Cravath Quarterly Review
M&A, Activism and Corporate Governance
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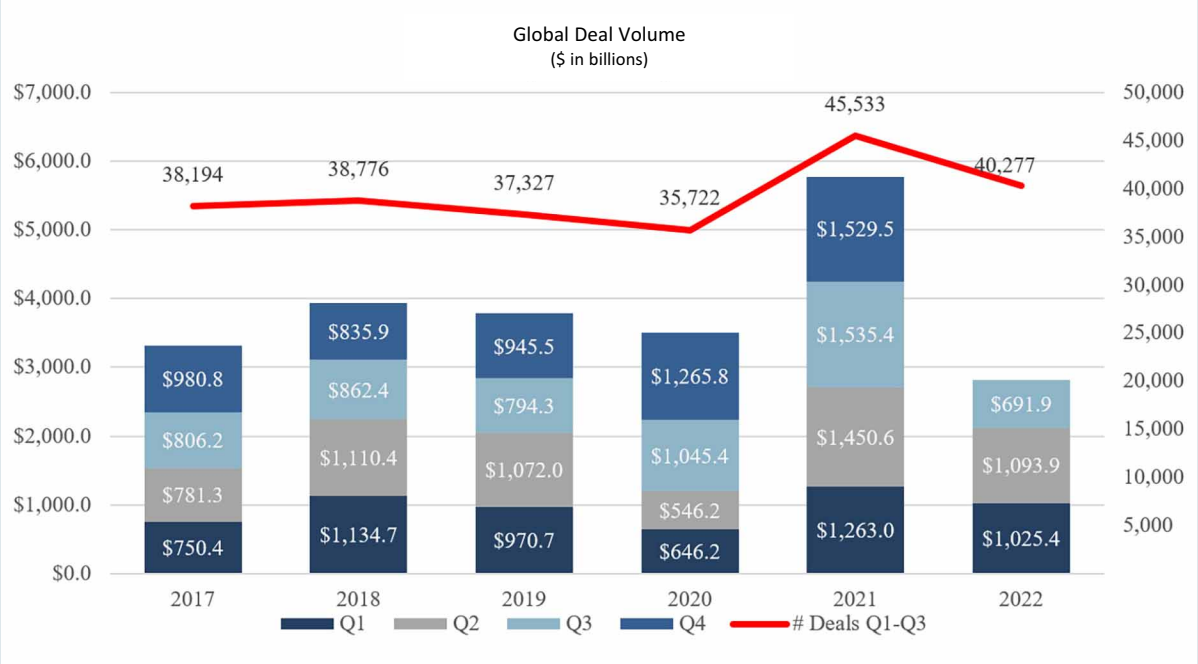
Mergers & Acquisitions

TRENDS[1]

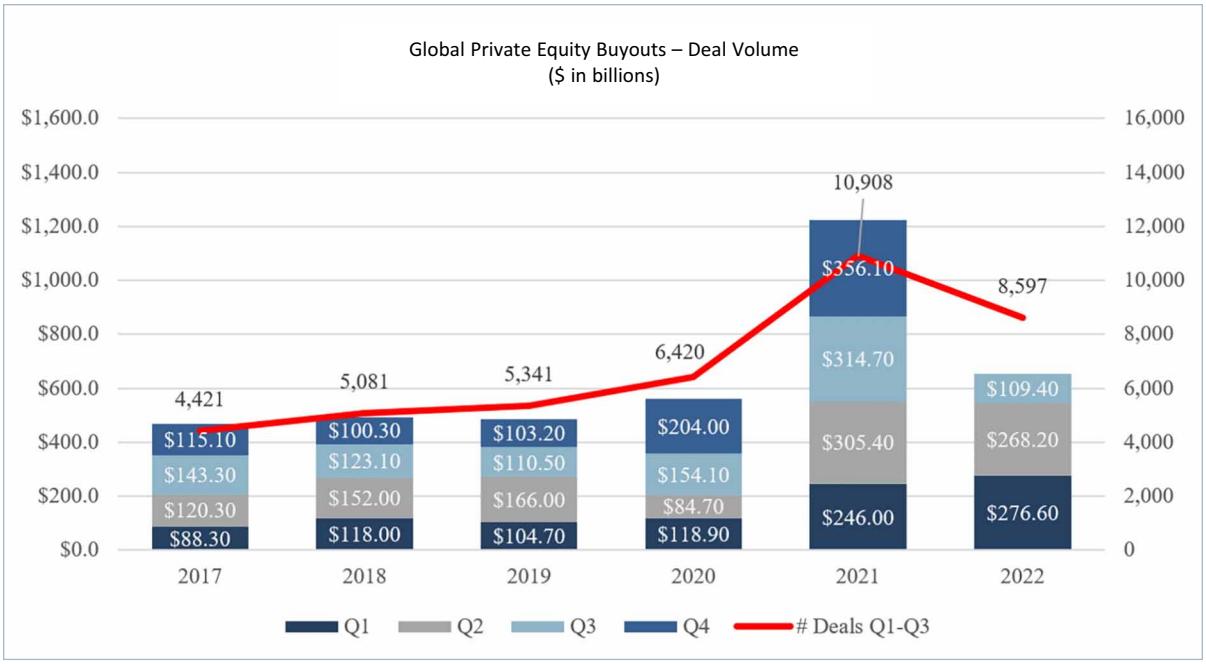


Source: Refinitiv, An LSEG Business.

Q3 2022: M&A Activity in Third Quarter Falls Below $1 Trillion, Ending Two-Year Streak

During the first nine months of 2022, global M&A activity slowed substantially compared to the same period in 2021, with $2.8 trillion in announced deal value, a year-over-year decrease of ~34% compared to the first nine months of 2021 and the largest year-over-year percentage decline since 2009. Q3 2022 marked the first quarter to fall below $1 trillion in announced deal value since Q2 2020. There were approximately 40,300 deals announced globally in the first nine months of 2022, a year-over-year decrease of ~17% compared to the same period in 2021.

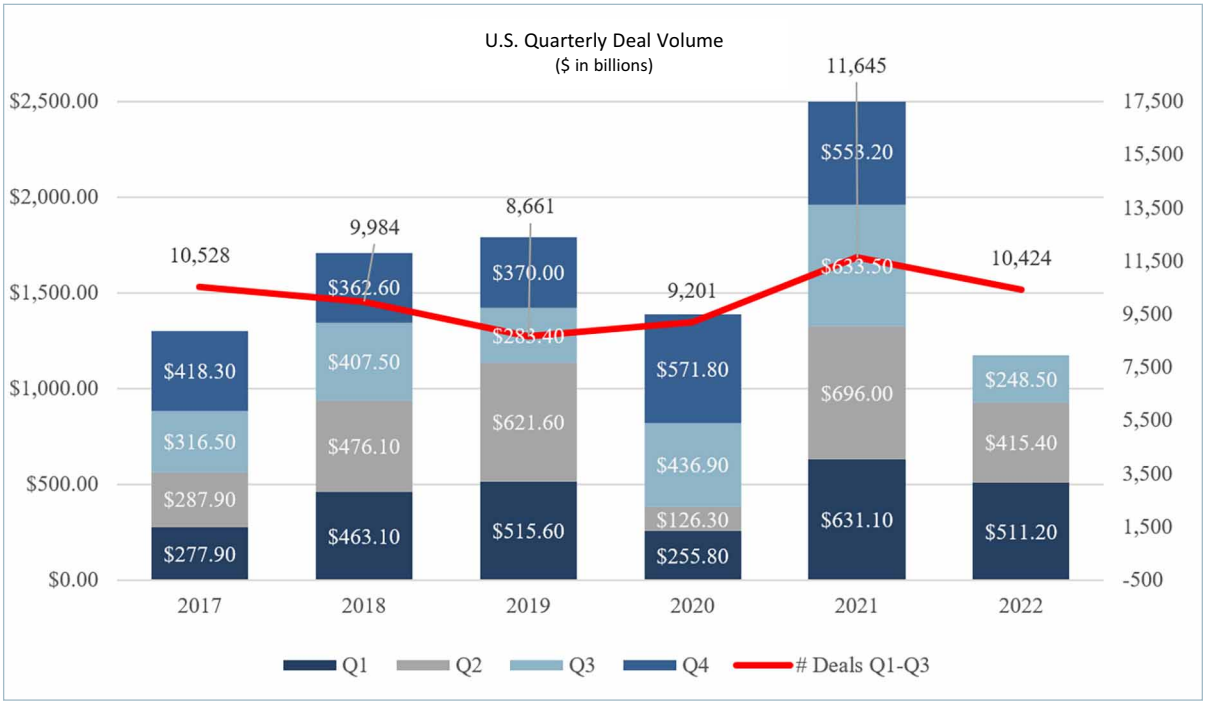
The year-over-year decrease in deal volume in the first three quarters of 2022 also saw a decrease in overall value. In the first nine months of 2022, the total value of deals between $1 billion and $5 billion totaled $770.6 billion, a year-over-year decrease of ~43% compared to the same period in 2021. Additionally, the aggregate value of mega deals was down ~30% compared to the same period in 2021, with 29 deals greater than $10 billion, totaling $618.7 billion.



Source: Refinitiv, An LSEG Business.

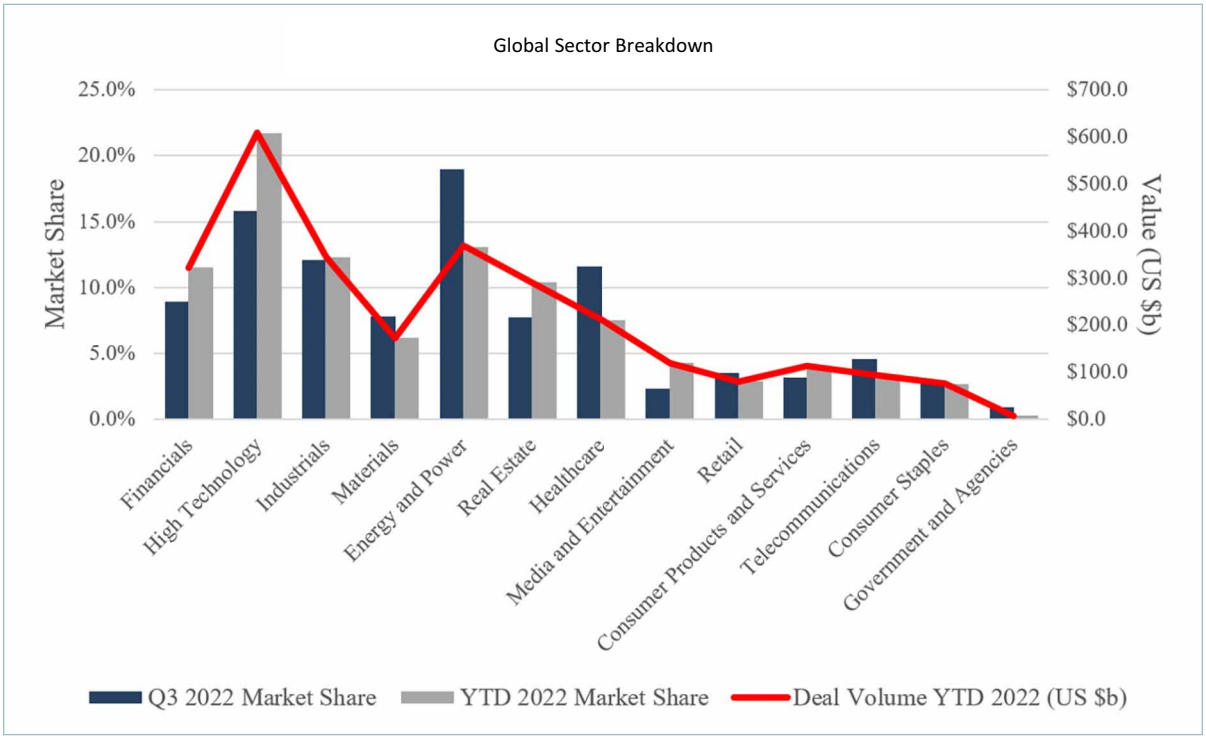
Private equity buyouts during the first nine months of 2022 reached $654.2 billion globally, a decrease of ~25% compared to the same period in 2021. Nearly 8,600 private equity-backed deals were announced in the first nine months of 2022, which represented a decrease of ~26% compared to the same period last year.

Private equity buyouts in Q3 2022 reached $109.4 billion globally, a decrease of ~59% compared to Q2 2022, accounting for ~16% of M&A activity in Q3 2022. Over 2,100 private equity-backed deals were announced in Q3 2022, which represented a decrease of ~26% compared to Q2 2022. The average global private equity deal size in Q3 2022 decreased to $50.2 million, down from $92.0 million in Q2 2022.



Source: Refinitiv, An LSEG Business.

Dealmaking Down Across All Regions
M&A activity for U.S. targets amounted to $1.2 trillion during the first nine months of 2022, a decrease of ~40% compared to the same period in 2021. M&A activity for European targets totaled $712.2 billion in the first nine months of 2022, a decrease of ~24% compared to the same period in 2021. In the Asia-Pacific region, dealmaking totaled $621.1 billion in the first nine months of 2022, a ~30% decrease compared to a year ago.



Source: Refinitiv, An LSEG Business.

Technology M&A Deal Percentage Increases as Cross-Border Deals Decline
M&A in the technology sector totaled $609.1 billion during the first nine months of 2022, representing a decrease of ~30% compared to a year ago but accounting for a record ~22% of overall deal value. The number of technology deals decreased ~22% compared to 2021 levels across the same period, but the aggregate value was driven in large part due to Microsoft Corporation's $68.7 billion pending acquisition of Activision Blizzard, Inc. and Broadcom Inc.'s $68.3 billion pending acquisition of VMware Inc. Dealmaking in the energy & power sector accounted for ~13% of overall M&A activity, down ~14% from the same period in 2021. Industrials dealmaking accounted for ~12% of overall M&A activity during the first nine months of 2022, a ~30% decrease from the same period in 2021.

Cross-border M&A activity totaled $930.1 billion during the first nine months of 2022, a ~38% decrease compared to the first nine months of 2021. The technology, energy & power and industrials sectors collectively accounted for ~42% of cross-border deals during the first nine months of 2022, up from ~40% over the same period last year.

SPAC Market Update[2]
Q3 2022 saw a continued slowdown in the special purpose acquisition company ("SPAC") market as compared to Q3 2021. In Q3 2022, 47 de-SPAC transactions were announced, totaling $30.9 billion of deal value, down from 61 de-SPAC transactions totaling $165.9 billion in Q3 2021. During Q3 2022, 20 previously announced de-SPAC mergers were terminated, compared to 29 terminations in total for H1 2022 and 7 terminations in Q3 2021. In Q3 2022, 36 SPAC IPOs were withdrawn or abandoned, on top of the 118 SPAC IPOs that were withdrawn or abandoned in H1 2022, as compared to one SPAC IPO withdrawn or abandoned in Q3 2021. In Q3 2022, there were only 8 priced SPAC IPOs, down from 69 priced SPAC IPOs in H1 2022 and 88 priced SPAC IPOs in Q3 2021. In the first nine months of 2022, there were only 77 priced SPAC IPOs, which is significantly less than the 450 priced SPAC IPOs during the same period in 2021. In Q3 2022, there were 16 SPAC liquidations, up from 6 SPAC liquidations in Q2 2022 and 1 SPAC liquidation in Q1 2022. There were no SPAC liquidations in 2021.

LEGAL & REGULATORY DEVELOPMENTS

Cases

Q3 2022 featured a number of notable Delaware decisions regarding M&A fiduciary duties and related matters.

***In re Match Group, Inc. Derivative Litigation*, C.A. No. 2020-0505-MTZ (Del. Ch. Sept. 1, 2022).**

In this memorandum opinion, the Delaware Court of Chancery granted a motion to dismiss a shareholder challenge to a multi-step reverse spinoff in which a controller obtained an undisputed nonratable benefit at the expense of minority shareholders. Among other considerations, the defendant directors successfully argued that this reverse spinoff complied with the framework set forth in *M&F Worldwide Corp.* ("*MFW*"),[3] thus subjecting the transaction to business judgment review.

In 1999, IAC/InterActiveCorp ("Old IAC") acquired Match.com, a dating website. In 2009, Match Group, Inc. ("Old Match") was incorporated in Delaware as an Old IAC subsidiary to hold Match.com and other dating websites. In 2015, Old Match conducted an IPO and went public, with Old IAC remaining Old Match's controlling stockholder. In 2019, Old IAC initiated a series of transactions to separate its dating businesses from the rest of its holdings. To that end, Old IAC formed a new subsidiary, later renamed IAC/Interactive Corp. ("New IAC"), contributed its non-dating businesses to the new subsidiary and subsequently spun it off. Old IAC then reclassified its two classes of high-vote and publicly traded stock into one class of common stock and became known as Match Group Inc. ("New Match"). Following Old IAC's reclassification, Old Match merged with and into a New Match merger subsidiary, with minority Old Match shareholders receiving New Match stock and Old Match ceasing to exist. The result was two structures, one in which New Match, owned by a combination of former Old IAC and Old Match shareholders, retained Match.com and other dating websites, and one in which New IAC, owned by former Old IAC shareholders, owned Old IAC's other businesses.

The plaintiff shareholders alleged that Old Match and New Match minority stockholders were harmed by the separation of New IAC, in that the separation saddled New Match with Old IAC's old debt in the form of convertible notes, potential litigation liabilities and unusually well-compensated directors loyal to New IAC. Conversely, New IAC received favorable tax treatment as well as significant cash assets. The plaintiff shareholders further argued that Old Match's directors only agreed to the terms of the separation because they incorrectly believed that Old Match was contractually bound to do so under a tax sharing agreement that dated back to Old Match's IPO in 2015.

In its opinion, the court considered whether the series of transactions that constituted the reverse spinoff fell under the *MFW* framework and should thus be reviewed under the business judgment rule. In its review, the court determined that although it was likely that one of the three members of a separation committee established by the board of directors of Old Match (the "Separation Committee") lacked independence as a result of a lucrative 20-year relationship with Old IAC, this member did not infect or dominate the Separation Committee's decision-making process and thus could not alone disqualify the committee as an independent body. The court also noted that the Separation Committee met at least 20 times, consulted and selected its own legal and financial advisors and successfully negotiated new benefits for the minority not included in Old IAC's original proposal. Finally, the court noted that the transaction had also been approved by a shareholder vote. The plaintiffs challenged whether this vote was sufficiently informed because the proxy did not explicitly disclose that the 2015 tax sharing agreement did not contractually obligate Old Match to agree to the separation, as the plaintiffs alleged many shareholders believed. However, the court explained that nonapplicable constraints are, by definition, not material. As a result, the court ruled that the proxy did not have to include such a disclosure and that the shareholder vote was informed. Because of these factors, the court found that the spinoff transactions fell under the business judgment rule and dismissed the shareholder challenge.

***In re GGP Stockholder Litigation*, No. 202, 2021 (Del. July 19, 2022).**

In this opinion, the Delaware Supreme Court reviewed *en banc* the Delaware Court of Chancery's ruling that the defendant directors did not structure a merger in a manner that unlawfully eliminated shareholders' appraisal rights by paying a large portion of the merger consideration through a pre-closing dividend. While the Delaware Supreme Court agreed that shareholders' appraisal rights were intact, the court disagreed with the Court of Chancery's conclusion that the merger proxy statement's disclosures regarding shareholders' appraisal rights were sufficient and, as a result, reversed the lower court's decision, remanding it for further proceedings.

GGP, Inc. ("GGP") was a publicly traded real estate investment trust that owned and operated shopping malls. Beginning in 2010, Brookfield Property Partners ("Brookfield") became one of GGP's major shareholders, owning about 35% of GGP's voting stock and retaining special rights such as the ability to appoint three out of GGP's nine directors. In 2017, Brookfield made an offer to buy out the remaining 65% of GGP, and GGP established a five-member special committee to evaluate the offer. The initial offer was rejected, but after further negotiations that resulted in the price being increased from $23.00 to $23.50 per share, Brookfield and GGP agreed to a transaction in February of 2018. A draft of the merger agreement for the transaction allowed the distribution of a pre-closing dividend and included an appraisal rights closing condition, which would permit Brookfield to terminate the transaction if a specified number of shares demanded appraisal. The special committee rejected the proposed appraisal rights closing condition and it was omitted from the final merger agreement, which the parties entered into in March of 2018. Under the merger agreement, payment was bifurcated: approximately 98.5% of the consideration for the merger was to be paid as a pre-closing dividend and the remaining 1.5% was to be paid at closing as traditional per-share merger consideration. The proxy statement issued in connection with the transaction included an appraisal rights notice that explained that shareholders who exercised such rights would be entitled to receive an appraisal value tied to the "per share merger consideration", giving the impression that any dissenters could only exercise appraisal rights with regard to the 1.5% balance of merger consideration payable at closing, or about $0.312 per share.

The plaintiff shareholders brought suit alleging two main causes of action. First, the plaintiffs alleged that Brookfield as a controlling shareholder aided and abetted the director defendants in breaching their fiduciary duty of loyalty by failing to provide a fair summary of shareholders' appraisal rights in the proxy statement. Second, they alleged that the director defendants designed the large pre-closing dividend to improperly eviscerate GGP shareholders' appraisal rights. The Delaware Court of Chancery rejected both claims. The court determined that Brookfield was not a controlling shareholder because its 35.5% ownership of GGP prior to the merger was less than the 50% actual control threshold. The court then examined whether Brookfield controlled the transaction specifically or GGP generally, finding that Brookfield controlled neither. For transaction-specific control, plaintiffs alleged that Brookfield controlled five of GGP's nine directors, but the court noted that only two of the interested directors served on the special committee overseeing the transaction and lacked control over the committee. The plaintiffs also alleged Brookfield had general control over GGP notwithstanding that it only retained a contractual right to purchase up to 45% of GGP's stock. The court found that this potential for acquisition, absent other factors, was not sufficient to constitute general control. The court also found that the proxy statement was sufficient and that shareholders had retained their appraisal rights because Delaware law permitted courts to consider both the pre-closing dividend and the closing per-share consideration in evaluating value despite the timing of the two payments.

In its *de novo* review, a split Delaware Supreme Court first examined whether the use of the pre-closing dividend improperly restricted or eliminated appraisal rights. The Delaware Supreme Court agreed that Delaware law considers dividends conditioned on the consummation of a merger as part of the merger consideration and consequently found that because an appraisal of fair value would include both the dividend and the per-share closing consideration, the use of such a dividend did not curtail shareholders' appraisal rights. The Delaware Supreme Court then examined the question of whether the director defendants or Brookfield had breached their fiduciary duties by issuing a misleading proxy statement. In a three-to-two split, the Delaware Supreme Court majority found the proxy statement's wording confusing and the appraisal rights description to have fallen short of accurately describing that shareholders who exercised their appraisal rights could do so with regard to the full $23.50 per-share value rather than only the $0.312 per-share value paid at closing. The majority also found that the plaintiffs had met their burden at the pleading stage of alleging that this conduct was intentional because their complaint was supported both by the fact that Brookfield had twice demanded an appraisal rights closing condition in merger negotiations and because the director defendants could not identify an alternative justification for the introduction of the bifurcated payment structure. The Delaware Supreme Court consequently reversed the lower court's judgment dismissing the complaint and remanded it for further proceedings.

***In re BGC Partners, Inc. Derivative Litigation*, C.A. No 2018-0722-LWW (Del. Ch. Aug. 19, 2022).**

In this memorandum opinion, the Delaware Court of Chancery evaluated a derivative action

by shareholders challenging the fairness of an acquisition in which billionaire Howard Lutnick was the controlling shareholder of both the buyer and the seller. The shareholder plaintiffs alleged that Lutnick as well as William Moran, a special committee member, breached their fiduciary duties and that the transaction was fundamentally unfair to shareholders. The court found that because the acquisition price was reasonable, the special committee and its advisors were independent and Lutnick timely extracted himself from the special committee's deliberations after it was fully empowered, the acquisition was ultimately fair.

In 2004, BGC Partners, Inc. ("BGC"), a publicly traded financial technology company, was spun off from Cantor Fitzgerald, L.P. ("Cantor"), a privately owned financial services firm. Lutnick served as the Chairman and CEO of both BGC and Cantor and was also the sole shareholder of Cantor's managing partner, CF Group Management, Inc. In 2017, Lutnick announced to BGC's audit committee that BGC management was interested in purchasing Berkeley Point Financial LLC ("Berkeley Point"), a commercial real estate finance company, from Cantor. Lutnick also explained that Cantor was in talks to buy out some of Berkeley Point's other investors to clear the way for BGC's acquisition and offhandedly mentioned a rough evaluation for Berkeley Point of $700 million. The four members of the audit committee, including Moran, as well as BGC's board of directors, then authorized the audit committee to act as a special committee with regard to the proposed transaction. Negotiations followed, in which plaintiffs alleged the special committee failed to properly advocate for BGC at key moments, including when Cantor substantially raised its asking price. Prior to the transaction's completion, the special committee's financial advisor explained why Cantor's $880 million valuation of Berkeley Point overvalued the company by at least $160 million. The special committee disregarded this and ultimately paid $875 million to Cantor and invested another $100 million in another Cantor subsidiary for a five-year period. Post-closing, Berkeley Point merged with another entity and completed an IPO, the price of which suggested a fair Berkeley Point valuation of only about $560 million.

The court began by emphasizing that the standard of review for transactions involving self-dealing by a controlling shareholder was entire fairness, which requires both fair dealing and fair price. With regard to fair dealing, the court found that although plaintiffs had succeeded at trial at demonstrating that the negotiation process was imperfect—with Lutnick introducing the transaction to BGC, selecting the special committee's chairs and advisors and compressing the time period for negotiations—Delaware law does not require perfection. Instead, the court looked to relevant *Weinberger*[4] factors, including timing and initiation, structure, negotiations and approval, and found that the deal ultimately satisfied each of them. The court then examined the price and compared various expert testimonies and methods of estimating an appropriate price range for Berkeley Point, ultimately concluding that the $875 million price was fair and an earlier $700 million figure named by Lutnick was back-of-the-envelope math rather than a true offer on Cantor's behalf. Finally, the court separately considered whether Moran had breached his fiduciary duties, finding that although his behavior in discussing special committee appointments with Lutnick rose to negligence and perhaps even gross negligence, it was nonetheless not disloyal. Because the court found the transactions fair and that neither Lutnick nor Moran had breached their fiduciary duties, the court found for the defendants.

CFIUS

Annual Report for Calendar Year 2021 (August 2022)

In August 2022, the Committee on Foreign Investment in the United States ("CFIUS") published the unclassified version of its Annual Report to Congress for the 2021 calendar year.[5] Key findings and insights from the report include:

- CFIUS reviewed 272 notices (*i.e.*, long-form filings) and 164 declarations (*i.e.*, short-form filings), or 436 total filings, in 2021. This represents a ~39% increase over 2020, when CFIUS reviewed 313 filings.[6]

- Of the 164 declarations submitted in 2021, CFIUS approved 120 (~73%) in the 30-day assessment period, up significantly from 2020 (~64%).[7]

- In 2021, declarations were most often submitted by acquirors from Canada (22 declarations), followed by Germany, Japan, Singapore and South Korea (11 each) and the United Kingdom (10).

- Of the 272 notices filed in 2021, 130 (~48%) went to the second 45-day investigation period, up slightly from 2020 (~47%).[8]

- Of the 272 notices filed in 2021, 26 (~10%) were approved with mitigation, up slightly from 2020 (~9%).[9]

- Of the 272 notices filed in 2021, 9 (~3%) were abandoned by the parties after CFIUS raised concerns, down slightly from 2020 (~4%).[10] There were no presidential prohibitions in 2021.

- Of the 272 notices filed in 2021, 63 (~23%) were withdrawn and re-filed, up significantly from 2020 (~11%).[11]

- In 2021, 135 non-notified/non-declared transactions were put forward to CFIUS for consideration, a ~15% increase over 2020 (117).[12] Of these non-notified/non-declared transactions, 8 (~6%) resulted in a request for filing, down significantly from 2020 (~15%).[13]

- In 2021, acquirors from China re-took the top spot in notices filed (44) after having placed behind Japan in both 2020 and 2019.[14] After China, 2021 notice filers hailed most frequently from Canada (28), Japan (26) and the Cayman Islands (18).

Overall, the data demonstrate that, for the most part, CFIUS continues to execute its national security mission efficiently and consistently, traits that have garnered the Committee bipartisan support in Washington. Despite this good news, however, the Report contains a number of red flags for dealmakers. The percentage of approved transactions requiring mitigation measures increased slightly in 2021 (~10%) as compared to 2020 (~9%), although it is still below 2019, 2018 and 2017.[15] More worrisome is the fact that, in 2021, transaction parties withdrew and re-filed notices at the highest rate in 10 years. In addition, for the first time since the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) gave CFIUS the authority to extend the 45-day investigation period in extraordinary circumstances, in 2021 CFIUS utilized that authority to give itself an additional 15 days to investigate three notices.

The increase in re-filed notices and the novel use of the 15-day extension authority may signify that, although most transactions are being cleared efficiently and without conditions, parties to transactions that are complex or are likely to require mitigation should be prepared for increased scrutiny and extended timelines.

Executive Order (September 2022)

On September 15, 2022, President Biden signed Executive Order 14083, "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States" (the "EO").[16]

The EO is the first executive order to provide formal presidential direction to CFIUS on the risks the Committee should consider when reviewing transactions. It did so by elaborating on several existing national security factors that CFIUS must, by statute, consider in its reviews, and adding several new factors. Specifically, the EO:

- elaborated on an existing national security factor relating to the control of domestic industries by, among other things, highlighting the importance of **U.S. supply chain resilience** and security, both within and outside of the defense industrial base;

- elaborated on an existing national security factor relating to **U.S. technological leadership** in areas affecting national security by, among other things, emphasizing the importance of certain technology sectors, including microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy and climate adaptation technologies;

- added a new national security factor for CFIUS to consider relating to **aggregate industry investment trends** that may have consequences for an individual transaction's impact on national security;

- added a new national security factor for CFIUS to consider relating to **cybersecurity** and cyber-enabled malicious activity, including, among other things: (i) activity designed to undermine the protection or integrity of data in storage, databases or systems housing sensitive data; (ii) activity designed to interfere with U.S. elections, U.S. critical infrastructure, the defense industrial base or other cybersecurity national security priorities; and (iii) the sabotage of critical energy infrastructure, including smart grids; and

- added a new national security factor for CFIUS to consider relating to U.S. persons' **sensitive personal data**, including health, digital identity or other biological data, as well as data on sub-populations in the United States that could be used to target individuals or groups of individuals in a manner that threatens national security.[17]

As noted by a White House fact sheet accompanying the EO, the EO does not change CFIUS processes or legal jurisdiction, and it largely formalizes factors that CFIUS has, in practice, been considering for some time.[18] Nevertheless, the EO is noteworthy as a public pronouncement from the President that CFIUS is—and will for the foreseeable future continue

to be—an indispensable tool for addressing an ever-evolving set of national security risks that may arise from foreign investment in the United States.

Bank M&A

On September 7, 2022, Federal Reserve Board ("FRB") Vice Chair for Supervision Michael Barr gave a speech setting forth the near-term agenda for his new role.[19] The goals and priorities outlined in the agenda included, among other things, implementing enhanced regulatory capital requirements to align with the final set of "Basel III" standards or the so-called "Basel endgame", considering potential adjustments to the supplementary leverage ratio, and, notably, assessing how the FRB performs its analysis of bank mergers. The speech indicated that the FRB would be undertaking efforts in line with those of the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation (the "FDIC") and the Department of Justice (the "DOJ") in reviewing their bank merger policies.

There are some indications that the federal banking agencies are likely to focus on the convenience and needs and financial stability prongs of the analysis in any merger analysis reform.[20] A recent order approving the merger of two bank holding companies, CBTX, Inc. and Allegiance Bancshares, Inc., indicates that the federal banking agencies may already be taking a harder look at convenience and needs considerations in approving pending merger applications.[21] For instance, consistent with our prior analysis,[22] the FRB order highlighted that the FDIC's separate approval of the merger included a condition "requiring the combined institution to develop an action plan, to be submitted to the FDIC for approval, for improving the extent of home mortgage applications from, and originations to, African American applicants in the combined institution's assessment areas".[23]

Another important topic for reassessing bank merger oversight is how banking markets should be defined in light of the broadening of the competitive landscape for banking services in recent years. FRB Governor Michelle Bowman outlined three areas that she believes should be included in any merger review modernization efforts: (i) more systematically including credit unions in all competitive analyses; (ii) factoring in deposits at digital banks in relevant markets; and (iii) considering nonbank financial firms in all competitive analyses.[24]

Outside of bank merger analysis, the September speech by the Vice Chair for Supervision also highlighted resolution planning as an area where the FRB is considering seeking future policy actions, including working with the other federal banking agencies and seeking public comment.[25] It was recently reported that new proposed changes may include requirements for large, regional banks to raise additional long-term debt to absorb losses in case of insolvency.[26] On October 14, 2022, the FRB and FDIC issued an advance notice of proposed rulemaking (ANPR) soliciting public feedback on changes to the resolution plan framework for large banks, which is primarily focused on whether large banking organizations should be required to issue more long-term debt to improve resolvability.[27]

Sanctions

M&A activity continues to be impacted by sanctions against Russia imposed by the United States and its allies as Russia's invasion of Ukraine passes the six-month mark. Both acquiring firms and targets have had to maintain flexibility during the M&A process as sanctions have changed seemingly overnight, often implemented with little or no grace period for compliance. The sanctions banning U.S. persons from making any new investment in Russia,[28] as well as sanctions banning the provision of certain types of professional services to Russian persons,[29] have been most impactful on the M&A process. These sanctions can cause firms to change a deal's structure by, for example, requiring a seller to carve out its Russian subsidiary or assets from the sale or restricting a seller's ability to provide post-closing transitional services to Russian entities included in the sale. The imposition of stricter sanctions has only increased the importance of conducting thorough due diligence on a target's operations in Russia and business relationships with Russian parties. The U.S. government has sanctioned many Russian parties for funding and supporting the invasion and has recently expanded its focus on non-Russian parties that contribute to the supply of goods and technology to Russia's defense-industrial base.[30] As a result, sanctions due diligence should explore all touchpoints that a target may have with Russia.

Tax

Enacted on August 16, 2022, the Inflation Reduction Act imposes two new types of tax that will frequently be relevant in the M&A context. The first is the 15% corporate alternative minimum tax ("CAMT") on financial statement income and the second is a 1% excess tax on stock buybacks.

CAMT

For tax years beginning after December 31, 2022, the CAMT imposes a minimum tax on corporate

groups with average adjusted financial statement income ("AFSI") of at least $1 billion calculated over a three-year period in any prior year.[31] AFSI is net income as reflected on the group's audited GAAP (or IFRS) financial statements filed with the Securities and Exchange Commission (the "SEC") (or foreign equivalent) subject to certain adjustments, including for accelerated depreciation and loss carryforwards. As a minimum tax, the CAMT applies only to the extent the corporate group's regular tax liability is less than 15% of the group's AFSI—accordingly, it targets large corporate groups that do not pay income tax commensurate with their book earnings.[32] Payments of minimum tax also carry forward to offset future regular taxes, to the extent the taxpayer does not have any CAMT liability in that year.

In the M&A context, the CAMT may be relevant in a few different ways. First, M&A transactions that are tax-free under normal income tax principles may create AFSI, which could trigger CAMT liability; these transactions include corporate "split-offs" (where a corporation repurchases its shares for shares of a corporate subsidiary) and contributions to certain joint ventures. United States Department of the Treasury ("Treasury") guidance is authorized to address these situations but, pending regulatory feedback, taxpayers should scrutinize the potential CAMT consequences of these transactions.

Second, even taxable M&A transactions may cause the buyer to become subject to the CAMT. For instance, this may be the case if the acquisition causes the buyer to cross the applicable AFSI threshold or, potentially, if the target itself was subject to the CAMT prior to the acquisition. Although Treasury guidance may clarify the CAMT's applicability in these circumstances, potential buyers should be mindful of their CAMT profile on a pro forma basis prior to any acquisition.

Third, the CAMT may complicate the valuation of tax attributes resulting from an M&A transaction if those tax attributes do not produce a corresponding financial statement expense. For instance, goodwill resulting from an acquisition structured as an asset purchase for U.S. tax purposes will generally not be amortized under GAAP. This may undercut the value of that asset if the buyer is in a negative CAMT position.

Beyond these topics, there remains significant uncertainty about how the CAMT will apply in practice. Corporate groups subject to the CAMT should track regulatory developments in this area going forward.

Excise Tax on Stock Buybacks

Also included in the Inflation Reduction Act is a 1% excise tax on stock repurchases by publicly traded U.S. corporations. The excise tax is equal to 1% of the fair market value of any stock repurchased by that corporation or (an affiliate) for that year, net of any issuances by the corporation during the same year to employees or other shareholders.[33] The tax applies to repurchases occurring after December 31, 2022. There are certain exceptions, including repurchases that are part of a reorganization, in any case where the total value of the stock repurchased during a taxable year does not exceed $1 million and to the extent the repurchases are treated as a dividend.

The excise tax on buybacks may be relevant in certain M&A transactions depending on structure. For instance, the payment of cash deal consideration may be viewed as redemption for tax purposes if it is funded with debt at the target level. Similarly, notwithstanding the reorganization exception, certain split-off transactions may trigger the excise tax depending on their structure and the use of any associated proceeds. Redemptions by a domestic SPAC could also be subject to the excise tax, even if the redemptions are pursuant to a redemption right. Although these topics will potentially be addressed by Treasury guidance, near-term acquirors should consider the excise tax consequences of potential acquisitions as part of their planning.

Antitrust

POLICY DEVELOPMENTS

Agency Head Remarks Regarding Revisions to the Merger Guidelines

On September 13, 2022, Department of Justice Assistant Attorney General Jonathan Kanter discussed the DOJ and Federal Trade Commission's (the "FTC") upcoming revised merger guidelines at the Georgetown University Law Center's annual antitrust enforcement symposium.[34] AAG Kanter previewed that the upcoming new merger guidelines would rely less on economic analysis and market definition and give more weight to direct evidence of anticompetitive effects. AAG Kanter asserted that, under the current merger guidelines, merger enforcement had become an artificial exercise that ignored market realities. AAG Kanter also emphasized the prophylactic aspect of the Clayton Act, noting that Section 7 is intended to prevent anticompetitive harms at their incipiency, and told reporters that

merger-specific efficiencies would receive less weight under the new guidelines.[35]

On September 16, 2022, FTC Chair Lina Khan addressed the Fordham Competition Law Institute's 49th Annual Conference on International Antitrust Law and Policy.[36] In Chair Khan's prepared remarks, she argued that since the 1980s, antitrust regulators had failed to exercise the full authority granted by Congress under the federal antitrust laws. Chair Khan expressed her view that Section 7 of the Clayton Act gives the FTC and DOJ the power to block a merger on the basis of a trend towards concentration or reduced competition in an industry. Chair Khan also asserted that merger-specific efficiencies should not be considered when evaluating the legality of a merger. Chair Khan previewed that the revised merger guidelines, which will be published in the coming months, will be rooted in these concepts.

Agency Head Testimony Before Senate Judiciary Antitrust Subcommittee

On September 20, 2022, AAG Kanter and Chair Khan testified in an oversight hearing before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. Chair Khan's testimony[37] focused on the FTC's continued efforts at rigorous merger enforcement, particularly towards vertical mergers and in industries at risk of being dominated by a few firms. Chair Khan highlighted the FTC's recent challenges of the NVIDIA Corporation's proposed acquisition of ARM Limited and Lockheed Martin Corporation's proposed acquisition of Aerojet Rocketdyne Holdings, Inc.—both of which were abandoned—as examples of vertical mergers successfully blocked by the FTC. Chair Khan also highlighted the FTC's evolving approach to merger remedies, noting that the FTC now strongly disfavors behavioral remedies and will not hesitate to reject proposed divestitures.

AAG Kanter's testimony[38] focused on the DOJ's strong enforcement efforts, noting that the DOJ is on pace to litigate more merger trials this year than in any fiscal year on record. AAG Kanter highlighted that the DOJ's focus on blocking mergers in concentrated industries, enforcement to protect labor markets and increased coordination with state attorneys' general offices and international regulatory bodies on the review of mergers. AAG Kanter also implored senators to pass several antitrust bills before Congress, including the American Innovation and Choice Online Act, which would enhance the ability of agencies to challenge anticompetitive conduct in digital markets.

AAG Kanter's Remarks at the Conference on Antitrust Law and Policy

On September 16, 2022, AAG Kanter addressed the Fordham Competition Law Institute's 49th Annual Conference on International Antitrust Law and Policy.[39] In AAG Kanter's prepared remarks, he noted that monopolization is increasing globally, particularly in the tech industry. AAG Kanter asserted that antitrust enforcers worldwide must adapt their approach to the novel concerns presented by digital platforms, and that antitrust case law must be modernized to recognize those concerns. Finally, AAG Kanter highlighted the need for Congress to enact new antitrust statutes targeted at digital platforms.

ENFORCEMENT

Federal Trade Commission

On July 27, 2022, the FTC voted 3-2 to block Meta Platforms, Inc.'s ("Meta") proposed acquisition of Within Unlimited, Inc. ("Within").[40] Meta operates the social media sites Facebook and Instagram, and markets and sells virtual reality hardware under the Oculus/Quest brands and the virtual reality app distribution platform Quest Store. Within sells virtual reality applications, including the fitness app Supernatural. The FTC's complaint alleges that Meta's acquisition of Within would substantially lessen competition in the market for virtual reality dedicated fitness apps. Republican Commissioners Noah Joshua Phillips and Christine S. Wilson voted against filing the complaint.

On September 1, 2022, FTC Chief Administrative Law Judge D. Michael Chappell dismissed the FTC's antitrust charges against Illumina, Inc. ("Illumina") over its $7.1 billion acquisition of GRAIL, Inc. ("GRAIL").[41] Illumina develops and sells DNA sequencing technology, and GRAIL makes a multi-cancer early detection ("MCED") test. The FTC's complaint alleged that the acquisition would diminish innovation in the market for the research and development of MCED, as it would incentivize Illumina to deny GRAIL's competitors access to Illumina's DNA sequencing technology. Judge Chappell concluded that the FTC had failed to prove that GRAIL's rivals were poised to imminently launch competing MCED tests and found that Illumina's long-term supply agreement offered to all U.S. oncology testing customers constrains Illumina from harming GRAIL's alleged rivals.

Department of Justice Antitrust Division

On August 25, 2022, China International Marine Containers Group Co. Ltd. abandoned its $1 billion acquisition of Maersk Container Industry A/S and Maersk Container Industry Qingdao Ltd.[42] The DOJ was in the process of

investigating the transaction when the parties abandoned the deal. In its press release, the DOJ noted that the acquisition would have reduced the number of suppliers of insulated container boxes and refrigerated shipping containers from four to three. The DOJ also noted that it cooperated with Germany's national competition regulatory agency, the Bundeskartellamt, in investigating the transaction.

On September 15, 2022, the DOJ filed a complaint in federal court to enjoin ASSA ABLOY AB's ("ASSA ABLOY") proposed $4.3 billion acquisition of the hardware and home improvement division of competitor Spectrum Brands Holdings, Inc. ("Spectrum").[43] The DOJ's complaint asserts that the merger would eliminate competition between ASSA ABLOY and Spectrum, risking higher prices, lower quality, reduced innovation and poorer service in the sale of two types of residential door products: premium mechanical door hardware and smart locks.

On September 19, 2022, U.S. District Judge Carl J. Nichols rejected the DOJ's request to enjoin UnitedHealth Group Incorporated's ("UnitedHealth") $13.8 billion proposed acquisition of Change Healthcare, Inc. ("Change").[44] UnitedHealth operates the largest health insurer in the United States, United Healthcare, and Change provides revenue and payment cycle management for health insurers and providers. The DOJ had alleged that the vertical merger could allow UnitedHealth to access its rivals' competitively sensitive information through Change and use that information to advantage United Healthcare. The court rejected this argument, noting that the government's theory was speculative and unsupported by factual evidence.

On September 23, 2022, U.S. District Judge Maryellen Noreika issued a judgment in favor of defendants in the DOJ's suit to block United Sugar Corporation's ("United Sugar") acquisition of Imperial Sugar Company ("Imperial") from Louis Dreyfus Holding BV.[45] The DOJ had sought to block United Sugar's acquisition of Imperial on the grounds that the merger would substantially reduce competition in the market for sugar sales in a region stretching from Mississippi to Delaware, resulting in higher prices. Judge Noreika noted that the DOJ had failed to identify a relevant product market of sugar sales and found that the DOJ's proffered geographic market was unsupported by the evidence.[46]

PERSONNEL DEVELOPMENTS

On August 8, 2022, FTC Commissioner Noah Joshua Phillips announced his intent to depart his position as Commissioner in the fall.[47] Commissioner Phillips was sworn in as Commissioner in May 2018 and occupies one of two Republican seats on the FTC. Though President Biden will have the opportunity to appoint a new Republican commissioner to replace Commissioner Phillips, Presidents generally defer to the opposing party Senators when nominating a minority party commissioner at the FTC. On October 17, 2022, it was announced that former FTC Commissioner Phillips joined Cravath, Swaine & Moore LLP as a partner in its Washington, D.C. office.[48]

Activism[49]

In October 2022, Lazard released its *Q3 2022 Review of Shareholder Activism* (the "Lazard Report"), which offers key observations regarding activist activity levels and shareholder engagement through Q3 2022.

Key findings/insights from the Lazard Report include:

- Activism in the first three quarters of 2022 remained elevated, with 171 new campaigns launched globally, representing a ~39% increase from the first three quarters of 2021. In Q3 2022, 44 new campaigns were launched globally, representing a ~52% increase from Q3 2021 and marking the third consecutive quarter of year-over-year increased activity.

- United States activism continued to account for the largest share of global activity with 28 new campaigns in Q3 2022, representing ~64% of new campaigns. In the first three quarters of 2022, the United States registered 96 activist campaigns, up ~43% over the same period in 2021 and representing ~56% of all activist campaigns during such period.

- Europe registered 10 new activist campaigns in Q3 2022, representing ~23% of new campaigns. In the first three quarters of 2022, Europe registered 45 activist campaigns, up ~32% over the same period in 2021 and representing ~26% of all activist campaigns during such period.

- Approximately 48% of all activist campaigns in Q3 2022 featured an M&A-related objective, up from ~39% in Q2 2022 and ~32% in Q1 2022. Activity was bolstered by "sell the company" demands and a rebound in attacks on announced M&A.

- Technology companies continued to be the most frequently targeted companies in Q3 2022, accounting for ~22% of new activist targets.

TRENDS

Activism Increased in the First Three Quarters of 2022 with More Board Seats Secured by Activists

The first three quarters of 2022 saw a spike in campaigns initiated compared to the same period in 2021, with 171 new campaigns, a ~39% increase, up from 123 campaigns over the same period in 2021 and already approaching 2021's full year total of 173 campaigns.

Eighty-eight board seats in total were secured by activists in the first three quarters of 2022, compared with 73 board seats won by activists over the same period in 2021. Twenty-six seats remain "in play" going into Q4 2022. Icahn Associates won nine board seats in the first three quarters of 2022, representing the highest total of any activist.

In the first three quarters of 2022, 122 activists waged campaigns, the same number as over the same period in 2021. "First-time" activists accounted for ~37% of activists in the first three quarters of 2022. Only four activists in Q3 2022 waged multiple campaigns, and the four most prolific activists accounted for 26 campaigns. Elliott Investment Management L.P. ("Elliott") was the most prolific activist in the first three quarters of 2022, launching 11 campaigns, followed by Amber Capital L.P., Ancora Holdings Group, LLC and Land & Buildings Investment Management LLC each initiating 5 new campaigns.

Nearly 50% of all activist campaigns in Q3 2022 were related to M&A, up from ~39% in Q2 2022. Activity was bolstered by "sell the company" demands as well as by a rebound in attacks on announced M&A. As proxy season passed, demands for board representation continued to fall from their Q1 2022 peak of ~40% of campaigns to ~25% of campaigns in Q3 2022.

Activism Campaign Activity Continued to Increase in the United States and Europe Amid the Ukraine War and Economic Uncertainty

The uptick in U.S. activism activity continued to rebound through Q3 2022, as 96 U.S. campaigns accounted for ~56% of the global campaigns during the first three quarters of 2022. This represented a ~43% increase compared to the same period in 2021, in which 67 campaigns accounting for ~54% of global campaigns were launched. In Q3 2022, the United States registered 28 new campaigns, representing ~64% of new campaigns and a ~133% increase from the 12 campaigns registered in Q3 2021. Notable U.S. campaign targets from the first three quarters of 2022 include Cardinal Health Inc. ("Cardinal"), Pinterest, Inc. and PayPal Holdings Inc.

European activity also saw an uptick during the first three quarters of 2022. There were 45 campaigns across Europe in the first three quarters of 2022, up from 34 campaigns during the same period in 2021, accounting for ~26% of global activity and a year-over-year increase of ~32%. In Q3 2022, Europe registered 10 new activist campaigns, representing ~23% of new campaigns and a ~23% decrease from the 13 campaigns registered in Q3 2021.

Activism Focus Shifts to M&A

Activists increased their focus on M&A in campaigns over the first three quarters of 2022. This focus was more pronounced amidst economic uncertainty in Q3 2022 than in Q2 2022. In Q3 2022, ~48% of campaigns focused on M&A, compared to ~39% in the previous quarter, while ~21% of campaigns in the first three quarters of 2022 concentrated on strategy & operations, compared to ~20% over the same period in 2021.

SELECT CAMPAIGNS/DEVELOPMENTS[50]

On July 18, 2022, Suncor Energy Inc. ("Suncor") entered into a cooperation agreement with Elliott in which Suncor's board would temporarily expand its board to 13 directors and appoint three new independent directors, two of which would serve on a CEO search committee. Suncor also agreed to form a committee to oversee a strategic review of Suncor's downstream retail business and consider alternative strategies, such as a sale of the business and other strategies to enhance the value of the retail business. On July 20, 2022, LivePerson, Inc. ("LivePerson") entered into a cooperation agreement with Starboard Value LP ("Starboard") in which LivePerson agreed to appoint two Class I directors to its board, one determined by Starboard and the other by LivePerson. The agreement came after months of efforts by Starboard to elect its four nominees to the LivePerson board, which Starboard believed lacked the experience to oversee and run an enterprise software. On August 7, 2022, American Outdoor Brands, Inc. ("American Outdoor") entered into a cooperation agreement with Engine Capital Management LLC ("Engine Capital") in which Engine Capital agreed to withdraw its director nominations and instead support American Outdoor's full slate of nominees. In exchange for Engine Capital's support, American Outdoor expanded its board

size from six to seven members and appointed Bradley T. Favreau, a partner at Engine Capital, as a class III director to the board for a term expiring at American Outdoor's 2023 annual meeting. On September 6, 2022, Cardinal entered into a cooperation agreement with Elliott in which Cardinal expanded the size of its board from 11 to 15 directors and appointed four new independent directors to its board, including Steven Barg, the Global Head of Engagement for Elliott, and established an advisory business review committee. Additionally, two incumbent directors have announced their intention to conclude their board service following the 2022 annual meeting and at that time the board will be comprised of 13 directors.

Corporate Governance

PROXY ADVISOR UPDATES

National Association of Manufacturers ("NAM"), Natural Gas Services Group, U.S. Chamber of Commerce and Business Roundtable File Suits Against SEC to Stop Reversal of 2020 Proxy Advisor Rule and NAM Wins Case on SEC Non-Enforcement of 2020 Proxy Advisor Rule

In 2020, the SEC promulgated a proxy advisor rule which, among other things, clarified that proxy voting advice generally constituted a solicitation within the meaning of Section 14(a) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). This 2020 rule revised two exemptions from the information and filing requirements of the proxy rules, providing avenues for proxy advisors to rely on those exemptions. However, in June 2021, Chair Gensler announced that he had asked the SEC staff to consider changing the 2020 rule.[51] In October 2021, NAM filed suit against the SEC for failing to enforce the 2020 rule on proxy advisory firms (see update below).[52]

On July 13, 2022, the SEC adopted amendments to the 2020 rule which, among other things, rescinded the conditions to availability of the two exemptions.[53] Shortly thereafter, the SEC was sued by NAM and the Natural Gas Services Group[54] and separately by the U.S. Chamber of Commerce, along with the Business Round Table and the Tennessee Chamber of Commerce & Industry,[55] for violating the Administrative Procedure Act in adopting the July 2022 proxy advisory rules.

On September 28, 2022, a judge in the U.S. District Court for the Western District of Texas ruled on the NAM October 2021 lawsuit. The judge held that the SEC violated the Administrative Procedure Act (the "APA") when, in June 2021, it effectively refused to enforce the compliance date for the 2020 proxy advisory rules without undertaking the notice-and-comment rulemaking required by the APA.[56] NAM put out a press release stating the "decision is a victory for the rule of law, and the NAM Legal Center was proud to lead this effort for the industry. Federal agencies are bound by the APA—standards the SEC failed to meet by indefinitely delaying the compliance date for the 2020 proxy firm rule without notice-and-comment rulemaking".[57] The practical effect of this ruling is that the SEC may need to take a vote and put out a release for notice and comment if they want to delay a rule.

ACCOUNTING UPDATES

PCAOB Releases Draft Strategic Plan for Fiscal Years 2022-2026[58]

On August 16, 2022, the Public Company Accounting Oversight Board ("PCAOB") published its draft fiscal years 2022-2026 strategic plan. The strategic plan includes a draft of the PCAOB's organizational priorities and goals. The organizational priorities that helped craft the goals include investor protection, engagement and adaptability. The PCAOB's goals for fiscal years 2022-2026 include: (i) modernize standards; (ii) enhance inspections; (iii) strengthen enforcement; and (iv) improve organizational effectiveness. The comment period closed on September 15, 2022.

PCAOB Signs Agreement with Chinese Authorities to Inspect and Investigate China- and Hong Kong-Headquartered Registered Public Accounting Firms[59]

On August 26, 2022, the PCAOB signed an agreement with the Ministry of Finance of the People's Republic of China and the China Securities Regulatory Commission. The signed Statement of Protocol provides the PCAOB with the ability to review audit work papers, audit personnel and other relevant information of registered public accounting firms headquartered in mainland China and Hong Kong; this includes the capacity to interview and take testimony from personnel. For the past decade, the PCAOB was prevented from inspecting and investigating China- and Hong Kong-headquartered registered public accounting firms and thus barred from fulfilling its mandate under the Sarbanes-Oxley Act for these firms. Pursuant to the Holding Foreign Companies Accountable Act of 2020 ("HFCAA"), if the PCAOB determines for three years (beginning with 2021) that it was unable to inspect and investigate registered public accounting firms headquartered in mainland China and Hong Kong, companies audited

by these firms may be prohibited from trading on U.S. markets. In 2021, the PCAOB had determined pursuant to the HFCAA that authorities in mainland China and Hong Kong had prevented the PCAOB's inspections. While the new Statement of Protocol theoretically opens the doors for inspection by the PCAOB, it remains to be seen whether in practice the PCAOB will be able to undertake its investigations. At the end of 2022, the PCAOB will reassess whether the People's Republic of China has obstructed its inspections and investigations.

SEC UPDATES

SEC Amends Proxy Rules on Proxy Voting Advice, Rescinding Most of 2020 Proxy Advisor Rule[60]

On July 13, 2022, the SEC amended the rules which govern proxy voting advice. The rule targets proxy voting advice businesses, which guide shareholder votes on proposal matters by providing advice on certain topics through predetermined policies. Of important note, the amendments have rescinded part of the 2020 proxy advisor rules that had provided proxy voting advice businesses an exemption from proxy rule disclosure and filing requirements. Proxy advisory firms are no longer required to provide their advice to registrants prior to their investor clients, and are no longer required to provide a mechanism for their investor clients to be aware of registrants' responses to the proxy advisory firms' advice. The amendments became effective on September 19, 2022.

SEC Proposes Revisions to Three Rule 14a-8 Bases for Exclusion of Shareholder Proposals[61]

On July 13, 2022, the SEC proposed amendments to Rule 14a-8 which provides companies a number of bases for excluding shareholder proposals. The proposed amendments would revise the Rule 14a-8(i)(10) substantial implementation exclusion by clarifying that exclusion is permitted if "the company has already implemented the *essential elements* of the proposal"(emphasis added). The Rule 14a-8(i)(11) duplication exclusion would be amended to specify that a proposal is duplicative if it "addresses the *same* subject matter and seeks the *same* objective by the *same* means" (emphasis added) as a previous one. Lastly, the Rule 14a-8(i)(12) resubmission exclusion would be amended to align with the clarifications offered in the proposed Rule 14a-8(i)(11) amendments. The SEC noted that these new exclusions were intended to enhance consistency and predictability of the application of Rule 14a-8 exclusions, although many commentators believe it is likely the new standards will make it more difficult for registrants to obtain no-action relief from the SEC staff based on the amended exclusions. The comment period closed on September 12, 2022.

SEC Adopts Amendments to Pay Versus Performance Disclosure Rules[62]

On August 25, 2022, the SEC adopted new disclosure rules to implement the "pay versus performance" disclosure requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The new rule will require companies to quantify and describe (in both tabular and narrative format) the relationship between compensation actually paid to executives and company financial performance across multiple metrics. The new rule is applicable to all registered issuers (other than emerging growth companies, registered investment companies and foreign private issuers), although smaller reporting companies are permitted to provide a scaled-back version of disclosure. All proxy and information statements that include Item 402 executive compensation disclosures for fiscal years ending on or after December 16, 2022 will be required to include the new disclosure requirements. Most companies (i.e., companies with calendar fiscal years) will generally have to comply with the pay versus performance disclosures in their upcoming 2023 proxy statement. Disclosure will cover the last five fiscal years, although for the first year that the new disclosure is provided, only the last three fiscal years are required, with an additional year added over the next two years of disclosure. The SEC first proposed pay versus performance disclosure rules in 2015 and reopened the comment period in January 2022.[63]

SEC Updates Compliance and Disclosure Interpretations for Universal Proxy Card Rules[64]

On August 25, 2022, the SEC Division of Corporation Finance updated its Compliance and Disclosure Interpretations ("CDIs") for Proxy Rules and Schedules 14A/14C by adding CDI Questions 139.01, 139.02 and 139.03 to provide guidance on Rule 14a-19. CDI Question 139.01 clarifies that a dissident shareholder may not provide the names of more nominees than there are open seats for director elections on the Rule 14a-19(b) notice. However, a dissident shareholder is allowed to provide the names of additional or alternate nominees who may be presented for election if the original slate needs to be changed in the Rule 14a-19(b) notice, and pursuant to Rule 14a-19(c) must notify the issuer if such change occurs. CDI Question 139.02 notes that in a contested director election where more than one dissident presents a slate of director nominees, the issuer should inform each dissident of each Rule 14a-19(b) notice that it receives

by the deadline stated in Rule 14a-19(d). If there are any changes in either the issuer's or dissidents' slate of nominees, the issuer should also promptly notify all dissidents of such change. CDI Question 139.03 states that the notice period for a dissident shareholder to inform an issuer of its intent to present its own slate of director nominees in Rule 14a-19(b)(1) is a minimum notice period. Thus, it is permissible for an issuer to impose an earlier deadline for the dissident to provide notice of its nominees in the issuer's advance notice bylaw provision and proxy statement.

Universal Proxy Card Rules in Effect[65]

On August 31, 2022, amendments to the federal proxy rules mandating the use of "universal" proxy cards in contested director elections went into effect. The universal proxy card rules were adopted by the SEC on November 17, 2021. The new rules require both public companies and dissidents in contested director elections to include both sides' director nominees so shareholders can "mix and match" director nominees from the company's and dissident's director nominee slates.

SEC Creates Office of Crypto Assets and Office of Industrial Applications and Services in Division of Corporation Finance Disclosure Review Program[66]

On September 9, 2022, the SEC announced that it will add two new offices—the Office of Crypto Assets and the Office of Industrial Applications and Services—to the Division of Corporation Finance's Disclosure Review Program. As a result, there will be nine offices based on issuer industries to review filings. The Director of Corporation Finance, Renee Jones, noted the need for the two new industry expertise groups "as a result of recent growth in the crypto asset and the life sciences industries". The Office of Crypto Assets will review filings pertaining to crypto assets, while the Office of Industrial Applications and Services will review non-pharma, non-biotech and non-medicinal product issuers that are currently allocated to the Office of Life Sciences.

PERSONNEL ANNOUNCEMENTS

On July 18, 2022, Jaime Lizárraga was sworn into office as an SEC Commissioner.[67] He has over 30 years of experience in public service, with roles including Senior Advisor to House Speaker Nancy Pelosi, Senior Professional Staff Member/Director of Legislative Affairs for the House Financial Services Committee, Deputy to the Assistant Secretary of Legislative Affairs at the Treasury and Deputy Director in the SEC's Legislative and Intergovernmental Affairs Office. Commissioner Lizárraga's term will expire on June 5, 2027.

On August 2, 2022, Anthony C. Thompson was appointed to a second term on the PCAOB.[68] Mr. Thompson joined the PCAOB on January 3, 2022 to fill a term set to expire October 24, 2022. Prior to this, Mr. Thompson was the Executive Director and Chief Administrative Officer of the Commodity Futures Trading Commission, held senior roles at the United States Department of Agriculture and had 32 years of service in the United States Air Force. His second term will expire on October 24, 2027.

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

[2] All data regarding SPAC activity is from Deal Point Data unless otherwise indicated. Values and volume may vary across our newsletters due to continuous updates to the M&A activity sources.

[3] *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

[4] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

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

[6] CFIUS reviewed 187 notices and 126 declarations in 2020. Report, *Committee on Foreign Investment in the United States Annual Report to Congress, Report Period: CY2020*, U.S. Department of the Treasury (July 2021), https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf ("2020 Report") at 4, 15.

[7] In 2020, of 126 declarations submitted, CFIUS approved 81 in the 30-day assessment period. *Id.* at 4.

[8] In 2020, of 187 notices filed, 88 went to the second 45-day investigation period. *Id.* at 15.

[9] In 2020, of 187 notices filed, 16 were approved with mitigation. *Id.*

[10] In 2020, of 187 notices filed, seven were abandoned by the parties after CFIUS raised concerns. *Id.*

[11] In 2020, of 187 notices filed, 21 were withdrawn and re-filed. *Id.*

[12] In 2020, 117 non-notified transactions were put forward to CFIUS for consideration. *Id.* at 48.

[13] In 2020, of 117 non-notified transactions put forward to CFIUS for consideration, 17 resulted in a request for filing. *Id.*

[14] The Report notes that this is due, in part, to a change in how Hong Kong cases are categorized. For CFIUS cases concluding prior to the promulgation of Executive Order 13936 on Hong Kong Normalization (85 Fed. Reg. 43412 (July 17, 2020)), Hong Kong and China were tabulated separately. For CFIUS cases concluding after the date of the executive order, Hong Kong is included with China. 2021 Report at 11.

[15] *Id.* at 15; 2020 Report at 15.

[16] 87 FR 57368.

[17] *Id.*

[18] White House Fact Sheet: President Biden Signs Executive Order to Ensure Robust Reviews of Evolving National Security Risks by the Committee on Foreign Investment in the United States, The White House (Sept. 15, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/15/fact-sheet-president-biden-signs-executive-order-to-ensure-robust-reviews-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states/.

[19] Vice Chair for Supervision Michael S. Barr Remarks at The Brookings Institution, "*Making the Financial System Safer and Fairer*", FRB (Sept. 7, 2022), https://www.federalreserve.gov/newsevents/speech/files/barr20220907a.pdf.

[20] In his September speech, the Vice Chair for Supervision stated that "we review the potential effects on the convenience and needs of the communities to be served by the merged entity, particularly low-income communities. Under the Dodd-Frank Act, we are also required to consider financial stability risks. These risks may be difficult to assess, but this consideration is critical." *Id.*

[21] FRB Order No. 2022-19, FRB (Sept. 14, 2022), https://www.federalreserve.gov/newsevents/pressreleases/files/orders20220914a1.pdf.

[22] Cravath, Swaine & Moore LLP, "*The End of Bank M&A, Long Live Bank M&A*" (Jan. 3, 2022), https://www.cravath.com/a/web/mYBHjDi3dLHzuyam57TTm2/the-end-of-bank-manda-long-live-bank-manda.pdf.

[23] FRB Order No. 2022-19, FRB (Sept. 14, 2022), https://www.federalreserve.gov/newsevents/pressreleases/files/orders20220914a1.pdf.

[24] FRB Governor Michelle W. Bowman, "*The New Landscape for Banking Competition*", FRB (Sept. 28, 2022), https://www.federalreserve.gov/newsevents/speech/bowman20220928a.htm.

[25] Vice Chair for Supervision Michael S. Barr Remarks at The Brookings Institution, "*Making the Financial System Safer and Fairer*", FRB (Sept. 7, 2022), https://www.federalreserve.gov/newsevents/speech/files/barr20220907a.pdf.

[26] Andrew Ackerman, "*Big Regional Banks Might Face New Rules for Dealing With a Crisis*", The Wall Street Journal (Sept. 18, 2022), https://www.wsj.com/articles/big-regional-banks-might-face-new-rules-for-dealing-with-a-crisis-11663495202.

[27] Press Release, *Resolution-Related Resource Requirements for Large Banking Organizations*, FRB (Oct. 14, 2022), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20221014a1.pdf.

[28] Executive Order 14071, *Prohibiting New Investments in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression*, 87 Fed. Reg. 20999 (Apr. 8, 2022).

[29] Determination Pursuant to Section 1(a)(ii) of Executive Order 14071, *Prohibitions Related to Certain Accounting, Trust and Corporate Formation, and Management Consulting Services*, OFAC (May 8, 2022), https://home.treasury.gov/system/files/126/determination_05082022_eo14071.pdf.

[30] Press Release, *Treasury Imposes Swift and Severe Costs on Russia for Putin's Purported Annexation of Regions of Ukraine*, OFAC (Sept. 30, 2022), https://home.treasury.gov/news/press-releases/jy0981.

[31] Inflation Reduction Act of 2022, Pub. L. 117-169 § 10101 (2022). With respect to foreign-parented groups, the applicable income threshold is (i) $1 billion for the entire foreign group and (ii) $100 million for the relevant U.S. subgroup.

[32] Initial estimates by the Joint Committee on Taxation suggested that the CAMT would apply to as little as 150 corporations. Memorandum, *Proposed Book Minimum Tax Analysis by Industry*, Congress of the United States (July 28, 2022), https://www.finance.senate.gov/imo/media/doc/jct_analysis_book_minimum.pdf.

[33] Inflation Reduction Act of 2022, Pub. L. 117-169 § 10201.

[34] Public Statement, *Respecting the Antitrust Laws and Reflecting Market Realities*, DOJ (Sept. 13, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust.

[35] Leah Nylen, *DOJ Antitrust Chief Says Merger Efficiency Defense Is Under Review*, Bloomberg (Sept. 13, 2022), https://www.bloomberg.com/news/articles/2022-09-13/doj-s-kanter-says-efficiency-defense-for-mergers-is-under-review#xj4y7vzkg.

[36] Public Statement, *Remarks of Chair Lina M. Khan as Prepared for Delivery Fordham Annual Conference on International Antitrust Law & Policy*, FTC (Sept. 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf.

[37] Public Statement, *FTC Chair Lina M. Khan Testifies Before Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights*, FTC (Sept. 20, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-chair-lina-m-khan-testifies-senate-judiciary-subcommittee-antitrust-competition-policy-consumer-rights?utm_source=govdelivery.

[38] Public Statement, *Assistant Attorney General Jonathan Kanter of the Antitrust Division Testifies Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights*, DOJ (Sept. 20, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary.

[39] Public Statement, *Solving the Global Problem of Platform Monopolization*, DOJ (Sept. 16, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham.

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[46] Memorandum Order, *United States v. United States Sugar Corp.*, No. 21-1644 (MN), (D. Del. Sept. 28, 2022).

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[51] Additionally, on the same day, (i) the Division of Corporation Finance put out a statement saying it would not recommend enforcement of the 2020 rules while considering the Chair's instruction and (ii) the SEC moved to hold litigation by Institutional Investor Services (or ISS) on the 2020 rules in abeyance until either the end of the year or the promulgation of final rule amendments addressing proxy voting advice. *See* Statement, *Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(l), 14a-2(b), 14a-9*, SEC Division of Corporation Finance (June 1, 2021), https://www.sec.gov/news/public-statement/corp-fin-proxy-rules-2021-06-01.

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[54] Complaint, *Nat'l Ass'n of Mfrs. v. SEC*, No. 7:22-CV-00163 (W.D. Tex. July 21, 2022). *See also* Regulatory and Legal Reform, *Manufacturers Sue SEC on Proxy Rule Recission*, NAM (July 21, 2022), https://www.nam.org/manufacturers-sue-sec-on-proxy-rule-rescission-18335.

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[60] Press Release, *SEC Adopts Amendments to Proxy Rules Governing Proxy Voting Advice*, SEC (July 13, 2022), https://www.sec.gov/news/press-release/2022-120.

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