# THE MERGERS & ACQUISITIONS REVIEW

Thirteenth Edition

**Editor**
Mark Zerdin

THE LAWREVIEWS

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# UNITED STATES

*Richard Hall and Mark I Greene*[1]

## I OVERVIEW OF M&A ACTIVITY

Following declines in 2016 and 2017, US M&A activity reversed trajectory in 2018. Aggregate US M&A deal value increased significantly, although the number of transactions fell. With US$1.73 trillion in M&A activity during 2018, deals for US targets increased by 32.1 per cent compared to 2017.[2] However, the number of deals for US targets decreased 7.8 per cent from 13,500 in 2017 to 12,442 in 2018.[3] These figures demonstrate a trend toward fewer, larger deals, reversing the trend seen in 2016 and 2017 of a larger number of lower-value deals. Narrowing in on acquisitions of US public companies valued at US$100 million or more, there were 165 such deals announced in 2018, a decrease of 5.2 per cent from 2017 (174 deals).[4] Looking further back, the 165 deals signed in 2018 constituted a decrease of 12.2 per cent (188 deals) and 13.6 per cent (191 deals), and an increase of 9.3 per cent (151 deals) from 2016, 2015 and 2014, respectively.[5]

Consistent with the trend in overall US M&A value versus volume, large-cap US M&A saw marked increases in 2018. There were 34 announced US public M&A deals valued over US$5 billion announced in 2018, and 65 valued between US$1 billion and US$5 billion, compared to 26 and 58, respectively, in 2017.[6] Much of the 2018 large-cap activity was in the first half of the year (21 deals, compared to 13 deals in the second half of the year). Announced US public M&A deals valued between US$100 million and US$500 million decreased in 2018, from 56 in 2017 to 34 in 2018.[7] M&A activity in 2018 varied throughout the year, with more active first and fourth quarters and a relatively quieter third quarter. There were 46 announced deals for public US companies valued over US$100 million in the first and fourth quarters of 2018, compared to 40 and 33 in the second and third quarters, respectively.[8]

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1 Richard Hall and Mark I Greene are corporate partners at Cravath, Swaine & Moore LLP. The authors would like to acknowledge the contributions of fellow partners Daniel Slifkin, Eric Hilfers, Len Teti and Margaret D'Amico and associates Philip Cernera, Andrew Davis, Aaron Feuer and Amanda Lamothe-Cadet.

2 Mergers & Acquisitions Review, Full Year 2018, Financial Advisors, Thomson Reuters (2018).

3 Id.

4 What's Market tracks and summarises agreements for acquisitions of US reporting companies valued at $100 million or more. Practical Law Company, 'What's Market: 2018 Year-End Public M&A Wrap-Up', 22 February 2019.

5 Id.

6 Id.

7 Id.

8 Id.

For a discussion of cross-border deal volume, see Section IV.

US public M&A in 2018 was dominated by strategic rather than financial acquirers in 2018, as was the case in 2017. Approximately 136 US public M&A deals valued over US$100 million, or 82 per cent, involved strategic acquirers, up very slightly from 2017 (81 per cent).[9] However, financial sponsors, including private equity buyers, have become well-established players in the US M&A landscape with relatively stable participation for the past few years. For example, the percentage of US public M&A transactions valued over US$100 million that involved private equity buyers has ranged between 13 and 21 per cent over the past four years.[10] These numbers remain stable, among other reasons, because private equity activity is constrained by a cycle of low supply of quality targets, increasing levels of dry powder, and resultant competition among private equity buyers that contributes to high prices. Meanwhile, robust debt financing and stable equity markets have offered viable financing options to strategic buyers. Strategic buyers are even more dominant among large-cap deals. Of the 34 large-cap deals for US public targets entered into in 2018 (valued at US$5 billion or more), 31 were strategic (91 per cent), again up from 2017 (85 per cent).[11]

Like US M&A, global M&A grew in value and declined in volume in 2018. Global M&A activity reached US$4.02 trillion in 2018, compared to US$3.37 trillion in 2017, featuring 47,585 deals, compared to 51,474 in 2017.[12] Global cross-border M&A rose significantly to US$1.6 trillion, up 32 per cent from 2017.[13] China's outbound M&A dropped 5.3 per cent in 2018 after a steep 35 per cent decline in 2017 from a record year in 2016, in part as a result of government policies inhibiting US-inbound deals.[14] However, cross-border China-targeted M&A continued to grow in 2018, with a total value of US$56.1 billion, the highest on record.[15]

Compared against the fourth quarter of 2018, the first quarter of 2019 saw a decrease in volume and an increase in the value of announced US M&A deals. There were 3,219 deals worth US$475.5 billion announced in the first quarter of 2019, compared to 3,422 deals worth US$393.9 billion in the fourth quarter of 2018 (a decrease of 5.9 per cent and an increase of 20.7 per cent, respectively).[16] Compared against the first quarter of 2018, the first quarter of 2019 saw an increase in volume and a decrease in the value of announced US M&A deals. There were 3,137 deals worth US$545.2 billion in the first quarter of 2018 (an increase of 2.6 per cent and a decrease of 12.8 per cent compared to the first quarter of 2019, respectively). Globally, while worldwide M&A activity reached a record high of US$1.0 trillion in value during the first quarter of 2018, it decreased 30.7 per cent to US$693.4 in the first quarter of 2019, and the number of announced deals fell from 9,023 to 8,727.[17] While 2017 brought increased certainty on the tax reform front, 2018 saw additional uncertainty related to US policies regarding trade tariffs on Chinese imports and national security (including President Trump's executive order blocking the US$128.5 billion

9 Id.

10 Id.

11 What's Market: 2018 Year-End Public M&A Wrap-up, footnote 4.

12 Mergers & Acquisitions Review, Full Year 2018, Financial Advisors, footnote 2.

13 What's Market: 2018 Year-End Public M&A Wrap-up, footnote 4.

14 Mergers & Acquisitions Review, Full Year 2018, Financial Advisors, footnote 2.

15 Id.

16 Flashwire Advisor Quarterly: 1st Quarter 2019, FactSet, https://www.factset.com/hubfs/mergerstat_em/quarterly/AdvisorQuarterly.pdf.

17 Id.

proposed acquisition of Qualcomm Inc (Qualcomm) by Singapore-based Broadcom Ltd (Broadcom) in March). It remains to be seen how M&A activity, globally and in the US, will progress for the remainder of 2019.

## II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A in the US is governed by a dual regulatory regime, consisting of state corporation laws (e.g., the Delaware General Corporation Law (DGCL)) and the federal securities laws (primarily, the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934).[18] The Securities and Exchange Commission (SEC) is the regulatory agency responsible for administering the federal securities laws. Federal securities laws apply in the context of a merger, including federal proxy rules governing solicitation of target shareholder approval and federal securities laws relating to tender offers in the context of an offer to purchase shares of a publicly held target company. Furthermore, an acquisition or merger will imply fiduciary duties, as developed and applied in the target company's state of incorporation.

Unlike most other jurisdictions, the US patchwork of federal and state acquisition regulation is not focused on substantively regulating changes of control of target companies. Rather, US regulation focuses on disclosure, ensuring that target company shareholders have the time and information required to make a fully informed decision regarding accepting a tender offer or voting in favour of a merger.

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), an acquirer is normally required to make a filing with US antitrust authorities prior to completing an acquisition if the transaction size exceeds US$90 million (adjusted annually for inflation); the requirement was increased in April 2019 from US$84.4 million in 2018.[19]

There is no general statutory review process governing foreign investment in the US. Under the Exon-Florio Amendment to the Defense Production Act of 1950, however, the President, through the Committee on Foreign Investment in the United States (CFIUS), has the power to review, investigate, prohibit or unwind transactions involving investments by non-US entities that threaten to impair national security.[20] The 1992 Byrd Amendment requires CFIUS to conduct a full Exon-Florio investigation whenever CFIUS receives notice of a foreign government-led takeover of a US business that may affect national security.[21] A CFIUS review is formally a three-step process. The initial informal review step has evolved over time to give both transaction parties and CFIUS additional time to resolve any national security concerns without the time constraints imposed by the formal review process.[22] Historically, parties would pre-file a draft notice, address any initial comments and questions from CFIUS, and then formally file approximately one week later. However, CFIUS now regularly conducts detailed pre-filing reviews, asking extensive questions that must be

18 Securities Act of 1933, 15 U.S.C. § 77a (amended 2015); Securities Exchange Act of 1934, 15 U.S.C. § 78a (amended 2018).

19 HSR Threshold Adjustments and Reportability for 2019, Federal Trade Commission, 7 March 2019, https://www.ftc.gov/news-events/blogs/competition-matters/2019/03/hsr-threshold-adjustments-reportability-2019.

20 50 U.S.C. § 4565 (2015).

21 Pub. L. No. 102-484 (1992).

22 James K Jackson, 'The Committee on Foreign Investment in the United States (CFIUS)', Congressional Research Service, 19 February 2016, www.fas.org/sgp/crs/natsec/RL33388.pdf.

answered before the formal filing is made, which often takes several weeks.[23] The formal review process is usually (although not exclusively) initiated based on voluntary notice filings, with an initial 45-day period during which CFIUS reviews a transaction to consider its effects on US national security. If CFIUS still has national security concerns after the initial period, a second 45-day investigation is launched (with a potential 15-day extension). Few transactions progress to the third step: presidential review and final determination, which determination is not subject to judicial review.[24] Except for certain transactions, filing a notice to CFIUS is a voluntary measure. CFIUS may, however, review a transaction at its discretion, even after it is completed, which may affect the parties to an M&A transaction's anticipated benefits, and the rise in CFIUS reviews is pushing parties to address their possibility early in the transaction process.

On 13 August 2018, President Trump signed the John S McCain National Defense Authorization Act for fiscal year 2019 into law, which included the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA).[25] The legislation expands both the scope of activities subject to CFIUS review and the level of scrutiny directed towards transactions involving certain 'countries of special concern'.[26] Significantly, FIRRMA extends CFIUS's jurisdiction to include the review of non-controlling investments in certain US businesses, and imposes mandatory filings for transactions in certain industries involving a foreign investor in which a foreign government has a substantial interest. The legislation also extended the time frame for the review of transactions. While formal regulations have not yet been proposed to implement all of the FIRRMA modifications to CFIUS, a pilot programme was rolled out in November 2018 mandating notification for certain critical technology transactions. After playing an active role in 2017 and 2018, CFIUS continues to be a substantial player in the US M&A landscape moving forward (see Section IV for a discussion of recent executive action and CFIUS review).

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

23 Farhad Jalinous et al. of White & Case, 'CFIUS: Recent Developments and Trends', February 2017, www.whitecase.com/publications/alert/cfius-recent-developments-and-trends; Michael Gershberg and Justin Schenck, 'CFIUS Takeaways from Blocked Aixtron Deal', Law 360, 16 December 2016, www.law360.com/articles/873348/cfius-takeaways-from-blocked-aixtron-deal.

24 Nicholas Spiliotes, Aki Bayz and Betre Gizaw of Morrison & Foerster, 'Getting the Deal Done: China, Semiconductors, and CFIUS', *The M&A Journal*, Vol. 16 No. 5, www.mofo.com/~/media/Files/Articles/2016/04/160400ChinaSemiconductorsCFIUS.pdf.

25 H.R. 5515, 115th Congress (2017–2018): John S McCain National Defense Authorization Act for fiscal year 2019.

26 Id.

## III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

### i Fair value in appraisal actions

In the wake of the 2013 Dole Food Company, Inc management buyout, hedge funds added the battle for appraisal rights to their activist repertoires.[27] As hedge funds sit on large reserves of cash, they continue to seek ways to earn returns. While appraisal rights are generally not a lucrative pursuit for the average shareholder, activist funds have the resources to make it worth their while, and the values involved in appraisal arbitrage rose substantially in recent years. Appraisal arbitrage claims were valued at US$1.5 billion in 2013.[28] Claims continued to rise through 2016, with 76 petitions challenging 47 deals.[29] However, after years of steady increases, the tide turned in 2017.[30] Appraisal petitions fell even further in 2018, with 26 petitions challenging 22 deals.[31]

Developments in the law governing appraisal actions in recent years, both legislative and judicial, have had a substantial impact on an appraisal's upside and therefore on the incentive to bring appraisal actions in Delaware. In 2016, the Delaware legislature passed two amendments to Section 262 of the DGCL aimed at curbing appraisal arbitrage. The first imposed a *de minimis* exception for certain appraisal claims, requiring that more than 1 per cent of the outstanding shares entitled to appraisal perfect their appraisal rights or that the merger consideration for shares with perfected appraisal rights exceed US$1 million.[32] The second allows a corporation to prepay the claimant any portion of the transaction price, limiting the principal on which interest accrues while the claim is disputed.[33]

Delaware judicial decisions have also significantly undermined appraisal arbitrage. In several 2015 decisions, the Delaware Court of Chancery relied entirely upon, or gave substantial weight to, the merger price in determining fair value in shareholder appraisal actions where there was a robust, conflicts-free sales process.[34] Subsequently, three important 2016 Delaware Court of Chancery decisions cut back on what had appeared in 2015 to be strong deference to valuations based on per-share merger price minus any merger-related synergies, suggesting that other financial analyses would still be used.[35] In 2017, however, Delaware courts reinvoked 2015's deference to deal price. First, in May 2017, the Delaware Court of Chancery in *In re Appraisal of PetSmart, Inc* gave zero weight to the proffered

27 Steven M Davidoff, 'A New Form of Shareholder Activism Gains Momentum', *New York Times*, 4 March 2014, dealbook.nytimes.com/2014/03/04/a-new-form-of-shareholder-activism-gains-momentum/?_php=true&_type=blogs&_r=0.

28 Liz Hoffman, 'Hedge Funds Wield Risky Legal Ploy to Milk Buyouts', *The Wall Street Journal*, 13 April 2014, online.wsj.com/news/articles/ SB10001424052702303887804579500013770163966.

29 Cornerstone: Appraisal Litigation in Delaware: Trends in Petitions and Opinions (2006-2018).

30 Id.

31 Id.

32 Ronald Brown III and Keenan Lynch, 'Key 2016 Appraisal Decisions that Rejected Merger Price', *Law360*, 6 December 2016, www.law360.com/articles/868758/key-2016-appraisal-decisions-that-rejected-merg.

33 Id.

34 See, e.g., *Merlin Partners LP v. AutoInfo, Inc*, 2015 WL 2069417 (Del. Ch. 30 April 2015); *LongPath Capital, LLC v. Ramtron Int'l Corp*, CA No. 8094-VCP (Del. Ch. 30 June 2015); and *Merion Capital LP v. BMC Software, Inc*, No. 8900VCG (Del. Ch. 21 October 2015).

35 'M&A Update: Highlights from 2015 and Implications for 2016', Cadwalader, Wickersham & Taft LLP, 19 January 2016, www.cadwalader.com.

discounted cash flow (DCF) analyses, finding them speculative and that the claimants had not shown they were reliable, whereas the deal price resulted from a robust pre-signing auction with well-informed, appropriately incentivised bidders.[36]

In August 2017, the Delaware Supreme Court reversed the Court of Chancery's 2016 decision in *In re Appraisal of DFC Global Corp*, disagreeing that future uncertainty of the private equity buyer undermined the deal price and finding that the Court of Chancery was not justified in giving the deal price equal, rather than substantially more, weight relative to the other valuation methods proffered.[37] With regard to future uncertainty, the Court stated that absent any academic or empirical evidence to the contrary, there was no reason to think market participants would be incapable of factoring regulatory uncertainty into their analysis, and that the market's collective judgment would be more likely to be accurate in assessing the related risk than any individual's estimate.[38] The Court also found no logical basis for the notion that the deal price deserves less weight in the context of a private equity buyer, stating that all buyers take the potential return on equity into account to justify the costs and risks of an acquisition, and the fact that a private equity buyer may demand a certain rate of return does not mean that the price it is willing to pay is not a meaningful indication of fair value.[39]

Similarly, in December 2017, the Delaware Supreme Court reversed the Court of Chancery's 2016 decision in *In re Appraisal of Dell Inc* on the basis that the Court of Chancery did not afford the deal price any weight, stating that the deal price need not be shown to be the 'most reliable' indicator of fair value for it to receive any weight at all and that '[t]he issue in an appraisal is not whether a negotiator has extracted the highest possible bid. Rather, the key inquiry is whether the dissenters got fair value and were not exploited.'[40] The Court criticised several components of the trial court's reasoning. First, the Court found that any perceived 'valuation gap' based on investor 'myopia' was contrary to the proffered evidence, which indicated that analysts considered the company's long-range outlook, as well as to the efficient market theory, which suggests that for widely traded companies lacking a controlling shareholder, the market is well informed and able to digest available information to adjust its valuation for a long-range outlook.[41] As in *DFC*, the Court rejected the proposition that the absence of strategic bidders undermined the deal price, seeing no rational connection between status as a financial sponsor and fair price.[42] The Court also rejected the proposition that the go-shop was fatally flawed, including due to the alleged 'winner's curse' in management buyouts, because bidders had full access to requested data and affirmative steps were taken to remedy the inherent information asymmetry.[43] Furthermore, the Court rejected the proposition that Michael Dell's alignment with one bidder had meaningfully deterred rival bidders absent evidence that he would not participate with such rival bidders.[44] In July 2018, the Chancery Court in *In re Appraisal of Solera Holdings, Inc* applied *Dell* to conclude that deal price was the best evidence of fair value.[45] The Court accepted Solera's valuation, which

36 *In re Appraisal of PetSmart, Inc*, WL 2303599 (Del. Ch. 26 May 2017).

37 *DFC Global Corporation v. Muirfield Value Partners, LP*, 172 A.3d 346 (Del. 2017).

38 Id. at 349.

39 Id. at 349-50.

40 *Dell, Inc v. Magnetar Global Event Driven Master Fund Ltd*, 177 A.3d 1, 33 (Del. 2017).

41 Id. at 24-25.

42 Id. at 28.

43 Id. at 32.

44 Id. at 34-35.

45 *In re Appraisal of Solera Holdings, Inc*, C.A. No. 12080-CB, 2018 WL 3625644 (Del. Ch. 30 July 2018).

excluded synergies from the deal price and resulted in a valuation that was 3.4 per cent below deal price. The Court found that Solera was 'sold in an open process that, although not perfect, was characterized by many objective indicia of reliability', and that such process therefore provided the most reliable evidence of fair value.

Further undermining appraisal prospects, when Delaware courts have found flaws in a sale process, they have increasingly, although not universally, found fair value below rather than above the deal price, emphasising the statutory mandate to exclude synergies. In May 2017, the Delaware Court of Chancery in *In re Appraisal of SWS Group, Inc* found the US$6.92 per share merger price unreliable in light of a number of factors, including that the buyer, Hilltop Holdings, Inc, was a major creditor of the target's, and informed the target board that it would not waive its credit agreement's merger covenant for any alternative transaction.[46] The Court also found flaws with the proffered company comparables due to substantial differences in size, business lines and performance. The Court instead relied on its own DCF analysis to reach a value of US$6.38 per share.[47] Similarly, in *ACP Master, Ltd et al v. Sprint Corp et al*, Clearwire Corp was purchased by Sprint Corp (Sprint), its majority shareholder, for US$5 per share, but the Delaware Court of Chancery came to a valuation of US$2.13 per share.[48] The parties had not argued for use of the transaction price for fair value, and the Court acknowledged that while Sprint had in some ways controlled the sales process, Sprint's DCF analysis provided a better proxy for fair value than the dissenting shareholders' because it was prepared by management in the ordinary course of business and pertained to the stand-alone company, without synergies.[49] In two 2018 decisions, *Blueblade Capital Opportunities LLC v. Norcraft Cos*[50] and *In re Appraisal of AOL Inc*,[51] Delaware Chancery Courts found significant flaws in the respective sales processes and assigned no weight to the deal price in determining fair value. In each instance the Court instead applied its own DCF analysis, resulting in fair value determinations that were 2.5 per cent above the deal price in Norcraft and 2.6 per cent lower than the deal price in AOL.

The Delaware Court of Chancery continued to explore new theories of fair value in 2018. Regardless of the soundness of the sales process, one Delaware court articulated a preference for unaffected market price over deal price as a means to exclude synergies, at least where the target's stock is widely traded and absent evidence that the market was not well informed at the time. In February 2018, the Delaware Court of Chancery in *Verition Partners Master Fund Ltd v. Aruba Networks* found fair value equal to the 30-day unaffected market price of US$17.13 per share, well below the US$24.67 per share deal price. The Court found that the deal price was reliable even though, unlike Dell and DFC, there was only one bidder but, citing the statutory mandate to exclude synergies, instead utilised the 30-day average unaffected market price.[52] Absent expert testimony against the efficient market theory, and given that the company was widely traded and lacked a controlling shareholder, the Court

46 *In re Appraisal of SWS Group, Inc*, WL 2334852 (Del. Ch. 30 May 2017).

47 Id. at 30.

48 *ACP Master, Ltd v. Sprint Corporation*, WL 3421142 (Del. Ch. 8 August 2017).

49 Id. at 48-49.

50 *Blueblade Capital Opportunities LLC v. Norcraft Cos*, No. 11184-VCS, 2018 WL 3602940 (Del. Ch. 27 July 2018).

51 *In re Appraisal of AOL Inc*, No. 11204-VCG, 2018 WL 1037450 (Del. Ch. 23 February 2018).

52 *Verition Partners Master Fund Ltd v. Aruba Networks, Inc*, WL 922139 (Del. Ch. 15 February 2018).

found unaffected market price to be more direct and less speculative than deal price less synergies.[53] The Court's decision in *Aruba* would have both undermined appraisal prospects for public targets and also encouraged expert testimony challenging market efficiency.

In April 2019, the Delaware Supreme Court reversed the Court of Chancery's decision in *Aruba* on the basis that the Court of Chancery abused its discretion in arriving at Aruba's 30-day average unaffected market price as the fair value of the appellants' shares.[54] In a *per curiam* decision that was 'stunningly tough on Vice-Chancellor Laster',[55] the Court thoroughly rejected the idea of trading price as a proxy for fair value and awarded the petitioners US$19.10 per share, a price which reflected Aruba's estimation of the deal price excluding synergies.[56]

Appraisal will continue to be an important area of Delaware corporate law as courts will continue to address which methods produce the best indication of a company's fair value, with a particular emphasis on merger price (with potential adjustments for synergies or reduced agency costs). As courts delineate the circumstances in which sale processes should be respected, they will alter the appraisal landscape, deterring appraisal actions in circumstances where the merger price is likely to be treated as a ceiling, with adjustments reducing recoveries. Based on Delaware rulings in 2017, 2018 and early 2019, the territory where appraisal remains profitable is shrinking, and may well ultimately be confined to private company transactions and controller squeeze-outs, for which the deal price may be deemed unreliable.[57]

### ii Standard of review in fiduciary duty actions

The success of a claim that the members of a board of directors have breached their fiduciary duties, or that a financial adviser has aided and abetted such breach, is largely dependent upon the standard of review applied to the relevant directors' actions. In recent years, Delaware courts have expanded the territory in which the business judgment rule, requiring gross negligence, applies, thereby drastically increasing deference to boards of directors and discouraging fiduciary duty actions. In 2015, the Delaware Supreme Court in *Corwin v. KKR Financial Holdings LLC* clarified that the voluntary approval of a merger (other than with a controlling shareholder) by fully informed, disinterested shareholders invoked the business judgment rule standard of review in post-closing damages actions even where *Revlon*-enhanced scrutiny would otherwise apply.[58] According to the Court, *Unocal* and *Revlon* were designed as tools of injunctive relief to address important M&A decisions in real time and not as tools for obtaining post-closing money damages.[59]

53 Id. at 30.

54 *Verition Partners Master Fund Ltd v. Aruba Networks, Inc*, No. 368, 2018 (Del. 16 April 2019) at 3.

55 'Appraisal litigation after Aruba? It's still a bad bet for shareholders', Reuters, 17 April 2019, https://www.reuters.com/article/us-otc-appraisal/appraisal-litigation-after-aruba-its-still-a-bad-bet-for-shareholders-idUSKCN1RT2N4.

56 *Verition Partners Master Fund Ltd v. Aruba Networks, Inc* at 3, footnote 54.

57 'The New New Regime in Delaware Appraisal Law', Harvard Law School Forum, 1 March 2018, https://corpgov.law.harvard.edu/2018/03/01/the-new-new-regime-in-delaware-appraisal-law/.

58 'Delaware Corporate Law and Litigation: What Happened in 2015 and What It Means for You in 2016', DLA Piper, www.dlapiper.com; *Corwin v. KKR Fin Holdings LLC*, 125 A.3d 304, 309-11 (Del. 2015).

59 *Corwin v. KKR Fin Holdings LLC* at 312, footnote 58.

Subsequently, in 2016 and early 2017, Delaware courts continued to apply *Corwin* to fiduciary duty cases in a manner that clarified and extended the application of the decision.[60] For example, in *Singh v. Attenborough*, the Delaware Supreme Court clarified the *Corwin* ruling by holding that the business judgment rule applies irrebuttably to any post-closing judicial review of a merger that received the uncoerced, fully informed vote of disinterested shareholders.[61] Then, in *In re Volcano Corporation Stockholder Litigation*, the Delaware Supreme Court affirmed the Court of Chancery's holding that if fully informed, uncoerced and disinterested stockholders tender their shares to approve a merger under Section 251(h) of the DGCL, such approval has the same effect as a vote under *Corwin* and the business judgment rule applies irrebuttably to the transaction.[62]

However, in cases in 2017, Delaware courts applied *Corwin* more narrowly, demonstrating the limits of *Corwin's* reach.[63] This narrowing continued in 2018. In *Appel v. Berkman*,[64] the Delaware Supreme Court overruled a Court of Chancery finding that a stockholder vote was adequately informed. In reviewing the stockholder vote approving the acquisition of Diamond Resorts International, the Delaware Supreme Court found stockholders were not fully informed because the board failed to disclose that the Diamond's chair, the company's founder and largest stockholder, was opposed to the transaction. The Supreme Court found that the 'Chairman's views regarding the wisdom of selling the company were ones that reasonable stockholders would have found material in deciding whether to vote for the merger or seek appraisal, and the failure to disclose them rendered the facts that were disclosed misleadingly incomplete'.[65]

In November 2018, the Delaware Court of Chancery decided the *In re Tangoe, Inc Stockholders Litigation*, denying directors who approved a sale of the company *Corwin* protection because stockholders were inadequately informed when tendering into the transaction. Audited financials were not available at the time of the transaction due to a pending restatement, and while neither federal securities nor Delaware law mandated disclosure of audited financials in this particular context, the Court found that the absence of audited financials supported a reasonable inference that stockholder approval of the transaction was not fully informed.[66] The Court stated that directors making "difficult decisions amid a 'regulatory storm'" (such as a restatement of financials) may still achieve business judgment rule deference if they carefully and thoroughly explain all material aspects of the situation to stockholders. This may require providing information to stockholders beyond what is legally required.

Subsequently, in December 2018, the Delaware Court of Chancery denied a motion to dismiss fiduciary duty claims against the CEO of Xura, Inc in the *In re Xura, Inc Stockholder Litigation*.[67] The CEO was involved in negotiating the sale of the company, and the Court

60 Lisa A Schmidt, 'Recent Developments in Delaware Corporate Law', Tulane University Law School 29th Annual Corporate Law Institute, 30 March 2017.

61 *Singh v. Attenborough*, 137 A.3d 151 (Del. 2016).

62 'Recent Developments in Delaware Corporate Law', footnote 60.

63 See, e.g., *In re Saba Software, Inc Stockholder Litigation*, WL 1201108 (Del. Ch. 11 April 2017); *Sciabacucchi v. Liberty Broadband Corporation*, WL 2352152, 3 (Del. Ch. 31 May 2017); and *In re Massey Energy Company Derivative and Class Action Litigation*, 160 A.3d 484, (Del. Ch. 4 May 2017).

64 *Appel v. Berkman*, 180 A.3d 1055 (Del. 2018).

65 Id. at 2.

66 *In re Tangoe, Inc Stockholders Litig*, 2018 WL 6074435 (Del. Ch. 20 November 2018) at 29.

67 *In re Xura, Inc Stockholder Litig*, 2018 WL 6498677 (Del. Ch. 10 December 2018).

found that *Corwin* protection did not apply because stockholders were not fully informed about aspects of the negotiations when they approved the deal. The Xura CEO had pursued his own interests (including employment) over those of stockholders in undisclosed negotiations.

After Delaware courts' 2015 and 2016 decisions seemed to nearly sound the death knell for post-closing fiduciary duties actions challenging transactions that had been approved by disinterested shareholders, cases in 2017 and 2018 suggest at least some continued vitality. One could argue that the facts in certain of these instances were extreme, but courts have now shown a repeated willingness to deny *Corwin* cleansing. It remains to be seen if Delaware courts continue to find shareholder votes uninformed or coerced in other contexts to preclude the application of *Corwin*, or if the trend will reverse.

### iii Material adverse effect clauses in Delaware

October 2018 marked the first time that a Delaware court found that an M&A target had suffered a material adverse effect (MAE) such that an acquirer could walk away from a deal. The Delaware Court of Chancery issued a 246-page opinion in *Akorn, Inc v. Fresenius Kabi AG*, holding that Fresenius had validly terminated its merger agreement with Akorn on multiple independent grounds. The Court found that Akorn had breached its representation concerning regulatory compliance, which could reasonably be expected to amount to an MAE; materially breached a covenant to operate its business in the ordinary course; and suffered a general MAE as a result of its financial performance.[68] The Delaware Supreme Court upheld the decision in December 2018 on the grounds that Akorn's breach of its regulatory representation could reasonably be expected to amount to an MAE, and separately that Akorn had suffered a general MAE as a result of its financial performance.[69]

Akorn and Fresenius entered into a merger agreement shortly after the announcement of Akorn's results for the first quarter of 2017. During the second quarter of 2017, Akorn's business performance, in the words of the court, 'fell off a cliff', delivering results that fell materially below Akorn's prior-year performance on a year-over-year basis despite the fact that Akorn had reaffirmed its full-year guidance on the day the merger agreement was announced.[70] Akorn's performance fell well below that guidance, forcing management to adjust Akorn's full-year guidance downward.[71] Additionally, following signing, Fresenius received multiple anonymous letters regarding regulatory and data-integrity issues at Akorn, and initiated an investigation. Two days prior to the outside date, Fresenius delivered notice to Akorn that it was terminating the merger agreement because of, among other reasons, Akorn's breach of its regulatory representation and warranty, which could reasonably be expected to amount to an MAE; Akorn's material breach of a covenant to operate its business in the ordinary course; and Fresenius' right not to close once the outside date passed because Akorn had suffered an MAE.[72] The court agreed that Fresenius was within its rights to terminate the merger agreement.

68 *Akorn, Inc v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL (Del. Ch. 1 October 2018).

69 *Akorn Inc v. Fresenius Kabi AG*, ___ A.3d ___, 2018 WL 6427137 (Del. 7 December 2018) (unpublished table decision).

70 *Akorn, Inc v. Fresenius Kabi AG* at 2, footnote 68.

71 Id.

72 Id. at 4.

The court found that Akorn's performance decline was significant. In the five quarters following signing but prior to Fresenius' termination of the merger agreement, Akorn's revenue was down between 25 and 34 per cent each quarter, its operating income was down between 84 and 292 per cent each quarter, and its earnings per share was down between 96 and 300 per cent each quarter, in each case year-over-year. With respect to the finding that Akorn had suffered a general MAE, the court called Akorn's dramatic downturn in performance 'durationally-significant', having 'already persisted for a full year and show[ing] no sign of abating',[73] and noted that the problems were specific to Akorn rather than industry-wide.[74]

The court also found that Akorn's regulatory issues were significant. In reviewing whether Akorn had breached representations it made regarding its compliance with regulatory requirements and whether such breach could reasonably be expected to result in an MAE, the court found that there was 'overwhelming evidence of widespread regulatory violations and pervasive compliance problems at Akorn'.[75] The court found the problems to be qualitatively and quantitatively significant, with the regulatory issues expected to result in a decline in value of Akorn of 21 per cent.[76]

## IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Like US M&A overall, US cross-border activity increased in value in 2018. There was a 12.6 per cent increase in the value of US cross-border M&A from 2017.[77] For the first time since 2011, the US was a net acquirer in the context of cross-border M&A, with US companies acquiring US$321 billion of foreign companies, and foreign companies acquiring US$260 billion of US companies.[78] As a percentage of all US M&A, US inbound cross-border deals had a relatively smaller presence in 2018. As tracked by What's Market, compared to total deals, only 25, or 15.1 per cent, were reached with foreign buyers, compared to 36, or 20.7 per cent, in 2017.[79] China announced outbound M&A continued to fall in 2018, compared to its record levels in 2016, slowing to US$116.6 billion in deal value, a 5.3 per cent decline from 2017.[80] The depressed US–China deal volume was because of risks pertaining to deal certainty due to potential failures to receive regulatory approvals from Chinese regulators or CFIUS.[81]

73 Id. at 137.

74 Id. at 144.

75 Id. at 163.

76 Id. at 184.

77 Bob Carroll, James Mackie and Brandon Pizzola, 'Insight: U.S. Cross-Border Mergers and Acquisitions Rise in 2018', Bloomberg Tax, 4 April 2019, https://news.bloombergtax.com/daily-tax-report/insight-u-s-cross-border-mergers-and-acquisitions-rise-in-2018.

78 Id.

79 What's Market: 2018 Year-End Public M&A Wrap-up, footnote 4.

80 Id.

81 'How M&A Agreements Handle the Risks and Challenges of PRC Acquirors', Harvard Law School Forum, 8 September 2017, https://corpgov.law. harvard.edu/2017/09/08/how-ma-agreements-handle-the-risks-and-challenges-of-prc-acquirors/.

### i Acquisition inversions and earnings stripping

Acquisition inversions, whereby US corporations reincorporate in low-tax jurisdictions via cross-border M&A (hereinafter, inversions), have in previous years been fundamental to foreign involvement in US M&A. Historically, US tax rates were some of the highest globally, and US-based companies consistently looked for ways to shield their international earnings from those rates. In the past, US-based companies could accomplish this by reincorporating in a foreign jurisdiction, or by moving to a country in which it was already doing a substantial amount of business in order to benefit from that country's lower tax rate.[82] For this to work, 25 per cent of the company's sales, assets and employees had to be domiciled in the new jurisdiction.[83] This was a difficult burden for most companies to meet and, as a result, inversions became popular.[84] Under the rules governing inversions, a foreign target company and acquirer can be combined under a new holding company formed under the laws of a lower-tax foreign jurisdiction, whether or not it is the target company's jurisdiction of organisation, if less than 80 per cent of the combined entity's stock is owned by the former shareholders of the US company.[85] By 2015, acquisition inversions accounted for 66 per cent of all proposed US outbound deals, up from 1 per cent in 2011.[86]

Recent statutory and regulatory changes, however, have made inversion transactions substantially less attractive. In December 2017, massive US tax reform through the passage of the Tax Cuts and Jobs Act of 2017 (TCJA) substantially undercut the advantages of inversions and earnings stripping.[87] On the one hand, the lower corporate tax and the dividend exemption reduced the tax benefits associated with inverting by excluding foreign earnings from US tax or taxing them at a lower rate. On the other hand, the legislation contains a number of provisions that specifically penalise inverters. These include further limitations on the deductibility of interest expense, increased transition taxes, and the BEAT tax (as defined below), a minimum tax that is calculated without taking into account certain deductions from related-party transactions (like earnings stripping) (see Section VIII for a detailed discussion of the TCJA and its implications for US M&A).

### ii CFIUS review

CFIUS plays a key gatekeeping role when it comes to foreign involvement in US M&A. In 2017 and 2018, CFIUS review has presented an increasingly significant obstacle, as CFIUS continues to interpret its jurisdiction broadly and Congress has broadened its authority. As discussed in Section II, new legislation has expanded the reach of CFIUS. Evidence suggests CFIUS received over 235 filings in 2017, compared to 172 in 2016 and 143 in 2015.[88] CFIUS

82 David Gelles, 'New Corporate Tax Shelter: A Merger Abroad', *New York Times*, 8 October 2013, dealbook.nytimes.com/2013/10/08/to-cut-corporate-taxes-a-merger-abroad-and-a-new-home.

83 David Gelles, 'Obama Budget Seeks to Eliminate Inversions', *New York Times*, 5 March 2014, dealbook.nytimes.com/2014/03/05/obama-budget-seeks-to-eliminate-inversions.

84 Id.

85 Press release, Department of the Treasury, 'Fact Sheet: Treasury Actions to Rein in Corporate Tax Inversions', 22 September 2014, www.treasury.gov/press-center/press-releases/Pages/jl2645.aspx.

86 'The continuing appeal of inversions', *Financier Worldwide*, November 2015, www.financierworldwide.com/the-continuing-appeal-of-inversions/#.V0S9fmcUVaR.

87 Tax Cuts and Jobs Act of 2017, Pub. L. 115–97, 131 Stat. 2054 (2017).

88 'CFIUS: Recent Developments and Trends', footnote 23; 'Presidential Order—Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GMBH', The White House, Office of the Press Secretary, 2 December 2016, https://obamawhitehouse.archives.gov/the-press-

has interpreted its jurisdiction to include deals between non-US companies with a US nexus. For example, in 2016, the proposed acquisition of Lumileds by a Chinese consortium from Philips NV (a Dutch company) was abandoned by the parties at CFIUS' request. CFIUS also requested that the parties abandon the acquisition of Aixtron SE (a German company) by a Chinese investor due to national security concerns. The parties refused to abandon the deal and opted to submit the matter to President Obama for review, which led to the first-ever presidential order proactively blocking an acquisition. Additionally, the parties abandoned the sale of Global Communications Semiconductors, LLC to San'an Optoelectronics Co, Ltd (a Chinese semiconductor company) due to CFIUS' concerns. In September 2017, President Trump issued an executive order to block the acquisition of Lattice Semiconductor Corporation by Chinese private equity fund Canyon Bridge Capital Partners (Canyon Bridge).[89] Finally, on 12 March 2018, President Trump again stepped in with an executive order following CFIUS review, blocking Broadcom's US$128.6 billion proposed acquisition of Qualcomm on the basis that it threatened US national security.[90] Although Broadcom is a Singapore-based company, the order came during a period of intense technological competition between the US and China, and CFIUS expressed concerns that Broadcom would undergo its typical cost-cutting measures to stymie research and development (R&D) and therefore undermine Qualcomm's ability to compete with Chinese and other foreign rivals in the domain of wireless technology.[91]

CFIUS' recent history of enforcement demonstrates a focus on national security concerns, and increasingly general competition concerns, implicated in the context of Chinese buyers. In addition to Canyon Bridge, the Trump administration opposed billions of dollars worth of takeovers of US targets in 2017 and 2018.[92] In early 2019, CFIUS announced that it had forced three separate divestitures and had imposed a US$1 million fine, its first-ever civil penalty, for repeated violations of a 2016 mitigation agreement.[93] Two of the forced divestitures related to concerns about the potential exploitation of sensitive data relating to US citizens, part of the expanded scope of CFIUS granted by FIRRMA.[94] In its proposal for the fiscal year 2020 budget, the Department of Justice requested additional resources to assist with reviewing CFIUS cases.[95] Failure to obtain regulatory approvals can trigger break-up fees for acquirers, and the rise in CFIUS reviews could push more M&A parties to address it in termination fee provisions. In particular, Chinese buyers may have to offer a higher bid

office/2016/12/02/presidential-order-regarding-proposed-acquisition-controlling-interest.

89 Id.

90 'Presidential Order Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited', The White House, 12 March 2018, https://www.whitehouse.gov/presidential-actions/presidential-order-regarding-proposed-takeover-qualcomm-incorporated-broadcom-limited/.

91 'Trump Orders Broadcom to Cease Attempt to Buy Qualcomm', *The Wall Street Journal*, 13 March 2018, https://www.wsj.com/articles/in-letter-cfius-suggests-it-may-soon-recommend-against-broadcom-bid-for-qualcomm-1520869867.

92 David McLaughlin and Kristy Westgard, 'All About CFIUS, Trump's Watchdog on China Dealmaking: Quick Take', *Bloomberg*, 23 March 2018, https://www.bloomberg.com/news/articles/2018-03-23/all-about-cfius-trump-s-watchdog-on-china-dealmaking-quicktake.

93 'CFIUS Means Business, Unwinding Non-Notified Transactions and Penalizing Non-Compliance with Mitigation Agreements', Morrison Foerster, 15 April 2019, https://www.mofo.com/resources/publications/190415-cfius-mitigation-agreements.html.

94 Id.

95 'CFIUS Developments: Notable Cases and Key Trends, Gibson, Dunn & Crutcher LLP, 24 April 2019, https://www.gibsondunn.com/cfius-developments-notable-cases-and-key-trends/.

to overcome a perceived increased CFIUS risk.[96] Parties may also want to consider carving off any sensitive portions of their US businesses, which recently has included, among other things, finance and technology.[97]

## V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

In 2018, the leading industry sector in the US on the basis of announced deal value data provided by Thomson Reuters was the energy and power sector.[98] Deal value in this sector reached US$407.5 billion in 2018, which was a 23.6 per cent market share.[99] The technology sector fell from first to second place with US$324.8 billion (18.8 per cent of the market) and healthcare was again third with US$215.4 billion (12.5 per cent of the market).[100] The top five deals signed in 2018 for a US target were Cigna Corp's acquisition of Express Scripts Holding Co (US$68.5 billion), Energy Transfer Equity, LP's acquisition of Energy Transfer Partners, LP (US$61.8 billion), T-Mobile US, Inc's acquisition of Sprint Corp (US$58.7 billion), International Business Machines Corp's acquisition of Red Hat, Inc (US$32.3 billion) and Marathon Petroleum Corp's acquisition of Andeavor (US$31.3 billion).[101]

### i Shareholder activism and engagement

Like 2017, 2018 was a busy year for shareholder activists in the US, and shareholder activism is becoming increasingly concentrated among established activist players. In 2018, there were 268 total activist campaigns announced against US companies, compared to 254 in 2017.[102] There were a total of 51 proxy fights in 2018, up 8.5 per cent from 47 in 2017.[103] Activists invested approximately US$2.5 billion more dollars in new activist positions in 2018 than 2017, and won more board seats in 2018 than in 2017, mostly through settlements.[104] While 2017 saw a focus by such activists on large-cap companies,[105] in 2018 they reversed course and focused on fewer targets with market caps in excess of $50 billion.[106]

In connection with US M&A, activists continue to play a key role by arguing for alternatives to proposed mergers or by demanding a higher price, undermining target shareholder approval of proposed transactions. Activism and M&A often overlap. When

96 Shayndi Raice, 'Europe-China Deals Get More U.S. Scrutiny', *The Wall Street Journal*, 24 January 2016, www.wsj.com/articles/europe-china-deals-get-more-u-s-scrutiny-1453680070.

97 'Chinese Investments and the Committee on Foreign Investment in the United States', Lexology, 15 January 2018, https://www.lexology.com/library /detail.aspx?g=6889957f-16e2-4e24-bbe7-db382a66c0d6.

98 Mergers & Acquisitions Review, Full Year 2018, Financial Advisors, footnote 2.

99 Id.

100 Id.

101 What's Market: 2018 Year-End Public M&A Wrap-up, footnote 4.

102 'Review and Analysis of 2018 U.S. Shareholder Activism', Sullivan & Cromwell LLP, 14 March 2019, https://www.sullcrom.com/files/upload/SC-Publication-SandC-MnA-2018-US-Shareholder-Activism-Analysis.pdf.

103 Id.

104 Melissa Sawyer, Lauren S Boehmke, and Nathaniel R Ludewig, 'Review and Analysis of 2018 U.S. Shareholder Activism', Harvard Law School Forum on Corporate Governance and Financial Regulation, 5 April 2019, https://corpgov.law.harvard.edu/2019/04/05/review-and-analysis-of-2018-u-s-shareholder-activism/.

105 Id.

106 'Review and Analysis of 2018 U.S. Shareholder Activism', footnote 102.

activist investors buy up company stock and engage in various campaigns, they produce disruption and uncertainty that acquirers can leverage to garner support for a transaction, as occurred at Campbell's, Magellan Healthcare, Dell and Hyundai in 2018.[107] Activists may also advocate in favour of a sale of a target company to benefit from short-term increases in value. Pro-M&A activism was prominent in 2018, with approximately 33 per cent of campaigns launched in 2018 being M&A-driven.[108] As institutional investors continue to concentrate ownership, activist investors benefit from having to convince fewer of their fellow investors to pursue their agenda. As of December 2018, one of BlackRock, Vanguard or State Street was the largest shareholder in 438 of the S&P 500 companies, roughly 88 per cent, and collectively the three firms owned 18.7per cent of all shares in the S&P 500,[109] compared to 14.7 per cent in 2013, while retail holders now hold less than 30 per cent.[110] With the rise in shareholder activism, companies have increased their level of shareholder engagement with both activists and institutional investors.[111]

### ii Shifts in merger litigation to federal courts and away from disclosure-only settlements

Increasing deference towards boards of directors, exemplified by the legal developments in appraisal and post-closing fiduciary duty actions for damages discussed in Section III, have in part led to a shift in litigation away from appraisal and fiduciary duty claims in Delaware in favour of challenges in federal courts through federal securities claims alleging proxy fraud under Rule 14a-9 under the Securities Act of 1933.[112] In 2017, 73 per cent of deals valued over US$100 million were challenged by shareholders, down from 94 per cent in 2013, but 87 per cent of those lawsuits were filed in federal court compared to only 32 per cent in 2013.[113] The number of M&A litigated in Delaware has dropped precipitously in recent years, declining 81 per cent from 37 in 2016 to seven in 2017.[114]

Also fuelling the migration to federal courts has been Delaware's disdain towards disclosure-only settlements. In 2014, 93 per cent of US M&A deals over US$100 million resulted in shareholder litigation, with the first lawsuit in a challenged deal being filed an average of 14 days after the announcement of the deal and 59 per cent of all such litigation being resolved before deal closing.[115] Of the litigation resolved before closing,

107 Id.

108 '2018 Review of Shareholder Activism', Lazard, January 2019, https://www.lazard.com/media/450805/lazards-2018-review-of-shareholder-activism.pdf.

109 'Review and Analysis of 2018 U.S. Shareholder Activism', footnote 102.

110 Id.

111 'M&A Update: Highlights from 2015 and Implications for 2016', footnote 35.

112 Securities Act of 1933, footnote 18; False or Misleading Statements, 17 CFR 240.14a-9 (2000).

113 'The Continuing Shift Of Merger Litigation To Federal Courts', Robert Long and Andrew Sumner, *Law360*, 18 December 2019, https://www.law360.com/articles/1112193/the-continuing-shift-of-merger-litigation-to-federal-courts.

114 'Shareholder Litigation Involving Acquisition of Public Companies: Review of 2017 M&A Litigation', John Gould, Harvard Law School Forum on Corporate Governance and Financial Regulation, 19 July 2018, https://corpgov.law.harvard.edu/2018/07/19/shareholder-litigation-involving-acquisition-of-public-companies-review-of-2017-ma-litigation/. This post examines litigation challenging M&A deals valued over $100 million announced from 2008 through 2017.

115 'Shareholder Litigation Involving Acquisitions of Public Companies – Review of 2014 M&A Litigation', Cornerstone Research (2015), www.cornerstone.com.

close to 90 per cent settled, with the remainder being withdrawn or dismissed.[116] Of the 78 settlements reached in 2014, only six settlements, or 8 per cent, provided monetary consideration to shareholders, nearly 80 per cent only provided disclosure and 9 per cent included changes to deal protection provisions in the merger agreements.[117] However, after years of building criticism of routine disclosure-only settlements within the Delaware Court of Chancery, the Court was particularly critical in 2015, resulting in the rejection of two such proposed settlements in key cases: *Acevedo v. Aeroflex Holding Corporation* and *In re Aruba Networks, Inc Stockholder Litigation*.[118] Similarly, in its January 2016 decision in *In re Trulia, Inc Stockholder Litigation*, the Delaware Court of Chancery reaffirmed its disfavour of disclosure-only settlements in class action M&A litigation on the basis that such settlements fail to create meaningful value for the class while providing defendants with broad releases.[119]

Such rulings have led to fewer M&A challenges in Delaware and increasing challenges in federal courts under federal securities laws. However, after *Trulia*, the Seventh Circuit Court of Appeals overturned a lower court order approving a disclosure-only settlement using the same rationale as *Trulia*.[120] Judge Posner's endorsement of *Trulia* is binding on all federal courts in the Seventh Circuit, and is likely to convince other federal courts outside the Seventh Circuit to apply *Trulia* as well.[121] A number of federal district court judges have also raised questions about these settlements in recent years.[122] Additionally, the New York Supreme Court in New York County recently declined to approve what the court described as a 'peppercorn and a fee' disclosure-only settlement.[123] It remains to be seen whether other federal circuits will follow suit, but this development does not bode well for litigants who wish to use forum shopping to find a court that will rubber stamp a disclosure-only settlement.

A recent US Supreme Court case has additional implications for forum selection in securities litigation. The Supreme Court held in March 2018 that plaintiffs may bring class actions under federal securities laws in state courts, even where such lawsuits are comprised entirely of federal securities law claims, and companies may not then remove such claims to federal courts.[124] Some companies attempted to circumvent that outcome contractually. Some companies used forum selection clauses in their by-laws, selecting the federal district courts as the exclusive forum for asserting claims under the Securities Act. While Delaware companies happily subject themselves to state forums for substantive claims such as fiduciary challenges, in light of increasingly deferential outcomes described above, they have looked to the federal courts for relief from the harsh scrutiny towards disclosure-only settlements to

116 Id.

117 Id.

118 'The Shifting Landscape in M&A Litigation', Hunton and Williams LLP, January 2016, www.hunton.com.

119 *In re Trulia, Inc Stockholder Litig*, 129 A.3d 884, 895 (Del. Ch. 22 January 2016).

120 The Seventh Circuit Court of Appeals is based in Chicago, Illinois. Its jurisdiction covers the states of Illinois, Indiana and Wisconsin. *In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718 (2016).

121 'The End of Disclosure-Only Settlements in Securities Class Actions?' BakerHostetler, 11 November 2016, www.bakerlaw.com/alerts/-the-end-of-disclosure-only-settlements-in-securities-class-actions.

122 Alexandra C Boudreau and Daniel W Halston, 'Fighting the Rising Tide of Federal Disclosure Suits', Harvard Law School Forum on Corporate Governance and Financial Regulation, 29 December 2018, https://corpgov.law.harvard.edu/2018/12/29/fighting-the-rising-tide-of-federal-disclosure-suits/.

123 *City Trading Fund v. Nye*, 2018 WL 792283 (N.Y. Sup. Ct., 8 February 2018).

124 'Supreme Court Clarifies State Court Jurisdiction for Securities Claims and Opens Door to Plaintiff Forum Shopping' Lexology, 23 March 2018, https://www.lexology.com/library/detail.aspx?g=6de86471-6e96-4ca7-808d-ddabe1daec06.

resolve Securities Act claims. In late December 2017, a class action complaint by stockholders of Blue Apron Holdings, Inc, Stitch Fix, Inc and Roku, Inc (three of several recent companies that included forum selection by-laws requiring that federal securities cases be heard in federal district court), was filed in the Delaware Court of Chancery challenging such provisions under the DGCL.[125] In December 2018, the Delaware Court of Chancery held that Delaware law does not permit corporations to use charter provisions to require stockholders to litigate certain claims brought under the federal securities laws in a specific forum.

## VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

In US financing markets, 2008 to 2010 were difficult years, plagued by tumult and recession.[126] 2011 to 2015 were characterised by recovery and growth, with record-setting financing activity and ever-lower yields.[127] However, 2016 marked a turning point as interest rates experienced a sustained rise after hitting record lows in the first half of the year.[128] In 2017, investment-grade corporate bond deal values reached record highs for the sixth consecutive year.[129] During the first three quarters of 2018, the strong credit market continued. Leveraged loan issuance in the first half of 2018 fell just short of its first-half 2017 record.[130] High-yield bonds also performed well, with the spread between junk bonds and US treasuries touching a 10-year low.[131] However, the market turned dramatically in the fourth quarter of 2018, particularly in December. There was zero dollars of new high-yield issuance in December, the first such month since 2008.[132] Leveraged loan prices also fell significantly, and multiple loan syndications were aborted due to lack of demand.[133]

Several notable deals demonstrated that borrowers were able to achieve successful results at various credit levels in 2018. Permanent financings and major financing commitments included T-Mobile's US$38.0 billion of financing commitments for its combination with Sprint; Cigna's US$26.7 billion of bridge commitments, US$20.0 billion of senior notes and US$6.3 billion of bank facilities to fund its acquisition of Express Scripts; Broadcom's US$20.3 billion of loan facilities for its acquisition of CA; and United Technologies' US$6.5 billion bridge and US$11.0 billion of notes to support its acquisition of Rockwell Collins.[134] In light of shakier financial markets, one trend to watch for in 2019 will be potential downgrades of investment grade borrowers. Commentators note that bonds rated in the lowest investment grade tier (BBB) now constitute more than half of the US$5 trillion

125 Complaint, *Matthew Sciabacucci v. Matthew B Salzberg*, No. 2017-0931-JTL (Del. Ch. 29 December 2017).

126 Eric M Rosof, et al., 'Acquisition Financing: the Year Behind and the Year Ahead', Harvard Law School Forum on Corporate Governance and Financial Regulation, 17 January 2017, https://corpgov.law.harvard.edu/2017/01/17/acquisition-financing-the-year-behind-and-the-year-ahead-3/.

127 Id.

128 Id.

129 Id.

130 Eric M Rosof, Gregory E Pessin, Michael S Benn, John R Sobolewski and Emily D Johnson, 'Wachtell Lipton Offers Acquisition Financing Year in Review: From Break-Neck to Brakes-On', The CLS Blue Sky Blog, 14 January 2019, http://clsbluesky.law.columbia.edu/2019/01/14/wachtell-lipton-offers-acquisition-financing-year-in-review-from-break-neck-to-brakes-on/.

131 Id.

132 Id.

133 Id.

134 Id.

US investment grade bond market, up from about one-third in 2008.[135] This uptick in triple B debt suggests that if the economy were to fall into a recession, a 'wave of downgrades could push many BBB companies (and hundreds of billions of dollars of debt) out of the investment grade club entirely and potentially swamp the high-yield debt markets'.[136]

Overall, US-syndicated lending reached an all-time high of US$2.5 trillion in 2018, an increase of 6 per cent over 2017, due primarily to increased investment grade lending volume.[137] US-leveraged lending in 2018 was US$1.4 trillion, down 6.9 per cent from 2017, largely attributable to a reduction in refinancing activity.[138] Despite the decline, US M&A leveraged loan issuance was robust, increasing 22 per cent to US$381 billion, the highest level post-crisis.[139] In 2018, there were 78 leveraged acquisitions of US reporting companies valued at US$100 million or more, compared to 80 in 2017 and 88 in 2016, but leveraged acquisitions as a percentage of overall M&A activity was steady at 46 and 47 per cent in 2017 and 2018, respectively.[140] The second half of 2018 saw a significant decline in leveraged deals, dropping from 56per cent in the first half to 38per cent in the second half.[141] Average debt to EBITDA multiples for large US leveraged buyout (LBO) transactions stayed at elevated levels in 2018, remaining at an average 6.2 times.[142] While the average debt to EBITDA multiples remained stable, the number of highly leveraged deals grew. Of LBOs completed in 2018, almost 40 per cent were levered seven times or more, a return to levels not seen since 2007.[143]

US tax reform has had a significant impact on M&A financing moving forward (see Section VIII). In particular, new Section 163(j) of the Code caps taxpayers' net interest expenses at 30 per cent of the taxpayer's 'adjusted taxable income', which approximates EBITDA for tax years beginning before 1 January 2022, and EBIT thereafter. As a result of the limitation, highly levered acquirers are more likely to shift acquisition debt from the US, where interest deductions may be limited, to other jurisdictions. Acquirers may also limit their debt financing of acquisitions altogether in favour of equity financing (the new 21 per cent corporate tax rate has this effect as well). Because the limitation applies even to existing debt, financing for past acquisitions may also be compromised. However, it remains to be seen how the TCJA's various provisions will interact to impact acquisition finance dynamics going forward.

135 Id.

136 Id.

137 Joshua Thompson and Korey Fevzi, 'Global Trends in Leveraged Lending: Lending and Secured Finance 2019', International Comparative Legal Guides, 9 April 2019, https://iclg.com/practice-areas/lending-and-secured-finance-laws-and-regulations/05-global-trends-in-leveraged-lending.

138 Id.

139 LPC Leveraged Loan Monthly: Year-End 2018, *Practical Law Finance*, 9 January 2019.

140 What's Market: 2018 Year-End Public M&A Wrap-up, footnote 4.

141 Id.

142 '2018 Annual US PE Breakdown', PitchBook, (2019), https://pitchbook.com/news/reports/2018-annual-us-pe-breakdown.

143 'Global Private Equity Report 2019', Bain & Company (2019), https://www.bain.com/insights/topics/global-private-equity-report/.

## VII EMPLOYMENT LAW

At its best, executive compensation can incentivise corporate performance by aligning the interests of shareholders and management. At its worst, as seen in the bankruptcy of Enron Corporation, executives' pay can come at the direct expense of a company's shareholders and stakeholders.[144] Executive compensation has come under increased scrutiny from all directions – from institutional and retail investors, proxy advisers, courts and legislators – in efforts to minimise the agency problem that arises when directors and management are permitted to set their own compensation. As certain management-friendly pay practices are phased out in response to shareholder activism and proxy adviser recommendations, companies are crafting increasingly complex pay-for-performance programmes to better respond to shareholder and institutional investor concerns.

### i Shareholder engagement and institutional adviser influence

In 2018, shareholders continued to remain engaged with executive compensation issues through say-on-pay (SOP) advisory votes and the approval of both new and amended equity plans. Although SOP votes are non-binding, public companies are generally concerned with their outcomes given the ability of SOP votes to influence director elections.[145] In 2018, 57 Russell 3000 companies failed SOP votes, which is the highest failure rate since 2015.[146] The 2018 failure rate represents a marked increase from the number of failed SOP votes in 2017 and 2016, and is generally consistent with the number of failed SOP votes in the three years preceding 2016.[147]

Proxy advisory services such as Institutional Shareholder Services (ISS) and Glass, Lewis & Co continue to play a role in the increasingly complex landscape of executive compensation and equity programmes. However, data suggests that the connection between an 'against' recommendation from ISS and the shareholder vote to approve a company's compensation programme is tenuous. While just 2.6 per cent of companies failed SOP votes in 2018, ISS issued against recommendations on approximately 14 per cent of SOP votes in 2018, which is the highest observed rate of against recommendations issued by ISS since 2013.[148] Approximately, 20 per cent of companies that received against recommendations

144 Jerry W Markham, *A Financial History of Modern U.S. Corporate Scandals: From Enron to Reform* 87–88 (Routeledge, 1st ed. 2006) (comparing the severance payments of Enron executives to those of non-executive employees).

145 15 U.S.C. § 78n-1(a).

146 '2018 Say on Pay Results and Proxy Results – End of Year Report', Semler Brossy, 24 January 2019, https://www.semlerbrossy.com/wp-content/uploads/SBCG-2018-Year-End-SOP-Report.pdf. Compare to 2016 and 2017, in each of which 35 Russell 3000 companies received failed SOP votes. Id; see also Robert Kalb, et al., 'A Preliminary Review of the 2018 US Proxy Season', ISS Analytics, 20 July 2018, https://www.issgovernance.com/library/a-preliminary-review-of-the-2018-us-proxy-season/.

147 '2018 Say on Pay Results – End of Year Report'.

148 '2018 Say on Pay Results – End of Year Report'; 'U.S. Executive Pay Votes – 2018 Proxy Season Review' Willis Towers Watson, 1 August 2018, https://www.towerswatson.com/-/media/Pdf/Insights/Newsletters/Global/executive-pay-matters/2018/08/say-on-pay-update-august-15-2018-wtw.pdf?la=en-GB&hash=D61C310C4DBA015905C5F81593DC7006615956EB.

from ISS failed their SOP vote in 2018.[149] By comparison, 14 and 12.5 per cent of companies that received against recommendations from ISS failed their SOP vote in 2016 and 2017 respectively.[150]

Although the extent of ISS and other proxy advisers' influence on the corporate governance landscape is unclear, data shows that ISS recommendations do carry some weight. In 2018, shareholder support was 31 per cent lower at companies that received an against SOP recommendation from ISS.[151] However, proxy advisers' influence is not absolute, and not all US publicly traded companies engage with proxy advisers. Many of the major institutional investors, including BlackRock and Vanguard, maintain in-house proxy analysis and governance groups to inform their own voting decisions in lieu of engaging proxy advisory firms.[152]

Criticism of proxy advisers has also increased in recent years. Some critics have argued that proxy advisers serve a quasi-governmental role without the necessary regulatory safeguards.[153] For example, lawmakers have argued that ISS is inherently conflicted because it provides both proxy voting recommendations to shareholders and also consulting services to public companies.[154] As a result, in October 2017, HR 4015, the Corporate Governance Reform and Transparency Act of 2017, was introduced with the purpose of regulating proxy advisory firms.[155] Under HR 4015, proxy advisers would be required to register with the SEC, disclose any potential or actual conflicts of interest relating to the provision of proxy advisory services and provide an opportunity for companies to comment on draft recommendations. HR 4015 passed the House of Representatives and was referred to the Senate on 21 December 2017, which has held a number of hearings on the bill.[156]

149 Id.

150 '2017 Say on Pay Results – End of Year Report', Semler Brossy, 25 January 2018, https://www.semlerbrossy.com/wp-content/uploads/SBCG-2017-Year-End-Say-on-Pay-Report-01-24-2018.pdf.; '2016 Say on Pay Results – End of Year Report', Semler Brossy, 1 February 2017, www.semlerbrossy.com/wp-content/uploads/SBCG-2016-Year-End-Say-on-Pay-Report-02-01-2017.pdf.

151 '2018 Say on Pay Results – End of Year Report'; 'U.S. Executive Pay Votes – 2018 Proxy Season Review'. Compare to a 26 per cent decrease in shareholder support at such companies in 2017; 'U.S. Executive Pay Votes – 2018 Proxy Season Review'; '2017 Say on Pay Results – End of Year Report'.

152 'Proxy voting guidelines for U.S. securities', BlackRock, January 2019, https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf; 'Vanguard funds – Proxy voting guidelines for U.S. portfolio companies', effective 1 April 2019, https://about.vanguard.com/investment-stewardship/portfolio-company-resources/proxy_voting_guidelines.pdf.

153 'A Long/Short Incentive Scheme for Proxy Advisory Firms, Asaf Eckstein and Sharon Hannes', *Wake Forest Law Review* 2018 (29 January 2018). Available at SSRN: https://ssrn.com/abstract=3098008 or http://dx.doi.org/10.2139/ssrn.3098008.

154 Id.; see also 'Examining the Market Power and Impact of Proxy Advisory Firms: Hearing Before the Subcomm. on Capital Mkts. & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.', 113th Cong. 2 (2013), https://www.govinfo.gov/content/pkg/CHRG-113hhrg81762/pdf/CHRG-113hhrg81762.pdf.

155 H.R. 4015, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/4015/all-info?r=13. The latest action was hearings held by the Senate Committee on Banking, Housing, and Urban Affairs on 6 December 2018.

156 Id.

### ii Golden parachutes and executive severance developments

ISS has singled out certain change in control (CIC) benefits historically provided to executives in connection with M&A transactions (such as single-trigger acceleration of equity-based awards and gross-ups of the excise tax imposed under Section 280G of the US Internal Revenue Code of 1986 (Code)) as problematic.[157] ISS's published policy guidance states that it is likely to render an against or withhold vote recommendation when single-trigger acceleration or a Section 280G gross-up is included in a new CIC agreement.[158] In addition, ISS considers whether a company's plans and agreements that were in place prior to a transaction contain excise tax gross-up and single-trigger equity acceleration provisions in determining its recommendation on say on golden parachute (SOGP) proposals.[159]

Given the range of shareholder responses to SOGP proposals and pressure from proxy advisers to limit excessive compensation package strategies, it is likely that companies will continue to review and restructure CIC benefits and may shift increasingly towards a transaction-based gross-up model.[160] Although many companies have eliminated Section 280G gross-ups from their CIC and employment agreements to avoid negative recommendations from proxy advisory firms, recent data suggests that companies are increasingly providing for Section 280G gross-ups in the context of acquisitions.[161] Although shareholder dissatisfaction with outsized golden parachute payments has increased over the years to historically high levels, 2018 saw an decrease in the failure rate compared with 2017, with 14.7 per cent of the 95 Russell 3000 companies conducting an SOGP vote in 2018 failing versus 19.5 per cent of the 123 Russell 3000 companies conducting an SOGP vote in 2017.[162]

### iii Director compensation

In recent years, director compensation has come under scrutiny after a series of shareholder lawsuits alleging excessive director pay.[163] Until recently, the Delaware Court of Chancery reasoned that potential conflicts of interest that occur when directors set their own compensation are nonetheless subject to business judgment deference where stockholders approve a plan that contains 'meaningful limits' on director compensation.[164]

However, the Delaware Supreme Court held in *In re Investors Bancorp Stockholder Litigation* in December 2017 that certain awards to directors are subject to an 'entire fairness' review rather than business judgment deference.[165] Following *Investors Bancorp*, the business

157 'United States Proxy Voting Guidelines', ISS, 6 December 2019, https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf; 'U.S. Compensation Policies – Frequently Asked Questions', ISS, 20 December 2018, https://www.issgovernance.com/file/policy/active/americas/US-Compensation-Policies-FAQ.pdf.

158 Id.

159 Id.

160 Margaret Black and Jane Park, 'Think the Tax Gross-Up is Obsolete? Not Necessarily', Pearl Meyer, July 2018, https://www.pearlmeyer.com/knowledge-share/article/think-the-tax-gross-up-is-obsolete-not-necessarily; '280G Tax Gross-Ups Make a Comeback During Merger Negotiations', *Equilar*, 15 September 2017, http://www.equilar.com/blogs/307-tax-gross-ups-make-a-comeback.html.

161 Id.

162 '2018 Say on Pay Results – End of Year Report'.

163 See, e.g., *Calma v. Templeton*, C.A. No. 9579-CB (Del. Ch. 30 April 2015); *Seinfeld v. Slager*, C.A. No. 6462-VCG (Del. Ch. 29 June 2012); *In re 3COM Corp*, C.A. No. 16721-VC (Del. Ch. 25 October 1999).

164 *Seinfeld v. Slager*, at *40.

165 *In re Investors Bancorp Stockholder Litigation*, C.A. No. 12327-VCS (Del. 19 December 2017).

judgment rule will apply to judicial review of director compensation in Delaware only where directors submit specific compensation decisions for approval by fully informed and disinterested stockholders or where the stockholder-approved plan is self-executing and does not permit director discretion.[166] Otherwise, directors must prove that their compensation is entirely fair to the company, which may require the support of peer-group data and analysis by independent consultants.[167] However, where a shareholder-approved plan limit is reasonable, and where directors receive board approval to make grants to themselves within such limit, then it is possible that a board's decision will continue to receive business judgment deference.[168] Therefore, maintaining restrictive plan share limits that minimise director discretion will reduce the threat of shareholder litigation and maximise the chances of receiving business judgment review.[169]

Notably, ISS has recently turned its focus to director compensation and revised its proxy voting guidelines to specifically address non-employee director compensation.[170] Under ISS's guidelines for 2019, ISS will make recommendations on a case-by-case basis and take into consideration qualitative factors such as the existence of a meaningful limit on director compensation and ownership as well as ownership and holding requirements for equity awards.[171] Effective as of the 2020 proxy season, ISS has updated its methodology to identify pay outliers representing individual pay figures to directors above the top 2 to 3 per cent of all comparable directors within the same index or sector in both 2019 and 2020, followed by a qualitative evaluation of a company's director pay practices.[172] Relatedly, the number of proposals seeking shareholder ratification of director pay increased from one in 2017 to seven in 2018, with six such proposals receiving majority support.[173]

### iv Looking ahead

High levels of shareholder and proxy adviser involvement with SOP and SOGP votes indicate that boards of directors are increasingly restricted in their ability to set executives' compensation. In addition, Delaware directors will now have their own compensation analysed under the more rigorous standard of *In re Investors Bancorp*, which aims to mitigate the conflicts of interest that arise when directors set their own pay, and will be subject to the

166 Id. at 3.

167 'Delaware Supreme Court Heightens the Review Standard for Discretionary Equity Awards to Directors', John Spidi, 22 February 2018, https://www.natlawreview.com/article/delaware-supreme-court-heightens-review-standard-discretionary-equity-awards-to.

168 'New Year's Resolutions For Director Compensation From Investors Bancorp', Jennifer Conway, et al., Cravath, Swaine & Moore LLP, 23 January 2018, https://www.cravath.com/files/Uploads/Documents/Publications/3699393_1.pdf.

169 Id.

170 Brian Myers and Alex Pattillo, 'ISS policy updates for 2017: Focus on director compensation', Willis Towers Watson, 23 November 2016, www.towerswatson.com/en/Insights/Newsletters/Global/executive-pay-matters/2016/ISS-policy-updates-for-2017-Focus-on-director-compensation.

171 ISS US Compensation Policy FAQ (updated 20 December 2018), Q&A 67 and 68, https://www.issgovernance.com/file/policy/latest/americas/US-Compensation-Policies-FAQ.pdf (Last year, ISS announced a policy to potentially issue adverse vote recommendations for those board members responsible for approving/setting [non-employee director] pay when there is a recurring pattern of excessive NED pay magnitude without a compelling rationale).

172 Id.

173 'A Preliminary Review of the 2018 US Proxy Season', footnote 146.

increased focus of proxy advisory companies. Companies should continue to review their compensation and equity programmes (including those for directors) and carefully document compensation decisions, particularly in the context of acquisitions given the continuing impact of the SOP vote and the enhanced focus on director compensation.

Shareholders are also likely to continue exploring other avenues for influencing the pay practices of companies that are unresponsive to SOP votes and SOGP votes. Thus far, director reelection generally has been affected but not swayed by failed SOP votes, although shareholders increasingly express frustration over compensation practices by voting against reelection of directors, particularly those involved in compensation decisions.[174] The practices identified as most troublesome by ISS and other proxy advisory firms will likely continue to disappear, and compensation, even with respect to perquisites and other fringe benefits, is expected to continue to shift away from cash-to-equity and performance-based awards under increasingly complex pay-for-performance programmes. It is unclear what effect the migration to equity and performance-based pay, coupled with the elimination of the performance-based compensation exception under Section 162(m) of the Code, will have on future M&A transactions. Given the market uncertainty surrounding recent changes in law and practice, investors should engage with management and boards of directors in the early stages of the acquisition process to maximise both executive retention and shareholder value.

## VIII TAX LAW[175]

Congress passed the TCJA at the end of 2017, and with it transformed the US tax system. The TCJA's changes affect a significant number of rules that are relevant to US and cross-border M&A transactions, including those governing interest deductibility, bonus depreciation, net operating losses and the US international tax system.[176] Notwithstanding the significance of the TCJA's changes, however, the process behind it was rushed and chaotic, and left significant issues in the statute to be addressed by regulation. Throughout 2018 and early 2019, the Treasury Department released extensive regulatory guidance on topics related to the TCJA. We highlight two significant areas below.

### i Tax on global intangible low-taxed income

One of the TCJA's most significant changes is the introduction of a tax on global intangible low-taxed income (GILTI). Section 951A requires each US person (US shareholder) that owns at least 10 per cent of the stock of a controlled foreign corporation (CFC) to include in his or her income the US shareholder's GILTI, which is calculated based on the income and loss of its CFCs. Mechanically, the calculation of a US shareholder's GILTI inclusion is complex and can vary unexpectedly, because attributes of one CFC can interact with, and offset, the attributes of another CFC owned by the same US shareholder.

174 'Is Say on Pay All About Pay? The Impact of Firm Performance', Jill E Fisch, Darius Palia and Steven Davidoff Solomon, Harvard Law School Forum on Corporate Governance and Financial Regulation, 30 October 2017, https://corpgov.law.harvard.edu/2017/10/30/is-say-on-pay-all-about-pay-the-impact-of-firm-performance/.

175 Section references in this part are to the Internal Revenue Code of 1986, as amended (Code), unless otherwise specified.

176 See, e.g., Section 163(j) (interest deductibility); Section 179 (bonus depreciation); Section 172 (net operating losses).

Because a US shareholder must include GILTI in income, it is taxed at the US shareholder's regular tax rate. Corporate US shareholders, however, are entitled to a deduction that is intended to reduce GILTI's effective rate to 10.5 per cent for taxable years prior to 2025, and 13.125 per cent thereafter.[177] Corporate shareholders are also entitled to offset the inclusion by an 80 per cent credit for foreign taxes, subject to certain complicated limitations.[178]

Given these complexities, what were once reasonably straightforward structuring decisions (e.g., making a Section 338 election) now frequently require considerable numerical analysis. Smart taxpayers will engage their tax advisers before making decisions that affect structure.

***Proposed regulations***

Notwithstanding the complexity of GILTI, the statute does not address many important questions about how the GILTI regime actually operates.[179] In late 2018, the Treasury Department issued two sets of proposed regulations to address these questions, and we discuss certain issues raised by the proposed regulations below.[180] Although these regulations remain in proposed form, they will apply retroactively if finalised.

*Net operating losses*

The GILTI rules permit losses from one CFC to offset the income of other CFCs held by the same US shareholder; generally, this ensures that a US shareholder will owe GILTI tax only if its CFCs are profitable overall. The statute, however, does not address whether those same losses can be carried forward to offset income in later tax years (or carried back to offset income from previous tax years). Practitioners generally believed that permitting some form of loss carry forward would be fair and consistent with the intent of the GILTI regime.[181] Nevertheless, the proposed regulations provide that US shareholders cannot be carried back or forward for GILTI purposes.

*CFC basis reduction rule*

The proposed regulations add a new rule that requires US shareholders to reduce their basis in a CFC's stock to the extent that the CFC had losses that offset the income of other CFCs held by the US shareholder. The calculation of this reduction is complicated but, critically, it occurs at the time the US shareholder disposes of its CFC stock. One consequence of this change is that US shareholders will frequently have more gain on the sale of a CFC than they thought, because their basis may be reduced unexpectedly as a result of this rule. The rule may also affect the desirability of certain US tax elections, including those under Section 338.

177 Section 250. The deduction may be carved back if the applicable US shareholder has net operating loss carry forwards.

178 Section 960; Section 904(d).

179 See New York State Bar Association Tax Section Report No. 1394, Report on the GILTI Provisions of the Code (4 May 2018).

180 See REG-104390-18, Federal Register Vol. 83, No. 196, 10 October 2018 at 51072-51111; REG-105600-18, Federal Register Vol. 83, No. 235, 7 December 2018 at 63200-63266.

181 See NYSBA Tax Section Report No. 1394, at 34.

*Consolidated groups*

Another issue left open by the TCJA is the interaction of GILTI with the US consolidated group rules. Groups of commonly controlled US corporations can elect to file a consolidated federal tax return, which is intended to minimise the effect of the existence of the separate group entities on the group's consolidated tax liability. Consistent with this rationale, commentators believed that the GILTI calculation should be performed at the consolidated group level, taking into account all of the CFCs held by group members.[182] The proposed regulations adopt this approach, but also introduce complex rules that govern the basis consequences of offsetting income and loss for consolidated group members that own CFCs.

*Partnerships*

One implication of the GILTI rules is that foreign corporations held by US partnerships are treated as CFCs (and therefore create GILTI for the US partners of the partnership), even though the same entities would frequently not be CFCs if the partnership were foreign. This is a harsh result because partnerships are flow-through entities for US tax purposes: for this reason, commentators believed that it was inappropriate to have the application of the GILTI rules depend on whether the partnership was domestic or foreign. Indeed, the difference in treatment has led many taxpayers to convert US investment partnerships into foreign partnerships to avoid this result.

The proposed regulations do not resolve this issue, and instead further complicate the treatment of partnerships under the GILTI rules. On a high level, the new rules make the treatment of a partner dependent not only on whether a partnership is domestic or foreign, but also on whether the partner's indirect ownership of the CFC is 10 per cent or more. Compliance with this approach may be very costly for domestic partnerships: in certain circumstances, the rules will require domestic partnerships to perform many individualised GILTI calculations for their US partners.

### ii Dispositions of interests in partnerships with a US business

The TCJA made important changes to the taxation of foreign persons that dispose of an interest in a partnership that conducts business in the United States. Prior to the passage of the TCJA, it was settled law that, under the US rules governing effectively connected income (ECI), a foreign partner in a partnership conducting business in the United States would be taxed on its share of the ECI generated by the partnership's activities. It was unclear, however, whether gain on the sale of an interest in that same partnership would also constitute ECI. The IRS position, set out in Revenue Ruling 91-32,[183] was that a portion of the gain was ECI; this position ensured that the ECI consequences to a partner selling its partnership interest mirrored those of the partnership's ordinary course business activities. Taxpayers frequently took the opposing view that the gain was not ECI, consistent with the general rule treating gain on the sale of a partnership interest as capital gain.[184]

The issue went unresolved until a taxpayer ultimately challenged the IRS's position before the Tax Court in the 2017 case *Grecian Magnesite, Mining, Industrial & Shipping Co.*

182 See New York State Bar Association Tax Section Report No. 1406, Report on Proposed GILTI Regulations (26 November 2018).

183 See Rev. Rul. 91-32, 1991-1 C.B. 107.

184 See Section 741.

*SA v. Commissioner*.[185] In *Grecian Magnesite*, the Tax Court held that a foreign partner did not have ECI upon the redemption of its partnership interest, even though the taxpayer conceded that it would have been allocated ECI upon a sale of the partnership's assets. In so holding, the Tax Court explicitly rejected Revenue Ruling 91-32, finding it so flawed that it 'lack[ed] the power to persuade'.[186]

The taxpayers' victory in *Grecian Magnesite*, however, was short-lived. The TCJA overturned *Grecian Magnesite* by adopting Section 864(c)(8), which provides that gain on the sale of an interest in a partnership is ECI to the extent that the partner would have been allocated ECI on a deemed sale of the partnership's assets. In addition, the TCJA introduced Section 1446(f), which imposes a new withholding tax in connection with the sale of a partnership interest if that sale results in ECI under the new Section 864(c)(8) rule. Notably, the withholding tax equals 10 per cent of the amount realised by the foreign partner (including the partner's share of partnership liabilities). If the withholding tax applies, the transferee of the partnership interest is responsible for collecting it, although the partnership must also withhold on distributions to the transferee if the transferee fails to remit the tax.

***Proposed regulations***

Although the TCJA created a new withholding regime in adopting Section 1446(f), it offered taxpayers no guidance as to how to satisfy their withholding obligations.[187] In May 2019, however, the Treasury Department released proposed regulations to flesh out new Section 1446(f).[188] The regulations generally allow selling partners to avoid withholding if they provide an appropriate certification to the purchaser. The certification can take a number of different forms: for instance, it may address the seller's status as a US person or the nature of the income and assets of the partnership. The proposed regulations also provide rules for collecting withholding tax on dispositions of interests in publicly traded partnerships.

## IX COMPETITION LAW

In 2018, the Antitrust Division of the DOJ and the FTC (together, the agencies) carefully examined transactions in a variety of industries, including healthcare, entertainment and agriculture. The agencies continued to employ a rigorous approach to merger enforcement towards both proposed transactions and consummated mergers. Furthermore, the DOJ announced a number of new processes to streamline merger reviews.

Through both enforcement actions and statements from public officials, the agencies have continued to demonstrate a preference for structural remedies and a scepticism towards behavioural remedies. Agency officials have reasoned that structural remedies eliminate the

185 149 T.C. 63 (2017).

186 Id.

187 The IRS did mitigate the disruption caused by the TCJA's changes by suspending a portion of the new rules and allowing taxpayers to follow the related withholding rules under Section 1445 (pertaining to dispositions of interests in US real property) in the interim. See Notice 2018-08, 2018-7 I.R.B. 352 (29 December 2017); Notice 2018-29, 2018-16 I.R.B. 495 (2 April 2018).

188 See REG-105476-18, Federal Register Vol. 84, No. 92, 13 May 2019 at 21198-21225. The Treasury separately proposed regulations that address the calculation of the amount of ECI that is generated on the sale of a partnership interest under Section 864(c)(8). REG-113604-18, Federal Register Vol. 83, No. 247, 27 December 2018 at 66647-66655.

incentive and ability of merged companies to engage in harmful conduct while removing the necessity for monitoring of parties' compliance with consent decrees.[189] Of the 17 consent decrees entered into in 2018, the agencies required divestitures for 15 of the transactions.[190] The remaining two consent decrees were issued by the FTC, and required behavioural remedies including implementing firewalls, instituting monitors and limiting the sharing of competitively sensitive information, among other conditions.[191] As in previous years, the FTC increased the filing thresholds under the HSR Act. Under the new thresholds, the size of transaction test is satisfied for most transactions valued over US$90 million (increased from US$84.4 million).[192]

In 2018, the agencies also took a few enforcement actions in connection with consent decrees that were entered in previous years. For example, in March 2018, the FTC modified its consent decree against CoreLogic, Inc concerning the company's acquisition of DataQuick Information Systems, Inc in 2014.[193] The FTC alleged that CoreLogic failed to adhere to the 2014 order's condition that it provide all of the required data and information to the

189 Public statement, Department of Justice, 'Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum', 16 November 2017, https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar; Public Statement, Federal Trade Commission, 'Vertical Merger Enforcement at the FTC', 10 January 2018, https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

190 *Amneal Holdings, LLC*, 83 Fed. Reg. 19,764 (aid to public comment); *Marathon Petroleum Corp*, 83 Fed. Reg. 55,368 (aid to public comment); *Seven & iHoldings Co, Ltd*, 83 Fed. Reg. 4,051 (aid to public comment); *CRH plc*, 83 Fed. Reg. 28,647 (aid to public comment); *Air Medical Group Holdings, Inc,* 83 Fed. Reg. 11,527 (aid to public comment); *Linde AG*, 83 Fed. Reg. 55,533 (aid to public comment); *CVS Health Corporation*, 83 Fed. Reg. 52,558 (proposed final judgment and competitive impact statement); *The Walt Disney Company*, 83 Fed. Reg. 40,553 (proposed final judgment and competitive impact statement); *Martin Marietta Materials, Inc*, 83 Fed. Reg. 19,822 (proposed final judgment and competitive impact statement); *Bayer AG*, 83 Fed. Reg. 27,652 (proposed final judgment and competitive impact statement); *United Technologies Corporation*, 83 Fed. Reg. 52,542 (proposed final judgment and competitive impact statement); press release, Federal Trade Commission, 'FTC Requires Grifols S.A. to Divest Assets as Condition of Acquiring Biotest US Corporation', 1 August 2018, https://www.ftc.gov/news-events/press-releases/2018/08/ftc-requires-grifols-sa-divest-assets-condition-acquiring-biotest; press release, Federal Trade Commission, 'FTC Requires Casino Operators Penn National Gaming, Inc. and Pinnacle Entertainment, Inc. to Divest Assets in Three Midwestern Cities as a Condition of Merger', 1 October 2018, https://www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-casino-operators-penn-national-gaming-inc-pinnacle; press release, Department of Justice, 'Justice Department Requires Divestitures to Resolve Antitrust Concerns in Gray's Merger With Raycom', 14 December 2018, https://www.justice.gov/opa/pr/justice-department-requires-divestitures-resolve-antitrust-concerns-gray-s-merger-raycom; press release, Department of Justice, 'Justice Department Requires CRH to Divest Rocky Gap Quarry in Order to Proceed with Pounding Mill Acquisition', 22 June 2018, https://www.justice.gov/opa/pr/justice-department-requires-crh-divest-rocky-gap-quarry-order-proceed-pounding-mill.

191 Press release, Federal Trade Commission, 'FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.', 5 June 2018, https://www.ftc.gov/news-events/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket; press release, Federal Trade Commission, 'FTC Imposes Conditions in Joint Venture Among Three Producers of PET Resin', 21 December 2018, https://www.ftc.gov/news-events/press-releases/2018/12/ftc-imposes-conditions-joint-venture-among-three-producers-pet.

192 'HSR threshold adjustments and reportability for 2019', https://www.ftc.gov/news-events/blogs/competition-matters/2019/03/hsr-threshold-adjustments-reportability-2019.

193 Press release, Federal Trade Commission, 'FTC Adds Requirements to 2014 Order to Remedy CoreLogic Inc.'s Compliance Deficiencies', 15 March 2018, https://www.ftc.gov/news-events/press-releases/2018/03/ftc-adds-requirements-2014-order-remedy-corelogic-incs-compliance.

divestiture buyer.[194] Under the modified consent order, CoreLogic is required to provide bulk data to the divestiture buyer for an additional three years beyond the term of the original order and to adhere to certain quality metrics and service requirements.[195] Similarly, in December 2018, the FTC approved an application by Teva Pharmaceuticals Industries Ltd to reopen and modify its decision and order concerning the merger of Watson Pharmaceuticals, Inc and Actavis, Inc in 2012.[196] Under the previous decision and order, the merged company was required to divest a generic drug, supply it to Pfizer, Inc for no more than four years after the relaunch of the drug and assist with a technology transfer to a third party for manufacturing the drug.[197] The drug was relaunched in 2015, and in 2016 Teva assumed the rights and obligations of Activis through another acquisition.[198] At Pfizer's request, Teva sought to extend the supply agreement for an additional period since Pfizer had not yet completed the technology transfer.[199]

The DOJ also announced and began the implementation of a number of processes to streamline the merger review process. In particular, in September 2018, Assistant Attorney General Makan Delrahim announced that the DOJ had set a goal to resolve most merger investigations within six months, provided that the parties to a merger promptly comply with DOJ requests throughout the review period.[200] The DOJ has since published a model voluntary request letter, which seeks information from parties during the initial 30-day waiting period, and a revised model timing agreement, which governs the longer Second Request review process, on its website.[201] The DOJ has stated that its model timing agreement is designed to speed the merger review process by providing for fewer custodians whose documents must be searched as part of the Second Request, fewer depositions and a shorter time period for the DOJ to complete its review following the parties' certification of substantial compliance with a Second Request.[202] In exchange, the DOJ expects parties to provide faster and earlier productions of documents, and for data and to be forthcoming and accurate about privilege issues in the parties' document production.[203]

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

194 Id.

195 Id.

196 Press release, Federal Trade Commission, 'FTC Approves Teva Petition to Reopen and Modify Decision and Order in Case Involving Watson Pharmaceuticals Inc.'s Acquisition of Actavis Inc.', 18 December 2018, https://www.ftc.gov/news-events/press-releases/2018/12/ftc-approves-teva-petition-reopen-modify-decision-order-case.

197 Id.

198 Id.

199 Id.

200 'It Takes Two: Modernizing the Merger Review Process', https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust.

201 Antitrust Division Spring Update 2019, https://www.justice.gov/atr/division-operations/division-update-spring-2019/merger-review-reviewed.

202 Id.

203 Id.

### i DOJ

***Bayer/Monsanto***

In September 2016, Bayer AG (Bayer) announced that it would acquire Monsanto Company (Monsanto) in a transaction valued at US$66 billion.[204] The DOJ approved the transaction in May 2018 subject to divestitures of certain businesses and assets totalling US$9 billion, the largest negotiated merger divestiture ever required by the agencies.[205] The DOJ alleged that without the divestiture, the transaction, which combined two of the largest agricultural companies, would have resulted in higher prices for farmers, and by extension consumers, and would have stifled innovation in the industry.[206] Under the consent decree, Bayer was required to divest its businesses that competed with Monsanto, including its cotton, soybean, canola, vegetable seed and herbicide businesses.[207] The consent decree also required a number of other divestitures related to the parties' seed treatment businesses, intellectual property and research capabilities, including pipeline R&D projects, and assets that would provide the divestiture buyer with similar innovation incentives, capabilities and scale.[208]

***Disney/Fox***

In December 2017, The Walt Disney Company (Disney) announced it would acquire Twenty-First Century Fox, Inc (Fox); the parties subsequently announced they had signed an amended agreement valued at US$71.3 billion in June 2018, following a bidding war with Comcast for Fox.[209] Shortly thereafter, the DOJ approved the transaction subject to divestitures, alleging the parties competed to sell cable sports programming licences to multichannel video programming distributors (MVPDs) in several local markets, and that as a result of the proposed transaction, MVPDs would face increased prices.[210] Under the consent decree, Disney was required to divest Fox's 22 regional sports networks.[211] The transaction was completed in March 2019.[212]

204 Press release, Bayer AG, 'Bayer and Monsanto to Create a Global Leader in Agriculture', 14 September 2016, https://media.bayer.com/baynews/baynews.nsf/id/ADSF8F-Bayer-and-Monsanto-to-Create-a-Global-Leader-in-Agriculture.

205 Press release, Department of Justice, 'Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto', 29 May 2018, www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened.

206 Id.

207 Id.

208 Id.

209 Press release, The Walt Disney Company, 'The Walt Disney Company Signs Amended Acquisition Agreement to Acquire Twenty-First Century Fox, Inc.', 20 June 2018, https://www.thewaltdisneycompany.com/the-walt-disney-company-signs-amended-acquisition-agreement-to-acquire-twenty-first-century-fox-inc-for-71-3-billion-in-cash-and-stock/.

210 Id.

211 Id.

212 Press release, The Walt Disney Company, 'Disney's Acquisition of 21st Century Fox Will Bring an Unprecedented Collection of Content and Talent to Consumers Around the World', 19 March 2019, https://www.thewaltdisneycompany.com/disneys-acquisition-of-21st-century-fox-will-bring-an-unprecedented-collection-of-content-and-talent-to-consumers-around-the-world/.

***CVS/Aetna***

In December 2017, CVS Health announced it would acquire Aetna, Inc in a transaction valued at US$69 billion.[213] In October 2018, the DOJ approved the transaction subject to Aetna's divestiture of its Medicare Part D prescription drug plan for individuals business.[214] The consent decree also required that Aetna assist the divestiture buyer with operating the plan during the transition period.[215] The DOJ reasoned that without the divestiture, the combined company would result in increased prices, decreased innovation and decreased quality service in 16 Medicare Part D regions.[216] The parties completed the transaction in November 2018.[217]

### ii FTC

*Northrop Grumman/Orbital ATK*

Despite the agencies' stated preference for structural remedies, in June 2018, the FTC utilised behavioural remedies in its consent decree concerning Northrop Grumman Corp's acquisition of Orbital ATK, Inc.[218] The transaction, which was announced in September 2017, was valued at US$9.2 billion.[219] The FTC reasoned that because the defence industry only has the one buyer, the Department of Defense (DoD), it would allow the acquisition subject to certain conditions. Specifically, the consent decree required Northrop Grumman to supply solid rocket motors to competitors on a non-discriminatory basis, separate its solid rocket motors business via a firewall and allow the DoD to monitor its compliance with the order.[220] The parties completed the transaction in June 2018.[221]

213 Press release, CVS Health, 'CVS Health to Acquire Aetna; Combination to Provide Consumers with a Better Experience, Reduced Costs and Improved Access to Health Care Experts in Homes and Communities Across the Country', 3 December 2017, https://cvshealth.com/newsroom/press-releases/cvs-health-acquire-aetna-combination-provide-consumers-better-experience.

214 Press release, Department of Justice, 'Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger', 10 October 2018, https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d.

215 Id.

216 Id.

217 Press release, Aetna, 'CVS Health Completes Acquisition of Aetna, Marking the Start of Transforming the Consumer Health Experience', 28 November 2018, https://news.aetna.com/news-releases/2018/11/cvs-health-completes-acquisition-of-aetna-marking-the-start-of-transforming-the-consumer-health-experience/.

218 Press release, Federal Trade Commission, 'FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.', 5 June 2018, https://www.ftc.gov/news-events/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket.

219 Press release, Northrop Grumman Corp., 'Northrop Grumman to Acquire Orbital ATK for $9.2 Billion', 18 September 2017, https://news.northropgrumman.com/news/releases/northrop-grumman-to-acquire-orbital-atk-for-9-2-billion.

220 Press release, Federal Trade Commission, 'FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.', 5 June 2018, https://www.ftc.gov/news-events/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket.

221 Press release, Northrop Grumman Corp, 'Northrop Grumman Completes Orbital ATK Acquisition, Blake Larson Elected to Lead New Innovation Systems Sector', 6 June 2018, https://news.northropgrumman.com/news/releases/northrop-grumman-completes-orbital-atk-acquisition-blake-larson-elected-to-lead-new-innovation-systems-sector.

***Tronox/Cristal***

In February 2017, Tronox Limited announced it had reached a definite agreement to acquire Titanium Dioxide ($TiO_2$) business from Cristal in an acquisition valued at US$1.7 billion.[222] The FTC challenged the proposed transaction at the end of 2017 by filing an administrative complaint and then subsequently seeking a preliminary injunction in federal district court.[223] The FTC alleged that the acquisition would substantially lessen competition in the North American market for chloride process $TiO_2$ and would increase the risk of both coordination among competitors and anticompetitive strategic output reductions by Tronox in the future.[224] In September 2018, the court granted a preliminary injunction.[225] Following this decision, in December 2018 an administrative law judge issued an initial decision upholding the complaint and requiring the parties to terminate the proposed transaction.[226] Tronox ultimately reached a settlement agreement with the FTC in April 2019. Under the proposed consent decree, Tronox was required to divest Cristal's North American $TiO_2$ business to INEOS.[227]

***Ottobock/FIH Group Holdings***

In September 2017, Otto Bock HealthCare North America, Inc (Ottobock) acquired FIH Group Holdings, LLC, the owner of Freedom Innovations, in a transaction that was not reportable under the HSR Act.[228] The FTC issued an administrative complaint against Ottobock in December 2017, alleging the transaction harmed competition in the US microprocessor prosthetic knees market by eliminating a significant competitor.[229] While Ottobock had taken steps to integrate the Freedom Innovations business, it subsequently agreed to hold the business separate pending the FTC litigation.[230] In April 2019, an

222 Press release, Tronox Limited, 'Tronox Announces Definitive Agreement to Acquire Cristal TiO(2) Business', 21 February 2017, http://investor.tronox.com/news-releases/news-release-details/tronox-announces-definitive-agreement-acquire-cristal-tio2.

223 Press release, Federal Trade Commission, 'FTC Challenges Proposed Merger of Major Titanium Dioxide Companies', 5 December 2017, https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-proposed-merger-major-titanium-dioxide-companies.

224 Id.

225 Press release, Federal Trade Commission, 'Administrative Law Judge Upholds FTC's Complaint Allegations that Merger of Major Titanium Dioxide Companies would have Harmed Competition', 17 December 2018, https://www.ftc.gov/news-events/press-releases/2018/12/administrative-law-judge-upholds-ftcs-complaint-allegations.

226 Id.

227 Press release, Federal Trade Commission, 'FTC Requires Divestitures by Tronox and Cristal, Suppliers of Widely Used White Pigment, Settling Litigation over Proposed Merger', 10 April 2019, https://www.ftc.gov/news-events/press-releases/2019/04/ftc-requires-divestitures-tronox-cristal-suppliers-widely-used.

228 Press release, Ottobock, 'Ottobock Issues Statement on U.S. Federal Trade Commission Decision Regarding Acquisition of Freedom Innovations', 7 May 2019, https://www.ottobock.com/en/press/press-releases/ottobock-us-ftc-freedom-innovations.html.

229 Press release, Federal Trade Commission, 'FTC Challenges Consummated Merger of Companies That Make Microprocessor Prosthetic Knees', 20 December 2017, https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-consummated-merger-companies-make-microprocessor.

230 Id.

administrative law judge upheld the FTC's administrative complaint.[231] The judge also issued an order that requires Ottobock to divest FIH Group Holding to an approved buyer within 90 days of the order being final.[232]

### iii Conclusion

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

## X OUTLOOK

In 2018, US M&A activity increased in value, but decreased in volume, recovering from two years of declining deal values. Delaware courts continued to be deferential to corporate boards of directors, further reinforcing deal price as the starting point for fair value in appraisal actions. In terms of cross-border M&A, CFIUS review presented an increasingly significant obstacle, particularly for Chinese acquirers. Energy and power was the leading US M&A sector, driven in part by the increasing prevalence of combinations of technology companies with non-technology companies. Shareholder activism continued to exert significant influence, although the attacks on large-cap companies has subsided somewhat. As in 2017, all-cash transactions by strategic buyers were the norm, supported by robust financing opportunities. Antitrust enforcement continued to be aggressive. Finally, in light of the CFIUS developments, and the myriad of other dynamic forces that shape the US M&A landscape, it remains to be seen how M&A activity will progress for the remainder of 2019.

231 Press release, Federal Trade Commission, 'Administrative Law Judge Upholds FTC's Complaint Challenging Consummated Merger of Companies that Make Microprocessor Prosthetic Knees', 7 May 2019, https://www.ftc.gov/news-events/press-releases/2019/05/administrative-law-judge-upholds-ftcs-complaint-challenging.

232 Id.

**Appendix 1**

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