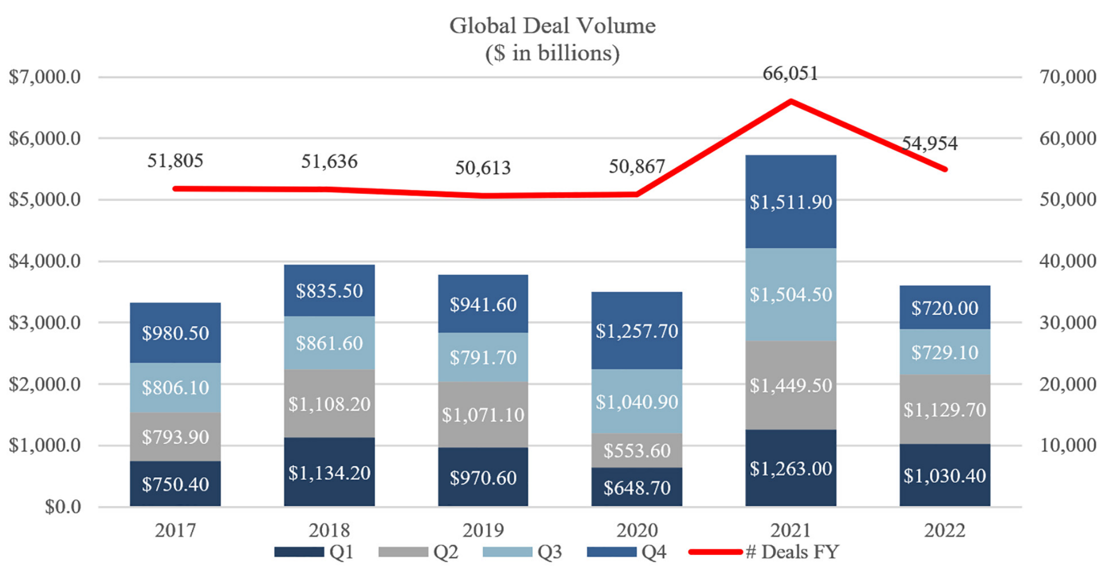
Cravath Quarterly Review

M&A, ACTIVISM AND CORPORATE GOVERNANCE

01

Mergers & Acquisitions

TRENDS[1]

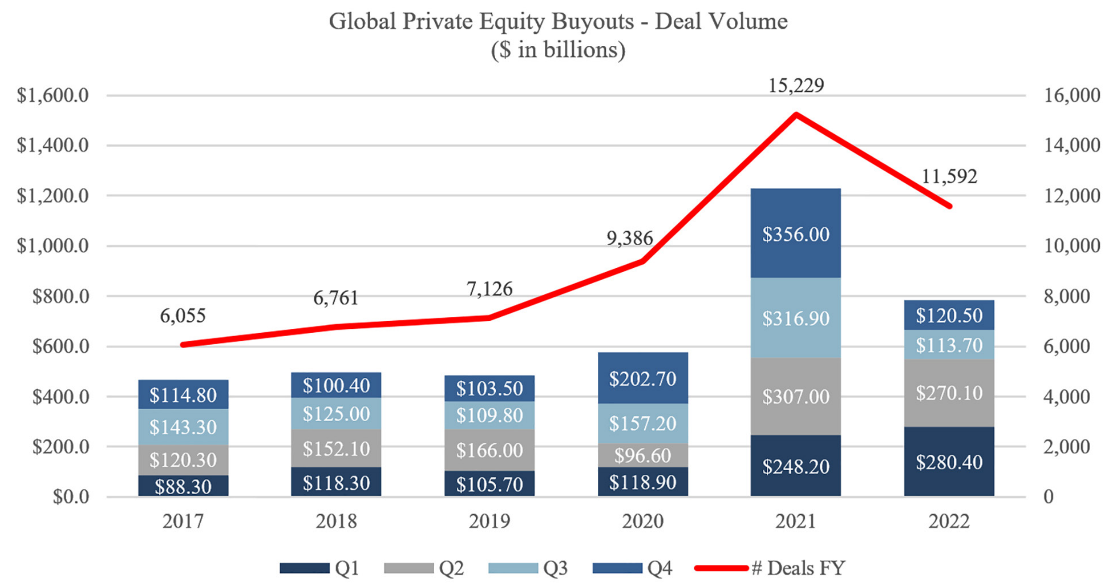


SOURCE Refinitiv, An LSEG Business.

Q4 2022: M&A Activity Falls for Second Consecutive Quarter

In 2022, global M&A activity totaled $3.6 trillion, a decrease of ~37% compared to 2021 and the largest year-over-year percentage decline since 2001. Q4 2022 marked the second consecutive quarter to fall below $1 trillion in announced deal value, with $720 billion in announced deal value. There were nearly 55,000 deals announced in 2022, a decrease of ~17% compared to 2021's all-time high of over 66,000 deals.

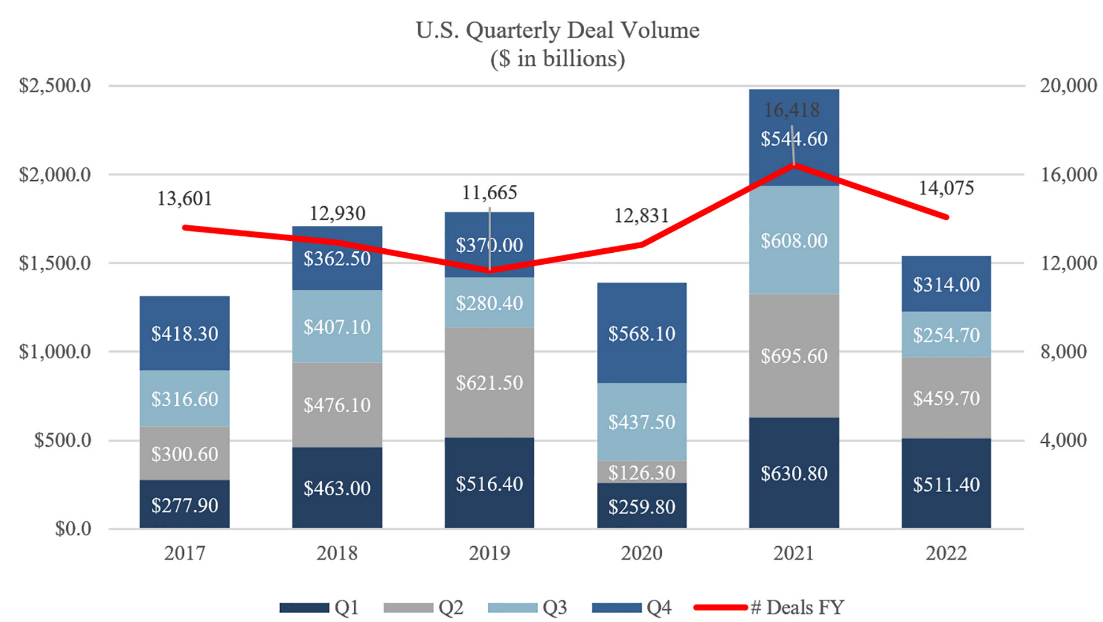
The year-over-year decrease in deal volume in 2022 was also accompanied by a decrease in overall value. In 2022, the total value of deals between $1 billion and $5 billion totaled approximately $1.0 trillion, a year-over-year decrease of ~44% compared to 2021. Additionally, the aggregate value of mega deals in 2022 was down ~31% compared to 2021, with 37 deals greater than $10 billion, totaling $786.8 billion.



SOURCE Refinitiv, An LSEG Business.

Private equity buyouts in 2022 reached $784.5 billion globally, a decrease of ~36% compared to 2021. Second half deal activity fell ~57% compared to the first half of 2022. Over 11,500 private equity-backed deals were announced in 2022, which represented a decrease of ~24% compared to 2021.

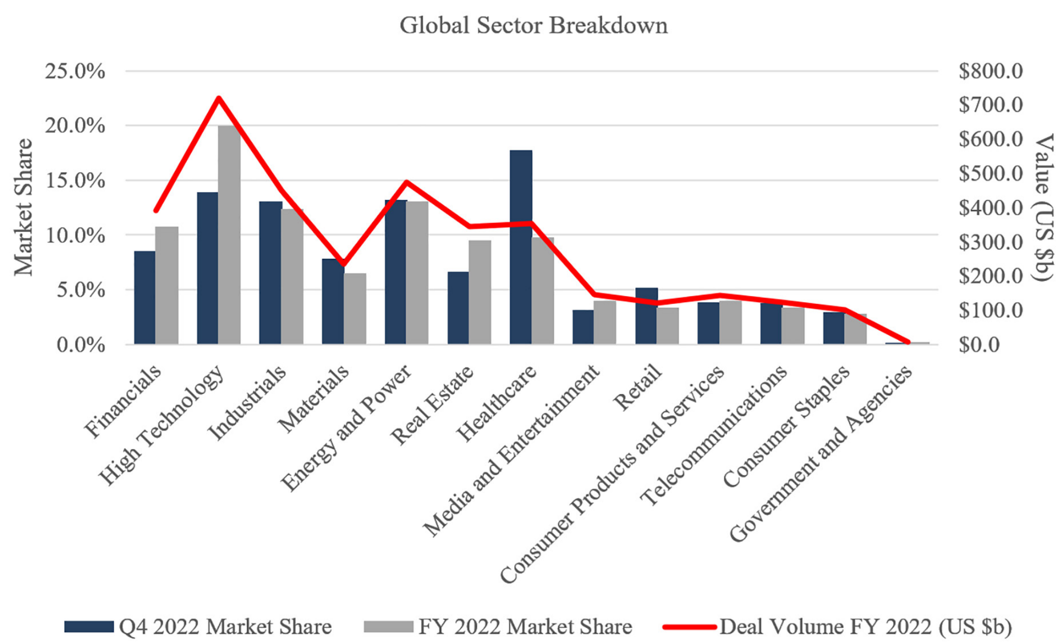
Private equity buyouts in Q4 2022 reached $120.5 billion globally, a decrease of ~66% compared to Q4 2021 and accounting for ~17% of M&A activity in Q4 2022. Over 2,200 private equity-backed deals were announced in Q4 2022, which represented a decrease of ~37% compared to Q4 2021. The average global private equity deal size in Q4 2022 increased to $54.5 million, down from $101.7 million in Q4 2021.



SOURCE Refinitiv, An LSEG Business.

Dealmaking Down Across All Regions

M&A activity for U.S. targets amounted to $1.5 trillion in 2022, a decrease of ~38% compared to 2021. M&A activity for European targets totaled $850.7 billion in 2022, a decrease of ~39% compared to 2021 and a three-year low. In the Asia-Pacific region, dealmaking totaled $830.7 billion in 2022, a ~32% decrease compared to 2021.



SOURCE Refinitiv, An LSEG Business.

Technology M&A Deal Percentage Increases as Cross-Border Deals Decline

M&A in the technology sector totaled $720.3 billion in 2022, representing a decrease of ~36% compared to 2021 but accounting for a record ~20% of overall deal value. The number of technology deals decreased ~21% compared to 2021. Dealmaking in the energy & power sector accounted for ~13% of overall M&A activity, down ~20% from 2021. Industrials dealmaking accounted for ~12% of overall M&A activity during 2022, a ~29% decrease from 2021.

Cross-border M&A activity totaled $1.1 trillion in 2022, a ~46% decrease compared to 2021. The technology, energy & power and industrials sectors collectively accounted for ~44% of cross-border deals in 2022, up from ~37% in 2021.

SPAC Market Update[2]

Q4 2022 saw a continued slowdown in the overall deal value involving special purpose acquisition companies ("SPACs"). In Q4 2022, 73 de-SPAC transactions were announced, totaling $37.1 billion of deal value. During Q4 2022, 16 previously announced de-SPAC mergers were terminated, compared to 21 terminations in Q3 2022 and 10 terminations in Q4 2021. In Q4 2022, 32 SPAC IPOs were withdrawn or abandoned, on top of the 155 SPAC IPOs that were withdrawn or abandoned in the first three quarters of 2022. In Q4 2022, there were only 8 priced SPAC IPOs, resulting in a total of 85 priced SPAC IPOs in 2022, compared to 163 priced SPAC IPOs in Q4 2021 and a total of 613 priced SPAC IPOs in 2021. In Q4 2022, there were 118 SPAC liquidations, up significantly from 16 SPAC liquidations in Q3 2022 and 7 SPAC liquidations in H1 2022.

LEGAL & REGULATORY DEVELOPMENTS

Cases

Q4 2022 featured a number of notable Delaware decisions regarding M&A contractual disputes and related matters.

BOARDWALK PIPELINE PARTNERS, LP V. BANDERA MASTER FUND LP, C.A. NO. 2018-0372 (DEL. DEC. 19, 2022).

In this appeal, the Delaware Supreme Court reviewed *en banc* the Delaware Court of Chancery's ruling that Boardwalk GP, LP ("Boardwalk GP"), the general partner of Boardwalk Pipeline Partners, LP ("Boardwalk"), a Delaware Master Limited Partnership (an "MLP") improperly exercised a call right to acquire all public units of Boardwalk and take the entity private. The Supreme Court reversed the ruling and found that Boardwalk GP was exculpated from damages under the partnership agreement.

In 2005, Loews Corporation ("Loews") formed Boardwalk, which controlled various subsidiaries operating interstate natural gas pipeline systems. Shortly thereafter, Loews took Boardwalk public as an MLP to take advantage of tax benefits under Federal Energy Regulatory Commission ("FERC") regulations. However, Loews continued indirectly to own a majority of Boardwalk's units through its controlling stake in Boardwalk GP, LLC, which was the general partner of Boardwalk GP. When forming Boardwalk, Loews was aware that FERC tax policy could change in a way that could make taking Boardwalk private advantageous to Loews. As a result, when taking Boardwalk public, Loews included a call right in Boardwalk's partnership agreement that provided Boardwalk GP the right to acquire all outstanding public limited partner interests. One of the conditions applicable to the exercise of the call right was that (i) Boardwalk GP and its affiliates owned more than 50% of the total outstanding units and (ii) Boardwalk GP received an opinion of counsel that Boardwalk's status as an association not taxable under certain FERC exemptions had or would be reasonably likely to have a material adverse effect on the maximum applicable rate that could be charged to customers. Pursuant to Boardwalk's partnership agreement, such opinion of counsel was required to be "acceptable" to Boardwalk GP. Finally, the partnership agreement provided that, in determining whether to exercise the call right, Boardwalk GP was free of any fiduciary duty and could act in its individual capacity. As a result of these disclaimers, Boardwalk GP was only bound by the non-waivable implied covenant of good faith and fair dealing. Further, the partnership agreement provided a conclusive good-faith presumption for any action taken in reliance on the advice of legal counsel and exculpated Boardwalk GP from monetary liability absent bad faith, fraud, willful misconduct or criminality.

Between 2005 and 2017, Boardwalk's public filings provided detailed disclosure regarding the call right and Boardwalk GP's authority and potential conflicts. In March 2018, FERC took a series of actions that revised its tax policy and led to a period of significant volatility in the valuation of MLP units. The price of Boardwalk units declined significantly and at one point fell 7% in a single day. Boardwalk noted in a press release response that it did not expect to be affected by the FERC revisions, and shortly thereafter, Boardwalk realized it had an opportunity to exercise its call right and buy back its public units while they were significantly undervalued. In June 2018, Boardwalk received an opinion from its outside counsel, Baker Botts LLP ("Baker Botts"), that Boardwalk's tax status had, or would be reasonably likely to have, a material adverse effect on the maximum applicable recourse rates that could be charged to shippers that send oil and gas through its indirectly owned pipelines and be passed on to consumers. Boardwalk also obtained a second opinion from Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") that the Baker Botts opinion had reasonable assumptions and it was acceptable to Boardwalk GP. In reliance on these two opinions, Boardwalk GP announced it would exercise the call right, sending the price of units plummeting. Because the price of units under the call right was based on a trailing market average, this meant that Boardwalk could acquire the units for an even lower price. Boardwalk became private on July 18, 2018, the day before FERC issued further guidance that stabilized the MLP markets. Public shareholders sued in a class action, arguing among other claims that Boardwalk had breached an implied covenant of good faith and fair dealing. After a four-day trial, the Court of Chancery found for the plaintiff shareholders, holding among other rulings that the Baker Botts opinion was contrived to generate a result and that the Skadden opinion was manufactured to "whitewash" the Baker Botts opinion. Importantly, the Court of Chancery never found that the Skadden opinion was the product of bad faith or willful misconduct. The Court of Chancery subsequently awarded the plaintiff shareholders roughly $690 million in damages.

In its *de novo* review, the Supreme Court first examined the overall structure of the partnership agreement, noting that Loews took full advantage of the MLP structure to limit fiduciary duties and consolidate its governing power through Boardwalk GP. The Supreme Court noted that this approach was permissible under Delaware law and that, similar to previous decisions, some weight should be given to the fact that the plaintiff shareholders willingly invested despite Boardwalk's clear warnings about the call right and Boardwalk GP's authority and lack of fiduciary duties. Next, the Supreme Court analyzed the legal opinions. The defendants argued that both opinions satisfied the requirements of the partnership agreement and that even if the Supreme Court upheld the finding that the Baker Botts opinion was in bad faith, Boardwalk GP's reliance on the Skadden opinion, which was not previously found to be so, was sufficient. In its review, the Supreme Court focused not on whether either legal opinion was in bad faith but rather on whether Boardwalk GP was reasonable in finding the opinion acceptable. The Skadden opinion included a detailed analysis of Boardwalk's governing documents and a complete review of the Baker Botts opinion. The team that drafted the opinion consisted of FERC policy experts and contributors from three other law firms. The Supreme Court consequently found that it was reasonable for Boardwalk GP to rely on this opinion and accept the Baker Botts opinion. As a result, the Supreme Court reversed the Court of Chancery ruling and found that Boardwalk GP was presumed to have acted in good faith and was immune from damages.

AMERICAN HEALTHCARE ADMINISTRATIVE SERVICES, INC., ET AL. V. AIZEN, C.A. NO. 2019-0793-JTL (DEL. CH. NOV. 18, 2022).

In this memorandum opinion, the Delaware Court of Chancery held that although Lee Aizen, the CEO of American Healthcare Administrative Services, Inc. ("American"), had discretionary authority over whether to release funds held in escrow to secure American's contingent financial obligations, he was required to exercise his discretionary authority in accordance with an implied covenant of good faith and fair dealing, which means he must also act consistent with the purpose and range of possibilities considered within the relevant purchase agreement. The Court ordered the funds to be released on a date no earlier than 60 days after its judgment in this case becomes final.

American provides pharmacy benefits services to self-insured entities, and Aizen became its president in 2012 and its CEO shortly thereafter. In 2014, Aizen entered into an employment agreement that included a stock option. Aizen exercised this option and borrowed $2.4 million from American to purchase shares. Pursuant to Aizen's employment agreement, American promised to forgive any amounts due by Aizen and make certain additional payments to Aizen if a change of control occurred. In 2017, Maxor Acquisition, Inc. ("Maxor") made an offer to purchase two of American's lines of business and American undertook an internal reorganization in order to prepare for the sale. In June 2018, American's parent approved and authorized the asset sale as well as an agreement terminating Aizen's existing employment agreement. Pursuant to the agreement, Aizen's remaining loan obligations would be forgiven and he was promised over $21 million in various compensation forms. The transaction closed on September 17, 2018 and Maxor placed $5.5 million in escrow to secure American's contingent financial obligations pursuant to an escrow agreement. Aizen was paid $9 million of the $21 million he was promised. After closing, the relationship between Aizen and American soured, and Aizen resigned from American's board and filed suit against American in New Jersey, claiming that the defendants had failed to pay him the amounts he was due under the termination agreement. On November 6, 2018, American terminated Aizen and filed suit against him in California. In its complaint, American asked for a declaration that the termination agreement was void and unenforceable. American and Aizen then proceeded to wage a lengthy and complex legal battle. In December 2020, American asked Aizen to release the remaining funds in escrow, and Aizen refused absent sufficient evidence about American's financial condition, explaining that he wanted to wait until the final disposition of the California action lest the funds be released and Aizen discover American had become judgment proof. American then filed suit against Aizen in Delaware, seeking a decree of specific performance compelling Aizen to release the remaining escrowed funds.

In its reasoning, the Delaware Court of Chancery first looked to the plain language of the purchase agreement, which specified that the funds should be released once the transaction had closed, at least 15 months had passed since the closing date and there was no dispute about the amount of any reserve that might be required. All of these requirements had been met. Aizen argued that the textual language of the purchase agreement granted him "sole and absolute discretion" to determine whether it is "necessary and proper" to disburse the funds. The court, however, found that his interpretation of the breadth of his authority was not a reasonable one. The court held that this delegation of power did not give Aizen the authority to ignore a mandatory provision of the purchase agreement governing the release of escrowed funds. The court also held that Aizen's authority under the agreement was constrained by the implied covenant of good faith and fair dealing and relied on precedent from the

Delaware Supreme Court that made clear that the use of the term "sole discretion" did not eliminate implied duties under this covenant. The court also did not find Aizen's defense of unclean hands compelling because his refusal to release the escrowed funds in this Delaware action was not immediate and necessary in relation to the claims under which he sought relief in California and because his fear that American could distribute the remaining escrowed amount to its stockholders and thus become judgment proof was a speculative concern about something that might happen in the future, rather than an event that had already happened. The court subsequently ordered specific performance compelling release of the funds.

RICHARD DELMAN V. GIGACQUISITIONS3 LLC, ET AL., C.A. NO. 2021-0679-LWW (DEL. CH. JAN. 4, 2023).

On January 4, 2023, the Delaware Court of Chancery denied a motion to dismiss relating to claims against GigCapital3, Inc., a Delaware SPAC ("GigCapital3"), and GigAcquisitions3, LLC, GigCapital3's sponsor (the "Sponsor"), which alleged that GigCapital3's directors and the Sponsor breached their fiduciary duties in connection with a de-SPAC transaction by depriving public stockholders of information necessary to decide whether to redeem their shares or to invest in the combined company.

GigCapital3's definitive proxy statement for the de-SPAC transaction (the "Proxy") with Lightning eMotors Inc. ("Lightning"), filed on March 22, 2021, contained financial projections prepared by Lightning's management that forecast dramatic growth over the next five years. On May 17, 2021, after the de-SPAC transaction was consummated, the combined company reduced its 2021 revenue guidance, decreasing its projected revenue by 12.7% compared to the financial projections contained in the Proxy.

In denying the motion to dismiss, the court noted that (1) disclosure in GigCapital3's prospectus of the facts creating a conflict of interest for the defendants did not waive fiduciary duty claims the plaintiffs may have under Delaware law on the basis of those facts and (2) it is reasonably conceivable that, in connection with the de-SPAC transaction, the defendants breached their fiduciary duty of disclosure under Delaware law (derived from the duties of care and loyalty) by failing to disclose information necessary for the plaintiff to decide whether to redeem or to invest in the combined company. The court also noted that the proxy issued in connection with the de-SPAC transaction was misleading because it did not accurately disclose the net cash per share to be invested in GigCapital3's target, and also provided "lofty projections" of the target that "were not counterbalanced by impartial information" showing what stockholders "could realistically expect from the combined company."

CFIUS

ENFORCEMENT AND PENALTY GUIDELINES

In October 2022, the Committee on Foreign Investment in the United States ("CFIUS") released its first-ever enforcement and penalty guidelines (the "Guidelines").[3] The Guidelines identify three types of conduct that may constitute a violation of CFIUS laws, regulations or agreements: (1) failure to timely submit a mandatory filing; (2) non-compliance with CFIUS mitigation agreements; and (3) making a material misstatement, omission or false certification to CFIUS.[4] Violations may lead to monetary penalties and other remedies.

The Guidelines set forth the process that CFIUS will use in considering and imposing penalties, as well as a list of aggravating and mitigation factors. In announcing the Guidelines, Assistant Secretary of the Treasury for Investment Security Paul Rosen stated: "The vast majority of those who come before CFIUS abide by their legal obligations and work collaboratively with the

Committee to mitigate any national security risks arising from the transaction; however, those who fail to comply with CFIUS mitigation agreements or other legal obligations will be held accountable."[5]

The release of the Guidelines indicates that CFIUS will continue to devote substantial resources to its monitoring and enforcement efforts, which have increased significantly since the implementation of the Foreign Investment Risk Review Modernization Act of 2018.

OUTBOUND INVESTMENT SCREENING

As we have previously covered in the Quarterly Review[6], U.S. policymakers are considering whether—and if so, how—the U.S. government should screen investments by U.S. persons in countries of concern for national security implications. Several developments in Q4 2022 indicated that such screening may be moving closer to fruition. First, Deputy Secretary of the Treasury Wally Adeyemo discussed investment security with European policymakers, including "ensuring that US, UK, and European intellectual and financial capital are not used to support the development of critical technologies used by foreign adversaries."[7] Coordination with allies and partners may foretell action by the Biden administration on outbound investment screening. Second, explanation statements by Congress in connection with the FY2023 Omnibus Appropriations Bill, passed in December 2022, encourage the Executive Branch to consider establishing a program to address national security threats emanating from outbound investments from the United States in certain sectors that are critical for U.S. national security, and further require reports to Congress describing such a program.[8]

NOTABLE CASES

There were a number of notable developments in CFIUS cases announced in Q4 2022.

First, in December 2022, F-star Therapeutics, Inc. ("F-star"), a clinical stage biopharmaceutical company developing immunotherapies for cancer patients, announced that CFIUS had issued an interim order prohibiting a proposed merger between F-star and an affiliate of Sino Biopharmaceutical Limited, a China-based entity.[9] This followed a prior announcement by F-star that the parties to the proposed merger had informed CFIUS that, absent CFIUS objection, they planned to close the transaction during the pendency of the CFIUS review process "given significant challenges facing [F-star], including that [F-star] would need to lay off a significant number of its employees and terminate several of its clinical studies, which would result in patients no longer receiving potentially life-saving treatments."[10] CFIUS's issuance of the interim order illustrates its ability and willingness to prevent the closing of transactions that are undergoing CFIUS review, even if the delay may have a significant negative impact on the parties and their respective stakeholders. It is a reminder to parties that, once they have initiated the CFIUS review process, they may not be able to close their transaction until CFIUS completes its work.

Second, in December 2022, Borqs Technologies, Inc., a China-based entity ("Borqs"), announced that CFIUS is requiring it to fully divest its ownership interests and rights in Holu Hou Energy LLC ("HHE"), which it had acquired in 2021, due to national security concerns.[11] Specifically, Borqs indicated that CFIUS considered, among other things, HHE's position as a top solar energy storage supplier in Hawaii whose technology focuses on multi-family dwelling units, which are common in military housing.[12] The announcement of the divestiture is a reminder that (1) CFIUS continues to be particularly focused on transactions involving an acquiror from, or with material ties to, China, (2) clean energy technology can raise significant national security considerations and (3) CFIUS will not hesitate to seek divestiture in order to protect national security when appropriate.

Third, in December 2022, press reports indicated that CFIUS determined it did not have jurisdiction to review the acquisition by an affiliate of Fufeng Group Limited, a China-based entity, of land located near Grand Forks, North Dakota.[13] The proposed acquisition had received attention from politicians at the state[14] and federal[15] levels due to the proximity of the land to Grand Forks Air Force Base, a U.S. military installation. The decision, which was derided by several lawmakers, is an example of CFIUS operating pursuant to its promulgated regulations despite political pressure to take action.[16] Nevertheless, CFIUS's determination that it lacked jurisdiction in such a high-profile matter ultimately may lead (1) CFIUS to expand its jurisdiction over real estate acquisitions (which it could do through the rulemaking process by, among other things, adding more sites to its published list of sensitive military installations) and/or (2) Congress to expand CFIUS's jurisdiction through legislation.

Finally, in December 2022, the U.S. Attorney's Office for the Southern District of New York submitted a notice relating to CFIUS in the Chapter 11 proceedings of Voyager Digital Holdings, Inc., *et al*.[17] The government indicated that it was submitting the notice, which contained a general summary of CFIUS and the CFIUS process, "to address the possibility that one or more transactions contemplated by the [debtors] may be subject to review by [CFIUS], which could affect the ability of the parties to complete the transactions, the timing of completion, or relevant terms."[18] The notice further indicated that "[b]ankruptcy courts have previously acknowledged that potential national security concerns (including CFIUS review) are relevant factors in bankruptcy proceedings, and specifically in determining whether bidders are qualified."[19] Voyager Digital Ltd. had previously announced an agreement to sell its assets to Binance.US.[20] The notice is a reminder that (1) CFIUS continues to devote significant resources to monitoring the deal landscape for potential transactions that may raise national security considerations, including transactions arising through the bankruptcy process and (2) CFIUS, through the Department of Justice (the "DOJ"), will involve itself in bankruptcy proceedings as it deems necessary to protect national security.

Bank M&A

Throughout the fourth quarter, the agencies continued to review their bank merger policy. In a speech at the Institute of International Finance, Federal Reserve Board ("FRB") Governor Michelle Bowman emphasized the need for transparency and legitimate prudential purposes to guide the FRB's analysis of bank mergers.[21] In November, Acting Chairman Martin Gruenberg of the Federal Deposit Insurance Corporation ("FDIC") addressed the FDIC's review of its bank merger policy in his testimony before the Senate Banking Committee on Oversight of Financial Regulators.[22] Nevertheless, the federal banking agencies have continued to act on bank M&A applications during this review, indicating that there are still paths forward for approval of transactions. In the new year, we will be watching to see if the agencies issue any proposed or other guidance on merger standards and, if so, whether that guidance is joint (reflecting broad agreement) or not (presumably indicating that the agencies' approaches will differ on mergers going forward).

The FRB and the FDIC also recently received a number of public comments regarding the agencies' joint advance notice of proposed rulemaking ("ANPR") on changes to the resolution plan framework for large banks. The ANPR, issued last October, focuses on whether an extra layer of loss-absorbing capacity could improve optionality in resolving a large banking organization that is not a global systemically important banking organization ("GSIB") or the subsidiary insured depository institution of the non-GSIB.[23] Comments submitted by a number of banking organizations and trade organizations representing them stated that the proposed requirements were not appropriate for non-GSIBs, especially when considered in light of the potential costs of such requirements.

Tax

On December 27, 2022, the Internal Revenue Service released Notice 2023-2 and Notice 2023-7 providing interim guidance on the application of the two new types of tax imposed by the Inflation Reduction Act: the 15% corporate alternative minimum tax ("CAMT") on financial statement income and the 1% excise tax on stock buybacks. Taxpayers may rely on the guidance until Treasury issues forthcoming proposed regulations.

CAMT

The CAMT is imposed on corporate groups with average adjusted financial statement income ("AFSI") of at least $1 billion calculated over a three-year period; the CAMT then applies to the extent the applicable group's regular tax liability is less than 15% of its annual AFSI.[24] Because AFSI is based on the group's net income for financial accounting purposes (subject to certain adjustments), AFSI could substantially diverge from taxable income. In the M&A context, this raised concerns that tax-free contributions and reorganizations could trigger significant CAMT liability, as those transactions could result in AFSI gain even if they were otherwise tax-free.

Notice 2023-7 directly addresses those concerns. Under the notice, AFSI gain or loss resulting from certain tax-free contributions and reorganizations is not taken into account for purposes of calculating AFSI. These include corporate "split-offs" (where a corporation repurchases its shares for shares of a corporate subsidiary) and contributions to certain joint ventures. Although this guidance is very helpful, the scope of this exemption remains uncertain in some circumstances.

In addition, Notice 2023-7 provides helpful rules governing where a target (or target group) remains an applicable corporation following a taxable or tax-free acquisition. Generally, the notice provides that the "applicable corporation" status of the target (or target group) terminates if that status existed prior to the transaction.[25] Going forward, the acquiror must take into account the target's historic AFSI (or its allocated portion of its group's AFSI) for purposes of determining whether the acquiror becomes an applicable corporation; this allocation has no effect on the AFSI calculation of the remaining target group (if any). Similar rules apply with respect to spin-off and split-off corporations.

Notice 2023-7 also includes a transitional safe harbor for determining "applicable corporation" status for a corporation's first taxable year beginning after December 31, 2022. Under the safe harbor, a corporation is not an "applicable corporation" and thus not subject to the CAMT if its AFSI, determined without regard to many of the various adjustments provided in the Inflation Reduction Act, does not exceed $500 million.[26]

EXCISE TAX ON STOCK BUYBACKS

The 1% excise tax applies to stock repurchases by publicly traded U.S. corporations occurring after December 31, 2022. The excise tax is equal to 1% of the fair market value of any stock repurchased by the corporation (or an affiliate) during the taxable year, net of any issuances by the corporation during the same year. 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.

Notice 2023-2 provides helpful clarification as to the application of the excise tax. On the one hand, the notice clarifies that certain common M&A transactions will generally not result in an excise tax liability. For instance, stock repurchased as part of tax-free reorganizations, spin-offs and split-offs are not included in the excise tax base, although the inclusion of cash consideration in these transactions may trigger tax. Similarly, distributions in complete liquidation of a corporation (such as a SPAC) are exempt from the excise tax, as are any other distributions by that corporation in the year of liquidation.

On the other hand, Notice 2023-2 confirms that many common M&A transactions will present excise-tax sensitivities. For instance, the payment of cash deal consideration will be treated as a redemption for excise tax purposes to the extent it is funded with debt at the target level (*i.e.*, an LBO structure). Similarly, there is no exemption for redemptions of preferred stock (even if those redemptions are pursuant to the preferred stock's terms).

02

Antitrust

POLICY DEVELOPMENTS

Cooperation with Foreign Antitrust Enforcers

On October 12, 2022, Department of Justice Assistant Attorney General ("AAG") Jonathan Kanter and Federal Trade Commission (the "FTC") Chair Lina Khan met with other enforcers from G7 countries at the G7 Joint Competition Policy Makers & Enforcers Summit.[27] The summit was hosted in Dusseldorf by the German antitrust enforcement agency, the Bundeskartellamt, and the German Ministry for Economic Affairs and Climate Action. The purpose of the Enforcers Summit was to facilitate coordination and cooperation between the G7 countries on competition policy and enforcement in digital markets.[28] In a statement, AAG Kanter noted that "[m]eeting with our like-minded G7 colleagues presents an excellent opportunity to take stock of our common experiences in confronting anticompetitive conduct in digital markets." Likewise, Chair Khan stated that "international cooperation is especially crucial as enforcers navigate the global challenges posed by dominant digital platforms and work to promote fair competition and the many benefits it delivers."

On October 13, 2022, AAG Kanter and Chair Khan met with European Commission ("EC") Executive Vice President Margrethe Vestager in Brussels for the second meeting of the U.S.-EU Joint Technology Competition Policy Dialogue.[29] The dialogue was initiated in December 2021 to evaluate the progress made on the DOJ, FTC and EC's cooperation efforts to ensure and promote fair competition in the digital economy. In a prepared statement, Chair Khan noted that "[d]ominance in digital markets poses global challenges, which makes global cooperation by antitrust enforcers essential." A press release from the DOJ stated that the forthcoming update to the U.S. Merger Guidelines was a topic of discussion at the meeting.[30]

Section 8 Interlocking Directorates

On October 19, 2022, the DOJ announced that seven directors had resigned from corporate board positions in response to concerns by the Antitrust Division that their roles violated Section 8 of the Clayton Act, which prohibits directors and officers from serving simultaneously on the boards of competing entities.[31] In a statement, AAG Kanter noted that "Congress made interlocking directorates a *per se* violation of the antitrust laws for good reason. Competitors sharing officers or directors further concentrates power and creates the opportunity to exchange competitively sensitive information and facilitate coordination – all to the detriment of the economy and the American public." The press release issued by the DOJ notes that two of the seven directors sat on the boards of competing entities as representatives of investments firms that held shares of those entities. Both the FTC and the DOJ have recently announced an intent to more carefully enforce Section 8 of the Clayton Act, and to specifically target investment and private equity firms for antitrust enforcement.[32]

FTC Section 5 Policy Statement

On November 10, 2022, the FTC issued a policy statement outlining a broadened view of the Commission's authority under Section 5 of the FTC Act, which grants the FTC authority to pursue enforcement actions against "unfair methods of competition."[33] The policy statement revokes all prior Commission interpretations of Section 5, and outlines a two-factor analysis to determine whether conduct violates Section 5. First, the conduct must be "coercive, exploitative, collusive, abusive, deceptive, predatory or involve the use of economic power of a similar nature" or "otherwise restrictive or exclusionary, depending on the circumstances." Second, the conduct must "tend to negatively affect competitive conditions", such as conduct that tends to "foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers." The FTC asserts that these factors are to be judged on a sliding scale—if conduct clearly meets one factor, a lesser showing is needed to establish the other factor. The FTC specifically notes that it intends to use its Section 5 authority to block mergers that represent "incipient violation[s] of the antitrust laws" or, while not in fact violative of the antitrust laws, violate the "spirit of the antitrust laws."

Increased HSR Fees and New Foreign Reporting Requirements

On December 29, 2022, President Biden signed into law an omnibus appropriations bill that included the Merger Filing Fee Modernization Act of 2021 (the "FMA"), which has significant impacts on merger control in the United States.[34] First, the FMA provides an updated filing fee schedule for the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"). These updates reduce the filing fees for transactions valued at less than $500 million, but significantly increase the maximum filing fee from $280,000 to $2.25 million. On January 23, 2023, the FTC voted 4-0 to approve the new filing fee thresholds proposed under the FMA. They will go into effect on February 27, 2023. The filing fee thresholds will be adjusted yearly based on the Consumer Price Index. The updated HSR filing fee thresholds are as follows:

Filing Fee	Size of Transaction
$30,000	Valued in excess of $111.4 million but less than $161.5 million
$100,000	Valued at $161.5 million or greater but less than $500 million
$250,000	Valued at $500 million or greater but less than $1 billion
$400,000	Valued at $1 billion or greater but less than $2 billion
$800,000	Valued at $2 billion or greater but less than $5 billion
$2,250,000	Valued at $5 billion or greater

Second, the FMA requires entities filing HSR forms to disclose subsidies received from "foreign entities of concern." The FMA defines foreign entities of concern as entities engaged in "unauthorized conduct that is detrimental to the national security or foreign policy of the United States." Examples include China, Russia, Iran, North Korea, terrorist organizations designated by the Secretary of State and organizations associated with certain foreign nationals. The FMA requires the FTC and DOJ to consult with CFIUS, the Department of Commerce, the International Trade Commission and the U.S. Trade Representative to identify the documents and information concerning applicable subsidies that must be submitted along with the HSR form.

Updated Size-of-Transaction Threshold for HSR Reporting

On January 23, 2023, the FTC approved monetary revisions to the monetary thresholds for pre-merger notifications under HSR. The FTC revises HSR thresholds annually based on the change in the gross national product in the preceding fiscal year. The revised thresholds will take effect, and apply to transactions closing on or after February 27, 2023. Under the revised thresholds: (1) the minimum size-of-transaction threshold will increase from $101 million to $111.4 million; (2) the size-of-person test will apply to transactions valued between $111.4 million and $445.5 million (increased from $403.9 million); (3) for the size-of-person test, the sales/assets value of $202 million has increased to $222.7 million and the sales/assets value of $20.2 million has increased to $22.3 million; and (4) transactions valued in excess of $445.5 million are reportable without regard to the size of the parties.

FTC Proposed Rule Banning Noncompete Clauses in Employment Agreements

On January 5, 2023, the FTC announced a new proposed rule that would broadly prohibit noncompete clauses in employment agreements (the "Proposed Rule").[35] The FTC asserts that noncompete clauses in employment agreements represent an unfair method of competition that violates Section 5 of the FTC Act. The Proposed Rule would make it unlawful for an employer to enter into a noncompete with a worker, maintain an existing noncompete with a worker or represent to a worker that the worker is subject to a noncompete. The Proposed Rule includes a carve-out for noncompete clauses included in agreements concerning the sale of a business, provided that (1) the agreement concerns a person selling a business entity, disposing of all of the person's ownership interest in a business entity, or selling all or substantially all of a business entity's operating assets; and (2) the person is a "substantial owner" of the business entity, meaning the person holds at least a 25% ownership interest in the business entity. The public has until March 20, 2023 to provide comments on the Proposed Rule, which was published in the Federal Register on January 19, 2023.[36]

ENFORCEMENT

Federal Trade Commission

On October 11, 2022, the FTC voted 5-0 to approve a consent order concerning Tractor Supply Company's ("TSC") acquisition of competitor Orscheln Farm and Home LLC ("Orscheln").[37] The consent order requires TSC to divest some of Orscheln's corporate offices, distribution centers and some stores to Bogmaars, a competing Iowa-based farm store chain, and other stores to Buchheit, a competing Missouri-based farm store chain. In addition to the usual confidentiality requirements included in consent orders, the TSC consent order requires TSC to ensure physical separation of the teams supporting Tractor Supply's stores, the stores being divested to Bomgaars, and the stores being divested to Buchheit, and technical separation of the data used by each team. The order also requires TSC to obtain prior approval from the Commission before acquiring any other farm stores within 60 miles of each Orscheln store being divested. The final order was approved in a 4-0 vote of the Commission on December 9, 2022.[38]

On October 14, 2022, the FTC voted 5-0 to approve a final order concerning JAB Consumer Partners SCA SICAR's ("JAB") $1.1 billion acquisition of the veterinary firm Ethos Veterinary Health LLC.[39] The consent decree requires JAB to (i) divest six veterinary clinics in California and Texas; (ii) secure prior approval from the FTC to acquire certain veterinary clinics within 25 miles of another JAB-owned clinic in California and Texas; and (iii) provide the FTC with prior notice of an acquisition of certain veterinary clinics within 25 miles of another JAB-owned clinic anywhere in the United States.

On November 22, 2022, the FTC further modified a consent order concerning the 2018 merger of industrial gas suppliers Praxair, Inc. and Linde AG.[40] The order requires the two entities to sell assets in nine industrial gases product markets[41] in numerous U.S. geographic markets to four divestiture buyers. The order had been previously modified by the FTC in 2019. Though the specific modifications were not disclosed, Commissioner Slaughter issued a brief statement, joined by Chair Khan, noting that "orders with numerous, complicated, and long-standing entanglements like this one are strongly disfavored" and that the "history of this consent order and the multiple modifications that have been necessary demonstrate why such orders are currently and will continue to be disfavored."[42]

On December 22, 2022, the FTC voted 3-1 to block Microsoft Corporation's ("Microsoft") proposed acquisition of Activision Blizzard, Inc. ("Activision").[43] Microsoft sells the XBOX gaming console, and the XBOX Game Pass and XBOX Cloud Gaming subscription services. Activision publishes popular gaming franchises, including *Call of Duty*, *Diablo* and *Overwatch*. In an administrative complaint, the FTC alleges that the deal would substantially reduce competition in the markets for high-performance gaming consoles, multi-game content library subscription services and cloud gaming subscription services. The FTC asserts that the acquisition will incentivize Microsoft to disadvantage competitors of XBOX, XBOX Game Pass and XBOX Cloud Gaming, Microsoft's offerings in each of the relevant markets, by withholding or degrading Activision franchises on competing platforms. The FTC further alleges that Microsoft's past conduct suggests it will likely act to withhold or degrade Activision content, pointing to Microsoft's decision to make certain ZeniMax (a game publisher purchased by Microsoft in March 2021) franchises exclusive to the XBOX ecosystem despite statements made by Microsoft to European regulators that it had no incentive to do so.

Department of Justice Antitrust Division

On October 31, 2022, Judge Florence Y. Pan of the U.S. Circuit Court of Appeals for the D.C. Circuit [44] issued a permanent injunction blocking Penguin Random House LLC's proposed acquisition of Simon & Schuster, Inc.[45] The Court accepted the DOJ's proposed relevant market—the market for the sale of publishing rights for anticipated top-selling books—and found that the post-merger entity's share of that market would exceed 49%, with the top four firms possessing a combined share of 91%.[46] The Court also noted that the DOJ "buttressed its market-share analysis with strong evidence of likely unilateral and coordinated effects that would hurt competition", while finding that the defendants had not "presented admissible evidence of efficiencies or any other evidence that changes the Court's view of the competitive landscape." On November 21, 2022, the parties announced that they would not appeal Judge Pan's decision.[47]

03

Activism[48]

In January 2023, Lazard released its Review of Shareholder Activism – 2022 (the "Lazard Report"), which offers key observations regarding activist activity levels and shareholder engagement in 2022.

Key findings/insights from the Lazard Report include:

- Activism in 2022 saw a significant spike, with 235 new campaigns launched globally, representing a ~36% increase from 2021 and making 2022 the busiest year for activism since 2018. In Q4 2022, 65 new campaigns were launched globally, representing a ~30% increase from Q4 2021 and marking the fourth consecutive quarter of year-over-year increased activity.
- United States activism continued to account for the largest share of global activity with 135 new campaigns in 2022, representing a ~41% increase from 2021 and accounting for ~57% of all activist campaigns in 2022.
- In 2022, Europe registered 60 activist campaigns, representing a ~20% increase from 2021 and accounting for ~26% of all activist campaigns in 2022.
- Approximately 41% of all activist campaigns in 2022 featured an M&A-related objective, down from ~43% in 2021. Activity was bolstered by an increase in break-up demands in Q4 2022.
- Technology companies continued to be the most frequently targeted companies in 2022, accounting for ~21% of new activist targets.

TRENDS

Activism Increased in 2022 with More Board Seats Secured by Activists

2022 saw a spike in campaigns initiated compared to 2021, with 235 new campaigns, a ~36% increase from 173 campaigns in 2021. Each quarter of 2022 saw a material spike in campaigns initiated compared to the corresponding quarter of 2021, resulting in the busiest year for activism since 2018. Q4 2022 was the second busiest quarter for activism in the last four years, trailing only Q1 2022. Sixty-five new campaigns were launched globally in Q4 2022, which represents a ~30% increase from Q4 2021.

In 2022, 108 board seats in total were secured by activists, a ~21% increase compared with 89 board seats won by activists in 2021.

Approximately 41% of all activist campaigns in 2022 were related to M&A, down from ~43% in 2021. Activity was bolstered by an increase in break-up demands in Q4 2022, as investors became increasingly focused on the strategic logic behind keeping disparate businesses together. "Sell the company" demands were the most common M&A theme of activist campaigns in 2022, accounting for ~14% of all activist campaigns.

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

The uptick in U.S. activism activity continued to rebound through 2022, as 135 U.S. campaigns accounted for ~57% of the global campaigns during 2022. This represented a ~41% increase compared to 2021, in which 96 campaigns accounting for ~55% of global campaigns were launched. In Q4 2022, the United States registered 39 new campaigns, representing ~60% of new campaigns and a ~34% increase from the 29 campaigns registered in Q4 2021.

European activity also saw an uptick during 2022. There were 60 campaigns across Europe in 2022, up from 50 campaigns during 2021, accounting for ~26% of global activity and a year-over-year increase of ~20%. In Q4 2022, Europe registered 15 new activist campaigns, representing ~23% of new campaigns and a ~6% decrease from the 16 campaigns registered in Q4 2021.

SELECT CAMPAIGNS/ DEVELOPMENTS[49]

On October 13, 2022, Mueller Water Products, Inc. ("Mueller") entered into a cooperation agreement with Ancora Advisors LLC pursuant to which Mueller agreed to temporarily increase the size of its board to 11 members and appointed Brian Slobodow as a director and Niclas Ytterdahl as an observer. Pursuant to the agreement, Ytterdahl will also serve on the board no later than five business days following the company's 2023 annual meeting. Mueller also announced the formation of a capital allocation and operations committee, and an accelerated process that would continue board refreshment over the next three years in order to align the board's experience and skills with the strategic direction of the company.

On December 6, 2022, Pinterest, Inc. ("Pinterest") entered into a cooperation agreement with Elliott Management Corporation ("Elliott") pursuant to which Pinterest appointed Elliott's representative Marc Steinberg as a Class I director of the board, effective December 16, 2022. Additionally, Pinterest stated that it would nominate Steinberg for reelection at the company's 2023 annual meeting. Pursuant to the agreement, Elliott also agreed to certain voting commitments and standstill restrictions that last until the company's 2026 annual meeting.

On December 13, 2022, Crown Holdings, Inc. entered into a director appointment and nomination agreement with Carl C. Icahn pursuant to which Jesse Lynn and Andrew Teno, two Icahn affiliates, would be appointed as director representatives of Icahn and stand for election at the company's 2023 annual meeting. Pursuant to the agreement, Icahn agreed to certain standstill restrictions.

On December 15, 2022, Fidelity National Information Services, Inc. ("Fidelity") entered into a cooperation agreement with D.E. Shaw & Co. LP ("D.E. Shaw") pursuant to which Fidelity appointed Mark Ernst as a new member to its board and compensation committee. D.E. Shaw also agreed to certain voting commitments and Fidelity announced it would commence a comprehensive assessment of its businesses intended to increase shareholder value and enhance client services. Fidelity reported that its CEO and Chairman would step down from his role and be replaced with Fidelity's President, Stephanie L. Ferris. Both parties agreed to certain standstill provisions lasting through the 2024 annual meeting.

On December 16, 2022, Diffusion Pharmaceuticals Inc. ("Diffusion") entered into a binding settlement agreement with LifeSci Capital LLC ("LifeSci") pursuant to which LifeSci agreed to withdraw its nomination notices at the 2022 annual meeting and to vote all of its shares in favor of the nominees recommended by the board. LifeSci also agreed to irrevocably withdraw its demand to review Diffusion's books and records. In exchange, Diffusion agreed that, if it does not complete an "extraordinary" transaction prior to July 1, 2023 and LifeSci collectively owns at least 96,976 of Diffusion's outstanding shares, Diffusion will promptly appoint one of LifeSci's nominees to the board.

04

Corporate Governance

PROXY ADVISOR UPDATES

ISS Benchmark Policy Updates[50]

Institutional Shareholder Services ("ISS") provided benchmark changes to its proxy voting guidelines, which will generally be applied for shareholder meetings on or after February 1, 2023.

BOARD GENDER DIVERSITY

As previously announced, the ISS policy to recommend generally voting against or withholding from the nominating chair (or on a case-by-case basis other directors) if there are no women on the board, barring some exceptions, now applies to all companies and not just those in the Russell 3000 and S&P 500.

POISON PILLS

The ISS voting guidelines will continue to recommend generally voting against or withholding from the nominees (1) if the company has a poison pill with a deadhand or slowhand feature, or (2) if the company has a long-term (over one year) poison pill, or (3) if the board makes an adverse modification to an existing poison pill. However, the ISS policy will be to recommend voting on a case-by-case basis if the board adopts an initial short-term poison pill (less than one year) without shareholder approval upon considering other factors (*e.g.*, trigger, rationale for adoption, etc.).

UNEQUAL VOTING RIGHTS

As previously announced, the new ISS policy will recommend generally voting against or withholding from directors, committee members or the entire board (except for new nominees who are considered on a case-by-case basis) if the company maintains unequal voting rights in their common stock structure. The policy noted that exceptions to this policy will be generally limited to four situations.[51]

PROBLEMATIC GOVERNANCE STRUCTURES

ISS has clarified that its policy for the problematic governance structures of newly public companies applies to companies that had their first annual stockholder meeting after February 1, 2015 and specified that the mitigating factor of a sunset provision only applies to those that sunset within seven years after the company goes public.

UNILATERAL BYLAW AND CHARTER AMENDMENTS AND PROBLEMATIC CAPITAL CHARTERS

The new ISS policy added other considerations for when to recommend generally voting against directors (except for new nominees who are considered on a case-by-case basis), namely if the board adopted a fee-shifting provision or another provision deemed egregious.

CLIMATE ACCOUNTABILITY

ISS's climate accountability policy to recommend generally voting against or withholding from an incumbent chair of the committee responsible for climate oversight if the company fails to follow minimum steps laid out by ISS (*e.g.*, detailing disclosure of climate-related risks, setting appropriate greenhouse gas ("GHG") emissions reduction targets) generally remains the same. However, ISS policy now defines an "appropriate GHG emissions reductions target" as medium-term GHG reduction targets or Net Zero-by-2050 GHG reduction targets for Scope 1 (*i.e.*, a company's operations) and Scope 2 (*i.e.*, electricity usage) and notes that targets should cover the vast majority of direct emissions.

DIRECTOR AND OFFICER INDEMNIFICATION, LIABILITY PROTECTION AND EXCULPATION

ISS's policy to make a recommendation on a case-by-case basis on director and officer indemnification and liability protection proposals now extends to exculpation. Additionally, although ISS previously noted proposals that it would recommend voting against, the ISS policy will now consider the rationale for the listed proposals and other factors rather than imposing a bright-line policy of recommending voting against certain types of proposals.

RACIAL EQUITY/CIVIL RIGHTS AUDITS

Citing the increased shareholder support of racial equity/civil rights audit proposals, ISS has updated the criteria for the recommended case-by-case voting analysis of such proposals. The new policy no longer takes into account whether the company's actions are aligned with market norms on civil rights and racial/ethnic diversity. The new policy adds a new consideration which is whether the company adequately discloses workforce diversity and inclusion metrics and goals.

POLITICAL EXPENDITURES AND LOBBYING CONGRUENCY

As the number of shareholder proposals requesting the transparency of companies' political activities has risen, ISS has created a new policy noting that it will recommend generally voting on a case-by-case basis on proposals that ask for disclosure of how a company's political expenditures and lobbying align with its publicly stated values and policies and outlining factors it will consider. Additionally, ISS will recommend generally voting on a case-by-case basis on proposals that ask how a company's political spending align with reducing material risks for a company (*e.g.*, climate change risk).

OTHERS

ISS has also updated its policy with respect to amending quorum requirements and various compensation matters, including (1) problematic pay practices, (2) value-adjusted burn rates for equity-based and other incentive plans and (3) environmental, social and governance compensation-related proposals. ISS has also added new policies on share issuance mandates at U.S. domestic issuers incorporated outside the United States.

Glass Lewis Policy Guidelines Updates[52]

Glass Lewis ("GL") updated its policy guidelines and are effective for shareholder meetings held on or after January 1, 2023.

BOARD GENDER DIVERSITY

As previously announced, GL has moved from a fixed number to a percentage approach and will now generally recommend voting against the nominating chair of a board with less than 30% gender diversity for companies in the Russell 3000. Note that the policy requiring one gender diverse director remains for companies outside the Russell 3000. When making a voting recommendation, GL will review diversity disclosures and may choose not to make a negative recommendation if a board has provided adequate rationale to account for its lack of board gender diversity and a timeline to rectify the issue.

UNDERREPRESENTED COMMUNITY DIVERSITY

GL will generally recommend voting against the nominating chair of a board with fewer than one director from an underrepresented community (*i.e.*, an individual who identifies as Black, African American, North African, Middle Eastern, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, Alaskan Native, gay, lesbian, bisexual or transgender) for companies in the Russell 1000. When making a voting recommendation, GL will review diversity disclosures and may choose not to make a negative recommendation if a board has provided adequate rationale to account for its lack of board underrepresented community diversity and a timeline to rectify the issue.

STATE LAWS ON DIVERSITY

For companies headquartered in California where GL previously provided a recommendation regarding compliance with California Senate Bill 826 and Assembly Bill 979, GL will not provide recommendations on compliance with board composition requirements as the appeals process regarding the laws' violation of the equal protection clause of the California constitution continues.

DIVERSITY AND SKILLS DISCLOSURE

GL will generally recommend voting against the nominating and/or governance chair of Russell 1000 companies that do not provide any disclosure of GL's tracked categories (*e.g.*, percentage of racial/ethnic diversity, inclusion of gender and/or race/ethnicity in board's definition of diversity, adoption of a "Rooney Rule"). GL will also generally recommend voting against the governance chair of Russell 1000 companies that do not provide disclosure of individual or aggregate racial or ethnic minority demographic information.

BOARD OVERSIGHT OF ENVIRONMENTAL AND SOCIAL ISSUES

GL will generally recommend voting against the governance chair of Russell 1000 companies that do not provide explicit disclosure of the board's oversight role of environmental and social issues. GL will also track Russell 3000 companies' board oversight of environmental and social issues. GL will look to a company's proxy statement and governing documents (such as committee charters) for evidence of such oversight.

DIRECTOR COMMITMENTS

GL will generally recommend voting against directors who serve as an executive officer (other than an executive chair) of a public company while also serving on the board of more than one external public company; directors who serve as an executive chair of a public company while also serving on the board of more than two external public companies; and directors who serve on more than five public company boards.

CYBER RISK OVERSIGHT

In light of increased regulatory attention to cyber risk oversight, GL will monitor a company's disclosure of cyber risk oversight when cyber attacks have caused significant harm to shareholders and may recommend voting against directors if such disclosure or oversight is inadequate.

BOARD ACCOUNTABILITY FOR CLIMATE-RELATED ISSUES

GL may recommend voting against relevant directors if companies with material exposure to climate risk fail to provide disclosures that align with the Task Force on Climate-Related Financial Disclosures ("TCFD") or maintain clearly defined board oversight roles for climate-related issues.

OFFICER EXCULPATION

For companies that plan to amend their certificate of incorporation to provide for an officer exculpation provision as a result of the newly amended Delaware General Corporation Law 102(b)(7), GL will review such proposals on a case-by-case basis but will generally recommend voting against if the proposed provision eliminates monetary liability for breaches of the duty of care unless the board provides a compelling rationale for the adoption and the proposed provision is reasonable.

LONG-TERM INCENTIVES

The minimum percentage threshold for performance-based long-term incentive grants that GL believes is appropriate has increased from 33% to 50%. GL may choose not to make a negative recommendation unless there are significant other issues with the executive pay program.

CLARIFYING AMENDMENTS

GL also clarified its policies on board responsiveness, compensation committee performance, company responsiveness for say-on-pay votes, one-time awards, grants of front-loaded awards, pay for performance, short- and long-term incentives and clawback policies.

ASSET MANAGER 2023 UPDATES

Blackrock 2023 Stewardship Expectations[53]

In December 2022, BlackRock published its annual report on investment stewardship. In 2023, BlackRock's stewardship policies are focused on (1) board quality and effectiveness, (2) strategy, purpose and financial resilience, (3) incentives aligned with value creation, (4) climate and natural capital and (5) company impacts on people. BlackRock noted that it does not expect material changes to its voting and will continue upon the engagement and dialogue with companies on material risks and opportunities. BlackRock modified its 2023 Global Principles in two ways. First, it continues to recommend that companies report material sustainability-related risks and opportunities and notes that recommendations of TCFD may be helpful, although BlackRock also recognizes that companies may be required to use other standards by regulation or may elect to use other private sector standards. Second, BlackRock is recommending companies plan ahead to produce their climate and sustainability-related disclosures prior to their annual meeting, understanding that companies require sufficient time to collect, analyze and report on year-end data.

ACCOUNTING UPDATES

PCAOB Receives Full Access to Inspect and Investigate China- and Hong Kong-Headquartered Registered Public Accounting Firms[54]

On December 15, 2022, the Public Company Accounting Oversight Board ("PCAOB") established that it has secured complete access to inspect and investigate China- and Hong-Kong-headquartered registered public accounting firms. This is the first time in history that the PCAOB has received such access and allowed the PCAOB to vacate its prior determinations that authorities in mainland China and Hong Kong had prevented the PCAOB's inspections as required by its mandate under the Sarbanes-Oxley Act of 2002. PCAOB Chair Erica Williams attributed the monumental progress in part to the Holding Foreign Companies Accountable Act of 2020, which provided that if the PCAOB determined 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 prevented from trading on U.S. markets. In determining that it received full access, the PCAOB noted it was able to select which firms, audit engagements and potential violations to inspect and investigate in its sole discretion and without interference from authorities of the People's Republic of China. Additionally, its inspectors and investigators were allowed to review unredacted materials and retain necessary information and it had the capacity to interview and take testimony from personnel.

SEC's Acting Chief Accountant Discusses Accounting for Obligations to Safeguard Crypto Assets[55]

On November 18, 2022, the Securities and Exchange Commission's (the "SEC") Acting Chief Accountant Paul Munter wrote an Op-Ed in the *Wall Street Journal* following the crash of FTX Trading Ltd., a cryptocurrency exchange and hedge fund. He noted that the SEC has provided issuers with guidance on how to account for obligations to safeguard crypto assets that it holds for others[56]; this allows investors to better understand their investment decisions as an issuer's obligations are reflected on the balance sheet. However, Munter points out that "SEC staff guidance about disclosure obligations is useful only to market participants that are interested in complying with the securities laws in the first place." He states that most firms comply with guidance and work with regulators, while a select few "have no interest in serving their investors at all, and those firms often run afoul of far more than accepted accounting practices...[which is] not a failure of staff accounting guidance; that's a failure of corporate governance."

SEC UPDATES

OIG Releases Report on SEC's Management and Performance Challenges to SEC Chair Gensler[57]

On October 13, 2022, the Office of Inspector General (the "OIG") released a report on the SEC's Management and Performance Challenges for fiscal year 2022. Of note, the SEC's regulatory agenda and rulemaking activity has drastically increased. In particular, the OIG pointed out that in just the first eight months of 2022, the SEC proposed twice as many rules as in the prior year and more than it had proposed in each of the prior five years. Some SEC staff believed the aggressive rulemaking agenda "potentially (1) limits the time available for staff research and analysis, and (2) increases litigation risk." Additionally, the increased staff needed for rulemaking teams has taken away resources from other SEC mission-related work. Furthermore, some SEC staff attributed the SEC's increased attrition rate and difficulty with hiring individuals to the intensified rulemaking agenda. In fiscal year 2022, the SEC had its highest attrition rate in 10 years of 6.4% – this included an attrition rate of 20.8% for Senior Officers and 8.4% for attorney positions. Note that the SEC plans to recruit and hire 454 new positions in fiscal year 2023, which would bring the SEC's total staff to 5,261.

OIG Releases Semiannual Report to Congress[58]

The OIG released its Semiannual Report to Congress for the dates April 1, 2022 to September 30, 2022. In the report, the OIG recommended that the SEC's Office of the Advocate for Small Business Capital Formation's programs and operations be bolstered, with a specific emphasis on creating performance measures for activities and amending its policies and procedures. Additionally, the OIG noted that it would be beneficial for the Office of the Chair to consider informing the Office of the Advocate for Small Business Capital Formation and the Office of the Investor Advocate prior to making any changes to the SEC rulemaking process that may impact those offices.

Comment Period Reopened for Several SEC Rulemaking Releases[59]

On October 7, 2022, the SEC reopened the comment period for 11 SEC rulemaking releases and one request for comment as a result of technological glitches that caused the SEC to not receive several public comments submitted on the SEC's internet comment form.[60] The SEC noted that most errors occurred in August 2022, but the problem had been occurring since as early as June 2021. The comment period for each affected rulemaking releases was reopened for 14 days after the publication of the reopening release in the Federal Register.

SEC Adopts Rules for Mandatory Clawback Policies[61]

On October 26, 2022, the SEC adopted final rules implementing the clawback provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The final rules will require national securities exchanges and national securities associations to establish listing standards which will require all listed companies to develop and implement policies to provide for the recovery of "erroneously awarded" incentive-based compensation received by current or former executive officers where such compensation is based on erroneously reported financial information and an accounting restatement is required (a "clawback policy"). Additionally, listed companies will be required to provide disclosures about their clawback policy and how it is implemented. Given that the listing standards established by the national securities exchanges and national securities associations must be effective within one year after the final rule is published in the Federal Register and a listed company must adopt its clawback policy within 60 days after the established listing standard becomes effective and comply with disclosure requirements in its proxy, information statements and annual reports filed on or after the effective date of the established listing standards, in practice, full effectiveness of the final rules may not occur until late 2023 or 2024.

SEC Provides Additional Compliance and Disclosure Interpretations for Universal Proxy Card Rules[62]

On December 6, 2022, the SEC Division of Corporation Finance provided additional Compliance and Disclosure Interpretations ("CDIs") for Proxy Rules and Schedules 14A/14C by including CDI questions 139.04, 139.05 and 139.06 to provide guidance on Rule 14a-19.

- CDI Question 139.04 clarifies that only candidates that were duly nominated are required to be included on any proxy card. Thus, if a dissident shareholder fails to comply with the company's advance notice bylaw requirements, the registrant does not need to include the dissident's nominees on its proxy card.
- CDI Question 139.05 provides that if a registrant finds the dissident shareholder's director nominations are invalid and the dissident shareholder proceeds to challenge such finding via litigation, the registrant's proxy statement must disclose that the dissident shareholder's director nomination was invalid and the basis for such finding, that there is ongoing litigation challenging the registrant's finding and implications if the dissident shareholder's director nominations are found valid through litigation. If the dissident shareholder's nominations are found to be valid and the registrant failed to include those candidates in its proxy cards, the registrant will need to discard its previous proxy cards, redistribute the new proxy cards with the dissident shareholder's nominees and take other appropriate action (*e.g.*, postpone or

adjourn the shareholder meeting) to provide shareholders with requisite time to receive and vote on the updated proxy card.

- CDI Question 139.06 notes that a dissident shareholder that is conducting a non-exempt solicitation in support of its own nominees cannot file a proxy statement on EDGAR and rely solely on the registrants' proxy card in order to avoid providing its own proxy card.

Comment Period Reopened for Rules on Share Repurchase Disclosure Modernization[63]

On December 7, 2022, the SEC published supplemental analysis[64] related to, and reopened the comment period for the second time for, its proposal to modernize and improve disclosures of share repurchases as a result of the enactment of the Inflation Reduction Act of 2022. The new law levies a non-deductible excise tax equal to one percent of the fair market value of the company's stock that it repurchases for certain corporations. The SEC believes the new tax will have potential economic effects on its proposed rule (*e.g.*, companies may choose to declare a dividend rather than utilize a repurchase in order to return money to stockholders), which were initially proposed in December 2021 prior to the new excise tax. The comment period was previously reopened on October 7, 2022 as a result of the technical errors with the SEC's internet comment form and the comment period closed on November 1, 2022. The second reopened comment period closed on January 11, 2023.

SEC Releases Sample Letter on Recent Developments in Crypto Asset Markets[65]

In light of ongoing bankruptcies and financial risks that have plagued crypto asset market participants and caused distress in the crypto asset markets, on December 8, 2022, the SEC's Division of Corporation Finance released an illustrative letter containing sample comments that it may issue to companies who are directly or indirectly impacted by such events. For example, the Division of Corporation Finance has asked, if applicable, for companies to disclose:

- significant crypto market asset developments that are material to an issuer's business, financial condition and results of operation and share price, including any impact that can be attributed to the price volatility of crypto assets;
- how bankruptcies of any crypto asset market participants have impacted or may impact, directly or indirectly, the issuer's business, financial condition, customers and counterparties, including if any material assets may fail to be recovered, or be lost or misappropriated as a result of bankruptcies;
- any exposures, direct or indirect, to other companies, customers, custodians or other crypto asset market participants who are in the midst of a bankruptcy, have experienced excessive or suspended redemptions of crypto assets, have unaccounted crypto assets or have experienced material corporate compliance failures;
- steps taken to safeguard the issuer's customers' crypto assets, including any policies or procedures to prevent self-dealing, conflicts of interests and commingling of assets and any changes made to such policies or procedures in light of the current crypto asset environment;
- any excessive redemptions or withdrawals of crypto assets, including any related suspensions, and its potential impact on the issuer's financial condition and liquidity;
- whether crypto assets serve as collateral for loans, margins, rehypothecations or similar

activities that the issuer or its affiliates are a party to and if so, the identity and quantity of the crypto assets used in the arrangement, as well as the nature of the relationship with the other parties and any encumbrances on the collateral;

- whether crypto assets that have been issued serve as collateral for another person's or entity's loans, margins, rehypothecations or similar activities and if so, whether the current crypto asset environment has impacted the value of the collateral and its potential impact on the issuer's financial condition and liquidity; and
- risk factors as a result of the current crypto asset environment, such as material risks arising from:
  - excessive or suspended redemptions or withdrawals of crypto assets;
  - reputational harm, including how the issuer's business is perceived by customers, counterparties and regulators;
  - unauthorized or impermissible customer access to products and services outside jurisdictions in which the issuer has obtained the requisite government licenses and authorizations;
  - regulatory developments, including material pending crypto asset regulation and legislation that may have a material impact on the issuer's business financial condition and results of operation;
  - any assertion of jurisdiction by regulators and government entities over the issuer's crypto assets and markets;
  - failing to safeguard the issuer's, its affiliates' or its customers' crypto assets, including the impact of any ineffective policy or procedure to prevent self-dealing, conflicts of interests and commingling of assets;
  - gaps that the issuer's board of directors or management has identified in the risk management of crypto assets;
  - using crypto assets as collateral, either by the issuer or others; and
  - depreciation in the issuer's stock price, loss in customer demand for products and services, equity and debt financing, increased losses or impairments of the issuer's investments or assets, legal proceedings and government investigations against the issuer or its affiliates and price volatility of crypto assets.

SEC Provides Additional Compliance and Disclosure Interpretations for Non-GAAP Financial Measures[66]

On December 13, 2022, the SEC Division of Corporation Finance updated its CDIs for Non-GAAP Financial Measures by amending CDI questions 100.01, 100.04 and 102.10(a) and providing new CDI questions 100.05, 100.06, 102.10(b) and 102.10(c).

- CDI Question 100.01 clarifies that presenting a non-GAAP performance measure that excludes normal, recurring, cash operating expenses necessary to operate an issuer's business is an example of an adjustment, that although not explicitly prohibited, could result in a non-GAAP measure that is misleading.
- CDI Question 100.04 notes that a non-GAAP measure can violate Rule 100(b) of Regulation G if the recognition and measurement principles used to calculate the measure are inconsistent with GAAP, and provides examples of such misleading presentations.
- CDI Question 100.05 provides that a non-GAAP measure can be misleading if any

adjustment made to it or the GAAP measure is not labeled or described.

- CDI Question 100.06 states that a non-GAAP measure can violate Rule 100(b) of Regulation G and be misleading, even if it includes extensive, detailed disclosure about the nature and effect of each adjustment made to the most directly comparable GAAP measure.
- CDI Question 102.10(a) is amended to provide new examples of disclosure where a non-GAAP measure would be more prominent than the most directly comparable GAAP measure, which would violate Item 10(e)(1)(i)(A) of Regulation S-K which requires an issuer that presents a non-GAAP measure to present the most directly comparable GAAP measure with equal or greater prominence.
- CDI Question 120.10(b) offers examples of disclosures that would cause the non-GAAP reconciliation to be more prominent than the most directly comparable GAAP measure, which would violate Item 10(e)(1)(i)(A) of Regulation S-K.
- CDI Question 120.10(c) explains that the SEC staff will consider an income statement that is comprised of non-GAAP measures and includes most or all line items and subtotals typically found in a GAAP income statement to be a non-GAAP income statement.

These CDIs generally reflect positions taken by the Division of Corporation Finance in recent comment letters, meetings and speeches, though the new CDIs (particularly CDI questions 100.01 and 100.06) may have a significant effect on the ability of some registrants to make non-GAAP adjustments in the same manner they have previously.

SEC Adopts Amendments to Rule 10b5-1 and Adds Insider Trading-Related Disclosures[67]

On December 14, 2022, the SEC adopted final rules to amend Rule 10b5-1 and provide additional conditions to reliance on the affirmative defense provided by that rule to violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The final rules also impose new disclosure requirements on public companies to (1) describe and file their insider trading policies, (2) provide additional narrative and tabular disclosure about compensatory incentive awards in certain situations and (3) disclose information about the use of Rule 10b5-1 plans and other trading arrangements by officers and directors on a quarterly basis. Lastly, the final rules add a mandatory check box to Forms 4 and 5 to require reporting insiders to indicate whether the transaction is pursuant to a plan intended to satisfy the Rule 10b5-1 affirmative defense and mandate the disclosure of bona fide gifts of securities to be reported on Form 4. The amendments to Rule 10b5-1 will be effective on February 27, 2023. The new Item 408 of Regulation S-K which requires disclosure of insider trading policies and the new Item 402(x) of Regulation S-K which requires disclosure related to compensatory incentive awards are effective in the first filing that covers the first full fiscal period that begins on or after April 1, 2023 for companies other than smaller reporting companies. In practice, this means that for companies with calendar year end, disclosure about insiders' use of Rule 10b5-1 plans and other trading arrangements will be required in the Form 10-Q filed for the second quarter of 2023 and disclosure of insider trading policies and compensatory incentive awards will be required in the Form 10-K covering fiscal year 2023 and the 2024 proxy statement, in each case to be filed in 2024. Section 16 reporting persons must disclose the bona fide gifts of securities on Form 4 for gifts made on or after February 27, 2023. The disclosure requirement upon Section 16 reporting persons to check a box indicating if the transaction is related to a 10b5-1 trading plan is effective for Forms 4 or 5 filed on or after April 1, 2023.

SEC Approves New Compliance Dates for NASDAQ Board Diversity Rules[68]

On December 14, 2022, the SEC posted a notice to declare NASDAQ's proposed amendments to the compliance dates for its board diversity rules effective. The date upon which companies listed on the NASDAQ Global Select Market and NASDAQ Global Market and NASDAQ Capital Market are required to have, or explain why they do not have, at least one diverse director pursuant to Rule 5605(f)(7)(A) is moved to December 31, 2023 and at least two diverse directors pursuant to Rule 5605(f)(7)(B) is moved to December 31, 2025. The date upon which companies listed on the NASDAQ Capital Market are required to have, or explain why they do not have, at least one diverse director pursuant to Rule 5605(f)(7)(A) is moved to December 31, 2023 and at least two diverse directors pursuant to Rule 5605(f)(7)(C) is moved to December 31, 2026. The deadline upon which a company should provide its annual matrix disclosure pursuant to Rule 5606(e) is now set to December 31 of each year.

PERSONNEL ANNOUNCEMENTS

On December 22, 2022, General Counsel Dan Berkovitz announced he will depart the SEC, effective as of January 31, 2023.[69] Megan Barbero, the current SEC Principal Deputy General Counsel, will be named the new SEC General Counsel once Mr. Berkovitz's departs. Ms. Barbero has worked at the SEC since July 2021 and previously served as the Deputy General Counsel for the U.S. House of Representatives and as an attorney for the U.S. Department of Justice Civil Appellate staff.

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 Press Release, *Treasury Releases CFIUS Enforcement and Penalty Guidelines*, CFIUS (Oct. 20, 2022), https://home.treasury.gov/news/press-releases/jy1037.

4 Policy Issues, *CFIUS Enforcement and Penalty Guidelines*, CFIUS, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-enforcement-and-penalty-guidelines.

5 Press Release, *Treasury Releases CFIUS Enforcement and Penalty Guidelines*, CFIUS (Oct. 20, 2022), https://home.treasury.gov/news/press-releases/jy1037.

6 Cravath Quarterly Review*,* 4.1 (2022) at 17 – 21 https://www.cravath.com/a/web/53FwrBdskt2FXHQaExe1pF/3WMRyX/cravath-manda-activism-and-corporate-governance-quarterly-review-2022-q1.pdf.

7 Press Release, *Readout: Deputy Secretary of the Treasury Wally Adeyemo's Trip to Europe* (Nov. 10, 2022), https://home.treasury.gov/news/press-releases/jy1092; *see also* https://home.treasury.gov/news/press-releases/jy1114.

8 *See* Committee on Appropriation of the House and Senate, *Division E - Financial Services and General Government Appropriations Act, 2023* (introduced June 28, 2022), https://www.appropriations.senate.gov/imo/media/doc/Division%20E%20-%20FSGG%20Statement%20FY23.pdf at 3; *see also* https://www.appropriations.senate.gov/imo/media/doc/Division%20B%20-%20CJS%20Statement%20FY23.pdf at 59.

9 *See* Form 8-K, *F-Star Therapeutics, Inc.*, SEC (Dec. 29, 2022), https://www.sec.gov/ix?doc=/Archives/edgar/data/1566373/000119312522314185/d421497d8k.htm.

10 *See* Form 8-K, *F-Star Therapeutics, Inc*, SEC (Dec. 20, 2022), https://www.sec.gov/ix?doc=/Archives/edgar/data/1566373/000119312522309500/d439272d8k.htm.

11 Global Newswire, *Borqs to Establish with the U.S. Government a Plan to Divest its Ownership of Holu Hou Energy Due to Deemed Critical Technology* (Dec. 19, 2022), https://www.globenewswire.com/news-release/2022/12/19/2576679/0/en/Borqs-to-Establish-with-the-U-S-Government-a-Plan-to-Divest-its-Ownership-of-Holu-Hou-Energy-Due-to-Deemed-Critical-Technology.html

12 *Id.*

13 Knox Radio, *Fufeng 'looks forward' to building GF plant after CFIUS says it has 'no jurisdiction'* (Dec. 13, 2022), https://knoxradio.com/2022/12/13/fufeng-looks-forward-to-building-gf-plant-after-cfius-says-it-has-no-jurisdiction/

14 *See* Governor Doug Burgum, *Requested CFIUS review of Fufeng Group land purchase in North Dakota* (July 25, 2022), https://www.governor.nd.gov/sites/www/files/documents/Gov.%20Burgum%20letter%20urging%20expedited%20CFIUS%20review%2007.25.2022.pdf.

15 *See* Letter to Secretary Janet Yellen and Lloyd Austin, Senators Marco Rubio, John Hoeven and Kevin Cramer (July 14, 2022), https://www.hoeven.senate.gov/imo/media/doc/07.14.22%20Rubio-Hoeven-Cramer%20Letter%20to%20Yellen%20and%20Austin%20re%20Fufeng%20CFIUS.pdf.

16 *See* Public Statement, *Sen. Cramer Discusses CFIUS, Fufeng on Newsmax* (Dec. 15, 2022), https://www.cramer.senate.gov/news/press-releases/sen-cramer-discusses-cfius-fufeng-on-newsmax; *see also* Press Release, *Rubio Slams CFIU's Refusal to Take Action Regarding Fufeng Farmland Purchase* (Dec. 14, 2022), https://www.rubio.senate.gov/public/index.cfm/2022/12/rubio-slams-cfius-s-refusal-to-take-action-regarding-fufeng-farmland-purchase.

17 *In re: Voyager Digital Holdings, Inc., et al., U.S. Bankruptcy Court of SDNY*, Case No. 22-1094-MEW (Dec. 30, 2022), https://cases.stretto.com/public/x193/11753/PLEADINGS/1175312302280000000059.pdf

18 *Id*. at 1.

19 *Id.* at 1-2.

20 *See* Cision PR Newswire, *Voyager Announces Agreement for Binance.US to Acquire Its Assets*, (Dec. 19, 2022), https://www.prnewswire.com/news-releases/voyager-announces-agreement-for-binanceus-to-acquire-its-assets-301706065.html.

21 Public Statement, *Speech by Governor Michelle W. Bowman at the Institute of International Finance (IIF) Event: In Conversation with Michelle Bowman, Washington, D.C. (virtual),* FRB (Sep. 30, 2022), https://www.federalreserve.gov/newsevents/speech/bowman20220930a.htm.

22 Public Statement, *Remarks by FDIC Acting Chairman Martin J. Gruenberg before the Senate Banking Committee on Oversight of Financial Regulators: A Strong Banking System for Main Street,* FDIC (Nov. 15, 2022), https://www.fdic.gov/news/speeches/2022/spnov1522.html.

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

24 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.

25 Generally, a member whose corporate group meets the AFSI threshold remains an "applicable corporation" subject to the CAMT indefinitely, with certain exceptions.

26 With respect to foreign-parented groups, the safe harbor threshold is (i) $500 million for the entire foreign group and (ii) $50 million for the relevant U.S. subgroup.

27 Press Release, *Justice Department and Federal Trade Commission Meet with Fellow G7 Enforcement Partners on Competition in Digital Markets*, DOJ (Oct. 12, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-justice-department-meet-fellow-g7-enforcement-partners-competition-digital-markets.

28 The G7 consists of Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States.

29 Press Release, *Justice Department, Federal Trade Commission and European Commission Hold Second U.S.-EU Joint Technology Competition Policy Dialogue*, DOJ (Oct. 13, 2022), https://www.justice.gov/opa/pr/justice-department-federal-trade-commission-and-european-commission-hold-second-us-eu-joint

30 *Id.*

31 Press Release, *Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates*, DOJ (Oct. 19, 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially

32 Cravath, Swaine & Moore LLP*, FTC/DOJ Make Increasing Antitrust Scrutiny of Private Equity a Top Priority*, (Jul. 12, 2022), https://www.cravath.com/news/ftcdoj-make-increasing-antitrust-scrutiny-of-private-equity-a-top-priority.html.

33 Policy Statement, *Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, FTC (Nov. 10, 2022), https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission.

34 *Merger Filing Fee Modernization Act of 2021*, Congressional Budget Office (Sep. 28, 2022).

35 *See* Press Release, *FTC Proposed Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FTC (FTC (Jan. 5, 2023).

36 *See* Notice of Proposed Rulemaking, *Non-Compete Clause Rule*, Federal Register (Jan. 19, 2023).

37 Press Release, *FTC Approves Consent Order Addressing Concerns Over Tractor Supply's Acquisition of Orscheln Farm and Home*, FTC (Oct. 11, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-approves-consent-order-addressing-concerns-over-tractor-supplys-acquisition-orscheln-farm-home.

38 Press Release, *FTC Approves Final Order Preserving Farm Store Competition in the Midwest and the South*, FTC (Dec. 9, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-approves-final-order-preserving-farm-store-competition-midwest-south.

39 Press Release, *FTC Approves Final Order against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm's Rollup of Veterinary Services Clinics*, FTC (Oct. 14, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-approves-final-order-against-jab-consumer-partners-protect-pet-owners-private-equity-firms.

40 Press Release, *FTC Further Modifies 2019 Order Requiring Praxair, Inc. and Linde AG to Sell Assets in Nine Industrial Gases Product Markets*, FTC (Nov. 22, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-further-modifies-2019-order-requiring-praxair-inc-linde-ag-sell-assets-nine-industrial-gases.

41 The nine product market are: bulk liquid oxygen, bulk liquid nitrogen, bulk liquid argon, bulk liquid carbon dioxide, bulk liquid hydrogen, bulk refined helium, on-site hydrogen, on-site carbon monoxide, and excimer laser gases.

42 Public Statement, *Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina M. Khan, In the Matter of Linde AG*, FTC (Nov. 15, 2022), https://www.ftc.gov/system/files/ftc _ gov/pdf/RKS-Statement-on-Linde-Praxair-%281710068%29-Joined-by-Chair-Khan-FINAL.pdf.

43 Press Release, *FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.*, FTC (Dec. 8, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc.

44 Judge Pan was a judge of the District Court for the District of Columbia when the case was assigned, but was subsequently elevate to the Circuit Court by President Biden and sat by designation in deciding the case.

45 Press Release, *Justice Department Obtains Permanent Injunction Blocking Penguin Random House's Proposed Acquisition of Simon & Schuster*, DOJ (Oct. 31, 2022).

46 Opinion, *United States v. Bertelsmann SE & Co. KGaA et al.*, No. 21-2886-FYP (Oct. 31, 2022).

47 Press Release, *Assistant Attorney General Jonathan Kanter Issues Statement on Penguin Random House and Simon & Schuster's Decision to not Appeal*, DOJ (Nov. 21, 2022).

48 Unless otherwise indicated, all data regarding activism is from Lazard, *Review of Shareholder Activism - 2022* (Jan. 18, 2023), https://www.lazard.com/perspective/lazard-s-review-of-shareholder-activism-2022/, which includes data for campaigns conducted globally by activists at companies with market capitalizations greater than $500 million at the time of campaign announcement; companies spun off as part of campaign process counted separately.

49 All data regarding Select Campaigns is from FactSet Research Systems Inc. unless otherwise indicated.

50 ISS, *Americas Proxy Voting Guidelines Benchmark Policy Changes for 2023* (Nov. 30, 2022), https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf.

51 "Newly-public companies with a sunset provision of no more than seven years from the date of going public; Limited Partnerships and the Operating Partnership (OP) unit structure of REITs; Situations where the super-voting shares represent less than 5% of total voting power and therefore considered to be de minimis; or The company provides sufficient protections for minority shareholders, such as allowing minority shareholders a regular binding vote on whether the capital structure should be maintained."

52 Glass Lewis, *2023 Policy Guidelines* (Nov. 17, 2022), https://www.glasslewis.com/wp-content/uploads/2022/11/US-Voting-Guidelines-2023-GL.pdf.

53 BlackRock, *Investment Stewardship 2023 Policies Summary* (Dec. 2022), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-global-policies-summary-2023.pdf.

54 News Release, *PCAOB Secures Complete Access to Inspect, Investigate Chinese Firms for First Time in History*, PCAOB (Dec. 15, 2022), https://pcaobus.org/news-events/news-releases/news-release-detail/pcaob-secures-complete-access-to-inspect-investigate-chinese-firms-for-first-time-in-history.

55 Paul Munter, *SEC Chief Accountant Replies on FTX Crash*, The Wall Street Journal Opinion (Nov. 18, 2022), https://www.wsj.com/articles/sec-chief-accountant-ftx-crypto-crash-regulation-rule-guidance-11668724515.

56 *See* Staff Accounting Bulletin, *Staff Accounting Bulletin No. 121*, SEC (Mar. 31, 2022), https://www.sec.gov/oca/staff-accounting-bulletin-121.

57 Report, *The Inspector General's Statement on the SEC's Management and Performance Challenges*, SEC (Oct. 13, 2022), https://www.sec.gov/files/inspector-generals-statement-sec-mgmt-and-perf-challenges-october-2022.pdf.

58 Report, *Office of Inspector General Semiannual Report to Congress*, SEC (Oct. 2022), https://www.sec.gov/files/semiannual-report-congress-april-1-2022-through-september-30-2022.pdf.

59 Press Release, *SEC Reopens Comment Periods for Several Rulemaking Releases Due to Technological Error in Receiving Certain Comments*, SEC (Oct. 7, 2022), https://www.sec.gov/news/press-release/2022-186.

60 The affected topics were: (1) Reporting of Securities Loans, (Dec. 8, 2021); (2) Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions (Feb. 4, 2022); (3) Money Market Fund Reforms (Feb. 8, 2022); (4) Share Repurchase Disclosure Modernization (Feb. 15, 2022); (5) Short Position and Short Activity Reporting by Institutional Investment Managers (Mar. 16, 2022); (6) Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure (Mar. 23, 2022); (7) Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (Mar. 24, 2022); (8) The Enhancement and Standardization of Climate-Related Disclosures for Investors (Apr. 11, 2022); (9) Special Purpose Acquisition Companies, Shell Companies, and Projections (May 13, 2022); (10) Investment Company Names (June 17, 2022); (11) Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices (June 17, 2022); (12) Request for Comment on Certain Information Providers Acting as Investment Advisers (June 22, 2022).

61 Cravath, Swaine & Moore LLP, *SEC Adopts Rules for Mandatory Clawback Policies* (Nov. 7, 2022), https://www.cravath.com/news/sec-adopts-rules-for-mandatory-clawback-policies.html.

62 Compliance and Disclosure Interpretations, *Proxy Rules and Schedules 14A/14C*, SEC (last updated Dec. 6, 2022), https://www.sec.gov/corpfin/proxy-rules-schedules-14a-14c-cdi.

63 Press Release, *SEC Reopens Comment Period for Proposed Rule on Share Repurchase Disclosure Modernization*, SEC (Dec. 7, 2022), https://www.sec.gov/news/press-release/2022-216.

64 Memorandum*, Supplemental Analysis of the Potential Implications of the Recently Enacted Excise Tax on Share Repurchases for the Economic Effects of Share Repurchase Disclosure Modernization Amendments*, SEC Division of Economic and Risk Analysis (Dec. 7, 2022), https://www.sec.gov/comments/s7-21-21/s72121-20152424-320317.pdf.

65 Sample Letter, *Sample Letter to Companies Regarding Recent Developments in Crypto Asset Markets*, SEC (Dec. 8, 2022), https://www.sec.gov/corpfin/sample-letter-companies-regarding-crypto-asset-markets.

66 Compliance and Disclosure Interpretations, *Non-GAAP Financial Measures*, SEC (last updated Dec. 13, 2022), https://www.sec.gov/corpfin/non-gaap-financial-measures.

67 *Id*.

68 Cravath, Swaine & Moore LLP, *SEC Adopts Amendments to Rule 10b5-1 and Adds Insider Trading-Related Disclosures* (Dec. 20, 2022), https://www.cravath.com/news/sec-adopts-amendments-to-rule-10b5-1-and-adds-insider-trading-related-disclosures.html.

69 Release No. 34-96500, *Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Listing Rules 5605 and 5606*, SEC (Dec. 14, 2022), https://www.sec.gov/rules/sro/nasdaq/2022/34-96500.pdf.

70 Press Release, *SEC Announces Departure of Dan Berkovitz; Megan Barbero Named General Counsel*, SEC (Dec. 22, 2022), https://www.sec.gov/news/press-release/2022-235.

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