Cravath Quarterly Review
M&A, Activism and Corporate Governance

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Q2 2020

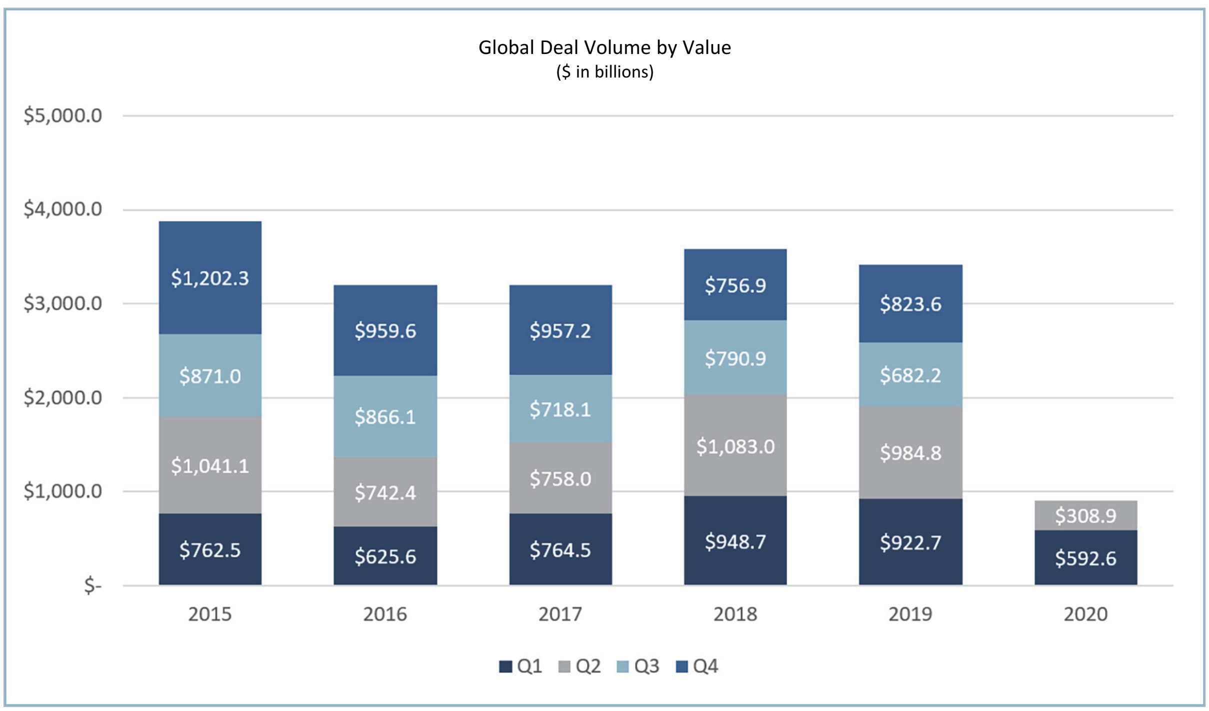
Mergers & Acquisitions

TRENDS[1]

The effects of the COVID-19 pandemic continued to be felt throughout the global economy in the second quarter of 2020. Global M&A activity in Q2 2020 was down ~48% by value compared to Q1 2020 and global M&A activity in 1H 2020 was down ~53% by value compared to 1H 2019. The extent of the impact of the COVID-19 pandemic varied across the world, though. For example, in China, deal count fell by ~7% year-over-year and deal value decreased by ~20% year-over-year. The United States, on the other hand, saw a drastic decrease in M&A activity—1H 2020 fell ~72% by value compared to 1H 2019. Private equity transactions experienced a decline in activity relative to 1H 2019, but achieved their highest half-year market share of total global M&A by volume (~19%) since 2005. The Industrials & Chemicals and Financial Services sectors continued to lead in 1H 2020 with $158.8 billion and $153.8 billion in aggregate transaction value in the first half of the year, respectively.

Global Deal Making Declined Significantly in Q2 2020

Deal volume dropped to 2,630 transactions in Q2 2020, a decline of ~39% from Q1 2020, and deal value decreased to $308.9 billion, a decline of ~48% from Q1 2020. Contrasting the first half of 2020 to the first half of 2019, deal volume declined ~32% (6,938 transactions in 1H 2020 compared to 10,155 transactions in 1H 2019) and deal value fell ~53% ($901.6 billion in 1H 2020 compared to $1.9 trillion in 1H 2019). Although there were declines across all sizes of deals, large deals were impacted the most in 1H 2020. Transactions of $2 billion or greater declined ~67% by volume in Q2 2020 compared to Q1 2019 (18 transactions in Q2 2020 compared to 54 transactions in Q1 2020). This is a continuation of the trend of a general decline in large deals in recent months—deals of $2 billion or greater declined ~54% by volume in 1H 2020 compared to 2H 2019 (72 transactions in 1H 2020 compared to 155 in 2H 2019). Smaller mid-market deals, on the other hand, saw less impact—deals under $2 billion declined ~24% by volume in Q2 2020 compared to Q1 2019 (1,297 transactions in Q2 2020 compared to 1,704 transactions in Q1 2020).



Source: Mergermarket

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

Severe Drop in Cross-Border M&A Activity in Q2 2020

The global nature of the COVID-19 pandemic resulted in a significant decline in cross-border M&A in Q2 2020. Global cross-border activity fell to $414.8 billion in 1H 2020, a decrease of ~46% compared to 1H 2019. While activity generally fell throughout all regions, certain parts of the world saw drastic declines in cross-border activity. Latin America saw a decline in inbound activity by value of ~78% compared to 1H 2019 and a decline in outbound activity by value of ~74% compared to 1H 2019. European inbound M&A dropped to $97.9 billion in 1H 2020, a decline of ~49% compared to 1H 2019 and outbound M&A dropped to $42.9 billion in 1H 2020, a decline of ~68% compared to 1H 2019 and its lowest outbound year-to-date value since 2013. Japan outbound M&A activity experienced a decade-low quarter, with only 43 deals worth $4.8 billion announced (a decline by value of ~80% and by volume of ~57% compared to Q2 2019). Japanese takeovers of US targets dropped most drastically, with only 9 deals worth $2.1 billion recorded in Q2 2020, the lowest quarterly level since Q1 2011.

Private Equity Faces Challenges; Europe and Asia (excluding Japan) Remains Strong as PE Activity Declines in Other Regions

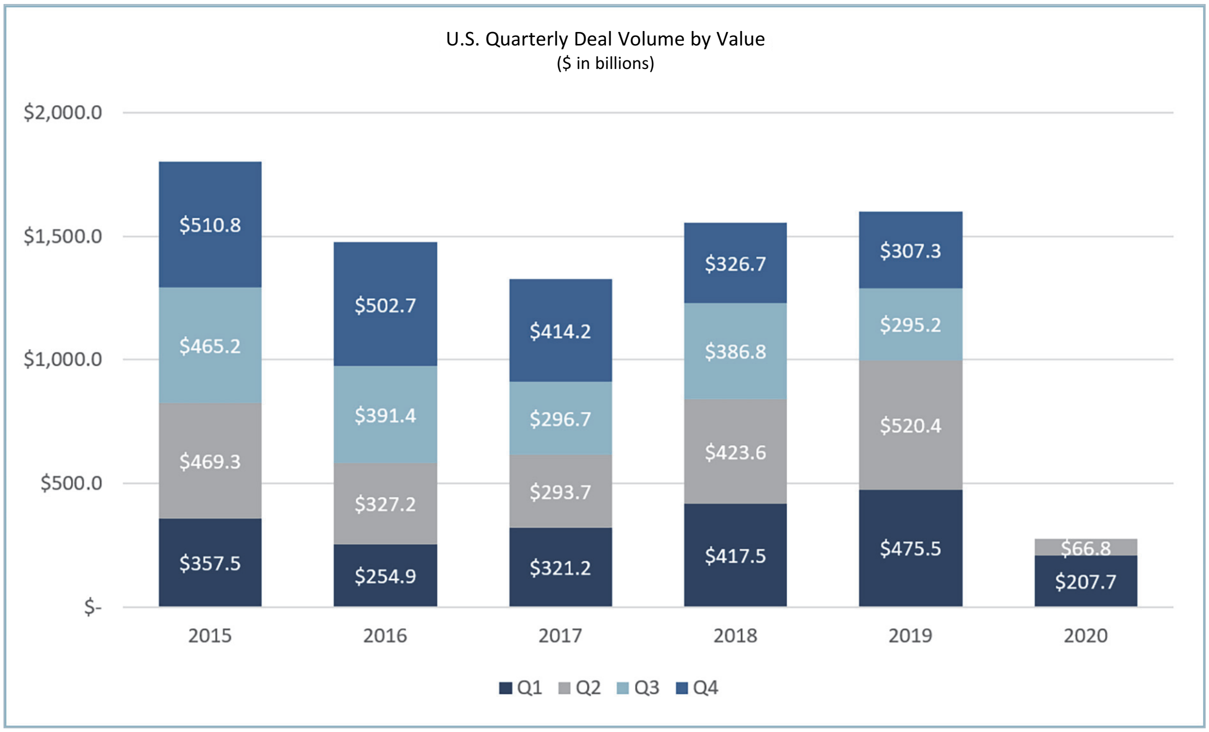
Due to the impact of the COVID-19 pandemic, private equity buyout activity experienced a severe drop in both deal value and volume in 1H 2020, totaling $210.4 billion across 1,318 deals, representing a ~30% decrease in value in relation to 1H 2019 and a ~29% decrease in deal count in relation to 1H 2019. Similarly, global exits experienced a severe decline in 1H 2020, totaling $136.4 billion across 776 deals, representing a ~52% decrease in value in relation to 1H 2019 and a ~37% decrease in deal count in relation to 1H 2019.

On a regional basis, despite an ~18% decrease in value in relation to 1H 2019, Europe enjoyed strong buyout activity in 1H 2020, reaching its third-highest point since the global financial crisis, totaling $92.5 billion across 523 deals, accounting for ~20% of overall European M&A activity in 1H 2020. In the United States, leveraged buyout activity decreased ~54% in value to $63.2 billion in 1H 2020 across 532 deals. In the Asia Pacific region excluding Japan, buyout activity was healthy in 1H 2020, generating $43.1 billion deal value across 195 deals, thanks to a rebound in transactions in Q2 2020 ($28.8 billion across 95 deals). In Q2 2020, Japan experienced a second consecutive declining quarter, recording $1.6 billion worth of buyouts in Q2 2020 across 8 deals.

U.S. M&A Market Continues Slowdown

The U.S. M&A market was hit hard by the COVID-19 pandemic. Deal activity in 1H 2020 declined to its lowest level by value since 2003. 1H 2020 featured $274.5 billion worth of deals across 2,139 transactions, a ~72% decrease by value relative to 1H 2019, with Q2 2020 specifically seeing only $67.6 billion worth of deals across 735 deals, compared to $520.4 billion across 1,629 deals in Q2 2019. As a result, the U.S. market only accounted for ~30% of global M&A by value in 1H 2020, down from ~52% in 1H 2019.

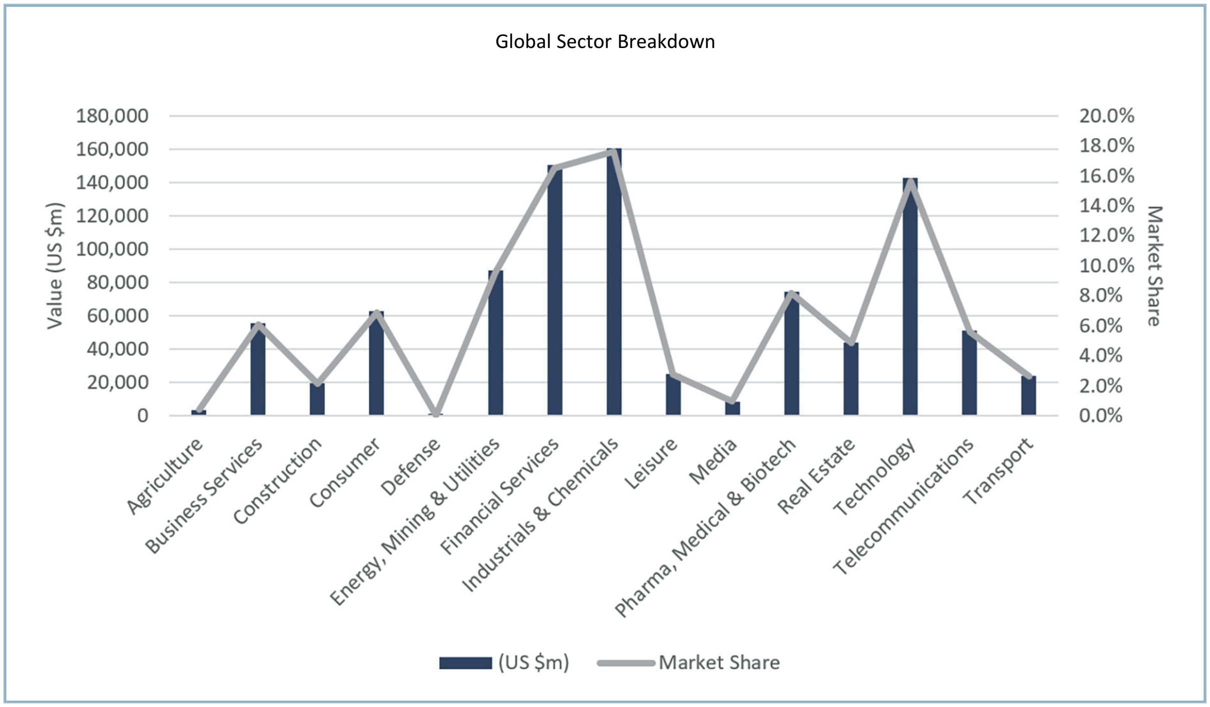
Deals worth over $1 billion were particularly hard hit in 1H 2020, with only 56 such deals announced in 1H 2020 compared to 126 such deals in 1H 2019. The average disclosed deal value declined ~53% from $826 million in 1H 2019 to $385 million in 1H 2020. In particular, strategic acquisitions declined in 1H 2020, down ~75% in value to $206.7 billion across 1,568 deals, leading to a reduced market share for strategic deals in 1H 2020 to ~77% of U.S. activity by value compared to ~86% in 1H 2019. In 1H 2020, there were 53 deals terminated or withdrawn, in the aggregate worth $77.3 billion, including Xerox's $35.5 billion takeover bid for HP, Woodward Inc.'s. $7.4 billion merger with Hexcel Corporation, and Simon Property Group's $6.8 billion acquisition of Taubman Centers.



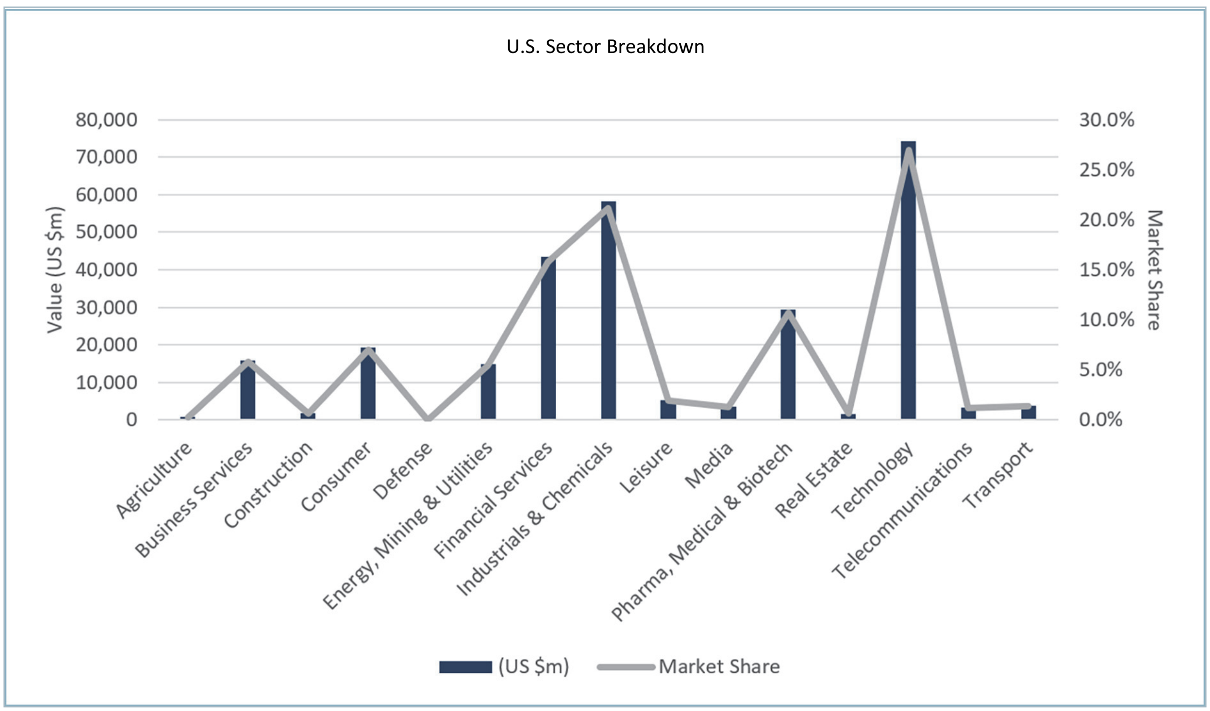
Source: Mergermarket

Major Activity in Certain Sectors

In terms of global deal value, the Industrials & Chemicals sector led the way in 1H 2020, posting $158.8 billion worth of deals, with Advent, Cinven and RAG-Stiftung's $18.9 billion acquisition of ThyssenKrupp's elevator business and United Technologies Corporation's $18.9 billion spinoff of OTIS representing the largest deals in the sector. The Financial Services sector was a close second, featuring $153.8 billion worth of deals and accounting for ~17% of global deal value in 1H 2020, doubling its global market share compared to 1H 2019. Notable deals in the Financial Services sector include Aon's $35.6 billion merger with Willis Towers Watson and Morgan Stanley's $13 billion acquisition of E-Trade. Technology, Energy, Mining & Utilities and Pharma, Medical & Biotech were the three other most active sectors, featuring $141.5 billion, $87.4 billion and $73.3 billion worth of deals, respectively. The U.S. Technology sector was particularly strong, with notable deals including Intuit's $7.1 billion acquisition of Credit Karma and Just Eat Takeaway.com's $7 billion acquisition of Grubhub. Sectors such as Consumer and Leisure were greatly impacted by the COVID-19 pandemic, falling by a combined ~64% by value from $143.6 billion in 1H 2019 to $87.4 billion in 1H 2020 and ~66% in deal count from 1,415 to 852 deals. Energy, Mining & Utilities was also hard hit, declining ~68% in value and ~34% in volume in 1H 2020. Construction was the only sector to achieve an increase in deal value (up ~6% compared to 1H 2019) despite a one-third decline in deal volume.



Source: Mergermarket



Source: Mergermarket

LEGAL DEVELOPMENTS

Cases

Q2 2020 featured a number of notable cases in the M&A space.

***K-Bar Holdings LLC v. Tile Shop Holdings, Inc., C.A. 2019-0892-SG* (Del. Ch. Dec. 12, 2019; transcript released March 23, 2020)**

In this case, the Court in a bench ruling ordered (1) three members of the board of directors of Tile Shop Holdings Inc. ("Tile Shop"), a publicly traded company, to cease purchasing stock in Tile Shop and (2) Tile Shop to halt the process to deregister its stock, until a preliminary injunctive relief hearing could be held. Tile Shop had announced that it would delist and deregister its stock, which allegedly caused its stock price to drop and created an opportunity for the directors to make open market purchases and increase their collective stake in the company from 29% to 42%. The Court found that there was a colorable claim that the board had breached its fiduciary duties by failing to adequately protect Tile Shop and its stockholders from an improper transfer of wealth to the directors increasing their ownership in Tile Shop (for example, through adopting a poison pill or obtaining standstill undertakings from the directors). In doing so, the Court affirmed the principle that a failure to implement protections against accumulations or a sale of control may constitute a breach of fiduciary duties, particularly when the board cannot be reasonably confident that such accumulations or sale of control would represent the best value reasonably available to stockholders.

***Robert Tera v. HC2 Holdings Inc., et al.*, C.A. 2020-0275 (Del. Ch. Apr. 10, 2020)**

In this case, the Delaware Court of Chancery granted a motion to expedite a stockholder suit against HC2 Holdings Inc. ("HC2") claiming that HC2 made a coercive claim to its stockholders that replacing a majority of the directors of HC2 may trigger a "proxy put" in preferred stock issued by HC2 and seeking to bar HC2 from counting consent revocations delivered to HC2 in opposition to a consent solicitation campaign to replace directors of HC2. The proxy put provisions in the preferred stock permitted the holders of the preferred stock to demand immediate redemption of the preferred stock for cash if a majority of the directors were replaced, although arguably the redemption right could be avoided if the current directors approved the replacement directors. The dissident stockholders argued that HC2's disclosure in the consent solicitation campaign that, even with such approval, there remained a risk that the holders of preferred stock could exercise their redemption right if a majority of the HC2 directors were replaced was either misleading or evidence that the provision was an illegal "dead hand proxy put." The Court found that the dissident stockholders had a potential claim warranting expedited treatment, noting that "proxy puts like the ones at issue here can pose a real threat of director entrenchment when improperly employed." Following the ruling, HC2 and the dissident stockholders entered into a settlement agreement pursuant to which more than 50% of the board would be refreshed following the 2020 annual meeting of the company.

***Hughes v. Hu*, C.A. 2019-0112-JTL (Del. Ch. Apr. 27, 2020)**

In this case, the Delaware Court of Chancery denied a motion to dismiss a claim of breach of the duty of care against certain directors and officers of Kandi Technologies ("Kandi"), a Delaware corporation headquartered in China, noting that the lack of a record of oversight activity by the board of directors indicated that the defendants "face a substantial likelihood of liability" for "failing to act in good faith to maintain a board-level system for monitoring the Company's financial reporting." The Court reaffirmed the principle established in In re Caremark Int'l Inc. Deriv. Litig. ("Caremark") that directors of Delaware corporations are at risk of liability for breaching the duty of care if "the directors utterly failed to implement any reporting or information system or controls" or "having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." The Court found that chronic deficiencies in the audit committee (including meeting sporadically, devoting inadequate time to its work and ignoring clear notice of irregularities) supported a reasonable inference that Kandi's board of directors, acting through its audit committee, had "failed to provide meaningful oversight over the Company's financial statements and system of financial controls." Notably, the Court noted that Kandi "could have produced documents in response to the plaintiff's Section 220 demand that would have rebutted this inference," and that "the absence of those documents is telling because it is more reasonable to infer that exculpatory documents would be provided than . . . that such documents existed and yet were inexplicably withheld."

The Frederick Hsu Living Trust v. ODN Holding Corp., et al., case number 12108 (Del. Ch. May 4, 2020)

In this case, the Delaware Court of Chancery ruled in a post-trial opinion that Oak Hill Capital Partners ("Oak Hill"), a private equity firm that controlled ODN Holding Corporation ("ODN"), proved at trial that its efforts to steer ODN into a strategy to accumulate cash in anticipation of the redemption of preferred stock held by Oak Hill was entirely fair and entered judgment in favor of Oak Hill. The Court found that the plaintiff, a minority stockholder of ODN, had proved that the cash-accumulation strategy conferred a unique benefit on Oak Hill by creating a pool of funds that ODN would be required to use to redeem preferred stock held by Oak Hill. Therefore, the Court held that, in order to avoid liability, Oak Hill had to prove that the cash-accumulation strategy was "entirely fair." The Court noted that, although the concept of fairness has two basic aspects (fair dealing and fair price), the test for fairness is not bifurcated and all aspects must be examined as a whole. The Court found that Oak Hill "fell short" in the fair process dimension, but ultimately its conduct did not amount to a fiduciary wrong, and "the strategy thus inflicted no harm on the common stockholders, who are in at least as good a position now as they would have been if the Company had followed a different course." The Court explained that the "concept of fairness is . . . not a technical concept" and the "economic dimension of the analysis can be the predominant consideration in the unitary fairness inquiry," holding that the defendants proved that the accumulation of cash was the best use of ODN's cash.

In re: Dell Technologies Inc. Class V Stockholders Litigation, C.A. 2018-0816-JTL (Del. Ch. Jun. 11, 2020)

In this case, the Delaware Court of Chancery denied a motion to dismiss a complaint alleging that directors of Dell Technologies Inc. ("Dell"), including Michael Dell, and Silver Lake Group LLC ("Silver Lake"), which together with Michael Dell controls Dell, breached their fiduciary duties when negotiating and approving the redemption of the Dell Class V stock, finding that the complaint alleged facts that made it reasonably conceivable that entire fairness was the operative standard of review.

The Class V shares at the center of the case were issued to the former stockholders of EMC Corporation ("EMC") in connection with Dell's acquisition of EMC. The Dell Class V shares were publicly traded and designed in the aggregate to track the performance of the equity stake in VMware, Inc. ("VMware") that Dell acquired when it acquired EMC. However, the Class V shares traded at a thirty percent discount to VMware's publicly traded shares at least in part due to the fact that the Class V shares were subject to a conversion right, pursuant to which Dell could forcibly convert the Class V shares into Dell Class C shares if the Class C shares were listed on a national exchange (the "Forced Conversion"). Dell sought to consolidate its ownership of VMware and negotiated a redemption of the Class V shares with a special committee of the Dell board of directors. Large holders of the Class V shares objected to the terms of the redemption, so Dell negotiated new redemption terms directly with six large holders of the Class V shares. Those new redemption terms were approved by the special committee and the holders of the Class V shares and the redemption subsequently closed. Former holders of Class V shares filed suit, asserting that the defendants breached their fiduciary duties when negotiating and approving the redemption.

In determining to deny the defendants' motion to dismiss, the Court found that the complaint supported a reasonable inference that defendants failed to comply with the requirements of Kahn v. M&F Worldwide Corp. ("MFW") and thus were not entitled to business judgment rule deference. The Court explained that, under MFW, the business judgment rule governs a conflicted transaction only if the controller accepts that "no transaction goes forward without special committee and disinterested stockholder approval." The Court found that there was a reasonable inference that Dell did not properly establish the two MFW conditions, as the company excluded the Forced Conversion from the scope of the special committee's mandate and bypassed the special committee by negotiating directly with certain large holders of Class V shares. The Court further held that there were reasonable inferences that (1) Dell engaged in coercive conduct that undermined the effectiveness of the special committee and the legitimacy of the Class V stockholder vote by threatening a Forced Conversion, (2) neither member of the special committee was independent and (3) material information was either omitted or presented in a way that was materially misleading to the Class V stockholders and therefore the Class V stockholder vote was not fully informed.

***City of Fort Myers General Employees Pension Fund et al. v. Haley et al.,* C.A. 2018-0132-KSJM (Del. June 30, 2020)**

In this case, the Delaware Supreme Court reversed the Court of Chancery's dismissal of a stockholder suit regarding the merger of Towers Watson & Co. ("Towers") and Willis Group Holdings plc ("Willis"), holding that the plaintiffs had adequately pleaded their claim for breach of fiduciary duty against John Haley, the CEO and chairman of the board of directors of Towers. The Supreme Court further directed the Court of Chancery to consider the claims of aiding and abetting breaches of fiduciary duty against ValueAct Capital Management, L.P. ("ValueAct"), an institutional stockholder of Willis, and Jeffrey Ubben, the chief investment officer of ValueAct, on remand.

In June 2015, Towers and Willis executed a merger agreement with closing conditioned on the approval of their respective stockholders. Upon announcement, the transaction was criticized as a bad deal for Towers and proxy advisory firms recommended that Towers stockholders vote against the merger. Also after the merger was announced, Ubben presented to Haley, who was leading the renegotiations of the merger consideration, a compensation proposal with the post-merger company that would potentially provide Haley with a five-fold increase in compensation. Haley did not disclose this proposal to the Towers board and continued to negotiate on behalf of Towers, eventually securing a deal with Willis that provided an increased special dividend to Towers stockholders and was ultimately approved by Towers stockholders. Haley became CEO of the combined company and was granted a compensation package similar to ValueAct's proposal. Towers stockholders filed suit alleging that Haley breached his duty of loyalty by negotiating the merger on behalf of Towers while failing to disclose to the Towers board a compensation proposal that misaligned Haley's incentives at a critical juncture in the negotiations, incentivizing him to "seek no more of a dividend than he believed necessary to secure the Towers stockholders' approval." The stockholders further alleged that ValueAct and Ubben had aided and abetted the breaches of fiduciary duty. The Court of Chancery dismissed the claims, holding that the business judgment rule applied because "a reasonable board member would not have regarded the proposal as significant when evaluating the proposed transaction."

On appeal, the Supreme Court held that the Court of Chancery erred in dismissing the breach of fiduciary duty and aiding and abetting claims. The Supreme Court explained that in order to rebut the presumption of the business judgment rule, the plaintiffs had to adequately allege that (i) Haley was "materially self-interested" in the transaction, (ii) Haley failed to disclose his interest in the transaction to the board and (iii) a reasonable board member would have considered his interest a "significant fact in the evaluation of the proposed transaction." While the Court of Chancery had held that the allegation of a failure to disclose the proposal was insufficient to rebut the business judgment rule, the Supreme Court found that the plaintiffs adequately alleged that the proposal "altered the nature of the potential conflict that the Towers Board knew of in a material way." Thus, the Supreme Court held that the plaintiffs were "entitled to an inference that the prospect of the undisclosed enhanced compensation was a motivating factor in Haley's conduct in the renegotiations to the detriment of Towers stockholders." The Supreme Court reiterated that there is "nothing inherently wrong with a Board delegating to a conflicted CEO the task of negotiating a transaction" but noted that "the conflict must be adequately disclosed to the Board, and the Board must properly oversee and manage the conflict."

RECENT TRANSACTIONS IMPACTED BY THE COVID-19 PANDEMIC

There continue to be a number of disputes regarding the closing of pending M&A transactions due to the COVID-19 pandemic. The most commonly cited grounds for buyers refusing to close have been breaches of interim operating covenants in transaction agreements, with buyers claiming both breaches of the affirmative covenant to operate in the ordinary course and/or consistent with past practice, as well as the negative covenants prohibiting the target from taking specified actions without the buyer's consent. Some buyers have asserted that various cost-cutting measures implemented by the target (*e.g.*, furloughing employees, reducing compensation or limiting capital expenditures) violated the ordinary course covenant, while others have argued the opposite—that the failure to take such measures was not consistent with acting in the ordinary course when faced with a crisis. Buyers have also challenged closing deals due to alleged breaches of access provisions, both as they relate to access to information and physical access to properties and employees. Although pure business "Material Adverse Effect" ("MAE") claims have been rare due to (i) the fact that most standard MAE definitions contain broad carve-outs for general economic, market or industry conditions and (ii) the difficulty of establishing a disproportionate adverse impact on the relevant target business given the sweeping effects of COVID-19 on entire industries, buyers have brought MAE claims asserting inability of the target to perform its obligations under the transaction agreement (in transactions where the MAE definition contains such a prong). Some buyers have also attempted to assert common law contract defenses (like impossibility, impracticability or frustration of purpose). While the judicial resolution of a number of disputes is still pending, a summary of recent case studies and key considerations regarding contractual claims can be found here.

REGULATORY DEVELOPMENTS

Antitrust

On June 30, 2020, the U.S. Federal Trade Commission (the "FTC") and Department of Justice (the "DOJ") (the "Agencies") released final 2020 Vertical Merger Guidelines (the "2020 Guidelines")[2] outlining the Agencies' principal analytical techniques, practices and enforcement policy for vertical mergers. The rules finalized proposed guidelines that the Agencies published on January 10, 2020.[3] Although the 2020 Guidelines largely retained the framework of the proposed guidelines, the final rules included a number of important changes and clarifications, including:

- elimination of a 20% relevant market share threshold to identify mergers that are unlikely to be anticompetitive;
- clarification of how the Agencies would consider the potential benefits related to the elimination of double marginalization ("EDM"), explaining that (i) the Agencies would consider EDM in assessing whether a merged firm would have an incentive to decrease or increase prices as a result of the merger, (ii) parties would be expected to substantiate claims that a merger would produce EDM, and (iii) the Agencies would address whether EDM is merger-specific by looking at the merged firm's cost of self-supply and its existing contracting practices; and
- expansion of the scope of the 2020 Guidelines to explicitly cover certain non-vertical relationships such as "diagonal" mergers (mergers between firms at different stages of competing supply chains) and mergers of complements, given potential vertical issues that could arise under such mergers.

National Security

Executive Order

On April 4, 2020, President Donald J. Trump issued an Executive Order[4] establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector ("Committee") responsible for reviewing certain licensing applications referred to it by the Federal Communications Commission ("FCC") for national security and law enforcement risks associated with foreign ownership. The Executive Order formalized the interagency working group composed of representatives of the U.S. Departments of Defense, Homeland Security, and Justice known as "Team Telecom," and made several changes to the prior Team Telecom structure and process. Notably, the Executive Order established timelines of up to 210 days for the Committee's review, whereas Team Telecom previously had no time limits on its review. In addition, the Executive Order provides broad and discretionary authority for the Committee to review previously granted licenses for potential national security or law enforcement risks. The Executive Order requires the relevant agencies to enter into a memorandum of understanding within 90 days of the issuance of the Executive Order to describe their plan to implement and execute the order.

Regulations

On May 21, 2020, the U.S. Department of the Treasury ("Treasury") released a proposed rule[5] that would make a number of important modifications to the Committee on Foreign Investment in the United States ("CFIUS") mandatory filing requirements. Most notably, for U.S. companies that engage in certain activities involving "critical technologies," the proposed rule would remove the North American Industry Classification System code-based industry test (*i.e.*, the 27 sensitive industries enumerated in

[2] Guidelines, "Vertical Merger Guidelines" (June 30, 2020); https://www.justice.gov/atr/page/file/1290686/download.

[3] A summary of the proposed rules can be found in the Q1 2020 issue of the Cravath Quarterly Review: M&A, Activism and Corporate Governance.

[4] Executive Order on Establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (April 4, 2020); https://www.whitehouse.gov/presidential-actions/executive-order-establishing-committee-assessment-foreign-participation-united-states-telecommunications-services-sector/

[5] Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 30893 (proposed May 21, 2020) (to be codified at 31 C.F.R. pt. 800).

prior CFIUS regulations) and add a new test based on the four main U.S. export control regimes (*i.e.*, those administered by the Nuclear Regulatory Commission and the Departments of State, Commerce and Energy). Under the new test, if certain licenses or authorizations under these regimes would be required in the context of a particular transaction described under the proposed rule, a mandatory filing with CFIUS would be triggered. In addition, the proposed rule would also make clarifying amendments to the definition of "substantial interest," which establishes how to determine the percentage interest held indirectly by one entity in another for purposes of assessing the CFIUS mandatory filing requirement relating to investments involving foreign governments. The comment period on the proposed rule closed on June 22, 2020, and Treasury has not yet issued a final rule.

<u>CFIUS 2018 Annual Report</u>

On May 19, CFIUS published its unclassified Annual Report to Congress for the calendar year 2018[6] ("Annual Report"), which is the first Annual Report to include data from the CFIUS Critical Technologies Pilot Program and to reflect certain changes made pursuant to the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA").

Key findings / insights from the report include:

- The number of filings reviewed by CFIUS (229 notices and 21 Pilot Program declarations) remained significant.

- A significant number of cases (158 notices) proceeded to the second-stage investigation period, but FIRRMA's extension of the statutory review period allowed CFIUS to address more cases in the initial review period. As a result, 53% of notices filed after the enactment of FIRRMA on August 13, 2018 proceeded to the investigation period compared to 76% of notices filed prior to that date.

- Of the 21 declarations filed pursuant to the Critical Technologies Pilot Program, CFIUS determined it could not conclude action on 11 of the transactions, requested the parties to 5 transactions to file a written notice, and cleared only 2 transactions.

- The plurality of notices (38%) were filed in connection with transactions in the Finance, Information, and Services sector, and investors from China were responsible for the largest number of notices filed (55).

- The percentage of cases in which CFIUS conditioned approval on the parties' acceptance of mitigation arrangements remained steady at 13%.

Updated DOJ Guidance on Corporate Compliance Programs

On June 1, 2020, the DOJ released an updated version of its guidance document, "Evaluation of Corporate Compliance Programs," which provides insight into how prosecutors evaluate the effectiveness of a corporation's compliance program both at the time of an offense, and later, when exploring a resolution. Three fundamental questions drive the DOJ's review and assessment:

- Is the compliance program well designed?
- Is the program adequately resourced and empowered to function effectively?
- Does the program work in practice?

While the June update contains relatively modest revisions to the April 2019 version, the update emphasizes the DOJ will take a "functional approach" to evaluating compliance programs. The "functional approach" encourages prosecutors to make individualized assessments based on a corporation's size, industry, and other factors, and it credits data-driven, consistently evolving compliance programs.

In the M&A context, the guidance document continues to emphasize that, when designing an effective compliance program, attention should be paid to the importance of conducting effective due diligence, including tracking and remediating any misconduct identified. The June update contains two significant changes in this area, however. First, the DOJ recognizes that opportunities for pre-acquisition due diligence may sometimes be limited or infeasible. Prosecutors are therefore advised to ask why a company was unable to complete pre-acquisition due diligence before penalizing the company for failing to do so. Second, to address the gaps often left by pre-acquisition due diligence, the guidance now emphasizes the importance of post-acquisition due diligence and audits, as well as the importance of swift compliance integration. A well-designed compliance program should now include "a process for timely and orderly integration of the acquired entity into existing compliance program structures and internal controls," in addition to "comprehensive due diligence of any acquisition targets."

[6] Committee on Foreign Investment in the United States, Annual Report to Congress Report Period: CY 2018; https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2018.pdf

SEC Amendments to M&A Financial Disclosure Requirements

On May 21, 2020, the Securities and Exchange Commission (the "SEC") adopted amendments to—on balance—relax the requirements for public companies to file target historical and pro forma financial statements with respect to significant acquisitions.

The SEC adopted the amendments largely in the form as proposed over a year ago, but notably deviated from its original proposal that mandated "Management's Adjustments" reflecting synergies and dis-synergies in pro forma financial statements by instead making the presentation of such adjustments optional.

Key changes include:

- Revising the significance tests used to determine if acquired business financial statements and pro forma information will be required and for what periods, by
    - using an acquiror's "worldwide market value" instead of the book value of its total assets in the investment test, and
    - adding a revenue component to the income test.
- Expanding the use of pro forma information in calculating significance.
- Limiting the periods to be presented for acquired business financial statements to no more than the two most recent fiscal years (vs. three), even at the highest significance level, as well as any required interim period.
- Permitting abbreviated financial statements for certain acquisitions of a component business of a seller.
- For significant series of "individually insignificant" acquisitions, reducing the burden of providing separate acquired business financial statements while expanding the scope of required pro forma information.
- Establishing three categories of pro forma adjustments:
    - mandatory transaction accounting adjustments;
    - mandatory autonomous entity adjustments; and
    - optional management's adjustments depicting synergies and dis-synergies.

The final rules will be effective on January 1, 2021, but voluntary compliance in full is permitted in advance of the effective date.

On June 1, 2020, Cravath published a memo entitled "The SEC's Revised Regime for M&A Financial Disclosure," which provides more information regarding the amendments.

Activism[7]

In July 2020, Lazard released its 1H 2020 Review of Shareholder Activism, which offers key observations regarding activist activity levels and shareholder engagement in the first half of 2020.

Key findings / insights from the report include:

- year-over-year decline of ~10% in campaigns launched in 1H 2020 globally, although there was a busy end to 1H;
- U.S. campaigns declined ~40% from the prior-year period and U.S. share of global activism activity declined (to ~42% of global campaigns in 1H 2020, compared to ~59% in 2019 overall), as Europe and Japan's share rose;
- decline in share of campaigns with an M&A objective from ~47% in 2019 to ~34% in 1H 2020; and
- reshuffling of strategies of activists, private equity and traditional long-only investors with each party adopting new tactics to respond to the evolving market conditions.

Campaign Activity Declined Compared to 1H 2019; Capital Deployed Comparable to 2019 Levels

There were 100 new campaigns initiated in the first half of 2020, compared to 111 campaigns initiated in 1H 2019. Notably, there was a significant drop in April (with only 8 campaigns initiated that month) followed by a quick rebound in May and June (with 16 and 17 new campaigns, respectively). $25.8 billion of capital was deployed in new campaigns in 1H 2020, which is comparable to the $24.6 billion deployed in 1H 2019. Elliott led the way both in terms of new campaigns and capital deployed in 1H 2020 with 8 campaigns launched and $6.2 billion deployed. The second most-active activist was ValueAct with 4 campaigns launched and $2.8 billion deployed.

In the first half of 2020, there were 86 board seats won, with ten of those won through a proxy fight and the other 76 by way of settlement; generally in line with the 81 won in 1H 2019. Of the 86 board seats won in 1H 2020, ~30% (26 board seats) were filled with activist fund employees. ~56% of the board seats (48 board seats) were won after the proxy process was initiated, compared to ~45% in 2019. Starboard, with its 17 board seats won[8], led the way in total board seats won, with Elliott coming in second with 12 board seats won.

U.S. Share of Global Activism Declined as Europe/Japan Activity Surged

1H 2020 saw a significant dip in U.S. share of global activity, amounting to only ~42% of global activism by campaigns initiated, down from ~59% in 2019 overall. This was due to a decline in U.S. campaigns and a surge in Asian activism and record European activity prior to the COVID-19 pandemic. In 1H 2020, 42 U.S. campaigns were initiated, representing a ~40% decline from 1H 2019, and aggregate capital deployed in 1H 2020 was $9.0 billion, the lowest level since 1H 2016 and ~35% of global capital deployed compared to ~60% in 2019. The decline was particularly severe for U.S. targets with market capitalizations greater than $10 billion, as only 3 new campaigns were launched against such targets compared to 15 in 1H 2019.

Europe's share of global campaign activity rose to ~28% of campaigns launched in 1H 2020, supported by strong pre-COVID-19 activity in Q1 2020 (20 campaigns were launched in Q1 2020 out of the 28 campaigns launched in 1H 2020) and an uptick in German activity. In Germany, 7 campaigns were launched in 1H 2020, more than 3 times the average for the past three years. In 1H, European campaigns were initiated predominantly by institutional investors and occasional activists that took positions long before agitating, making up ~68% of campaigns initiated compared to ~52% in 1H 2019. APAC companies saw increases in capital deployed in 1H 2020, accounting for ~28% of global capital deployed relative to ~14% in 2019. In Japan, 19 campaigns were launched in 1H 2020, equaling 2019's record total, with activity driven by APAC-focused activists such as Oasis and Asset Value Investors and U.S. activists such as Elliott and ValueAct.

Effects of Evolving Market Conditions

In 1H 2020, ~34% of campaigns had an M&A objective, down from ~47% in 2019 and a 2016-2019 average of ~37%. 1H 2020 saw an increase in the relative focus on other objectives such as board change, strategy, governance and management change. Furthermore, activists, private equity and traditional long-only investors have adopted new tactics to respond to market conditions. For example, there were a few notable instances of private equity firms increasing their actions in public markets, such as KKR filing a 13D with respect to its investment in Dave & Busters in January and later receiving board representation and Cerberus publicly calling for changes at Commerzbank (including board representation for itself) leading to the resignations of the chairman and the chief executive of Commerzbank, and an increased

[7] Activism data from Lazard, Review of Shareholder Activism – H1 2020, which includes all data for campaigns conducted globally by activists at companies with market capitalizations greater than $500 million at the time of campaign announcement (select campaigns with market capitalizations less than $500 million at the time of announcement were also included during the COVID-19 pandemic induced market downturn); companies that are spun off as part of the campaign process are counted separately.

[8] Starboard's victory in its proxy fight with GCP accounted for eight of the 17 board seats won.

willingness among traditional long-only investors to act alongside activists such as Fidelity Management, Capital Group and MFS Investment Management participating in an equity investment in CenterPoint Energy alongside Elliott Management in May 2020. In addition, activists have been pursuing new pools of capital through special purpose acquisition companies ("SPACs"), with Hudson Executive Capital registering a SPAC to acquire a company in the financial technology space in May and Pershing Square filing to raise a $3 billion SPAC in June (subsequently upsized to $4 billion in July), the largest ever SPAC initial public offering.

SELECT CAMPAIGNS / DEVELOPMENTS

Company	Market Capitalization ($ in billions)[9]	Activist	Development / Outcome
Nintendo Co., Ltd.	$56.2	ValueAct Capital Management LP	• In April 2020, news media reported that ValueAct had built an approximately $1.1 billion (~2%) stake in Nintendo and that ValueAct believed that there was potential for Nintendo to transform into a broader entertainment company. Both Nintendo and ValueAct subsequently confirmed that there had been engagement between the parties.
Commerzbank AG	$6.3	Cerberus Capital Management LP	• In June 2020, news media reported that Cerberus sent a letter to Commerzbank seeking two board seats, which Commerzbank rejected. Cerberus responded that it would use alternative paths to force leadership change. It was reported that Cerberus had bought a ~5% stake in the company in 2017. • In July 2020, Commerzbank announced the resignation of its CEO, Martin Zielke, and its Chairman, Stefan Schmittmann.
Nielsen Holdings plc	$5.3	Elliott Management Corporation	• In August 2018, Elliott disclosed a ~8% stake in Nielsen and that it sought to engage in discussions with Nielsen's management regarding, among other things, a sale of certain assets. • In November 2019, Nielsen announced its plan to spin-off its Global Connect business, which received support from Elliott. • In April 2020, Nielsen and Elliott (now with a ~13% stake) entered into an agreement where, among other things, Nielsen agreed to increase the size of its board, appoint an Elliott designee to its board and form a new finance committee of the board.
TEGNA, Inc.	$3.6	Standard General LP	• In January 2020, Standard General issued a letter to shareholders disclosing it would nominate four individuals for election to the TEGNA board at the 2020 annual meeting; Standard General had a ~9.7% stake in TEGNA at the time. • In March 2020, Standard General commented, in response to news media reports that TEGNA had received multiple offers from potential buyers, that TEGNA needed to explore all alternatives to maximize value for shareholders. TEGNA later responded that it had engaged substantially with two of the four parties who put forth an acquisition proposal but that the two parties had made proposals before the COVID-19 pandemic and had since ceased discussions. • In March 2020, Standard General filed a proxy statement soliciting votes for its four nominees and recommending that shareholders vote against the company's say-on-pay proposal. • In May 2020, TEGNA held its 2020 annual meeting where shareholders re-elected all of TEGNA's directors and approved the say-on-pay proposal.
Commvault Systems, Inc.	$1.9	Starboard Value LP	• In April 2020, Starboard disclosed it had sent a letter to Commvault nominating six individuals for election to the Commvault board at the 2020 annual meeting; Starboard had a ~9.9% stake at the time of the nomination. • In June 2020, Commvault and Starboard entered into an agreement whereby, among other things, three of Commvault's directors resigned and three Starboard designees were appointed to fill those vacancies and Commvault agreed to form a new operating committee of the board.
GCP Applied Technologies, Inc.	$1.6	Starboard Value LP	• In January 2020, Starboard disclosed a ~7.9% stake in GCP and that it had sent a letter to the board nominating nine individuals for election to the GCP board at the 2020 annual meeting (two of whom already sat on the GCP board as part of a 2019 agreement between GCP and Starboard). • In April 2020, Starboard filed a proxy statement soliciting votes for eight Starboard nominees. • In May 2020, GCP held its 2020 annual meeting where shareholders elected all eight of Starboard nominees and two of GCP's nominees.
Mack-Cali Realty Corporation	$1.5	Bow Street LLC	• In March 2020, Bow Street sent a letter nominating eight Bow Street individuals for election to the Mack-Cali board at the 2020 annual meeting (four of whom already sat on Mack-Cali's board as a result of Bow Street's proxy contest in 2019). Bow Street had a ~4.5% stake at the time of the letter. • In May 2020, Bow Street filed a proxy statement soliciting votes for the eight Bow Street nominees. • In June 2020, Mack-Cali and Bow Street entered into an agreement whereby, among other things, Mack-Cali agreed to reconstitute its board to be comprised of the eight Bow Street nominees and one Mack-Cali nominee.

[9] Market capitalization as of campaign announcement.

Corporate Governance

TRENDS FROM 2020 PROXY SEASON[10]

Director Elections and Say-on-Pay Continued To Receive Strong Support

Shareholder support for directors remained strong at an average of ~95% (on par with ~95% in 2019). Approximately 610 nominees (or ~4.5% of all candidates) did not receive more than 80% of the votes, which is a decrease compared to 2019 when approximately 680 nominees (or ~4.8% of all candidates) did not meet such threshold.[11] Thirty four nominees spread across 25 boards did not receive support of greater than 50%, which was generally consistent compared to 2019 when 35 nominees spread across 26 boards did not receive majority support.[12] Say-on-pay proposals also continued to receive strong support with companies receiving an average support of ~91% on these proposals (consistent with the ~91% support received in 2019).

Fewer Compromises than in Prior Years

An estimated ~62% of shareholder proposals submitted will be voted on, which is an increase compared to 2019 and 2018 where ~55% and ~54% of shareholder proposals were voted on, respectively, and ~14% of proposals were withdrawn, compared to 27% in 2019 and 20% in 2018, which suggest that companies and shareholder proponents arrived at fewer compromises than in prior years. As of early June 2020, 46 shareholder proposals received majority support (compared to 62 for the entire 2019 proxy season), with 30 of those proposals relating to more traditional governance matters, such as majority voting and board leadership structure, and 16 of those proposals addressing a variety of environmental and social topics, such as political contributions and lobbying disclosure and board diversity.

Independent Chair Proposals Received Increased Support

While independent board chair proposals have been present for a number of years, increased scrutiny of board leadership has led to an increased support of such proposals, with the average support of ~35% in 2020, compared to ~30% in 2019. Significantly, while no such proposal received majority support in 2019, two independent chair proposals (at Baxter International and Boeing) received majority support as of early June 2020, and an additional 16 proposals received support of greater than 40%.[13]

Environmental and Social Proposals Saw Significant Increase in Support Compared to 2019

Environmental and social proposals continued to receive significant attention from shareholders, and a record number of such proposals have already received majority support. In particular, as of early June 2020, 16 environmental and social related proposals had received majority support, as compared to eight for a similar time period in the 2019 proxy season and a then-record 12 for the entire 2019 proxy season.[14] Five of the proposals receiving majority support focused on climate-related reporting, another notable increase compared to the 2019 proxy season, where no such proposals received majority support. Also noteworthy is the increased reference to the Sustainability Accounting Standards Board ("SASB"). Shareholder advocacy groups, like As You Sow, filed at least seven shareholder proposals that specifically requested use of SASB's metrics and guidelines in the requested reports. At least three such SASB-focused proposals received majority shareholder support this proxy season, and one company has committed to implement the shareholder's proposal despite the proposal receiving only 11%.[15] Another of the SASB-focused proposals, along with more than 40 other environmental proposals, were voluntarily withdrawn, presumably after receiving some commitment from the company. In addition, several human capital proposals also received majority support.

Board Diversity Continued To Be a Focus

As part of the New York City Comptroller's Office's Board Accountability Project 3.0 campaign, the Comptroller's Office submitted shareholder proposals at 17 companies that it felt did not adequately address an earlier request by the Comptroller's Office to implement policies requiring consideration of qualified women and racially or ethnically diverse candidates for director and external CEO searches. Thirteen of the 17 companies later implemented such policies, resulting in the withdrawal by the Comptroller's Office of

[10] Unless otherwise indicated, data in this section is taken from Georgeson, *An Early Look at the 2020 Proxy Season* (June 10, 2020). Note that the numbers in this section pertaining to the 2020 proxy season reflect the analysis of voting results of Russell 3000 companies who have held their annual meetings through early June 2020. Because the 2020 proxy season is not yet complete and there may be gaps in available data, some of the data may not comprehensively represent the entire 2020 proxy season.

[11] Institutional Shareholder Services, *Key Highlights from the 2020 U.S. Proxy Season* (June 19, 2020) ("ISS Report").

[12] ISS Report.

[13] ISS Report.

[14] ISS Report.

[15] Paul Rissman and Andrew Behar, *A Successful Season for SASB-Based Shareholder Resolutions* (June 12, 2020).

its proposals and one of the four remaining proposals received majority support. In addition to the Board Accountability Project 3.0 campaign, several diversity-related proposals also received majority support, including proposals requesting a report on a company's plan to increase board diversity and requesting reporting on the diversity of a company's workforce.

Board diversity also played a role in driving opposition to director elections. As of early June 2020, 13 nominees spread across eight zero-women boards have drawn sub-majority support levels due to, at least in part, their lack of gender diversity.[16]

PROXY ADVISOR UPDATES

ISS Issued Guidance on Voting Policies in Light of the COVID-19 Pandemic

On April 8, 2020, Institutional Shareholder Services ("ISS") issued a policy guidance on a number of voting issues that it felt would likely be implicated by the COVID-19 pandemic.[17] These issues were broadly grouped into four categories:

AGM Issues

ISS noted that while there have already been widespread shareholder meeting postponements, it will be positively noted when companies and boards use webcasts, conference calls and other means of electronic communications to engage with shareholders and investors, even if meetings have been postponed. In addition, while ISS typically prefers hybrid meetings (in-person meetings combined with virtual participation) over virtual-only meetings, it noted that it does not have a policy to recommend votes against U.S. companies who hold virtual-only meetings and that there is no change to that policy. In a limited number of markets where ISS policy discourages virtual-only meetings, ISS will alter the application of such policy so as to not make adverse vote recommendations until it is safe to hold in-person meetings again. ISS encouraged boards who choose to hold virtual-only meetings to disclose their reasons for their decision, to strive to provide shareholders a meaningful opportunity to participate and to commit to return to in-person or hybrid meetings as soon as practicable.

Poison Pills, Shareholder Rights and Boards/Directors

While ISS stated that it will continue to take a case-by-case approach with respect to poison pills and will generally consider both the board's explanation and the specific provisions of the pill, it noted that a severe stock price decline as a result of the COVID-19 pandemic is likely to be considered valid justification in most cases for adopting a poison pill with a duration of less than one year and that boards should provide detailed disclosure regarding the duration or any decision to delay or avoid a shareholder vote beyond one year.

With respect to director attendance at in-person shareholder meetings or board meetings, ISS noted that in markets that do not routinely count telephonic/electronic participation as being "present," it will look for disclosures to provide adequate explanations of the alternative form of attendance. In terms of changes to directors or senior management, ISS noted that it believes that the board should have broad discretion during the COVID-19 pandemic to ensure the right team is in place and that it will adjust the application of its policies, as appropriate, for exceptional circumstances.

Compensation Issues

ISS acknowledged that boards may seek to make changes to short-term compensation plans, such as changes to performance metrics, goals or targets, in response to the decline in financial markets and the potential recession caused by the COVID-19 pandemic. ISS encouraged boards to provide contemporaneous disclosure to shareholders of the board's reasoning for making such changes to 2020 compensation programs, even though such decisions will not be analyzed and addressed by shareholders until annual meetings in 2021.

With respect to long-term compensation plans, ISS noted that its policies generally do not support changes to long-term midstream or in-flight awards since such awards cover multi-year periods. As a result, ISS will review any changes to such long-term awards on a case-by-case basis to determine if directors exercised appropriate discretion and provided adequate disclosure to shareholders of the rationale for such changes.

[16] ISS Report.

[17] ISS, *Impacts of the COVID-19 Pandemic* (ISS Policy Guidance) (April 8, 2020); https://www.issgovernance.com/file/policy/active/americas/ISS-Policy-Guidance-for-Impacts-of-the-Coronavirus-Pandemic.pdf.

In addition, ISS acknowledged that boards may consider making structural changes to long-term compensation plans in response to the COVID-19 pandemic and noted that any such changes will be assessed under ISS' existing policy framework.

With respect to stock option repricing, ISS noted that if boards undertake repricing actions, such as replacing, exchanging or canceling out-of-the-money stock options, without seeking shareholder approval or ratification in a timely fashion, such repricing actions will remain subject to scrutiny under voting policies related to board accountability. If boards seek shareholder approval or ratification at 2020 annual meetings, ISS will continue to apply its existing case-by-case policy. Under such policy, ISS will generally recommend opposing any repricing that occurs within one year of a significant decline in a company's stock price and will examine several factors, including whether (i) the repricing is shareholder value neutral, (ii) surrendered options are not added back to the plan reserve, (iii) replacement awards do not vest immediately and (iv) officers and directors are excluded. ISS confirmed that such policy and analysis would continue to be applied to repricing actions taken in response to the COVID-19 pandemic.

Capital Structure and Payouts

ISS acknowledged that the market downturn and need to conserve cash have caused boards to re-evaluate dividends policies and noted that in the markets where ISS policies ordinarily looked for dividend payout ratios to be within a certain range, it will, this year, support broad discretion for boards to seek to set payout ratios that may be below historic or customary levels.

In terms of share repurchases, ISS noted that, in the absence of barring regulation or serious concerns, it will generally continue to recommend in favor of repurchase authorizations within customary limits for each market. However, it noted that board actions related to repurchases over the course of 2020 will be reviewed in the time leading up to the next annual meeting to consider whether directors responsibly managed risks for any repurchases undertaken under the authority.

With respect to capital raises, ISS noted that its policies generally provide for case-by-case assessments of proposals, subject to any market-specific rules or guidance. ISS will continue to apply its existing policy framework with respect to share issuances, but will also take account of any appropriate local market regulatory relaxations or new guidance as a result of the COVID-19 pandemic, and will also continue to apply its existing policy framework with respect to private placements.

Glass Lewis Clarified Application of Poison Pill Policies During the COVID-19 Pandemic

On April 8, 2020, Glass Lewis published a post seeking to clarify existing policies on poison pills and application of such policies during the COVID-19 pandemic.[18] Glass Lewis emphasized its contextual approach to corporate governance issues and noted that it will continue to apply such contextual approach with appropriate discretion and pragmatism when making its recommendations. While Glass Lewis is generally opposed to poison pills, it is supportive of poison pills that meet certain conditions, particularly those that are limited in scope to accomplish a certain objective, which may include contextual factors like a severe drop in stock price due to a widespread industry or market downturn. It noted that it considered companies that are impacted by the COVID-19 pandemic and related economic crisis as reasonable context for adopting a poison pill if the duration of the pill is limited to one year or less and the company discloses a sound rational for adoption of the poison pill as a result of the pandemic.

RECENT STATEMENTS AND UPDATES FROM THE SEC

ESG Matters

Environmental, social and governance ("ESG") matters continued to receive attention at the SEC. The SEC Investor Advisory Committee recommended in May 2020 that the SEC begin in earnest an effort to update public reporting requirements to include material, decision-useful ESG disclosures and that such process should include both investor and issuer input.[19] Chairman Clayton has publicly stressed the benefits of principles-based disclosure rooted in materiality over mandated ESG disclosure standards. In May 2020, SEC Chairman Jay Clayton expressed his views that "E," "S" and "G" matters are quite different baskets of disclosure matters and that lumping them together diminishes the usefulness of such disclosures. He added that he had not seen circumstances where combining an analysis of the "E," "S" and "G" matters together, for

[18] Glass Lewis, *Poison Pills and Coronavirus: Understanding Glass Lewis' Contextual Policy Approach* (April 8, 2020); https://www.glasslewis.com/poison-pills-and-coronavirus-understanding-glass-lewis-contextual-policy-approach/.

[19] SEC Investor Advisory Committee; *Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure* (May 14, 2020).

example, with a rating or score, would facilitate meaningful investment analysis that was not over-inclusive or imprecise.[20] In a report issued in early July, the Government Accountability Office ("GAO") examined, among other things, (1) why investors seek ESG disclosures, (2) public companies' disclosures of ESG factors, and (3) the advantages and disadvantages of ESG disclosure policy options.[21] In response to the GAO's publishing of its report, Senator Mark Warner on July 6, 2020, issued a statement calling on the SEC to establish a task force to establish "quantifiable and comparable" ESG metrics that would apply to all public companies and to otherwise update its disclosure regime in this area.[22]

High Quality Disclosures Related to the COVID-19 Pandemic

In April 2020, a joint public statement regarding COVID-19 by SEC Chairman Jay Clayton and William Hinman, Director of the Division of Corporation Finance, urged companies to provide as much information as practicable regarding their financial and operating status and future operational and financial planning.[23] They noted that producing forward-looking disclosure can be a challenge but that they believed that taking on the challenge is appropriate and encouraged companies to make all reasonable efforts to convey meaningful information. Consistent with these points, the Division of Corporation Finance issued Disclosure Guidance Topic 9A on June 23, 2020.[24] Topic 9A presented a series of questions that the staff encouraged companies to consider toward the goal of enabling investors to understand how management and the board are analyzing the current and expected impact of COVID-19 on the company's operations and financial condition, including liquidity and capital resources. Topic 9A followed up on Disclosure Guidance Topic 9 which the Division of Corporation Finance issued on March 25, 2020, and presented the staff's initial guidance on assessing and disclosing the evolving impact of COVID-19. Finally, on June 24, 2020, Sagar Teotia, Chief Accountant of the SEC, issued a statement that also emphasized the continued importance of high-quality financial reporting in light of the COVID-19 pandemic and highlighted some of the Office of the Chief Accountant's engagements with various stakeholders and some of the more significant accounting, auditing and financial reporting issues recently address by the Office.[25]

BOARD AND WORKFORCE DIVERSITY

Goldman Sachs' Commitment to Board Diversity

On July 1, 2020, Goldman Sachs' policy, announced earlier in the year, that it will only underwrite IPOs in the United States and Europe of private companies that have at least one diverse director took effect. The target will be raised to two diverse directors starting in 2021.[26]

California Board Gender Diversity Statute

In April 2020, a federal district court in California granted a motion to dismiss a case brought by a shareholder of a publicly held corporation subject to California's statute requiring publicly held corporations headquartered in California to have a minimum number of female directors on their board.[27] The plaintiff sued the California Secretary of State and alleged that the statute impaired his right to vote for the corporation's directors in violation of the equal protection clause of the 14th Amendment. The court noted that the statute imposed a requirement on the corporation and not the plaintiff (as its shareholder) and found that the plaintiff lacked standing to bring a claim under the 14th Amendment. Accordingly, the court dismissed the claim on the basis of lack of standing.

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[20] Jay Clayton, *Remarks at Meeting of the Investor Advisory Committee (May 21, 2020); Jay Clayton, Remarks at Meeting of the Asset Management Advisory Committee* (May 27, 2020).

Commissioner Elad Roisman expressed a similar sentiment in a July 2020 speech where he said that he "often wondered how the three concepts of environmental, social, and governance matters got lumped together" and that in his view, governance matters stand by themselves and rarely have a direct relationship to environmental or social issues. Elad L. Roisman, *Keynote Speech at the Society for Corporate Governance National Conference* (July 7, 2020).

[21] GAO, *Report to the Honorable Mark Warner, U.S. Senate, Public Companies: Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them* (July 2020); https://www.gao.gov/assets/710/707949.pdf

[22] Press Release, *Warner on New GAO Report Highlighting Importance of Requiring Corporate Disclosure of Environmental, Social, and Governance Issues* (July 6, 2020); https://www.warner.senate.gov/public/index.cfm/2020/7/warner-on-new-gao-report-highlighting-importance-of-requiring-corporate-disclosure-of-environmental-social-and-governance-issues.

[23] Jay Clayton and William Hinman, *The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19* (April 8, 2020).

[24] Division of Corporation Finance, Securities and Exchange Commission, *Coronavirus (COVID-19) — Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources* (June 23, 2020); https://www.sec.gov/corpfin/covid-19-disclosure-considerations.

[25] Sagar Teotia, *Statement on the Continued Importance of High-Quality Financial Reporting for Investors in Light of COVID-19* (June 23, 2020).

[26] Goldman Sachs, *Goldman Sachs' Commitment to Board Diversity* (February 4, 2020); https://www.goldmansachs.com/what-we-do/investing-and-lending/launch-with-gs/pages/commitment-to-diversity.html.

[27] *Creighton Meland v. Alex Padilla, Secretary of State of the State of California, in his official capacity*, No. 2:19-cv-02288-JAM-AC (E.D. Cal. April 20, 2020) (order granting defendant's motion to dismiss).

New York City Comptroller Call for Public Disclosure of EEO-1 Reports

On July 1, 2020, New York City Comptroller Scott M. Stringer, on behalf of certain city retirement systems, sent letters to the CEOs of 67 S&P 100 companies that had recently "issued statements in support of racial equality and/or to affirm their commitment to diversity and inclusion in both their company and in the community," asking them to "put real force behind this commitment" by adopting a policy to publicly disclose their Consolidated EEO-1 report.[28] The letter argues that without the report—a federally mandated compliance survey that requires company employment data to be categorized by race/ethnicity, gender and job category—"investors, as well as employees and the public, are unable to monitor, assess and benchmark the company's performance in hiring, retaining and promoting black employees, other employees of color and women in the U.S." Mr. Stringer asked companies to provide a written commitment by August 30, 2020 to publicly disclose their next EEO-1 reports and noted that unresponsiveness could lead to a shareholder proposal or be part of the evaluation of whether to vote for incumbent directors at the next annual meeting of shareholders.

[28] Press Release, *Comptroller Stringer and Three New York City Retirement Systems Call on 67 S&P 100 Companies Who Issued Supportive Statements on Racial Equality to Publicly Disclose the Composition of their Workforce by Race, Ethnicity and Gender* (July 1, 2020); https://comptroller.nyc.gov/newsroom/comptroller-stringer-and-three-new-york-city-retirement-systems-call-on-67-sp-100-companies-who-issued-supportive-statements-on-racial-equality-to-publicly-disclose-the-composition-of-their-workforce/.