Scientific had not contemporaneously evaluated the costs of remediation and retesting, leading the court to view Boston Scientific's argument as pretext to terminate an agreement for which it had buyer's remorse.[38]

Given the substantial number of pending cases in Delaware where acquirors have claimed that MAEs occurred during the early periods of the covid-19 pandemic, the fact-intensive interpretations of the MAE clauses in *Akorn* and *Channel* – one finding that an MAE occurred while the other did not – will be important guideposts that will help to shape the outcome of the various pending cases and determine whether the Delaware courts will find an MAE for the second time in their history.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

i Overview[39]

Cross-border M&A had already been decreasing during the latter half of 2019 owing to uncertain geopolitical conditions, including trade tensions and increasing regulatory scrutiny over foreign investment by governments in the US, Europe and Asia. The global nature of covid-19, and its effect on both international travel and nationalist economic sentiment, led to further declines in cross-border M&A activity during Q1–Q3 2020.[40] During this period, US inbound deal value was US$122 billion across 557 deals, a decrease of 49.1 per cent and 29.0 per cent respectively compared with Q1–Q3 2019, and outbound deal value was US$231.4 billion across 806 deals, a decrease of 22.4 per cent and 24.8 per cent respectively relative to Q1–Q3 2019. In 2020, inbound M&A represented 15.8 per cent of total US deal value and 15.7 per cent of US deals, versus 16.1 per cent of deal value and 16 per cent of deals in Q1–Q3 2019.

The top countries for US inbound M&A by deal value in Q1–Q3 2020 were the UK, Canada and Germany, with US$20.1 billion, US$17.9 billion and US$17.3 billion

34 id. at 13.

35 id. at 14.

36 id. at 25.

37 id. at 29-36.

38 id. at 26, 29-36.

39 All deal-related data in this article is from Mergermarket as of October 2020, unless otherwise noted. Mergermarket continuously updates its database, including for past periods, so the statistics cited in this article are subject to minor fluctuations over time, including relative to past Mergermarket publications.

40 *Cravath Quarterly Review*, M&A, Activism and Corporate Governance, Q2 2020, Volume 2, Issue 2 (2020); Ortenca Aliaj, Kaye Wiggins, James Fontanella-Khan and Arash Massoudi, 'Dealmaking rebound drives busiest summer for M&A on record', *Financial Times*, 30 September 2020.

respectively, and the top countries by number of deals were the UK, Canada and Japan, with 114 deals, 107 deals and 45 deals respectively. In Q1–Q3 2020, China accounted for only US$1.3 billion in inbound deal value across 10 deals, which continued a trend of depressed deal activity between the US and China resulting from the ongoing US–China trade war and several years of increased scrutiny of Chinese foreign investment by CFIUS.[41] The top countries for US outbound M&A by deal value in Q1–Q3 2020 were the UK, India and the Netherlands, with US$69.8 billion, US$25.2 billion and US$15.8 billion respectively, and the top countries by number of deals were the UK, Canada and India, with 142 deals, 110 deals and 60 deals respectively.

The largest US inbound deals in Q1–Q3 2020 were Siemens Healthineers AG's US$16 billion acquisition of Varian Medical Systems, Inc, Adevinta ASA's US$8.9 billion acquisition of eBay Classifieds Group, and Just Eat Takeaway.com NV's US$7 billion acquisition of Grubhub, Inc. The largest US outbound deals of Q1–Q3 2020 were Nvidia Corporation's US$38.5 billion acquisition of Arm Limited from Softbank Group Corp and the SoftBank Vision Fund, and Thermo Fisher Scientific Inc's US$12 billion acquisition of QIAGEN NV.

ii CFIUS review

CFIUS plays a key role with respect to foreign investment in the US, and in 2019 CFIUS received 325 filings (notices and declarations), the most in its history.[42] In Q1–Q3 2020, CFIUS action led to presidential prohibitions of two high-profile transactions, and modifications to CFIUS's mandatory filing requirements changed the way many market participants will have to assess their transactions. The rise in CFIUS scrutiny is pushing parties to identify and address CFIUS issues early in the transaction process, including during due diligence, as both parties must fully understand the CFIUS risk posed by the seller's US assets, as well as by the buyer's ownership structure.

CFIUS is solely focused on national security concerns, and its recent history of public action demonstrates a focus on technology transfer (including semiconductors and other dual-use technology, export-controlled items and emerging and foundational technology), supply assurance and supply integrity for US businesses with direct or indirect US government customers, sensitive personal data and critical infrastructure, including the US financial system.

Although Japan has overtaken China as the most represented country in CFIUS reviews,[43] CFIUS remains very concerned with any nexus to China, and CFIUS reviews increasingly address foreign investors' (including limited partners and co-investors in the case of investment funds) connections to China, including their operations in China, Chinese customers, Chinese vendors and integration with the Chinese supply chain, even if the investor or acquiror is not a Chinese entity.[44]

41 As a reference point, in Q1–Q3 2016, Chinese inbound M&A activity into the US was US$40.5 billion across 65 deals.

42 Committee on Foreign Investment in the United States, Annual Report to Congress, Report Period: CY 2019, Public/Unclassified Version, https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2019.pdf (CFIUS Annual Report for 2019); Mario Mancuso, Ivan A Schlager, Shawn B Cooley, Daniel J Gerkin, Nathan L Mitchell, Michelle A Weinbaum and Lucille Hague, 'CFIUS Releases its 2019 Annual Report – Key Points for Dealmakers', Kirkland & Ellis, 12 August 2020, https://www.kirkland.com/-/media/publications/alert/2020/08/cfius-releases-its-2019-annual-report--key-points.pdf.

43 CFIUS Annual Report for 2019.

44 Mancuso, Schlager, Cooley, Gerkin, Mitchell, Weinbaum and Hague.

In 2019, Chinese-based companies filed only 25 notices, relative to 55 notices in 2018 and 60 notices in 2017, which correlated with a continued decline in Chinese investment in the US during that period.[45] Interestingly, the number of notices withdrawn and transactions abandoned 'in light of CFIUS-Related National Security Concerns' (i.e., effectively blocked by CFIUS),[46] decreased to only eight transactions out of 231 notices (3.5 per cent) in 2019, versus 7.9 per cent in 2018 and 10.1 per cent in 2017, indicating that the reduction in Chinese investment into the US in 2019 may have been connected to the reduction in the number of transactions abandoned owing to national security concerns raised by CFIUS.[47]

However, the decrease in Chinese notices did not result in a decrease in mitigation measures imposed by CFIUS.[48] During 2019, CFIUS adopted mitigation measures for 28 notices, which accounted for 14.3 per cent of the total notices.[49] Examples of mitigation measures imposed by CFIUS in 2019 include prohibiting or limiting the transfer or sharing of certain intellectual property, trade secrets or know-how, ensuring that only US citizens handle certain products and services, ensuring that certain activities and products are located only in the US, appointing US government-approved security officers or board members and independent audit requirements.[50] Many of these mitigation measures are implicitly intended to prevent foreign investors or acquirors from moving operations, resources or data to China, or from accessing sensitive information or networks from China.[51]

During Q1–Q3 2020, President Trump twice used his authority under CFIUS to unwind previously completed transactions, in each case with respect to acquisitions by Chinese-based companies. On 6 March 2020, President Trump signed an executive order requiring that Chinese-based Beijing Shiji Information Technology Co, Ltd (Beijing Shiji) unwind its September 2018 acquisition of StayNTouch, Inc (StayNTouch), a US-based software company that provides a mobile property management system to hotels.[52] The parties did not file a notice with CFIUS prior to completing the transaction.[53] Although

45 id.

46 The CFIUS Annual Report for 2019 notes that 'divestiture of all of a US business is an option parties may consent to in lieu of a referral to the President and (sic) typically effectuated through a withdrawal of the notice and abandonment of the transaction.' CFIUS Annual Report for 2019.

47 id.; CFIUS Summary Data 2015–2019, Notices, Withdrawals, and Presidential Decisions for Covered Transactions 2015–2019, https://home.treasury.gov/system/files/206/CFIUS-Summary-Data-2015-2019.pdf.

48 id.

49 There were five additional notices for which CFIUS adopted mitigation measures, but the transactions were withdrawn or abandoned. CFIUS Annual Report for 2019.

50 id.

51 Mancuso, Schlager, Cooley, Gerkin, Mitchell, Weinbaum and Hague.

52 Order Regarding the Acquisition of Stayntouch, Inc by Beijing Shiji Information Technology Co, Ltd, The White House, 6 March 2020, www.whitehouse.gov/presidential-actions/order-regarding-acquisition-stayntouch-inc-beijing-shiji-information-technology-co-ltd.

53 Harry Clark and Jeanine P McGuinness, 'President Trump Orders Divestment of US Company; CFIUS Clears Semiconductor Transaction', 13 March 2020, www.orrick.com/en/Insights/2020/03/President-Trump-Orders-Divestment-of-US-Company-CFIUS-Clears-Semiconductor-Transaction.

the President did not make the reason for the divestment order clear in his executive order,[54] CFIUS was presumably concerned about the sensitive personal data of hotel guests that StayNTouch handles in its business.[55]

On 14 August 2020, President Trump signed an executive order demanding that Chinese-based ByteDance Ltd (ByteDance) unwind the US portion of its November 2017 acquisition of another Chinese company, Musical.ly Inc (Musical.ly).[56] Following the 2017 acquisition, ByteDance merged its TikTok social media application with Musical.ly's social media application, and the resulting integrated application, named TikTok, subsequently became very popular among teenagers in the United States. Notwithstanding Musical.ly's operations in the US prior to the acquisition, the parties did not file a notice with CFIUS in connection with the transaction. In his executive order, President Trump ordered ByteDance to divest '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 . . . and any data obtained or derived from TikTok application or Musical.ly application users in the United States.'[57] President Trump had repeatedly indicated that he believed Chinese ownership of TikTok enabled the Chinese government to access the personal data of US citizens, including in a related executive order.[58]

Each of the Beijing Shiji and TikTok executive orders were only the third and fourth time that a President has used authority under CFIUS to unwind a completed transaction.[59] Together, the respective orders demonstrate that CFIUS is very concerned about foreign access to sensitive personal data, especially when the acquiror is a Chinese company or investor.[60]

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54 In the executive order, President Trump noted '[t]here is credible evidence that leads me to believe that [Beijing Shiji] . . . might take action that threatens to impair the national security of the United States'. Order Regarding the Acquisition of StayNTouch, Inc by Beijing Shiji Information Technology Co, Ltd, The White House, 6 March 2020, www.whitehouse.gov/presidential-actions/order-regarding-acquisition-stayntouch-inc-beijing-shiji-information-technology-co-ltd.

55 Clark and McGuinness.

56 Order Regarding the Acquisition of Musical.ly by ByteDance Ltd., The White House, 14 August 2020, www.whitehouse.gov/presidential-actions/order-regarding-acquisition-musical-ly-bytedance-ltd/.

57 id.

58 In an executive order on 6 August 2020, President Trump stated that TikTok's data collection 'threatens to allow the Chinese Communist Party access to Americans' personal and proprietary information – potentially allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage'. Executive Order on Addressing the Threat Posed by TikTok, The White House, 6 August 2020, www.whitehouse.gov/presidential-actions/executive-order-addressing-threat-posed-tiktok/.

59 Clark and McGuinness.

60 'POTUS Uses CFIUS to Unwind TikTok Deal, Fears Chinese Government Will Get Americans' Private Data', 18 August 2020, *The National Law Review*, Volume X, Number 284, www.natlawreview.com/article/potus-uses-cfius-to-unwind-tiktok-deal-fears-chinese-government-will-get-americans.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Overview

The five largest US M&A deals in Q1–Q3 2020 (excluding deals with special purpose acquisition companies) were 7-Eleven Inc's US$21 billion acquisition of Speedway LLC, Analog Devices Inc's US$20.3 billion acquisition of Maxim Integrated Products, Inc, Gilead Sciences Inc's US$19.4 billion acquisition of Immunomedics Inc, Siemens Healthineers AG's US$16 billion acquisition of Varian Medical Systems, Inc and Teladoc Health, Inc's US$14.7 billion acquisition of Livongo Health, Inc, all of which occurred during the dramatic rebound in M&A activity in Q3 2020.[61]

During Q1–Q3 2020, sectors resilient to the effects of covid-19, such as the technology sector, dominated M&A activity, while sectors disproportionately impacted by social distancing, such as business services, saw dramatic declines in M&A activity. During Q1–Q3 2020, technology M&A accounted for 28 per cent of US deal value, double its 14 per cent market share in Q1–Q3 2019.[62] In Q3 2020 specifically, technology M&A accounted for US$226 billion in deal value, its best quarter by deal value since Refinitiv began tracking this data in 1990.[63] Technology was also the most active sector for private equity buyouts in Q1–Q3 2020; during that period, technology buyouts accounted for US$49.5 billion across 244 deals.[64] In contrast to the technology sector, in Q1–Q3 2020, business services M&A declined by 77 per cent in value relative to Q1–Q3 2019, which caused its market share to decrease to 5 per cent of US M&A by value, relative to its 13 per cent market share in Q1–Q3 2019.[65]

ii Litigation and deal terminations resulting from covid-19

Through mid-September 2020, significant market volatility, uncertain closing timelines and large declines in targets' earnings and revenues resulted in terminated deals with a value of US$94 billion, including Xerox Holdings Corp's US$35.5 billion takeover bid for HP Inc, Woodward Inc's US$7.4 billion merger with Hexcel Corporation, Front Yard Residential Corporation's US$2.3 billion merger with Amherst Residential, LLC, and Sycamore Partners' US$525 million acquisition of the Victoria's Secret business from L Brands, Inc.[66] Additionally, through mid-September 2020, lawsuits were filed in Delaware courts with respect to about US$30 billion in deals.[67]

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61 All deal-related data in this article is from Mergermarket as of October 2020, unless otherwise noted. Mergermarket continuously updates its database, including for past periods, so the statistics cited in this article are subject to minor fluctuations over time, including relative to past Mergermarket publications.

62 Global & Regional M&A Report 1Q–3Q20 Including League Tables of Legal Advisors, Mergermarket, 1 October 2020.

63 Ortenca Aliaj, Kaye Wiggins, James Fontanella-Khan and Arash Massoudi.

64 'Trend Summary: US Private Equity 3Q20', Mergermarket, 9 October 2020.

65 id.

66 *Cravath Quarterly Review*, M&A, Activism and Corporate Governance, Q2 2020; 'NorthAm M&A at inflection point after record 1H for lapsed deals – data analysis', Mergermarket, 6 August 2020; Jef Feeley and Michael Hytha, 'LVMH-Tiffany Busted Deal Is Year's Biggest to End In Court', Bloomberg, 11 September 2020, www.bloomberg.com/news/articles/2020-09-10/lvmh-tiffany-busted-deal-is-year-s-biggest-to-end-up-in-court.

67 id.

The most commonly cited reason for refusing to close was owing to alleged breaches of interim operating covenants in transaction agreements. In response to the covid-19 lockdowns in the US, many companies initiated cost-cutting measures, such as furloughing employees, closing retail locations, reducing compensation and limiting capital expenditures. Acquirors claimed that in doing so, sellers breached negative covenants not to take specified actions without the acquiror's consent, as well as the affirmative covenant to operate in the ordinary course, consistent with past practice.[68] For sellers that chose not to implement cost-cutting measures, acquirors also claimed that the failure to take such measures was inconsistent with acting in the ordinary course when faced with a crisis.[69]

Buyers also claimed that sellers had suffered MAEs as a result of the covid-19 pandemic. Some buyers claimed that business MAEs had occurred, although most standard MAE definitions contain broad carve-outs for general economic, market or industry conditions, and some have express carve-outs for pandemics, force majeure events or acts of God.[70] The more common MAE claim was with respect to acquisition agreements that included a sub-clause in the MAE definition about the inability of the seller to perform its obligations under the transaction agreement; in such cases, acquirors argued that an MAE had occurred that made the seller unable to perform its obligations under interim operating covenants and even certain post-closing obligations.[71] These sub-clauses in MAE definitions are generally not subject to the above-referenced carve-outs.

Acquirors also made additional arguments, including alleging breaches of access provisions, both related to access to information and physical access to properties and employees, as well as common law contract defences such as impossibility, impracticability and frustration of purpose.[72]

Two significant cases are summarised below.

On 22 February 2020, Sycamore Partners agreed to acquire a 55 per cent stake in the Victoria's Secret business from L Brands, Inc (L Brands) for US$525 million.[73] On 22 April 2020, Sycamore Partners terminated the transaction agreement, and filed a lawsuit with the Delaware Court of Chancery for a declaratory judgment in which it alleged that L Brands breached its obligation to operate Victoria's Secret in the ordinary course of business, that it breached related representations and warranties, and that Victoria's Secret suffered an MAE, among other reasons, because Victoria's Secret furloughed most of its employees, reduced executive compensation by 20 per cent, substantially reduced merchandise receipts and failed to pay rent in April 2020 for its retail stores in the US.[74] On 23 April 2020, L Brands

68 See, e.g., Complaint at 2, *SP VS Buyer LP v. L Brands, Inc*, CA No. 2020-0297 (Del Ch 2020); *AB Stable VIII LLC v. MAPS Hotel and Resorts One LLC*, CA No. 2020-0310 (Del Ch 2020).

69 See, e.g., *Simon Property Group, Inc v. Taubman Centers, Inc*, No. 2020-181675-CB (Mich Cir 2020).

70 See, e.g., *Tiffany & Co v. LVMH Moët Hennessy-Louis Vuitton SE et al*, CA No. 2020-0768 (Del Ch 2020); *Realogy Holdings Corp v. SIRVA Worldwide, Inc et al*, CA No. 2020-0311-MTZ (Del Ch 2020); *Juweel Investors, Ltd v. Carlyle Roundtrip, LP et al*, CA No. 2020-0338-JRS (Del Ch 2020); *SP VS Buyer LP v. L Brands, Inc*.

71 See, e.g., *Tiffany & Co v. LVMH Moët Hennessy-Louis Vuitton SE et al*; *Realogy Holdings Corp v. SIRVA Worldwide, Inc et al*; *SP VS Buyer LP v. L Brands, Inc*.

72 See, e.g., *Omar Khan, SCGC, Inc et al v. Cinemex USA Real Estate Holdings, Inc et al*, No. 20-1178 (Tex SD 2020); *Oberman, Tivoli & Pickert, Inc v. Cast & Crew Indie Services, LLC and Camera Holdings, LP*, CA No. 2020-0257-PAF (Del Ch 2020).

73 *SP VS Buyer LP v. L Brands, Inc*.

74 Complaint at 29, *SP VS Buyer LP v. L Brands, Inc*.

filed a countersuit against Sycamore Partners, seeking specific performance of its obligation to close the transaction, or money damages in the alternative.[75] On 24 April 2020, Sycamore Partners filed another lawsuit seeking a declaratory judgment that its equity commitment letter had been terminated, because L Brands' claim for money damages was not a permitted claim under the equity commitment letter, which triggered its termination.[76] On 4 May 2020, Sycamore Partners and L Brands mutually agreed to terminate the transaction agreement and settle the litigation, without the payment of a termination fee or other consideration by either party.[77]

On 24 November 2019, Tiffany & Co (Tiffany) and LVMH Moët Hennessy-Louis Vuitton SE (LVMH) entered into a merger agreement pursuant to which LVMH agreed to acquire Tiffany for US$16.2 billion.[78] Under the merger agreement, the drop-dead date could only be extended if regulatory approvals were the only unsatisfied condition to closing at the initially scheduled drop-dead date.[79] In August 2020, Tiffany exercised its right to extend the drop-dead date in the merger agreement from 24 August 2020 to 24 November 2020, on the basis that receipt of certain required regulatory approvals was the only outstanding condition to closing.[80] LVMH argued that Tiffany was prohibited from extending the drop-dead date because it had suffered an MAE.[81] On 8 September 2020, LVMH disclosed that it had received a letter dated 31 August 2020 from the French Ministry for Europe and Foreign Affairs, which suggested that LVMH defer closing the transaction with Tiffany until 6 January 2021 to support France's efforts to dissuade the US government from imposing tariff sanctions against France.[82] On 9 September 2020, Tiffany filed a lawsuit with the Delaware Court of Chancery seeking to force LVMH to take all actions necessary to obtain the required antitrust clearances as promptly as practicable, and consummate the transaction in accordance with the merger agreement.[83] In its complaint, Tiffany alleged that LVMH had breached the 'hell or high water' regulatory efforts covenant by delaying its responses to information requests by competition authorities and failing to file merger-clearance applications, in an effort to reach the drop-dead date without antitrust approval being granted.[84] On 28 September 2020, LVMH filed a counterclaim, arguing that it was not required to close the transaction because:

a Tiffany had suffered an MAE;

b Tiffany materially breached the interim operating covenants; and

c the letter was a legal restraint issued by the French government that precluded closing before the drop-dead date.[85]

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75 Complaint at 31, *L Brands, Inc v. SP VS Buyer LP et al*, CA No. 2020-0304 (Del Ch 2020).

76 Complaint at 5, 8, *Sycamore Partners III, LP et al v. L Brands, Inc*, CA No. 2020-0306 (Del Ch 2020).

77 Press release, Sycamore Partners Confirms Mutual Termination of Transaction Agreement with L Brands, 4 May 2020, www.prnewswire.com/news-releases/sycamore-partners-confirms-mutual-termination-of-transaction-agreement-with-l-brands-301052299.html.

78 Complaint at 26, *Tiffany & Co. v. LVMH Moët Hennessy-Louis Vuitton SE et al.*

79 id. at 24-25.

80 id. at 31.

81 id. at 15.

82 id. at 16.

83 id. at 110-111.

84 id. at 10-11, 90.

85 Counterclaim and Answer at 15, 49 and 61, *Tiffany & Co v. LVMH Moët Hennessy-Louis Vuitton SE et al.*

With respect to the MAE claim, LVMH argued that the general MAE definition did not contain a carve-out for pandemics; that the subclause of the MAE definition related to Tiffany's ability to perform its obligations under the merger agreement did not contain any carveouts; and that Tiffany's business had been devastated by the covid-19 pandemic and that it was ill-suited for the challenges ahead.[86]

On 29 October 2020, LVMH and Tiffany announced that they entered into a new merger agreement that, among other things, reduced the purchase price by about US$400 million to US$15.8 billion, and also agreed to settle the litigation pending in the Delaware Court of Chancery.[87]

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Trends in the US financing markets during Q1–Q3 2020 have been driven primarily by the covid-19 pandemic and the resulting policy response by the US government. To prevent a liquidity crisis in US financial markets and lessen the economic damage caused by covid-19, in March 2020 the US Federal Reserve lowered short-term interest rates to effectively zero, and then over the next several months took unprecedented actions to inject liquidity into US financial markets, including through a massive bond-buying programme that involved purchases of investment grade and high-yield bonds, and bond exchange traded funds.[88] To strengthen their balance sheets to weather the pandemic, and supported by the US Federal Reserve's policy accommodation, in Q1–Q3 2020 companies borrowed record sums from both the US investment grade and high-yield bond markets (US$1.493 trillion and US$339 billion, corresponding to year-over-year increases of 70.8 per cent and 72.1 per cent respectively),[89] although during the same period US syndicated lending volume was US$1.136 trillion, corresponding to a 28.8 per cent year-over-year decline.[90] However, despite the record period for bond issuance in Q1–Q3 2020, during the same period M&A financing declined across both bonds and syndicated loans, mirroring the reduction in US M&A activity (although the bond market was less affected than the loan market).

During Q1–Q3 2020, total M&A syndicated loan volume was US$168.4 billion, a decrease of 58.5 per cent relative to Q1–Q3 2019 and the lowest nine-month total since 2008.[91] The Q1–Q3 2020 M&A syndicated loan volume was split between US$40.6 billion

86 id. at 7, 16 and 23.

87 Cara Lombardo and Dana Cimilluca, 'Tiffany Agrees to New Deal Terms with LVMH', *The Wall Street Journal*, 29 October 2020.

88 Nick Timiraos and Jon Hilsenrath, 'The Federal Reserve is Changing What it Means to be a Central Bank', *The Wall Street Journal*, 27 April 2020, www.wsj.com/articles/fate-and-history-the-fed-tosses-the-rules-to-fight-coronavirus-downturn-11587999986; Matt Wirz and Tom McGinty, 'Fed Discloses More Corporate Bond and ETF Purchases', *The Wall Street Journal*, 10 July 2020, www.wsj.com/articles/fed-bought-about-1-3-billion-corporate-bonds-in-late-june-11594396039.

89 LCD Interactive High-Yield Report, S&P Global Market Intelligence; Jakema Lewis, 'US high-yield issuance blasts prior years to set new record', S&P Global Market Intelligence, 8 October 2020; John Atkins, 'Record September leaves high-grade volume 71 per cent ahead of 2019 pace', S&P Global Market Intelligence, 2 October 2020.

90 Ioana Barza, Refinitiv LPC's US Large Corporate Buyside & Sellside Survey 3Q Review/4Q Preview, Refinitiv, 9 October 2020.

91 'Feature – US: 3Q20 US loan volume lowest since 1Q10; lenders provide ongoing market support', Refinitiv Loan Connector, 4 October 2020, Refinitiv.

from investment grade loans (a decrease of 80 per cent from Q1–Q3 2019), US$77.2 billion from non-LBO leveraged loans (a decrease of 28.5 per cent from Q1–Q3 2019) and US$50.6 billion from LBO leveraged loans (a decrease of 46.9 per cent from Q1–Q3 2019).[92] By quarter, US M&A syndicated loan volume was US$79.9 billion in Q1 2020 (a decrease of 46 per cent from Q1 2019), US$59.9 billion in Q2 2020 (a decrease of 56.4 per cent from Q2 2019) and US$28.6 billion in Q3 2020 (a decrease of 76.3 per cent from Q3 2019).[93]

During Q1–Q3 2020, total US M&A bond issuance was US$148.5 billion, a decrease of 21.1 per cent relative to Q1–Q3 2019, split between US$115.3 billion from investment grade bonds[94] (a decrease of 21.8 per cent from Q1–Q3 2019) and US$33.2 billion from high-yield bonds (a decrease of 18.6 per cent from Q1–Q3 2019).[95] By quarter, US M&A bond issuances were US$36.4 billion in Q1 2020 (a decrease of 42.4 per cent relative to Q1 2019), $US67.9 billion in Q2 2020 (a decrease of 3.4 per cent relative to Q2 2019) and US$44.2 billion in Q3 2020 (a decrease of 18.5 per cent relative to Q3 2019).[96]

The relative strength of the M&A bond market in Q2 2020, when new M&A activity was severely limited during the early months of the covid-19 pandemic in the US, was partially related to financings for deals that had been announced in prior periods, such as T-Mobile US, Inc's US$19 billion bond offering in connection with its merger with Sprint Corporation.[97] Notwithstanding the dramatic increase in M&A activity during Q3 2020, during that quarter syndicated loan volume had its lowest quarterly total since Q1 2010, and M&A high-yield bond volume had its slowest quarter since Q3 2009.[98] During the M&A rebound in Q3 2020, investment grade strategic acquirers generally pursued all-stock transactions or used cash-on-hand to finance transactions, entirely bypassing the financing markets.[99] Likewise, the lack of large private equity buyout opportunities, and a focus by private equity sponsors on smaller middle market deals and add-on acquisitions for portfolio companies,[100] led to reduced leveraged financing activity in Q1–Q3 2020, and specifically limited leveraged loan volume in Q3 2020 to its lowest quarterly total since Q1 2012.[101] The decrease in LBO loan volume, and leveraged loans generally, is also explained by a lack of investor appetite for risky companies and sectors disproportionately affected by covid-19.[102] However, despite the relative lack of M&A financing during Q1–Q3 2020, debt financing remained available on competitive terms for M&A deals targeting creditworthy companies and businesses resilient to the economic effects of covid-19, fuelled by investors searching for yield in an era of ultra-low interest rates.[103]

92 Historical Data – US: Quarterly M&A Volume by Segment, Refinitiv Loan Connector, Refinitiv.

93 id.

94 Investment grade bond volume excludes sovereign, quasi-sovereign, supranational, preferred and hybrid-structure deals.

95 LCD Interactive High-Yield Report, S&P Global Market Intelligence; LCD HG Monthly, S&P Global Market Intelligence.

96 id.; id.

97 LCD Interactive High-Yield Report; LCD High Grade Issuance, S&P Global Market Intelligence.

98 Ioana Barza; LCD Interactive High-Yield Report.

99 'Feature – US: 3Q20 US loan volume lowest since 1Q10; lenders provide ongoing market support'.

100 Stephen-George Davis, North American M&A Report Q2 2020, Pitchbook; Amy Whyte, 'Private Equity Funds are Making Record Numbers of Buyout Deals', Institutional Investor, 30 September 2020.

101 Historical Data – US: Quarterly M&A Volume by Segment.

102 id.

103 'Feature – US: 3Q20 US loan volume lowest since 1Q10; lenders provide ongoing market support'.

With respect to pricing, in the investment grade bond market, average new-issue yields ended Q3 2020 below pre-pandemic levels due to the reduction in benchmark interest rates; average new-issue yields fluctuated from 2.70 per cent in February 2020, to 3.56 per cent in March 2020, to 2.48 per cent in June 2020, down as low as 1.97 per cent in August 2020 and back to 2.30 per cent in September 2020.[104] In the high-yield bond market, average new-issue yields fluctuated from 5.25 per cent in February 2020, to 7.20 per cent in May 2020, down to 5.30 per cent in August 2020, and back to 5.50 per cent in September 2020, slightly above pre-pandemic levels.[105] In the investment grade loan market, average new-issue yields were 3.24 per cent in Q1 2020, 3.08 per cent in Q2 2020 and 2.26 per cent in Q3 2020.[106] In the leveraged loan market, average yields for 3-year loans were 5.04 per cent in Q1 2020, 7.64 per cent in Q2 2020, and 5.95 per cent in Q3 2020.[107]

VII EMPLOYMENT LAW

Executive compensation has come under increased scrutiny from institutional and retail investors, proxy advisers, courts and legislators, in efforts to minimise agency problems that arise when management are permitted to set their own compensation.

i Shareholder engagement and institutional adviser influence

In 2019 and 2020, shareholders remained engaged with executive compensation issues through say-on-pay (SOP) advisory votes and the approval of equity plans. Although SOP votes are non-binding, public companies are concerned with their outcomes given the ability of SOP votes to influence director elections.[108] In 2019 and, as of 14 September 2020, in 2020, 52 and 60, respectively, Russell 3000 companies failed SOP votes, which is consistent with results in recent years.[109]

Proxy advisory services, such as Institutional Shareholder Services (ISS) and Glass, Lewis & Co, continue to play a role in the increasingly complex landscape of executive compensation and equity programmes, and their recommendations carry some weight. For example, in 2019, shareholder support was 30 per cent lower at companies that received an 'against' SOP recommendation from ISS.[110] However, proxy advisers' influence is not absolute, as data suggests that the connection between an 'against' recommendation from ISS and SOP votes is tenuous. While 2.7 per cent of companies failed SOP votes in 2019, ISS issued 'against' recommendations with respect to approximately 13 per cent of 2019

104 John Atkins, 'Record September leaves high-grade volume 71 per cent ahead of 2019 pace'. The authors also accessed related data from S&P Global Market Intelligence supporting the cited article.

105 John Atkins, 'September HY bond volume caps record Q3 as issuers push out maturities', S&P Global Market Intelligence, 5 October 2020. The authors also accessed related data from S&P Global Market Intelligence supporting the cited article.

106 Data from S&P Global Market Intelligence.

107 *Credit Connector*, Volume 2, Issue 18, Refinitiv LPC, 6 October 2020.

108 15 USC § 78n-1(a).

109 '2020 Say on Pay Results and Proxy Results', Semler Brossy, 24 September 2020, www.semlerbrossy.com/wp-content/uploads/SBCG-2020-SOP-Report-2020-09-24.pdf.

110 '2019 Say on Pay Results – End of Year Report'; 'US Executive Pay Votes – 2019 Proxy Season Review'.

SOP votes. Additionally, major institutional investors, including BlackRock and Vanguard, maintain in-house proxy analysis and governance groups to inform their voting decisions in lieu of engaging proxy advisory firms.[111]

ii Golden parachutes and executive severance developments

ISS has singled out certain change in control (CIC) benefits historically provided to executives in connection with M&A transactions (such as single-trigger acceleration of equity-based awards and gross-ups of the excise tax imposed under Section 280G of the US Internal Revenue Code of 1986 (Code)) as problematic.[112] ISS's published guidance states that it is likely to render an 'against' vote recommendation when single-trigger acceleration or a Section 280G gross-up is included in a new CIC arrangement.[113] ISS also considers whether CIC arrangements in place prior to a transaction contain such CIC benefits in its recommendation on say on golden parachute (SOGP) proposals.[114]

Although shareholder dissatisfaction with outsized golden parachute payments remains at generally high levels, only 7 per cent of companies in both the S&P 500 and the Russell 3000 failed SOGP votes in 2020 compared to 12 per cent in 2019.[115] Many companies have eliminated Section 280G gross-ups from their CIC and employment agreements to avoid negative recommendations from proxy advisory firms, but recent data suggests that companies are increasingly providing for Section 280G gross-ups in the context of acquisitions.[116]

iii Looking ahead

High levels of shareholder and proxy adviser involvement with SOP and SOGP votes indicate that boards of directors are increasingly restricted in their ability to set executives' compensation. Shareholders are likely to continue exploring other avenues for influencing the pay practices of companies that are unresponsive to SOP votes and SOGP votes given the overall limited impact of such votes on director re-elections.

The most troublesome corporate practices identified by proxy advisers continue to disappear, and compensation (including perquisites and other fringe benefits) continues to shift away from cash to equity- and performance-based awards under increasingly complex pay-for-performance programmes. It is unclear what effect such a shift, coupled with the elimination of the performance-based compensation exception under Section 162(m) of the Code, may have on future M&A transactions. Given the market uncertainty surrounding recent changes in law and practice, investors should engage management and boards of directors in the early stages of the acquisition process to maximise both executive retention and shareholder value.

111 'BlackRock Investment Stewardship: Corporate Governance and Proxy Voting Guidelines for US Securities', BlackRock, January 2020, www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf.

112 'United States Proxy Voting Guidelines', ISS, 18 November 2019, www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf; 'US Compensation Policies – Frequently Asked Questions', ISS, 6 December 2019, www.issgovernance.com/file/policy/active/americas/US-Compensation-Policies-FAQ.pdf.

113 id.

114 id.

115 'US Compensation 2020 Proxy Season Review', ISS, 30 July 2020.

116 id.

VIII TAX LAW[117]

On 27 March 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act),[118] the first in a series of changes to the US tax system in response to covid-19. The stated intent of the CARES Act and subsequent lawmaking was to provide economic assistance to American workers and small businesses and to preserve jobs threatened by covid-19.[119] This section provides an overview of the most significant components of these legislative and administrative changes that relate to M&A.

i Payroll tax deferrals

Introduction

The CARES Act allowed for the deferral of the payment of federal payroll taxes used to fund social security. These payroll taxes are generally measured as a percentage of an employee's wages below a certain threshold and are imposed equally on employers and employees, with employers withholding the employees' portion of the tax.[120] The tax is sizable – in the aggregate, it equals 12.4 per cent of applicable wages, with employees bearing 6.2 per cent and employers bearing 6.2 per cent.[121]

CARES Act deferrals

Under the CARES Act, payment of the employer portion of the social security tax has been deferred for the remainder of 2020. The employer must pay 50 per cent of the amount deferred by 31 December 2021, with the remaining 50 per cent due on 31 December 2022.[122]

These deferrals represent an additional debt-like liability that should be addressed in M&A agreements. Market practice generally dictates that sellers bear the cost of pre-closing taxes; in transactions that include a purchase price adjustment for debt or net working capital, this is accomplished by treating pre-closing taxes as a liability in the calculation of one of these adjustments. Given that deferred employer payroll taxes relate to services provided before closing, buyers typically take the position that the taxes should likewise reduce the purchase price (and therefore be included in one of these adjustments). It is best practice for the acquisition agreement to explicitly address the inclusion of these deferred taxes in the calculation of the purchase price.

117 Section references in this part are to the Code, unless otherwise specified.

118 Pub L No. 116-136 (2020).

119 See The CARES Act Works for All Americans, US Department of the Treasury, http://home.treasury.gov/policy-issues/cares (accessed 1 October 2020).

120 See 26 USC §§ 3101(a); 3111(a).

121 id. There is a similar tax of 2.9 per cent imposed on wages to fund Medicare, with employers bearing 1.45 per cent and employees bearing 1.45 per cent (along with an additional 0.9 per cent imposed on employees earning above a certain threshold). id §§ 3101(b)(2); 3101(b)(6); 3111(b)(6). The CARES Act did not defer the collection of the Medicare payroll taxes.

122 CARES Act § 2302(a)(1), (d)(3).

Executive order deferrals

Subsequently, on 8 August 2020, President Trump issued an executive order that allowed employers to defer the collection of employee payroll taxes on wages paid to certain employees from 1 September 2020 until 31 December 2020. [123] Any deferred employee payroll taxes must be remitted by the employer by 1 May 2021.[124] Although President Trump has suggested that the US government may potentially forgive these deferred amounts, lawmakers have not taken concrete steps to permit forgiveness.[125]

Few large companies have ceased withholding employee payroll taxes as a result of the executive order.[126] Because employers are liable to remit deferred employee payroll taxes by 1 May 2021, those amounts must be withheld from employees' pay cheques at that time. Collecting these deferred taxes may be impossible, however, if the relevant employee is no longer employed by that employer. And, even if employees do remain employed until the end of the deferral period, they may react negatively to the increased withholding necessary to remit the deferred taxes.

Buyers should determine whether the target company has ceased employee payroll tax withholding under the executive order. If the target has ceased withholding, the relevant buyer should assess the recoverability of these deferred employee payroll taxes and, potentially, factor the deferral into the calculation of the purchase price.

ii PPP loans and the Employee Retention Credit

Current law

The CARES Act contains a number of provisions that are designed to provide small businesses with direct economic assistance. First, the CARES Act implemented the Paycheck Protection Program (PPP), which granted low-interest loans to certain small businesses (generally, businesses with no more than 500 employees).[127] The PPP loans have maturities of between two and five years, but they may be forgiven to the extent the proceeds are used for specified costs within a 24-week period after receiving the loan.[128]

In addition, the CARES Act granted a payroll tax credit for certain wages paid between 13 March 2020 and 31 December 2020 by employers that have been directly affected by the pandemic (Employee Retention Credit).[129] Any employer that receives a PPP loan is not eligible to claim the Employee Retention Credit, regardless of when the PPP loan was

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123 Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing Covid-19 Disaster, Presidential Memoranda, The White House, 8 August 2020, www.whitehouse.gov/presidential-actions/memorandum-deferring-payroll-tax-obligations-light-ongoing-covid-19-disaster/.

124 I.R.S. Notice 2020-65.

125 See Richard Rubin, 'Some Large Employers Reject Trump's Payroll-Tax Deferral Plan', *The Wall Street Journal*, 11 September 2020, www.wsj.com/articles/some-large-employers-reject-trumps-payroll-tax-deferral-plan-11599840079.

126 See Richard Rubin, 'Trump Payroll-Tax Deferral Leaves Employers Wary as Plan Starts', *The Wall Street Journal*, 1 September 2020, www.wsj.com/articles/trump-payroll-tax-deferral-leaves-employers-wary-as-plan-starts-11598958000.

127 CARES Act § 1102(a)(1)(D). Different thresholds apply for certain industries.

128 id. § 1106(b).

129 id. § 2301.

received or whether the PPP loan was repaid or forgiven (with a limited exception for loans repaid by 18 May 2020).[130] Furthermore, ineligibility extends to all affiliates of the PPP loan recipient.[131]

Implications

The interplay between the PPP and the Employee Retention Credit created significant concern that, if a buyer that has claimed (or will claim) the Employee Retention Credit acquired a PPP loan recipient, the buyer (and its affiliates) would risk losing their Employee Retention Credit eligibility and be required to repay any previously claimed credit. The size of the PPP loan did not matter, and the issue arose even where PPP loans had been repaid in full after 18 May 2020.

On 16 November 2020, the US Internal Revenue Service released informal guidance that largely eliminates this concern. In particular, it allows a buyer to remain eligible for the Employee Retention Credit and, as long as the target company's PPP loan has been satisfied by the closing or is not assumed by the buyer, the target company effectively gets a clean slate to claim the Employee Retention Credit after the closing.[132]

iii Adjusted rules for NOL carrybacks and carryforwards

The CARES Act permitted federal net operating losses (NOLs) arising in the 2018, 2019 and 2020 taxable years to be carried back up to five years, even though the Tax Cuts and Jobs Act of 2017 (TCJA) had eliminated the ability of taxpayers to carry back such NOLs.[133] This change is particularly significant because it allows carrybacks to taxable years in which the pre-TCJA 35 per cent corporate tax rate applied (potentially increasing the value of the NOL). The CARES Act also permitted taxpayers to use NOLs to offset 100 per cent of taxable income in the 2020 taxable year and earlier (whereas the TCJA limited such offset to 80 per cent of taxable income).[134]

The CARES Act's expansion of the NOL rules caused disruption in many M&A transactions that were between signing and closing at the time of its passage. In these transactions, the newfound NOL carryback created a new tax benefit that had to be allocated between the parties. Going forward, buyers should be aware that NOLs generated in the years affected by the CARES Act may be carried back for the benefit of the seller, absent language in the acquisition agreement to the contrary.

130 id. § 2301(j).

131 id. § 2301(d).

132 COVID-19-Related Employee Retention Credits: Interaction with Other Credit and Relief Provisions FAQs, US Internal Revenue Service, 16 November 2020, www.irs.gov/newsroom/covid-19-related-employee-retention-credits-interaction-with-other-credit-and-relief-provisions-faqs.

133 CARES Act § 2303.

134 id.

iv Interest deductibility

The CARES Act loosened certain restrictions on the deductibility of interest expense that were implemented under the TCJA. In particular, the cap on interest deductions was increased from 30 per cent to 50 per cent of earnings before interest, taxes, depreciation and amortisation (EBITDA) for the 2019 and 2020 taxable years.[135] Taxpayers were also permitted to use their 2019 EBITDA for purposes of calculating their 2020 cap.[136]

IX COMPETITION LAW

In 2019 and into 2020, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (the FTC and, together with the DOJ, the Agencies) carefully examined transactions in a variety of industries, employing a rigorous approach to merger enforcement towards both proposed transactions and consummated mergers.

The Agencies, and the DOJ in particular, have continued to demonstrate a preference for structural remedies and a scepticism towards behavioural remedies. In September 2020, the DOJ issued a modernised merger remedies manual that provides limited circumstances in which conduct remedies may be appropriate.[137] Of the 15 consent decrees entered into in 2019, the Agencies required divestitures for 13 of the transactions.[138] As in previous years, the FTC increased the filing thresholds under the HSR Act, and the size of transaction test is satisfied for most transactions valued over US$94 million (increased from US$90 million).[139]

In 2019, the Agencies also took a few enforcement actions in connection with consent decrees that were entered in previous years.[140] For example, in December 2019, the DOJ filed a motion to significantly modify and extend the 2010 consent decree with Live Nation and

135 CARES Act § 2306.

136 id.

137 Press release, Department of Justice, 'Justice Department Issues Modernized Merger Remedies Manual', 3 September 2020, www.justice.gov/opa/pr/justice-department-issues-modernized-merger-remedies-manual.

138 *Thales SA & Gemalto NV*, 84 Fed Reg 8,745; press release, Federal Trade Commission, 'FTC Requires Fresenius Medical Care AG & KGaA and NxStage Medical, Inc to Divest Bloodline Tubing Assets to B Braun Medical, Inc as a Condition of Merger', 19 February 2019, www.ftc.gov/news-events/press-releases/2019/02/ftc-requires-fresenius-medical-care-ag-kgaa-nxstage-medical-inc; press release, Federal Trade Commission, 'FTC Requires Divestitures by Tronox and Cristal, Suppliers of Widely Used White Pigment, Settling Litigation over Proposed Merger', 10 April 2019, www.ftc.gov/news-events/press-releases/2019/04/ftc-requires-divestitures-tronox-cristal-suppliers-widely-used; *Amcor Ltd & Bemis Co*, 84 Fed Reg 30,223; Harris Corp & L3 Techs, 84 Fed Reg 32,951; press release, Federal Trade Commission, 'FTC Imposes Conditions on Quaker Chemical Corp's Acquisition of Houghton International Inc', 23 July 2019, www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-conditions-quaker-chemical-corps-acquisition-houghton; press release, Federal Trade Commission, 'FTC Imposes Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group', 19 June 2019, www.ftc.gov/news-events/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition; *Deutsche Telekom AG*, 84 Fed Reg 39,862; *Boston Sci Corp*, 84 Fed Reg 40,411; *Nexstar Media Grp*, 84 Fed Reg 41,738; *US Foods Holding Corp & Servs Grp of Am*, 84 Fed Reg 49,106; *Symrise AG*, 84 Fed Reg 65,174; *Bristol-Myers Squibb Co & Celgene Corp*, 84 Fed Reg 66,191.

139 'HSR threshold adjustments and reportability for 2020', www.ftc.gov/news-events/blogs/competition-matters/2020/01/hsr-threshold-adjustments-reportability-2020.

140 Press release, Federal Trade Commission, 'FTC Issues Modified Final Order Imposing Conditions on Merger of International Industrial Gas Suppliers Praxair, Inc and Linde AG', 28 February 2019, www.ftc.gov/news-events/press-releases/2019/02/ftc-issues-modified-final-order-imposing-conditions-merger.

Ticketmaster, alleging that Live Nation repeatedly violated the final judgment. The DOJ's motion was granted in January 2020 and represented the most significant enforcement action of an existing antitrust decree by the DOJ in 20 years.[141]

In March 2020, the Agencies announced a series of temporary changes to the merger review process for the duration of the covid-19 pandemic, including electronic HSR Act filings, extensions of timing agreements for mergers pending at the time and expedited antitrust procedures and guidance for covid-19-related public health efforts.[142]

The Agencies also withdrew the 1984 non-horizontal merger guidelines in January 2020 and issued new vertical merger guidelines in June 2020, which detailed potential theories of harm that the Agencies will consider when evaluating vertical mergers, in particular foreclosure, and clarified that efficiencies, such as the elimination of double marginalisation, will be considered as procompetitive justifications.[143]

Some recent, significant DOJ and FTC actions are described below.

In April 2018, T-Mobile US, Inc announced that it would acquire Sprint Corporation in a transaction valued at US$59 billion.[144] The DOJ approved the transaction in July 2019 subject to divestiture of certain Sprint assets.[145] Despite the settlement with the DOJ, the merger faced opposition from multiple state Attorneys General until February 2020, when, after a 10-day trial, a federal district court denied the state Attorneys General's request for an injunction to block the transaction.[146] The parties closed the transaction in April 2020.[147]

In July 2018, Novelis Inc announced it would acquire Aleris Corporation in a transaction valued at US$2.6 billion.[148] In March 2020, the DOJ approved the transaction subject to divestiture of certain Aleris assets.[149] Prior to agreeing to this divestiture, the DOJ

141 Press release, Department of Justice, 'Court Enters Judgment That Significantly Modifies and Extends Consent Decree With Live Nation/Ticketmaster', 28 January 2020, www.justice.gov/opa/pr/court-enters-judgment-significantly-modifies-and-extends-consent-decree-live.

142 Press release, Department of Justice, 'The Justice Department and the Federal Trade Commission Announce Expedited Antitrust Procedure and Guidance for Coronavirus Public Health Efforts', 24 March 2020, www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-announce-expedited-antitrust-procedure-and; press release, Department of Justice, 'Justice Department Announces Antitrust Civil Process Changes for Pendency of Covid-19 Event', 17 March 2020, www.justice.gov/opa/pr/justice-department-announces-antitrust-civil-process-changes-pendency-covid-19-event.

143 Press release, Department of Justice, 'Department of Justice And Federal Trade Commission Issue New Vertical Merger Guidelines', 30 June 2020, www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-issue-new-vertical-merger-guidelines.

144 Press release, T-Mobile, 'T-Mobile and Sprint to Combine, Accelerating 5G Innovation & Increasing Competition', 29 April 2018, www.t-mobile.com/news/press/5gforall.

145 Press release, Department of Justice, 'Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish', 26 July 2019, www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package.

146 Press release, Department of Justice, 'Justice Department Welcomes Decision in *New York v. Deutsche Telecom*, the *T-Mobile/Sprint* Merger', 11 February 2020,www.justice.gov/opa/pr/justice-department-welcomes-decision-new-york-v-deutsche-telecom-t-mobilesprint-merger.

147 Press release, T-Mobile, 'T-Mobile Completes Merger with Sprint to Create the New T-Mobile', 1 April 2020, https://investor.t-mobile.com/news-and-events/t-mobile-us-press-releases/press-release-details/2020/T-Mobile-Completes-Merger-with-Sprint-to-Create-the-New-T-Mobile/default.aspx.

148 Press release, Novelis, 'Poised for Transformational Growth', 26 July 2018, http://investors.novelis.com/download/Novelis+Acquisition+Analyst+Slides.pdf.

149 Press release, Department of Justice, 'Justice Department Wins Historic Arbitration of a Merger Dispute', 9 March 2020, www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute.

and the defendants had agreed to refer the issue of product market definition to binding arbitration, which marked the first time the DOJ used its arbitration authority to resolve a matter.[150] The parties completed the transaction in April 2020.[151]

In January 2019, Bristol-Myers Squibb Company announced it would acquire Celgene Corporation in a transaction valued at US$74 billion.[152] In November 2019, the FTC approved the transaction subject to divestiture of certain Celgene assets for $13.4 billion, the largest divestiture that the Agencies have ever required in a merger enforcement matter.[153] The parties completed the transaction in November 2019.[154]

In May 2018, Axon Enterprise, Inc acquired VieVu, LLC, in a transaction that was not reportable under the HSR Act. The FTC subsequently issued an administrative complaint against Axon in January 2020 alleging competitive harm, which has since been stayed in light of the covid-19 pandemic.[155] Separately, in January 2020, Axon sued the FTC in federal district court alleging that the FTC's structure and administrative procedures are unconstitutional, and asking the court to enjoin the administrative proceeding.[156] The district court dismissed the complaint on jurisdictional grounds and the appeal is currently pending.[157]

The preceding cases demonstrate that the DOJ and FTC have continued to engage in active enforcement, demonstrating a willingness to challenge both proposed and consummated transactions, engage in litigation where necessary and require significant remedies where they believe these are necessary to preserve competition.

X OUTLOOK

In Q1–Q3 2020, US M&A activity declined significantly relative to Q1–Q3 2019, predominantly because of the covid-19 pandemic. The reduction in M&A activity was especially severe during Q2 2020 when a large portion of the US economy was shut down, but M&A activity dramatically rebounded in Q3 2020 as business confidence improved, led

150 id.

151 Press release, Novelis, 'Novelis Completes Acquisition of Aleris', 14 April 2020, https://novelis.com/blog/2020/04/14/novelis-completes-acquisition-of-aleris/.

152 Press release, Bristol-Myers Squibb, 'Bristol-Myers Squibb to Acquire Celgene to Create a Premier Innovative Biopharma Company', 3 January 2019, https://news.bms.com/news/corporate-financial/2019/Bristol-Myers-Squibb-to-Acquire-Celgene-to-Create-a-Premier-Innovative-Biopharma-Company/default.aspx.

153 Press release, Federal Trade Commission, 'FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition', 15 November 2019, www.ftc.gov/news-events/press-releases/2019/11/ftc-requires-bristol-myers-squibb-company-celgene-corporation.

154 Press release, Bristol-Myers Squibb, 'Bristol-Myers Squibb Completes Acquisition of Celgene, Creating a Leading Biopharma Company', 20 November 2019, https://news.bms.com/news/corporate-financial/2019/Bristol-Myers-Squibb-Completes-Acquisition-of-Celgene-Creating-a-Leading-Biopharma-Company/default.aspx.

155 Press release, Federal Trade Commission, 'FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments', 3 January 2020, www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn.

156 Press release, Axon, 'Axon Sues FTC for Alleged Violation of US Constitution', 3 January 2020, https://investor.axon.com/press-releases/press-release-details/2020/Axon-Sues-FTC-for-Alleged-Violation-of-US-Constitution/default.aspx.

157 Press release, Axon, 'Axon v. Federal Trade Commission Media & Investor Briefing Page', 3 January 2020, www.axon.com/ftc.

by the technology sector and other sectors resilient to the economic effects of covid-19. Many existing deals were withdrawn or terminated as a result of covid-19, and various high-profile deals resulted in litigation. With respect to corporate law, Delaware courts continued to demand robust disclosure for shareholder votes on M&A transactions, and reaffirmed that demonstrating an MAE remains a high bar for acquirors, which may have implications for the aforementioned cases subject to litigation. US inbound cross-border M&A activity was also severely affected by covid-19, and the CFIUS review presented an increasingly significant regulatory obstacle, particularly for acquirors or investors with any nexus to China. Antitrust enforcement continued to be aggressive, and certain tax changes in the CARES Act should be addressed by acquirors during due diligence. While financing for M&A transactions was muted owing to the decline in M&A activity, pricing remained relatively borrower-friendly owing to US government stimulus, and yield-starved investors were eager to finance transactions targeting creditworthy companies and companies less impacted by covid-19. Using Q1–Q3 2020 as a guide, M&A activity during Q4 2020 and into 2021 will likely be driven by the progression of the covid-19 pandemic in the US, as well as by the outcome of the US presidential election in November 2020.

Appendix 1

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Richard Hall is a partner in Cravath's corporate department. His practice focuses on M&A, corporate governance advice and matters relating to activist defence. Hall is the head of Cravath's M&A practice for EMEA.

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Hall received a B Com with honours in 1984, an LLB with honours in 1986 from the University of Melbourne and an LLM from Harvard University in 1988. He joined Cravath in 1988 and became a partner in 1996.

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