WACHTELL, LIPTON, ROSEN & KATZ

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July 2022

Greetings from Wachtell Lipton,

In this document you will find the following information about the Firm:

- Vault Firm Profile;
- Reprint of the Brunswick Review article *Europe Courts Marty Lipton*;
- Reprint of the American Lawyer article *Dealmakers of the Year*;
- Reprint of the American Lawyer article *For Wachtell, Diversity Hinges on Long-Term Focus of Associate Pipeline;*
- NALP Form; and
- Selected Firm memoranda.

Also noteworthy is this article in Forbes featuring one of the Firm's co-chairmen, Dan Neff. Finally, you may also visit our web site at www.wlrk.com for practice descriptions, attorney biographies and more.

Thank you for your interest in the Firm.

Warm Regards,

Elizabeth F. Breslow

Elizabeth F. Breslow
Director of Recruiting and Legal Personnel

Wachtell, Lipton, Rosen & Katz

2023 TOP 100 LAW FIRM HIGHLIGHTS

#2 NEW YORK

PRESTIGE

#2 Overall Prestige

PRACTICE AREA

#1 Mergers & Acquisitions
#3 General Corporate Practice
#3 Securities Litigation
#5 Tax
#6 Private Equity
#8 Securities/Capital Markets
#9 Banking & Financial Services
#14 General Commercial Litigation
#15 Bankruptcy/Restructuring
#16 Antitrust
#18 White Collar Defense & Internal Investigations
#24 Appellate Litigation

QUALITY OF LIFE

#2 Selectivity
#8 Business Outlook
#9 Compensation
#19 Career Outlook

ABOUT THE FIRM

Each year, a significant chunk of the world's dealmaking—major mergers and acquisitions, antitrust and shareholder litigation, big-name restructurings, and multibillion-dollar real estate ventures—gets cranked through the well-oiled machine that is Wachtell Lipton. Manning the apparatus are a gifted few, whose compensation far outstrips industry standards. While it may not be the biggest or the highest revenue maker as a firm, it is the most profitable place in the world to practice law. Wachtell Lipton is one of the smallest firms in the AmLaw 100, but it is continually one of the top firms (and usually the top firm) when it comes to PPP. It also stands above the going market rate for first-year associate salaries.

The New York Four

Founded in 1965 by four princes of NYU's Law Review—Herbert Wachtell, Martin Lipton, Leonard Rosen, and George Katz—this resolutely New York firm still operates from a single Manhattan office. Public interest law champion Katz died young, at 57, in 1989. Rosen remained at the firm as of counsel until he passed away in 2014 at the age of 83. Wachtell and Lipton remain at the firm as active partners. In 1982, Lipton—who recently topped *New York Magazine*'s list of the most influential lawyers in New York—actually created the "poison pill," one of the most famous and enduring ways to protect shareholders' rights.

Corporate Kings

What sets the firm apart—even rivals concede—is that in a city of razor-sharp competitors, no other quite matches what Wachtell Lipton does. From its early days, the firm steered clear of run-of-the-mill corporate matters, choosing messier, riskier work. As such, Wachtell Lipton relies far less on bread-and-butter clients and politely declines more plebeian (though profitable) engagements. The firm was one of the first to link its fees to deal value, a model that became the aspiration of most major M&A houses.

When it comes to M&A, Wachtell Lipton reigns supreme, holding the No. 1 spot in Vault's M&A ranking for more than a decade. It also regularly places among the top 10 firms in Vault's General Corporate, Private Equity, and Banking & Financial Services rankings. The firm was involved in the death's door resuscitation of Chrysler in the 1970s. It also played a key role in the much-publicized acquisition of Getty Oil Company, in which Texaco's "white knight" offer was heralded as one of the greatest acquisitions in history. In more recent history, the firm has seen great success with LBOs and IPOs, corporate restructurings, and other finance matters. It took the lead on what some observers have called the most complex real estate deal in history: the successful negotiation of a master development agreement for the World Trade Center site following September 11, 2001.

See You in Court

The firm's litigators are no slouches either, complementing Wachtell Lipton's corporate practice with high-profile securities, corporate

FIRM INFO

CONTACT INFO

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LOCATION

New York, NY

MAJOR DEPARTMENTS

Antitrust • Corporate • Executive Compensation & Benefits • Litigation • Restructuring & Finance • Tax

See firm website for complete list of practice areas and industries.

THE STATS

No. of attorneys: 278
No. of offices: 1
Executive Committee Co-Chairs: Edward D. Herlihy and Daniel A. Neff
Hiring Partner(s): By committee

EMPLOYMENT CONTACT

Elizabeth F. Breslow
Director of Recruiting & Legal Personnel
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governance, and takeover matters. The firm's notable cases are many, including *Morrison v. National Australia Bank*—in which the Supreme Court determined that Section 10(b) of the Securities Exchange Act applies solely to those U.S. securities purchased and sold in the United States—and *Martin Marietta Materials, Inc. v. Vulcan Materials Co.* in which the Delaware Supreme Court affirmed the order to enjoin a hostile takeover of the firm's client based on improper use of confidential materials.

AWARDS & RECOGNITIONS

- Dealmakers of the Year, 2022: Steven Rosenblum, Elina Tetelbaum, Raaj Narayan—*The American Lawyer*
- Bill Savitt inducted into Benchmark Litigation's Hall of Fame—*Benchmark Litigation*
- They've Got Next: Antitrust Fresh Face: Christina Ma—*Bloomberg Law*
- They've Got Next: 40 Under 40: Ryan McLeod—*Bloomberg Law*
- MVPs: Nelson Fitts (Competition), Andy Nussbaum (M&A)—*Law 360*
- Rising Stars: Elina Tetelbaum (2022)—*Law 360*
- Practice Groups of the Year 2021: M&A, Securities—*Law 360*

RECENT NEWS

Clients rely on us for the most complex transactions
Wachtell Lipton advised Kansas City Southern in its merger with Canadian Pacific. Pending final approval by the Surface Transportation Board, the $31 billion deal will create the first single-track railroad spanning the United States, Mexico, and Canada and is the first Class I railroad merger in North America in more than two decades.

Tech Time
Top tech companies routinely come to Wachtell Lipton for high stakes transactions. Wachtell Lipton was hired as legal advisor to Twitter to enforce its agreed transaction with Elon Musk and represented Square, Inc. in its US$29 billion acquisition of Afterplay, Salesforce in its US$27.7 billion acquisition of Slack, and Broadcom in its US$69 billion acquisition of VMware, among other recent matters.

Go-to firm for Activism defense
Wachtell Lipton is the go-to firm for activism defense as the top legal advisor to target companies with a market cap of $1 billion+, by stake values and aggregate market cap for FY 2021, which is a standing the firm has maintained for the past five years.

Life-changing pro bono victory
George Bell, Rohan Bolt, and Gary Johnson, who were wrongfully convicted of a double murder in Queens and incarcerated for the last 24 years, walked free from prison on March 5, 2021. Wachtell Lipton represented George Bell, pro bono, in this case. The firm continues to handle Mr. Bell's Section 1983 claim against New York State and is working with Emery Celli to bring a civil rights claim on behalf of Mr. Bell.

NOTABLE MATTERS

- Wachtell Lipton has repeatedly contributed major evolutions in corporate law to advance the interests of its clients. Among other things, Wachtell Lipton originated the shareholder rights plan, or "poison pill," invented novel two-tiered price structure to resolve antitrust-risk impasse in the $11.3 billion Valspar/Sherwin-Williams merger, and structured the first cross-border "Morris Trust" transaction between SmithKline Beckman and Beecham.
- Wachtell Lipton has been involved in the transactions giving rise to most of the landmark corporate governance decisions in Delaware (and elsewhere), including the *Corwin*, *Arconic*, *Allergan*, *Airgas*, *Sotheby's*, *Vulcan Materials*, *Household*, *Time Warner* and *QVC* decisions.
- Following the financial crisis in 2008, Wachtell Lipton represented the U.S. Treasury in connection with the rescues of Fannie Mae and Freddie Mac.
- Wachtell Lipton is the leading firm for appraisal litigation defense, including winning *PetSmart*, the largest appraisal case in Delaware history. The firm also played a central role in the litigation related to the tragic events of 9/11 and a leading role in the redevelopment of the World Trade Center.

VAULT'S VERDICT

Wachtell Lipton may not have the centuries-old pedigree of some firms, but over the course of its 57-year history it has established itself as a major force, especially in the fields of M&A, shareholder activism, and corporate governance. Given its prestige, the firm generally recruits only the highest achievers from top law schools. Associates can expect substantive work and substantial responsibility early in their careers, and work across a range of matters is fairly distributed. Long and intense hours are a staple, even without a billable hour requirement, but Wachtell Lipton attorneys are paid accordingly. The firm employs lockstep compensation, which is exceptional and top of the market, based on class year. Associates acknowledge that the firm has adopted various wellness initiatives, but hours and expectations make work-life balance—as well as engagement in pro bono efforts—difficult to manage. There are few complaints with tech and tech support, both in the office and when working from home. Formal training for new Wachtell Lipton associates is limited; associates give hands-on training and attorney mentorship higher marks. Partners generally treat associates with respect and as valued members of the team. In terms of career outlook, promotion to partner seems to be expected and realistic for many, especially considering the low associate-to-partner ratio. For others, the experience gained at Wachtell Lipton lends itself to excellent exit opportunities with startup companies and in-house positions. While racial diversity is lacking at the partner level, the firm has taken steps to improve hiring and support of diverse individuals.

OUR SURVEY SAYS

GETTING HIRED

Hiring Process

- "I think the firm prioritizes candidates from top-tier law schools with great grades, journal experience, prior work experience, and clerkships."
- "The firm looks for intellectual curiosity and commitment to corporate law practice. Attorneys at the firm find the work very exciting and intellectually rewarding, and the firm looks for similar types."
- "The type of candidate that I believe the firm is looking for is one who is self-motivated, driven, and willing to learn quickly. The firm is small, so the best candidates are people who will be comfortable taking responsibility early on in their careers. For the corporate practice areas, certainly an interest in business and prior work experience are pluses; however, plenty of candidates join the firm without prior experience in business or another profession."

Interview Questions

- "Very substantive questions about the area of the law you're interested in. What do you think of the newly promulgated SEC guidance related to 'XYZ,' describe a bespoke covenant in a document that you read about and analyze how you think through the drafting, etc."
- "More substantive questions to see how the candidate thinks; interviewers will also challenge some responses to probe a candidate's position."

ASSOCIATE LIFE

Firm Culture

- "The firm is very collegial, although everyone is very focused on work so there is not an abundance of social events. The socializing occurs at meals in the office, when people are able to come in. There are also regular mentorship events that are firm sponsored for affinity groups, as well as attorney-organized events such as dinners, group fitness classes, and theater outings. The atmosphere day to day in my experience has been supportive and respectful."
- "It's a mix; some people are social, others less so. We get together as a class on a regular basis. People are quite collegial and casual with one another. Day to day is pleasant in terms of working with colleagues, though the work itself can be pretty stressful. Lawyers and staff usually have a pretty good relationship."

Associate/Partner Relations

- "The firm's partners treat the associates with respect and professionalism. Associates are really treated as members of the firm community."
- "Partners work very closely with associates, they mentor and coach a lot and also trust associates to get work done. Partners also socialize with associates."

Hours

- "You are given too much work, but you sign up for that by working at Wachtell. There is flexibility in where and when you work and the work feels evenly distributed. There is no billable hour requirement but everyone still works an incredible amount."
- "Extremely high hours, but everyone works extremely hard, across all practice areas and across all levels of seniority, so it leaves me feeling satisfied knowing my colleagues are all in this together."

Compensation

- "It is leaps and bounds above its nearest competitor. No one else comes close."
- "Our compensation is generous and above market, as is our bonus. However, we have not heard about a raise…yet, though I'm sure it's coming."
- "I am extremely grateful that the firm maintains a lockstep compensation policy based entirely on class year. They are very generous and the compensation policy helps me focus on work without worrying about hours, which can fluctuate especially in the first year."

Quality of Work

- "Everything we do is extremely substantive, enormous responsibility very early on, although it can vary by project and partner."
- "My work is very substantive and I think it is appropriate for

my level. We have very leanly-staffed teams so I am able to do most of the substantive work. I do a lot of writing, research, and memos. And older associates are always there to help as well, so I don't feel overwhelmed."

Technology & Innovation

- "We are provided an iPad, phone, desktop, and laptop. Company is constantly evaluating what it can do to be more efficient."
- "Great and the firm is always receptive to ideas to improve technology."

Wellness Efforts

- "There are exercise and meditation programs that are routinely offered and publicized."
- "There are resources and programs available, although the onus is on you to find them."

Training & Mentoring

- "There is much more emphasis on informal training. The firm's professional and respectful environment, as well as sense of community, really fosters informal training."
- "There are weekly training sessions for associates, but the vast majority of the training happens via mentorship, sponsorship, and informal training. Partners and senior associates constantly provide detailed and thorough instruction, explanation, and feedback as we work together on matters."

Career Outlook

- "I feel that I have a strong career outlook. While it is impossible to know at this stage whether promotion to partnership is realistic at this firm, I believe that I could eventually become a partner at a law firm. There seem to be countless exit opportunities available to associates at the firm. Many go to in-house roles at startups. Some start their own practices."
- "The firm has a low associate-to-partner ratio, so promotion to partner is the 'expectation' of all associates. In practice, there are more opportunities for promotion to partner in the larger practice groups, like M&A, than litigation, which is to be expected. The partnership process is a black box, at least from the perspective of a junior to mid-level associate."

PRO BONO & DIVERSITY

Pro Bono Commitment

- "The firm encourages and supports pro bono work, but it is something that attorneys pursue in addition to billable work. Therefore, it can be difficult to find time to take on pro bono projects. I have not gotten involved with pro bono work yet."
- "The firm does not have extensive pro bono projects. However, the firm encourages community involvement in other areas."

Diversity Efforts

- "The firm makes an effort via training groups, affinity groups, etc. to foster an environment of inclusion."
- "The firm is diverse amongst the younger associates but retention remains an issue."

SUMMER PROGRAM

Training & Assignments

- "As a summer associate, I was able to work on substantive assignments that helped to move my cases forward. The rotations through different practice areas helped me to make an informed decision when it was time to choose a practice group."
- "I received very substantive work that paralleled the assignments of an associate. My work was used or referenced in meetings with clients, strategy meetings, etc. I was also able to work on a wide variety of matters as a summer associate."
- "The responsibility and work experience was unparalleled. For example, as a summer associate, I worked directly with one of the firm's founding (and named) partners on a litigation matter and drafted portions of an appellate brief we filed in the Second Circuit."

Social Opportunities

- "I appreciated that the firm had a diverse array of social events from museum visits to dinners. I felt like I received substantial opportunities to interact with firm attorneys. There was decent camaraderie amongst our class; we were also encouraged to plan get-togethers facilitated by the firm."

Associate Experience vs. Summer Expectations

- "My experience practicing so far matches the expectations I had when I was a summer associate. I am working directly with partners and rarely have another associate between me and the partner, so I get a lot of exposure and feedback. I have been pleasantly surprised by how much individual attention I have been given to help mentor me and develop my skills."

Favorite Summer Events

- "Movie visits, museum visits, dinners hosted by firm attorneys."
- "Jeopardy. They also sent us bagels and pizza once, which was amazing and a great intro to New York City."
- "We attended a Jennifer Lopez concert and got to meet Alex Rodriguez and J-Lo!"

Notable Perks

- "All meals paid for, Ubers to and from the office paid for."
- "New frozen yogurt flavor every day. Huge pantries with all kinds of food on every floor."

Fun Facts

- "It is a very young firm and its founding partners still come into the office every day."
- "They really operate as thought leaders and provide a great deal of white papers and client summaries on recent developments."

PHOTOGRAPH: STEVEN LAXTON

Europe Courts MARTY LIPTON

Brunswick's **KEVIN HELLIKER** speaks with **MARTY LIPTON,** a legend in corporate battles against activists, about the latest trends in that war

For half a century Marty Lipton has been the defender of choice for companies under attack by an activist investor. That has been his specialty since he graduated from the New York University School of Law in 1955. The inventor of the "poison pill" strategy for thwarting hostile takeovers, he published a landmark article in 1979 on the responsibility of board members to stakeholders other than shareholders. A 1992 article he co-authored, "A modest proposal for improved corporate governance," became the template for basic corporate governance principles that were adopted in the 1990s.

Far from slowing down at 86, he has become an important adviser to lawyers and board members in Europe, where activism recently has taken root. From the Midtown New York offices of the law firm he founded in 1965, Wachtell, Lipton, Rosen & Katz, Lipton reiterated his long-standing arguments against activism, while noting that the battle has taken some recent turns. What follows are the thoughts he expressed in that interview along with select excerpts from previous conversations with Brunswick.

Have activists become an ordinary and less acrimonious part of the corporate landscape?
Yes and no. Certainly the acrimony has increased with activists like Paul Singer and Bill Ackman, and the number of activists has increased. Most institutional investors are not terribly affected by acrimony. But some of the activists feel that acrimony is essential to achieve their efforts. It's hard to generalize. There are 15 or so major activists and another 100 or so more. They have different targets and different strategies. Some activists who had a very aggressive strategy have changed and are much more cooperative. I think probably the single most significant development has been that some of the major activists have essentially shifted so they no longer promote

"Unless a company is quite comfortable that it could win, it's usually a mistake to go into a proxy fight"

financial engineering or short-term changes. Some are basically looking to invest to help a company change its strategy. Sometimes to improve it. And they've had quite a bit of success doing it. It's sort of like an old-fashioned merchant bank having a significant investment in a company and trying to help it on a long-term basis. I call them pro-bono management consultants.

Are boards open to that or resisting it?
The P&G board resisted it with Trian last year. But some boards have encouraged it or at least accepted it.

I'm guessing your advice would depend on the case?
Depends on the case. Unless a company is quite comfortable that it could win, it's usually a mistake to go into a proxy fight. Even if it's won, a close vote sets up a situation where any downturn, any problem, could result in a change of leadership. It's not helpful to management to have a proxy fight that comes out, even if you win it, you know, 52-48, something like that. That just shows that 48 percent of the shareholders are not satisfied with the way the company is being managed.

Unless a company is comfortable that it's going to win a proxy fight by a large margin, it should not undertake one. It's better to settle the matter and put one or two new directors on the board.

In other cases where the activist is promoting something that's untenable, or something the company feels runs contrary to the best interests of shareholders, then the company is basically forced to defend a proxy fight and should do so, but always keeping in mind that a close win is the equivalent of a loss.

The most important thing is that the company has a very good IR effort and a real understanding of what its principal shareholders are thinking. What is their evaluation of the company? What is their opinion of management? On the basis of that information, the company can make the right decision as to whether to settle or to fight.

Are you more often recommending that boards negotiate with activists?
Not really. About the same. I have one message: activism is a disaster for the economy. And unless that gets played back, we are condemning ourselves to low growth – or no growth.

Is demand for your and your firm's counsel as strong as ever?
I'd say it's as high as it's ever been, maybe even a little higher.

As activism spreads across Europe, is your counsel in demand there?
Europe hadn't experienced activism, and now there's a sharp increase in it not just in Europe but around the world. Publicly traded stocks on stock exchanges everywhere are subject to activism. I would say the trajectory for activism outside the United States is at a higher rate than the growth of activism in the US.

While we don't operate in other countries, we've had a significant number of situations where companies outside the US have come to us for help in dealing with an activist situation in their country.

Do you advise by phone or travel to the scene of the battle?
Oh, we travel. An activist battle is basically fought on the home country's turf. You might give some advice long distance, but you basically have to be on the ground when you're in the midst of an activist fight. In dealing with an activist situation, there are a lot of people that need to be involved and it's always best to meet in person. It doesn't mean you stay there for a month or two. It's back and forth.

Does a strong market provide some coverage to companies that might otherwise become activist targets?
Yes. If the price of a stock has gone up, it improves the total shareholder return. One of the key metrics that activists use is comparison of the target's TSR to the peer group TSR. And to the extent that the target's TSR is lower than the peer group, it's an argument that activists like to use.

Some proponents of long-term investing, for instance McKinsey's Dominic Barton, have suggested that short-termism may play a role in rising populism. What do you think?
I view activism as being a major factor in inequality. And inequality always breeds populism. There are a number of economic studies that show that. There are organizations like the Coalition for Inclusive Capitalism that are trying to moderate short-termism and activism in order to make the economy more inclusive.

Going back to 1970, when Milton Friedman published an article in *The New York Times* basically saying that the sole social purpose of a corporation should be maximizing value for the shareholders – usually virtually those words – there's been academic support for short-termism and activism.

There are those who have accepted that and basically believe that shareholders should have absolute control over the corporation and that management should operate solely to maximize the return to shareholders.

I think it's axiomatic that if that thinking dominates an economy, the average worker is going to get less and the shareholders are going to get more. And sooner or later, you have created a degree of inequality – and really, despair – that's going to spur a sharp populous turn.

That's been true throughout history. Step back to Roman times. If there's an elite that begins to take an outsized share of the economy, it causes disruption and ultimately some kind of revolution. It can be a revolution that moves toward a more socialistic approach, or it can be a sharp turn to a totalitarian approach. But one way or another, the few who control the source of income in an economy, whether it be land in feudal times or business corporations in modern times, you're going to get a reaction unless there's a fair mediation of the proceeds of economic activity.

A series of economic studies, two of which have come from Europe, showed that activism – short-termism, shareholder-centric governance – is responsible for a very material drag on GDP growth in the US, UK, Netherlands, France and Germany. If companies don't invest, you're not going to get an increase in productivity, you're not going to create employment – you're not adding to the economy. It doesn't take statistics to show that. It's plain, ordinary common sense. And people are beginning to have common sense.

That's why I feel so strongly that activism is not beneficial to an economy and it should not be encouraged. Now, there are always companies that are not well-managed, pursuing a bad strategy. Those companies need to be turned around, but it is not necessary to have activists do it. The institutional investors should undertake to engage with those companies and convince them to turn around. If you promote activism, what you're doing is sending a message to every company that it should start thinking the way of the activist or otherwise it's going to be attacked, which means in a sense that you kill long-term strategies.

So what can be done?
We need to rethink corporate governance. The board of directors should determine the strategy of the company. We've taken that away and put the power into the hands of shareholders. The best way of dealing with that is for institutional investors to stop outsourcing the monitoring of their investments, and instead take it in-house.

What really annoys me, what I get really angry about, is that the public and union pension funds don't try to do something about this. Activism is the cause of these great layoffs. It is bad for working people, it's bad for shareholders and it's bad for the economy.

How should boards deal with the potential for activism?
What activists are trying to do is drive a wedge between the board and management. Boards need to be prepared to back the management. Boards need to be on top of shareholder relations, to be ready to meet with institutional investors. Then they will get the support of institutions to win proxy fights.

That means, with regard to the potential for activism, the single most important thing for a CEO is to maintain a relationship with the board of directors so the board doesn't feel pressured to seek a solution that's not in the best interests of the long-term shareholder.

How optimistic are you for future generations?
Well, at the moment one cannot be very optimistic because the world is somewhat chaotic, both from an economic standpoint and a political standpoint. And the failure of investment, both in business corporations and by government, has basically penalized future generations.

If you don't invest in infrastructure – and by infrastructure I mean not only bridges and roads but also soft infrastructure like education, employee training, healthcare and housing – if you don't invest in that, you're basically penalizing future generations. We've now had more than 16 years of robbing from future generations.

KEVIN HELLIKER, a Pulitzer Prize-winning journalist, is Editor-in-Chief of the *Brunswick Review*.

"The single most significant development is that some major activists no longer promote financial engineering or short-term changes"

MARTY LIPTON

A founder in 1965 of Wachtell, Lipton, Rosen & Katz, Marty Lipton is a dean of mergers and acquisition law, his practice focused in particular on corporate defense. He invented the so-called poison-pill defense.

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2022 DEALMAKERS OF THE YEAR

Raaj Narayan

Wachtell, Lipton, Rosen & Katz

WACHTELL, LIPTON, ROSEN & KATZ PARTNER RAAJ NARAYAN HAD worked with next-generation financial services company Social Finance since 2016, advising it on capital raises and a large financing round in 2019. The company had started out by giving personal student loans, but by 2021 had diversified into a one-stop shop for consumer finance. In order to keep growing, it needed more money—and it needed to get a bank charter.

Over the course of its growth as a private entity, Social Finance had developed a very complicated and unique capital structure, which fueled its growth but also created impediments to taking it public and obtaining the bank charter it needed to lower rates.

"The company was evaluating strategies for its next stage of growth, and part of that was taking seriously the SPAC option," Narayan says. "A lot of companies take serial preferred stock and it all looks the same. Finding a capital structure that worked for everyone in this case was a bit more challenging."

Narayan says part of that challenge was the sophistication of the stakeholders, which included Silver Lake Partners, Softbank and Qatar Investment Authority.

Narayan and his team acted as a negotiation hub, leading multi-party negotiations involving at least five counterparties at any time. They also needed to create a capital structure that could thrive in public markets and provide different merger considerations for the several classes of capital stock through five different exchange ratios.

"It wasn't plain vanilla," Narayan says. "It is more interesting to work with sophisticated lenders. People have stronger viewpoints when they are used to negotiating every element of this."

The deal came together at the height of the SPAC boom (which had its own difficulties given a SPAC is a hybrid mix of a merger and a going-public transaction) and ultimately gave Social Finance, now SoFi Technologies, what it needed while also keeping the various investors happy.

Shortly after the transaction, Narayan's team was able to acquire a small community bank called Golden Pacific in order to gain the bank charter. The company's shares soared when it cleared the final regulatory hurdle in January.

Narayan says he and his team have been asked by Social Capital, the SPAC in the deal, to do its next round of de-SPACs as well. "It's satisfying when the other side in a deal respects your work and hires your firm for their subsequent transactions," he says. *—Patrick Smith*

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2022 DEALMAKERS OF THE YEAR

Steven Rosenblum

Elina Tetelbaum

Wachtell, Lipton, Rosen & Katz

THROUGH REGULATORY SAVVY AND PATIENCE, SULLIVAN & Cromwell M&A partners Frank Aquila and Andrew Gerlach helped Canadian Pacific Railway acquire Kansas City Southern last year after initially losing the deal to a higher bidder. Pending final approval by the Surface Transportation Board, the $31 billion deal will create the first single-track railroad spanning the United States, Mexico and Canada. It may also be the last of its kind: Decades of railroad consolidation means any future mergers among the country's seven remaining Class 1 railroads will be deemed increasingly anti-competitive.

Kansas City Southern had options when it entered into its initial merger agreement with Canadian Pacific, valued at $275 per share, in March 2021. By then, its stock price had more than doubled from its February 2020 low of $127. The deal followed months of unsolicited bids, initially from a private equity consortium including Blackstone Group and GIP, and then from Canadian Pacific.

The next month, fellow Class 1 railroad Canadian National Railway came over the top with an unsolicited bid at $320 per share. It offered more cash and less stock than the bid from Canadian Pacific, which declined to match. However, Aquila and Gerlach knew their client still wanted the deal, so they got to work exploiting the regulatory uncertainties of the Canadian National deal.

Kansas City Southern required any acquisition to include a voting trust, which would hold shares of the railway until the STB approved the transaction. Aquila knew the STB was wary of further consolidation—a previous Canadian Pacific attempt to acquire Norfolk Southern Railway fell apart because of regulatory doubts.

While Canadian National offered more money, Canadian Pacific offered certainty. Its voting trust had already been approved. None of its routes overlapped with Kansas City Southern, but some Canadian National routes did. Gerlach and Aquila argued those points to regulators and, via a proxy contest, Kansas City Southern's shareholders.

"Canadian Pacific was running what amounted to a lobbying campaign from before we signed with Canadian National to the time when the STB rejected the Canadian National voting trust," says Wachtell, Lipton, Rosen & Katz corporate partner Steven Rosenblum, who represented Kansas City Southern alongside corporate partner Elina Tetelbaum.

As shareholders prepared for a mid-August vote on the Canadian National deal, the STB announced it would soon rule on the voting trust. The target railway postponed the vote and, sensing opportunity, Canadian Pacific upped its bid to $300 per share.

When the STB ruled against Canadian National, Canadian Pacific moved to close the deal by putting a time limit on its revised bid. In mid-September, Kansas City Southern terminated its deal with Canadian National and signed with Canadian Pacific.

For the Wachtell team, playing a cool, neutral hand as the Canadian railways squared off helped earn their client the best deal possible.

"It requires calmness and patience and open mindedness that you try to maintain over a long period of time and not get lost in rooting for one deal over another because that's the one you have in hand," Tetelbaum says. "That's the discipline I've certainly taken away from this."

—Dan Roe

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For Wachtell, Diversity Hinges on Long-Term Focus of Associate Pipeline

Two-thirds of the firm's associates were men in 2008. Now close to half of the firm's associates are female.

By Christine Simmons
December 11, 2020

In the wake of the racial justice protests this year, more firms in the Am Law 200 are announcing targeted increases in the diversity of their lawyers and clearly **delineated goals** for their partnership.

But for firms that rarely hire lateral partners, improving diversity can be a marathon, with the associate pipeline taking on even more importance.

Take Wachtell, Lipton, Rosen & Katz, an elite M&A powerhouse. It has a plan that considers the entire early-career timeline—from hiring diverse lawyers in summer programs to retaining them and promoting them to partner, a process that takes about a decade. Lawyers there believe that plan, through a mix of recruiting efforts and associate mentoring, has been working and is increasingly evident in the firm's associate and partnership levels.

In the last 10 years, 55% of the firm's new partners—22 of 40—are women or racially or ethnically diverse, or identify as LGBTQ, the firm said. That includes 10 diverse lawyers. And over the last five years, 62% of the firm's new partners, 13 of 21, are women or diverse lawyers. That includes five diverse lawyers.


Cynthia Fernandez Lumermann, left, and Christina Ma, right, of Wachtell, Lipton, Rosen & Katz. Courtesy photos

But while the most profitable firm in the Am Law 100 has seen more diversity progress in the last decade, there's a lot more work to do. Diversity in the firm's overall partnership falls behind associate levels. "There's definitely progress to be made. We recognized this was going to be a long-term program," partner Steven Rosenblum said in an interview.

The firm last month elected associates Cynthia Fernandez Lumermann, who is Latina, and Christina Ma, who is Asian American, as partners effective January 2021. Earlier this year, the firm, in a rare partner hire, added Sarah Eddy, a former Wachtell associate and U.S. Supreme Court clerk

who was chief of appeals for the criminal division at the Southern District of New York U.S. Attorney's Office. (Wachtell has only hired four lateral partner in 40 years, said Rosenblum.)

Wachtell's promotions were announced shortly after Cravath, Swaine & Moore, another elite firm that rarely hires lateral partners, **announced** it had promoted 11 lawyers to partner, including two Black attorneys.

While legal team diversity may not be the No. 1 goal in high-stakes deals and litigation, that doesn't mean there isn't a "reasonable expectation" by clients for diversity on the team and within the law firm, said Merle Vaughn, the national law firm diversity practice leader at Major, Lindsey & Africa. Elite firms are not immune.

It's also become increasingly important for law school students, she said. When few partners are diverse, "it's really difficult to retain that talent when they don't see anybody who looks like them at that level," Vaughn said, "because it seems unattainable."

Indeed, Wachtell lawyers recognized that if they wanted to have top talent, they needed to have a diverse pool of incoming associates.

"Being able to attract more women and diverse lawyers to the firm expands our recruiting pool," said Rosenblum, who is co-chairman of the firm's corporate department. "You want to be an attractive firm to all students, but if you're not attractive to women and diverse students, you're losing out to people who can become great lawyers."

An evolving firm profile

Vaughn said building a diverse partnership only through the associate pipeline—instead of a mix of lateral partner hiring and associate promotions—is risky.

"You can't control whether your client takes that one diverse lawyer in that class away and brings them in-house. So numbers make a difference," she said. "If you only have one and that one leaves, then you have a problem."

At Wachtell, the number of female and diverse associates has steadily increased.

For instance, when Rosenblum became chairman of the recruiting committee in 2008, two-thirds of the firm's associates were men, and the number of female students who accepted offers almost every year lagged behind the number of male students. Now close to half of the firm's associates—about 47%—at this point are women. And the percentage of the firm's associates who are African American, Asian American, Hispanic or multiracial has risen in the past several years, according to American Lawyer data.

Generally, more than 90% of Wachtell's new associate hires come from its summer program, making it the most important part of its talent pipeline. It's essentially 10 years from the hiring decision to when they could be considered for partnership, including the eight-year partnership track and their time in law school, Rosenblum said.

"The only way to make it work is to consistently over time keep feeding the pipeline," he said.

The firm saw the diversity of the associate ranks tick up through a number of factors. During on-campus interview recruiting, Rosenblum said, law students are talking with the firm's women and diverse partners, and some recruitment events have focused on women.

When the firm has extended offers to students but they haven't yet accepted, they have a chance to talk with additional partners and associates.

Wachtell does on-campus interviews at seven law schools: Harvard, Yale, Stanford, Columbia, New York University, Chicago and Penn Law. And in the last seven years, the firm began soliciting resumes at another set of schools, including Duke, Cornell, Georgetown, Michigan, Berkeley, Northwestern and University of Virginia. The firm on occasion hires from other law schools based on unsolicited resumes.

The firm typically has about 30 new associates each year, including first-years and those who clerked.

In making sure lawyers stay at the firm through the partnership level, the firm has an associate development committee, which is led by a female partner, Jodi Schwartz. The group makes sure associates have top career development, including exploring a range of client matters, while all junior lawyers have mentors, Rosenblum said.

Fernandez Lumermann, one of the newly promoted lawyers, said she has been a "huge beneficiary" of the firm's mentorship and feedback program, especially for diverse associates. "I got a lot of consistent feedback from partners on how my work was viewed and how I was doing and that really made me feel at home at the firm and that the firm wanted me to stay," said Fernandez Lumermann, a mother to a young daughter.

Making sure women and diverse associates at Wachtell receive mentorships, coaching and feedback "needs to continue to be a focus and more of a focus," she said. "That's something I'm looking forward to contributing to."

Of course, it also helps recruitment and retention when associates are paid above market compensation. For instance, first-year associates at Wachtell have a base $195,000 salary, compared with the $190,000 market rate in New York. Rosenblum declined to comment about the firm's associate bonuses, including this year, when several firms are paying double bonuses. But it's believed the firm's associates will again see the highest total compensation by year-end compared with peers at other firms.

The total diversity in the partnership ranks still falls behind the associate representation. Women make up 23% of the firm's partnership, including the new partners. Meanwhile, 12% of the firm's partnership—11 of 91 partners—are racially or ethnically diverse. The firm has one Black partner, while 9% of the firm's associates are Black lawyers. The firm ranked No. 47 in the American Lawyer's **Diversity Scorecard** this year.

"It's a long-term project. The efforts are ongoing and they will continue," Rosenblum said about the firm's diversity goals, "but already we're seeing success from the efforts, manifesting not just in the partners we're promoting this year but our track record over the past 10 years."

Christine Simmons *writes about the New York legal community and the business of law. Email her at csimmons@alm.com and find her on Twitter @chlsimmons*

Wachtell, Lipton, Rosen & Katz (www.wlrk.com)

nalp We advance law careers

Basic Information

51 West 52nd Street
New York
NY, NY 10019
Organization Size: 280
Office Size: 261
Hiring Attorney:
By Committee

Recruiting Contact:
Ms. Elizabeth F. Breslow
Director of Recruiting & Legal Personnel
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, New York (NY) 10019
United States
Phone: 212-403-1334
efbreslow@wlrk.com

Compensation & Benefits

2022 compensation for entry-level lawyers ($/year)	220,000
Summer Compensation	
2022 compensation for Post-3Ls ($/week)	4,230
2022 compensation for 2Ls ($/week)	4,230
2022 compensation for 1Ls($/week)	4,230

Partnership & Advancement

Does the firm have two or more tiers of partner?	No
If no, how many years is the partnership track?	8

Lawyer Demographics

		Partner/Member	Associates	Counsel	Non-traditional Track/Staff Attorneys	Summer Associates
	Men	68	85	24	0	15
	Women	21	72	10	0	19
	Non-binary	0	0	0	0	0
	Total	89	157	34	0	34
Latinx	Men	0	2	1	0	3
	Women	1	7	0	0	3
	Non-binary	0	0	0	0	0
White	Men	63	61	22	0	9
	Women	17	41	8	0	10
	Non-binary	0	0	0	0	0
Black or African American	Men	1	11	0	0	1
	Women	0	5	0	0	1
	Non-binary	0	0	0	0	0
Native Hawaiian or Other Pacific Islander	Men	0	0	0	0	0
	Women	0	0	0	0	0
	Non-binary	0	0	0	0	0
Asian	Men	4	8	1	0	2
	Women	3	15	2	0	4
	Non-binary	0	0	0	0	0
Native American or Alaska Native	Men	0	0	0	0	0
	Women	0	0	0	0	0
	Non-binary	0	0	0	0	0
2 or More Races	Men	0	3	0	0	0
	Women	0	4	0	0	4
	Non-binary	0	0	0	0	0
Persons with Disabilities	Men	0	2	0	0	0
	Women	0	0	0	0	0
	Non-binary	0	0	0	0	0
LGBTQ	Men	2	4	0	0	2
	Women	0	2	0	0	2
	Non-binary	0	0	0	0	0
Veteran	Men	0	3	0	0	1
	Women	0	0	0	0	0
	Non-binary	0	0	0	0	0

Wachtell, Lipton, Rosen & Katz (www.wlrk.com)

Pro Bono/Public Interest

Marc Wolinsky
Of Counsel
212-403-1000
mwolinsky@wlrk.com

Is the pro bono information indicated here firm-wide or specific to one office?	Firm-wide
% Firm Billable Hours last year	
Average Hours per Attorney last year	
Percent of associates participating last year	
Percent of partners participating last year	
Percent of other lawyers participating last year	

Professional Development

Evaluations	Annual
Does your organization use upward reviews to evaluate and provide feedback to supervising lawyers?	No
Rotation for junior associates between departments/practice groups?	No
Does your organization have a dedicated professional development staff?	Yes
Does your organization have a coaching/mentoring program	Yes
Does your organization give billable hours credit for training time?	Yes

HIRING & RECRUITMENT

	Began Work In				Expected
LAWYERS	**2020**	**Prior Summer Associates**	**2021**	**Prior Summer Associates**	**2022**
Entry-level	28	28	30	30	25
Entry-level (non-traditional track)	0	0	0	0	0
Lateral Partners	1	1	0	0	0
Lateral Associates	5	1	14	1	3
All Other Laterals (non-traditional track)	1	0	1	0	1
Post-Clerkship	6	5	6	6	1
LL.M.s (U.S.)	0	0	0	0	0
LL.M.s (non-U.S.)	0	0	0	0	0
SUMMER					
Post-3Ls	0	0	0	0	0
2Ls	31	2	29	3	30
1Ls	3	0	3	0	4

Number of 2021 Summer 2Ls considered for associate offers	29
Number of offers made to summer 2L associates	29
General Hiring Criteria	*We look for highly motivated, well-rounded candidates who possess strong intellectual abilities and interpersonal skills. We prize independent thinking, creativity, and diversity and we seek individuals who are committed to the practice of law.*

General Practice Areas

GENERAL PRACTICE AREAS	EMPLOYER'S PRACTICE GROUP NAME	NO. OF PARTNERS/MEMBERS	NO. OF COUNSEL	NO. OF ASSOCIATES	NO. OF ENTRY-LEVEL PLACEMENTS IN THIS PRACTICE AREA LAST YEAR	NO. OF NON-TRADITIONAL TRACK/STAFF ATTORNEYS
Business, Corporate	Antitrust	4	4	5	0	0
Business, Corporate	Corporate	38	11	66	11	0
Business, Corporate	Executive Compensation and Benefits	6	1	6	2	0
Litigation	Litigation	25	9	53	10	0

Business, Corporate Real Estate, Land Use	Real Estate M&A	1	1	2	0	0
Business, Corporate Litigation	Restructuring and Finance	9	6	18	6	0
Tax	Tax	6		6	2	0
Trusts and Estates	Trusts and Estates	0	2	1	0	0

Diversity & Inclusion

Diversity Contact: Ms. Casey Matthew
Diversity Website/URL: https://www.wlrk.com/firm/diversity/

Organization Narrative

Wachtell, Lipton, Rosen & Katz enjoys a global reputation as one of the world's leading business law firms. Our deep experience in the fields of mergers and acquisitions, strategic investments, takeovers and takeover defense, shareholder activism, corporate and securities law, and corporate governance means that we regularly handle some of the largest, most complex and demanding transactions in the United States and around the world. We counsel both public and private acquirors and targets. We also have extensive experience handling major litigation matters, both deal and non-deal related, as well as white collar crime and investigative matters. We are involved in significant corporate restructurings and financings, and advise on tax, antitrust and executive compensation and benefits matters. In addition, our attorneys are thought leaders, speaking and writing frequently in our various areas of expertise.

Wachtell Lipton is a distinctive firm where you can practice as part of a small, close-knit group of lawyers who work as teams on demanding, high profile matters that command the attention of the legal and business worlds and involve "cutting-edge" issues. We were founded 57 years ago by four law school classmates. With approximately 280 lawyers, we consistently rank near the very top of legal advisors by transaction dollar volume, notwithstanding that we are significantly smaller than all of our major competitors. Our clients include enterprises of virtually every nature, in the United States and around the world, including many Fortune 500 companies and other leading enterprises.

The result of our combination of sophisticated practice, intellectually charged atmosphere and people-oriented culture is a group of associates who are excited about the firm. We think the reason for our success is our people. While staying small and maintaining a low ratio of associates to partners, we are able to attract some of the most talented and entrepreneurial lawyers in the country.

January 21, 2022

Mergers and Acquisitions—2022

The year 2021 was a remarkable one on many levels for M&A and the transactional market. While it was, to a significant degree, a continuation of the incredibly strong market that began in the middle of 2020, few predicted such record-breaking activity at the outset of the pandemic just several months earlier. Records were shattered across every dimension—M&A volume and number of transactions, in the United States and globally; private equity transactions; the SPAC phenomenon; and IPOs, to name just a handful. All in the midst of the ongoing Covid-19 pandemic, uncertainty regarding the timing of transitions from remote to conventional working arrangements, a volatile global economy, supply chain disruptions, more aggressive antitrust enforcement, and the prospect of increasing interest rates. These headwinds were overcome by improving economic conditions, unprecedented stimulus and central bank liquidity initiatives, uncertainty about whether potential tax reform would increase tax costs to sellers, low interest rates, increased optimism amongst corporate executives in the U.S. and across Europe as vaccine programs were successfully rolled out, and receptivity in the markets to announced transactions, among other factors. As a result of these and other dynamics, in 2021, total deal volume was the highest it has been since recordkeepers began tracking M&A volume, with over $5.8 trillion of deals recorded globally for the year. Total deal volume in 2021 increased more than 60% relative to the $3.6 trillion recorded for total deal volume in 2020 and increased over 50% relative to the $3.8 trillion recorded for total deal volume in 2019. Over 63,212 transactions were announced in 2021, a 24% increase to the 50,871 transactions announced in 2020.

The unprecedented levels of activity were driven in part by megadeals, including Canadian Pacific's $31 billion acquisition of Kansas City Southern (following a bidding war with attempted interloper Canadian National Railway in which Canadian Pacific ultimately emerged victorious), Square's (now Block's) $29 billion acquisition of Afterpay, Rogers Communications' $16.5 billion acquisition of Shaw Communications, AT&T and Discovery's deal to combine their media assets into a new publicly traded company with an enterprise value of approximately $132 billion, the $30 billion club deal for Medline involving Blackstone, Carlyle and Hellman & Friedman, and Oracle's $28.3 billion acquisition of Cerner, as well as blockbuster de-SPAC transactions including Grab's $34.3 billion combination with a private equity-backed SPAC and MSP Recovery's $32.5 billion SPAC merger. That said, while mega-mergers were an important contributor to the year's overall M&A activity, they comprised a proportionately lower percentage of deal volume than in 2020, likely reflecting hesitation to pursue large transactions in the current antitrust environment, in particular in industries that are the subject of geopolitical tensions and/or regulatory scrutiny such as technology, healthcare, and semiconductors. We expect this trend to continue, but as in 2021, the impact may be mitigated by more and larger deals involving SPACs and private equity firms.

In addition to whole company acquisitions, 2021 witnessed announcements of numerous high-profile separations, carveouts, and spinoffs, including 3M's combination of its food safety business with Neogen in a Reverse Morris Trust transaction valued at $9.3 billion, General Electric's announcement of plans to spin off both its healthcare and renewable energy, power and digital businesses, creating three standalone public companies, Blackstone's $2.2 billion

acquisition of a 9.9% stake in AIG's Life & Retirement business in connection with AIG's planned separation of the business, Johnson & Johnson's planned separation into two independent publicly traded companies by spinning off its consumer health business, eBay's sale of a majority of its Korean businesses to Emart for $3.8 billion and sale of part of its stake in Adevinta to Permira for $2.25 billion, Grupo Televisa's combination of its content and media assets with Univision in a transaction valued at $4.8 billion, and Dell's spin-off of its 81% equity ownership of VMware. Spin-offs, in particular, continue to be a focus of activists pushing companies to try to unlock shareholder value.

As we kick off 2022, we look back on a record-breaking year and discuss expectations for what last year's blistering pace may mean for the year to come.

Technology M&A

The technology sector continued to drive M&A in 2021, with 21.3% of global M&A volume ($1.24 trillion) and 28.4% of U.S. M&A volume ($727 billion) involving a tech company on either the acquiror or target side (or both). Notable transactions included, among others, Square's $29 billion acquisition of Afterpay, Entegris's $6.5 billion acquisition of CMC Materials, Aurora Innovation's $11 billion de-SPAC transaction with Reinvent Technology Partners following the combination of Uber's self-driving business with Aurora, and Microsoft's $16 billion acquisition of Nuance. Private equity backed a record volume of tech deals in 2021, announcing over $400 billion in U.S. tech deals as compared to $196 billion in 2020. Significant PE-backed tech transactions included Thoma Bravo's $10.1 billion acquisition of cyber security firm Proofpoint and the $14 billion acquisition of McAfee by a consortium of PE investors.

The tech sector's continued strong performance was driven in part by the fact that many technology-focused businesses were less affected by – or even benefitted from – the economic and social impact of Covid-19, as well as the need for companies to acquire new technologies to remain competitive in industries that are constantly innovating and changing, a trend that is unlikely to abate in 2022. As one example, logistics software became a highly desirable asset in 2021 given global supply chain disruptions – Panasonic's $7.1 billion purchase of an 80% interest in Blue Yonder, a U.S. supply chain software company, and American Eagle's $350 million acquisition of Quiet Logistics are just two illustrations of this trend. Another example is the explosion of deal activity in the electric vehicle industry – electric vehicle companies Rivian and Lucid Motors went public in 2021 at massive valuations despite not having generated meaningful revenue, and a number of large automakers have announced joint ventures to produce electric vehicles and/or critical materials for EV cars. The burgeoning blockchain and cryptocurrency sector also witnessed growing M&A activity, with notable transactions including Galaxy Digital's $1.2 billion acquisition of BitGo.

At the same time, headwinds in the form of public interest and intense regulatory scrutiny could signal a more complex environment for tech companies in the coming year and beyond. Global regulators are closely examining transactions involving tech companies, in some cases even ordering companies to undo previously consummated transactions, such as the U.K. Competition & Markets Authority's (CMA) order that Facebook (now Meta) divest Giphy to an approved purchaser and the Federal Trade Commission's (FTC) late 2020 challenge to Facebook's acquisitions of WhatsApp in 2014 and Instagram in 2012 (which recently survived a

second motion to dismiss). Further, various legislative bills currently pending in Congress have the potential to fundamentally reshape the ability of tech companies to engage in M&A and the costs to both buyers and sellers of doing so, including the Trust-Busting for the Twenty-First Century Act, which would prohibit companies over $100 billion from engaging in acquisitions that lessen competition "in any way," and the Competition and Antitrust Law Enforcement Reform Act, which would shift the burden of proof in certain sufficiently large or consequential transactions from the regulatory agencies to the merging parties, who would be required to establish that the acquisition will not materially harm competition. Finally, news reports in the early weeks of 2022 described preliminary SEC planning to amend the "held of record" definition, which would have the effect of subjecting a greater number of private companies to the extensive disclosure requirements applicable to public companies under federal securities laws. These changes, if implemented, would align with SEC Chairman Gary Gensler's commitment to increasing transparency, but would come at significant cost to private companies, including many Silicon Valley startups that typically rely on private funding for many years before going public. Relatedly, the London Stock Exchange is reportedly considering the creation of a special market for private companies to publicly trade shares in specified trading windows, which, if implemented, may be an attractive alternative to IPOs for private tech companies.

These and other regulatory developments reinforce the importance of conducting careful diligence and considering the possibility of prolonged regulatory review when allocating risk in transaction agreements, as well as utilizing creative legal and structural technology to ensure successful outcomes.

Private Equity Trends

Private equity was another primary driver of M&A activity in 2021, with global PE volume increasing approximately 111% in 2021 compared to 2020, ending the year at approximately $1.2 trillion worth of deals. The increased activity levels were fueled by, among other factors, the availability of capital and low interest rates, as well as the deployment of massive amounts of dry powder that PE firms had been amassing for the past few years during a rising market environment. As a result of these factors and others, PE was a major source of dealmaking in 2021 (approximately 20% of overall global M&A volume), notwithstanding market records and significant ongoing competition from strategic buyers.

Looking ahead, one trend to watch for is a possible resurgence of PE club deals (where two or more firms band together to buy a company), which had fallen out of favor following the 2008 financial crisis, but which may be coming back as PE firms look for opportunities to deploy significant capital in transactions involving large targets while strategic buyers face potential regulatory constraints. Indeed, 2021 witnessed the largest buyout involving a club of PE firms since the financial crisis, with the acquisition of Medline by Blackstone, Carlyle and Hellman & Friedman. Further, major PE players are planning additional capital raises projected to result in record-size funds and unprecedented levels of dry powder. Among many others, Blackstone and Apollo are reportedly preparing for major fundraising efforts (with Blackstone reportedly planning to target as much as $30 billion). We expect that sponsors will continue to pursue acquisitions and actively look for creative opportunities, with PE activity boosted by access to financing, as well as by a greater availability of potential targets as regulatory concerns cause

hesitation among strategics and activists continue to prod companies to become more focused on just their core businesses.

Finally, in 2022, we may see an increase in private equity groups going public through the IPO process, as privately held buyout firms seek to share in premium valuations enjoyed by the largest, U.S.-listed funds. There were a few private equity IPOs in 2021 – including Bridgepoint, Blue Owl and Antin Infrastructure Partners – and we expect the trend to continue into 2022, with TPG listing in January 2022 at a valuation exceeding $9 billion, and other PE firms reportedly considering joining the public markets as well.

Financial Institutions M&A

Global M&A volume in the financial services industry was over $730 billion in 2021 and has continued at a strong pace with over a third of the activity occurring in the U.S. Bank mergers set records in 2021, in particular in the latter part of the year, which saw the announcement of major transactions including BMO Financial Group's $16.3 billion acquisition of Bank of the West in late December and U.S. Bancorp's $8 billion acquisition of MUFG Union Bank in September. Other notable deals announced over the course of the year, include Webster Financial's $10.3 billion merger with Sterling Bancorp, Cadence Bancorporation's $6 billion merger with BancorpSouth Bank, Columbia Banking System's $10.2 billion merger with Umpqua Holdings, Valley National's $1.18 billion acquisition of Bank Leumi's U.S. bank and Independent Bank's $1.15 billion acquisition of Meridian Bancorp.

The fintech industry also witnessed substantial consolidation, marked by the $29 billion acquisition by Square of buy now, pay later lender Afterpay. Notably, SoFi announced earlier this week the receipt of all required regulatory approvals to close its acquisition of Golden Pacific Bancorp. Upon the closing of the transaction, SoFi would become the largest fintech to transition to a bank holding company as the convergence of banks and fintechs continues.

In the insurance sector, AIG announced in July an innovative strategic partnership with Blackstone. The partnership included a sale by AIG to Blackstone of 9.9% of AIG's Life & Retirement business, a strategic asset management relationship and a sale by AIG to Blackstone of affordable housing assets. In October, Chubb agreed to acquire from Cigna insurance businesses in seven Asia-Pacific markets for $5.75 billion.

The strong pace of bank M&A activity throughout 2021 persisted despite President Biden's July Executive Order directing the Department of Justice (DOJ) and federal banking regulatory agencies to update guidelines on bank mergers. In December, the Federal Reserve announced that they would be reviewing and updating bank M&A approval procedures, and the Antitrust Division of the DOJ issued a release seeking additional public comments on whether to revise its 1995 Bank Merger Guidelines. Partisan tensions came into the spotlight when three members of the Federal Deposit Insurance Corporation's board posted a request for comment on bank merger rules on the Consumer Financial Protection Bureau's website without the approval of the FDIC's chair (who has subsequently announced her resignation). A new chair of the FDIC has not yet been nominated. Other vacancies in key regulatory positions include a permanent Comptroller of the Currency and the Federal Reserve Vice Chair of Supervision. These vacancies, combined with political pressure from the Biden administration and progressive

members of Congress, cast some degree of uncertainty as to whether and how the bank merger approval process might change.

REIT M&A

The year 2021 was an especially active one for M&A involving real estate investment trusts (REITs), spurred in many cases by Covid-19's continuing ripple effects on the real estate markets, low interest rates, private equity's voracious appetite, the acceleration of tech disruption, and activists. Major REIT transactions involving both strategic and financial acquirors were announced over the course of the year – including Realty Income Corporation's all-stock acquisition of VEREIT to create a combined company with an enterprise value of $50 billion, which will be immediately followed by a spin-off of substantially all of the office properties of both companies into a new, self-managed publicly traded REIT, Ventas's $2.3 billion all-stock acquisition of New Senior Investment Group, Monmouth's $4 billion sale to Industrial Logistics Properties Trust, Bluerock Residential Growth REIT's $3.6 billion sale to Blackstone and simultaneous spin-off of its single-family rental business into a publicly traded REIT, Columbia Property Trust's $3.9 billion sale to PIMCO, CoreSite's $10.1 billion sale to American Tower, DigitalBridge's acquisition of Vertical Bridge and its tower portfolio, and Kimco's $20 billion merger with Weingarten. REIT M&A in 2021 spanned a variety of industry sectors, both traditional (retail, office, senior housing, and residential) and digital (data centers, cell towers, and logistics).

We expect that 2022 will build on the REIT trends of 2021 as the real estate environment continues to evolve, including in response to the pandemic, changes in residential and commercial real estate and the shift to online shopping, remote working, and the digital economy.

Cross-Border M&A

Although Covid-19 restricted international travel in 2021, cross-border dealmaking was exceptionally robust over the course of the year, constituting 36% of overall global M&A volume. Global cross-border M&A grew nearly 70% relative to the level of activity in 2020, with a total of 17,661 transactions announced throughout the year. Notable cross-border deals included Square's $29 billion acquisition of Afterpay, Rentokil's $6.7 billion acquisition of Terminix, and Canadian Pacific's $31 billion acquisition of Kansas City Southern.

We expect that the level of cross-border M&A activity in 2022 and beyond will depend on a variety of factors, including cultural, political and regulatory considerations, technical complexity inherent in cross-border deals, and the effects of recently implemented protectionist measures and foreign investment screening regimes (discussed below). Given these dynamics, prospective acquirors and targets evaluating cross-border opportunities will benefit from early and proactive planning regarding potential geopolitical and global economic and market risks.

SPACs

In 2021, SPAC volume continued the previous year's scorching pace, with a total of 613 SPAC IPOs priced over the course of the year – a 147% increase compared to the 248 SPAC

IPOs priced in 2020. That said, the number of priced SPAC IPOs and new SPAC IPO filings slowed significantly after the first quarter of 2021, due to increased scrutiny from the SEC and changing investor demand, including a tighter "PIPE" market. There were 298 SPAC IPOs priced in the first quarter, followed by just 64 in the second quarter, 88 in the third quarter, and a rebound to 163 in the fourth quarter. The number of new SPAC IPO filings similarly declined, with 469 new SPAC IPO filings made in the first quarter, as compared to 342 combined over the last three quarters of the year. A record number of de-SPAC transactions were also seen in 2021: a total of 289 such deals closed over the course of the year (97 in the first quarter, 70 in the second quarter, and 61 in each of the third and fourth quarters, respectively).

The explosion of SPAC activity triggered heightened regulatory scrutiny as federal agencies grappled with the more widespread use of these funding vehicles. Several notable enforcement actions were brought against SPACs, their sponsors, and/or target company executives. Additionally, the plaintiffs' bar has begun to focus attention on SPACs' public disclosures. The SEC also is considering the adequacy of the existing disclosure regime in relation to SPACs. The SEC is focused in particular on the use of financial projections by private targets going public through de-SPAC transactions – one key difference between de-SPAC transactions and traditional IPOs. In disclosing financial projections in de-SPAC transactions, practitioners have generally relied on a safe harbor in the Private Securities Litigation Reform Act (PSLRA) that permits existing public companies (within certain limits) to discuss projections. However, SEC officials have questioned the applicability of the PSLRA's safe harbor to de-SPAC transactions, and public reports have indicated that new guidelines may be forthcoming. Further, to the extent that de-SPAC transactions involve stockholder votes and redemption rights, practitioners should carefully consider the robustness of disclosures in proxy statements, especially in light of the Delaware Court of Chancery's recent decision in *MultiPlan*, which declined to dismiss a case alleging structural conflicts for SPAC directors and faulty proxy disclosure. Against this backdrop, de-SPAC transaction terms are continuing to evolve, and well-priced and marketed de-SPAC transactions are being completed.

Looking forward to 2022, SPACs will continue to be a fixture in the M&A environment and a driver of overall activity. There are approximately 575 SPACs with combined buying power of $779 billion (assuming an average target size of five times the size of the SPAC's trust account) that currently are looking for targets and are highly incentivized to complete deals before the expiration of the time periods specified in their charters (generally 18 to 24 months). At the same time, headwinds – including greater regulatory attention and the possibility of stricter guidance, as well as increased litigation risk – may present new challenges for SPAC deals in the coming year, and should be carefully considered by SPACs and SPAC targets together with their advisors.

Evolving Antitrust Landscape

One of the most significant areas of development in M&A in 2021 was in antitrust, and the effects of this year's developments will likely factor into dealmakers' decisionmaking for years to come. New leadership appointed by the Biden administration at the FTC (including the appointment of Lina Khan as chair of the agency in June) and the DOJ (including the appointment of Jonathan Kanter as the top official at the DOJ's Antitrust Division in November) have ushered in a new, more aggressive and unpredictable era of merger enforcement. As new

leadership attempts to make their mark on the U.S. antitrust environment, parties should expect continued aggressive enforcement in 2022.

The federal agencies, in particular the FTC, have not shied away from updating policy priorities and changing existing practices. Procedural policy changes (some adopted by a divided FTC split along partisan lines) include (i) the "temporary" suspension of early termination of the initial waiting period for HSR filings, which was announced in February and remains in place with no indication of when or if the suspension will be lifted, (ii) the FTC's new practice of sending standard form pre-consummation warning letters to merging parties alerting them that, notwithstanding the expiration of the statutory waiting period, the FTC's investigation remains open, the agency may subsequently determine that the deal was unlawful, and companies that choose to proceed with transactions that have not been fully investigated are doing so "at their own risk," and (iii) the FTC's adoption of a policy requiring acquirors who settle merger enforcement actions to obtain prior approval from the FTC before closing transactions in the same or related relevant markets for a period of at least ten years. Substantive policy changes include the FTC's new "holistic" approach that focuses on harms that "Americans are facing in their daily lives," which now may consider novel issues beyond the traditional focus on anticompetitive effects (such as unions, wages, sustainability and diversity), potentially shifting existing antitrust doctrine away from the consumer welfare standard, as well as the FTC's repeal of the 2020 vertical merger guidelines with the intent to adopt guidelines that better reflect "the skepticism the law demands." Just this week, the FTC and DOJ announced the launch of a joint public inquiry to solicit input on ways to modernize their horizontal and vertical merger guidelines "to better detect and prevent illegal, anticompetitive deals in today's modern markets," an effort that the agencies hope to complete this year. These changes, among others, have complicated dealmaking by introducing greater uncertainty for merging parties, increasing unpredictability and the regulatory burden in the context of specific transactions as well as for future transactions companies may wish to pursue, and creating longer review periods.

Amidst robust M&A activity in 2021, the FTC and DOJ have investigated and challenged transactions in an array of industries. High profile enforcement actions included the DOJ's challenge of Visa's $5.3 billion acquisition of Plaid, which involved allegations that Plaid was "developing a payments platform that would challenge Visa's monopoly" in online debit payments, and therefore the acquisition would "kill" a nascent competitor, and which the parties abandoned in early 2021, shortly after the DOJ's challenge, the DOJ's successful challenge to the $30 billion megadeal between insurance brokers Aon plc and Willis Towers Watson, which the parties abandoned in July 2021 after being unable to reach a settlement with the DOJ, the FTC's pending challenges against two vertical mergers—NVIDIA's $40 billion acquisition of Arm and Illumina's $8 billion acquisition of Grail—two deals that are also under review in Europe, and the DOJ's recent challenge to Penguin Random House's $2.2 billion purchase of competitor Simon & Schuster, a deal that would combine two of the top five publishing companies in the U.S., and notably focuses on harm to authors (monopsony) rather than consumers (monopoly).

All indications point to an even more active enforcement environment in 2022. In particular, the agencies will continue to investigate and aggressively pursue vertical mergers and so-called "killer" acquisitions, in addition to traditional horizontal mergers. The DOJ may be increasingly active in shaking up previous policies as Jonathan Kanter settles into his new role.

Additionally, leaders of the FTC and the DOJ have expressed a commitment to working together to progress their priorities, making it likely that interagency coordination will increase in the year ahead. Finally, enhanced collaboration between U.S. regulatory agencies and their international counterparts, especially in industries such as technology, will create a tougher environment for competition enforcement.

Further complicating the regulatory landscape is the possibility that Congress will overhaul the current legislative framework in the near future. Various proposals pending in Congress range from burden shifting, outright bans on mergers involving companies over a certain size, modification of the standards used to evaluate mergers, and increased penalties for antitrust violations. State antitrust regimes may also be amended in the near future, exemplified by a sweeping antitrust bill recently reintroduced in the New York State legislature. While there is broad bipartisan commitment to altering the current antitrust regime, it remains unclear whether any of the pending antitrust bills have the requisite Congressional support.

We expect that regulatory headwinds will impact levels of M&A activity in 2022, both by strategic acquirors and by private equity firms (which historically have faced relatively more lenient antitrust review) as Biden administration officials continue working to implement the Administration's aggressive antitrust agenda. One way parties will account for the uncertainty is through deal mechanics – including detailed regulatory commitments, more frequent reverse termination fees, longer outside dates, and potentially changes to the interim operating covenants that restrict the seller's conduct of its business in the pre-closing period. The uncertainty and general environment of hostility underscore the importance of careful and early planning in consultation with legal and financial advisors, as well as proactive engagement with the agencies if issues may arise.

Foreign Investment Review

The impact of regulatory scrutiny of foreign investments has increased in the U.S. and in numerous jurisdictions around the world. In the U.S., review of foreign investments is conducted by the Committee on Foreign Investment in the U.S. (CFIUS), which is a federal interagency group tasked with assessing foreign investments in U.S. business and certain real estate transactions for national security implications. CFIUS's mandate has expanded in recent years, most recently in 2018 with the passage of the Foreign Investment Risk Review Modernization Act (FIRRMA), which introduced mandatory notification requirements for certain transactions and expanded the jurisdiction of CFIUS review across various critical technology and infrastructure or sensitive data businesses.

In a trend that significantly accelerated during the Covid-19 pandemic, other countries are also bolstering their foreign investment review regimes. For example, the United Kingdom overhauled its foreign investment rules and implemented the National Security and Investment Act in early January 2022, France announced tightened restrictions on its foreign investment rules in September 2021, and China's Measures for Security Review of Foreign Investment, which took effect in January 2021, provide for national security review similar to that of CFIUS.

Given increasing geopolitical tensions, in particular increasing tensions between the U.S. and China, advanced planning for foreign investment scrutiny – which, in some cases, will be a

bigger driver of transaction timing than competition reviews – will be critical to timely and successful completion of cross-border deals.

ESG, Activism and M&A

ESG has continued to gain momentum as corporate boards, managements, shareholders, and other stakeholders assess and recognize the bottom-line implications of environmental, employee, social and governance considerations generally and in the context of the long-term value of the corporation. In the past year, ESG has played an increasingly prominent role in activist campaigns, most dramatically exemplified by Engine No. 1's success in electing three directors to Exxon Mobil's board, as well as by the development of the two-front activist "pincer" attack in which an ESG activist attack is followed by an attack from an activist focusing on financial returns. Activists have also leveraged ESG to further their M&A theses: Third Point called for the breakup of Royal Dutch Shell, Elliott called for the separation of SSE's renewables business and Bluebell called on Glencore to divest its coal business.

ESG's influence is also increasingly evident in the context of M&A negotiations and larger deal considerations. As one example, it has become ever more critical for acquirors to comprehensively diligence the ESG profile of potential targets – a result of the SEC's increased focus on the adequacy of ESG disclosures and the growing legal, financial and reputational costs of ESG underperformance.

Climate change and related risks may also create M&A opportunities in the near term, as companies restructure operations in the face of investor pressure to reduce their emissions output. Relatedly, environmental considerations may factor into the regulatory review of proposed transactions by U.S. and other international regulatory bodies, as the FTC increasingly includes questions about sustainability in merger investigations and the U.K. CMA recently requested input on how the U.K. competition regime could better promote sustainability. Finally, because of the importance of ESG performance to investors, companies should consider highlighting ESG-related synergies and opportunities in transaction rollouts, investor presentations, press releases and at analyst and investor meetings.

In addition, activism-driven M&A was an important part of the corporate landscape in 2021, and was often focused on sweetening or scuttling announced transactions, as exemplified by TCI's campaign at Canadian National, in which TCI originally sought to thwart Canadian National's interloping bid for Kansas City Southern (and is now involved in an ongoing proxy fight with the company). Numerous other 2021 campaigns were aimed at selling or breaking up target companies, including the sale of Columbia Property Trust to PIMCO following Arkhouse Partners' public unsolicited takeover offer, the sale of W. R. Grace to 40 North after multiple unsolicited offers from 40 North, and Monmouth Real Estate Investment Corporation's settlement with Blackwells Capital in connection with Monmouth's $4 billion acquisition by Industrial Logistics Properties Trust, to name a few prominent examples. Relatedly, prospective buyers must also remember that proxy advisors can affect the success of transactions, exemplified by the termination of Zoom's proposed acquisition of Five9, Inc. after ISS recommended against the merger and the deal failed to receive the requisite shareholder support.

Looking forward to 2022, we expect that activist activity will continue to remain elevated, with activists pursuing various tactics including pushing for break-ups and challenging announced deals (including using ESG deficiencies to help garner investor support). In addition, activists are likely to continue launching proxy fights to gain board seats, with the dynamics regarding these contests changing in light of the SEC's adoption, in November 2021, of final rules requiring parties in contested elections to use universal proxy cards that include all director nominees presented for election at shareholder meetings, which facilitates mixed ballot voting and therefore will increase the likelihood that the activist will obtain at least one board seat in a contested election.

Acquisition Financing

The record-breaking debt financing markets in 2021 helped drive a year of robust deal-making activity. Acquirors, whether investment grade, high-yield, or sponsor-backed, and across industries, had strong access to financing commitments with favorable terms, which were followed by permanent financing take-out deals that were often significantly oversubscribed. New issuance volumes for both high-yield bonds and loans set full-year records before Thanksgiving, and those record high volumes were accompanied by record low yields. Investment grade bond issuance levels were the second highest on record, eclipsed only by levels reached in 2020.

The attractive financing available in 2021 supported dealmaking at an all-time record pace, including M&A transactions such as Salesforce.com's $27.7 billion acquisition of Slack, Jazz Pharmaceuticals' $7.2 billion acquisition of GW Pharmaceuticals, II-VI's $7.0 billion acquisition of Coherent, IAC's $2.7 billion acquisition of Meredith Corporation's National Media Group, Herman Miller's $1.8 billion acquisition of Knoll, and Siris Capital's innovative $1.5 billion double-acquisition of Equiniti Group and American Stock Transfer & Trust Company. The financing markets also supported other types of M&A activity, including spin-offs such as XPO Logistics' $7.8 billion spin of GXO Logistics, and "Reverse Morris Trust" transactions such as the $9.3 billion combination of 3M's food safety business with Neogen. Refinancings were fast and frequent as well, and companies in sectors that faced headwinds at the initial peak of the Covid-19 crisis, including Expedia and Gap, reset their capital structures on enviable terms. As central banks begin to taper monetary easing measures taken during the height of the Covid-19 pandemic, potential acquirors should closely monitor the impact of these changes on the financing landscape. But so far, even as monetary authorities have signaled that their support for the economy will begin to be curtailed, debt markets remain open and constructive.

As always, a new year brings its own challenges and considerations, including the possibility of new and disruptive Covid-19 developments and ongoing inflationary pressures. In this environment, borrowers seeking acquisition financing commitments must remain alert and prepared. Provisions in merger agreements allocating financing failure risk remain an important area of focus. Likewise, it remains critical for corporate acquirors to model downside cases, and to understand the "flex" and other terms that could make a debt commitment ultimately less appealing to them by the time their deal closes. On one hand, high-grade borrowers may find that traditional financing sources (*i.e.*, capital markets deals and bank loans arranged by major banks) remain their best paths to execution. Leveraged borrowers, on the other hand, may

continue to find it useful to consider alternative financing paths and sources to reach a deal, as funding will be driven, in part, by factors such as the availability of direct lending and enhanced covenant flexibility.

Delaware Developments

Delaware M&A litigation in 2021 largely maintained the status quo. In 2020, the Delaware courts were presented with a number of Covid-19 "material adverse effect" and other disputes concerning M&A agreements that had been entered into before the onset of, and then pressured by, Covid-19 and its effects. Many of these disputes were resolved (in some cases through price adjustments) before the courts adjudicated on the merits (including Simon/Taubman and LVMH/Tiffany's). As the pandemic progressed, market participants quickly became focused on how to address Covid-19-related issues in MAE definitions and related provisions of transaction agreements, with new "market standard" provisions developing regarding carveouts for Covid-19, and suggestions that there might, for the first time, be a wave of Delaware court cases excusing buyers from closing on the basis of MAEs proving unfounded. Indeed, the bar for any finding of an MAE has remained fixed at a very high level, as attention has also focused on provisions addressing compliance with interim operating covenants, with parties paying careful attention to how actions taken in response to Covid-19 are treated under these covenants, which has been another area of recent litigation.

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This past year's M&A boom will be difficult to beat, but we expect that the fast pace of dealmaking activity will continue at least for the first part of 2022, and possibly beyond, as shareholders demand that companies focus on core businesses and grow those businesses sometimes faster than their organic capabilities permit and companies leverage transformative transactions, both buying and selling, to meet those demands and remain competitive. While dealmakers may face headwinds – including aggressive antitrust enforcement (both in the U.S. and globally), a scarcity of attractive targets, and the prospect of increasing interest rates – there are many conditions heading into the new year that are conducive to M&A, including large amounts of dry powder amassed by private equity firms and by SPACs seeking targets, as well as the need to innovate to keep pace with technological advances. Dealmakers should continue to carefully analyze the risks and benefits of potential M&A transactions, taking into account the financial and strategic rationales for the deal, and thoughtfully structure transactions to maximize the potential for successful outcomes.

Wachtell, Lipton, Rosen & Katz

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White-Collar and Regulatory Enforcement: What Mattered in 2021 and What to Expect in 2022

Introduction

The Biden administration has just completed its first full year in office, and the talk has been tough. New leadership at DOJ, the SEC, the FTC, the CFTC, and other regulatory and law enforcement agencies have issued statements and policy revisions signaling their intention to train more focus on white-collar and regulatory enforcement. We correctly predicted this tougher stance in our wrap-up memorandum last year. What we did not anticipate was the announcement of policies that, depending on how they are implemented, could resurrect what we have viewed as ill-conceived approaches to eligibility for cooperation credit, monitorship imposition, civil penalties, and corporate admissions.

At the Department of Justice, the new leadership includes Attorney General Merrick Garland, Deputy AG Lisa Monaco, and Assistant AG for the Criminal Division Kenneth A. Polite Jr. In her first major speech in October 2021, DAG Monaco announced three significant revisions to corporate enforcement policies that echo initiatives touted by the DAG's Obama-era predecessor, Sally Yates: (1) prosecutors making charging decisions about a company must consider "all misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it," whether or not the "past misconduct is similar to the instant offense"; (2) any company seeking cooperation credit will once again be required to provide the government with "all nonprivileged information relevant to *all* individuals involved in the misconduct" — not just those whose involvement was substantial; and (3) prosecutors are now encouraged to more often consider imposing monitors as part of corporate criminal resolutions.

At the SEC, Chair Gary Gensler and Director of Enforcement Gurbir Grewal unveiled enforcement policies that track in many respects DOJ's tough stance. These include an unfortunate return to insisting upon admissions of wrongdoing and imposition of independent consultants as prerequisites to settlement in some cases. The SEC also signaled a determination to consider extracting larger civil penalties for white-collar wrongdoers, saying it needs to "make it harder for market participants to simply 'price in' the potential costs of a violation."

We expect it will take some time before the impact of these policies is reflected in the case and penalty data. Below, we discuss the significance of the policy changes and their likely effect on white-collar enforcement over the coming year. We then outline the substantive areas — including accounting fraud, antitrust, cyber security, ESG disclosure, FCPA, and U.S. sanctions — that we expect will attract the greatest attention in 2022. Finally, we review the role we anticipate state Attorneys General will play in the enforcement arena this year.

DOJ Policy Updates

In line with our prediction last year, DOJ leadership appointed as part of the Biden administration has announced its intention to end the four-year period of relatively slower white-collar enforcement under the prior administration. While some of the announced policy changes raise potential concerns, we hope that, as the new DOJ hits its stride, it will provide clarity and transparency concerning the criteria it is applying in exercising prosecutorial discretion, evaluating compliance programs, and granting credit for corporate self-reporting and cooperation.

As noted, the three policy developments DAG Monaco announced in October 2021 seem to auger a return to a tougher, Yates-era program of corporate criminal enforcement.

First, they define corporate "recidivism" broadly — encouraging prosecutors to consider not just prior conduct similar to that currently under investigation but "*all* misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it," however unrelated it may be to the current conduct. In announcing this approach, DAG Monaco explained that a company's history of misconduct "speaks directly to a company's overall commitment to compliance programs and [whether it has] the appropriate culture to disincentivize criminal activity." This policy could have a particularly significant impact on large financial institutions. By virtue of their size, the breadth of their business, and the intense regulatory scrutiny under which they operate, large banks historically have often found themselves in DOJ's cross-hairs. A policy that holds every error and misstep identified during previous regulatory inquiries against a bank, even in completely unrelated investigations, could lead to unjustifiably harsh outcomes.

Second, by resurrecting the Yates-era requirement that companies furnish information about *all* actors with any involvement in the conduct under investigation, DOJ has sought to limit judgment calls made by company counsel, who can no longer "limit disclosure to those individuals believed to be only substantially involved in the criminal conduct." Explaining the need for this reversal, Criminal Division Chief Polite explained that companies are not always "in the best position to evaluate" who is substantially involved in misconduct and that DOJ may have information that "indicates to [it] which individuals could be helpful to [its] case." Prosecutors are of course entitled to exercise judgment about the scope of their investigation, but we are concerned that this new policy may generate unnecessary delay and resource expenditure and could result in unfairness. Particularly where company counsel has significantly greater familiarity with the facts at the beginning of an investigation and can assist in guiding prosecutors to the important evidence and witnesses, we believe companies should be given full cooperation credit for such efforts and not be second-guessed when they have acted in good faith to substantially assist the government's inquiry.

Third, DOJ's renewed embrace of corporate monitorships may encourage an unwillingness to allow corporations the flexibility to develop and implement their own remedial measures informed by companies' greater knowledge of their own businesses and systems. Our hope is that this new policy will be applied only in those extraordinary cases where the investigation has unveiled a truly broken internal compliance system. And there is some basis for that hope: in explaining the policy, DAG Monaco noted that monitorships will likely be

appropriate only where "compliance program[s] and controls are untested, ineffective, inadequately resourced or not fully implemented at the time of a resolution."

While the full practical impact of these policy changes cannot yet be ascertained, there are signs already that DOJ plans to match its tough talk with more aggressive action. In late December, for example, DOJ resolved investigations involving NatWest Markets PLC and Balfour Beatty Communities LLC by requiring each to enter a guilty plea and accept imposition of a monitor. According to DOJ, these harsh resolutions were warranted because NatWest had breached the terms of a prior NPA and Balfour Beatty Communities had failed to maintain "adequate compliance programs, voluntarily self-disclose misconduct, and fully cooperate with the government."

Having announced these three policy changes, DAG Monaco also announced the creation of a "Corporate Crime Advisory Group" of DOJ personnel tasked with reviewing and proposing changes to corporate criminal enforcement policies and evaluating ways to help prosecutors investigate corporate crime. And she previewed other areas of likely focus over the coming year, including the appropriateness of NPAs and DPAs in cases involving recidivist companies. Depending on just how broadly recidivism ends up being defined, a new policy making it harder to secure an NPA or DPA if a company has an earlier such resolution on its "record" could lead companies to reconsider in the first instance whether to settle or litigate with the government. An NPA or even a no-admit-no-deny settlement with the SEC may appear less attractive as a resolution mechanism if the effect is to seriously limit one's options in future cases. While it is impossible to predict at this early stage, the government's overall enforcement efforts may be impaired and scarce governmental resources stretched if this new policy leads companies to be more reluctant to settle.

Relatedly, DAG Monaco announced an intent, going forward, to "hold accountable any company that breaches the terms of its DPA or NPA." DOJ reportedly has already made good on that commitment, informing Deutsche Bank and Ericsson that they may be in breach of their respective obligations under DPAs entered into during the prior administration for failing to turn over certain factual information. The imperative is thus stronger now than ever to establish robust processes for ensuring compliance with the terms of agreements with DOJ and to strictly monitor those processes. Companies should by no means assume that an NPA or DPA puts past misconduct permanently in the rear-view mirror.

SEC Developments

As with DOJ, the new leadership at the SEC and within the agency's Division of Enforcement have begun their tenure with promises of a more aggressive approach to enforcement. Those promises will not fully bear fruit right away; the investigative process takes time, and further time is required for enforcement recommendations to make their way through the staff's review process and up to the Commission for action. Most of the cases brought in 2021 were the culmination of investigations commenced under the prior administration. But the current administration's announced approach is discernible in recent charging decisions and settlement terms.

The Commission brought a total of 434 standalone enforcement actions in its fiscal year ended September 30, 2021. This was a 7% increase over the more significantly pandemic-disrupted fiscal 2020, though it was still somewhat below pre-2020 levels. The case mix was in line with historical patterns. Public company disclosure and accounting cases were about 12% of the total. (Securities offerings comprised 32% of the cases, but many of these involved unregistered offerings, Ponzi schemes, etc. — rather than offerings by public companies.) Insider trading cases always get a degree of attention out of proportion to their share of the enforcement pie — in 2021, they were 6.5% of the cases brought, within the historical range.

The whistleblower program continues to be an important component of the SEC's enforcement effort. In fiscal 2021, the SEC received a total of 12,200 whistleblower reports, a staggering 76% increase over 2020, which was the previous annual high water mark. The largest categories of reports in 2021 were manipulation (25%), corporate disclosure and financial reporting (16%) and offering frauds (16%). The concrete results traceable to whistleblower information also reached new heights in 2021. The Commission awarded more whistleblower payments in 2021 — a total of $564 million — than in all prior years combined, dating from the inception of the program in 2011. The whistleblower program also continues to illustrate the importance of thoughtful efforts by companies to address compliance concerns when they are raised by corporate personnel. Approximately 60% of the 2021 award recipients were current or former insiders of the entity about which they reported information to the SEC. Of those awardees, 75% say they raised their concerns internally before making a report to the SEC. At least some portion of these represent lost opportunities to address a problem before it got worse.

"Aggressiveness" in SEC enforcement can take many forms. A more zealous approach may, for example, lead the Commission to authorize charges where critical factual elements are in dispute. A recent example is an insider trading case involving the "shadow theory," in which an employee of a biopharmaceutical company who received information about the potential acquisition of his employer then traded in the securities of another company in the same small industry segment. Another recent illustration is a case brought under Regulation FD involving alleged selective disclosure of material nonpublic information to sell-side analysts. Both cases are in litigation. The SEC has a long history of bringing reasonable cases that further its enforcement program goals even where victory at trial is not assured. But a conscious effort to be seen as more aggressive can sometimes go hand-in-hand with questionable charging decisions. We saw this in the wake of the financial crisis, for example, when defense advocacy and/or contested litigation revealed that a number of cases the SEC brought against individuals lacked sufficient supporting evidence.

A desire to present a more aggressive profile can also translate into changes in enforcement policy. The new SEC leadership has, for example, spoken of a desire to increase the level of civil money penalties imposed in settlements. The penalty amount pendulum has swung back and forth with the change of administrations for decades. What is often overlooked is that the SEC's authority to obtain penalties is statutory and subject to specific dollar limitations. This has sometimes not prevented the SEC from seeking or obtaining through settlements penalty amounts that would be virtually impossible to obtain in litigation before a judge bound to apply the statutory criteria. It is our hope that the SEC will stay mindful of the

limitations on its penalty authority, and not seek settlement terms that would be unobtainable even in the event of complete success in contested litigation.

The new aggressiveness at the SEC has also been reflected in a revival of the policy of seeking admissions in certain settlements. This is a regrettable development that serves no articulable public interest. In the wake of the Commission's decision under then-SEC Chair Jay Clayton to edge away from his predecessor's innovation of requiring admissions, we have seen no development in the securities markets, no upswing in any category of violations, no diminution in the perceived significance of SEC settlements, nor any other reason to suggest discontinuance of the admissions experiment was anything but well-advised. The SEC already has ample methods to exhibit "toughness" in framing enforcement actions without the need to exact admissions. These include administrative orders and injunctive complaints that describe violative conduct in detail, civil penalties in appropriate measure, thorough remedial undertakings where warranted, and public commentary by members of the Commission and senior enforcement staff. The Commission's long-standing policy of settling cases on a no-admit-no-deny basis was not an effort to go easy on wrongdoers. Rather, it was intended to encourage and facilitate settlements by limiting collateral effects in proceedings not involving the SEC. The policy made settlements more feasible, and avoided unwarranted expenditure of resources in cases that could otherwise be resolved. The policy produced tangible gains in the public interest.

Finally, the SEC is pursuing a variety of policy goals that may signal future enforcement attention. For example, the Commission has published for comment proposed changes in the rules governing share repurchases by issuers and the use of 10b5-1 plans by corporate officers and directors. The interest in pursuing policy changes may heighten the likelihood of an enforcement inquiry in the event that information comes to the staff's attention suggesting possible violations in these areas. Neither area, however, has historically been a focus of enforcement activity and the pending rulemaking process is the proper method for considering changes in regulation.

Update on Main Areas of Substantive Focus

A. Uptick in accounting fraud investigations

In recent years, we and other observers noted some diminution in the number of major SEC accounting fraud and disclosure investigations. But 2021 saw an uptick in enforcement activity in this area, and we expect that trend to continue. At a high level, audit and accounting charges, including cases where issuers' financial disclosures were found misleading, represented 12% of all SEC actions in FY 2021. At least one of those cases originated from the Enforcement Division's EPS Initiative, which uses data analytics to seek out potential instances of accounting and disclosure violations caused by, among other things, earnings management practices. The no-admit-no-deny settlement with Healthcare Services Group, Inc. and its CFO and controller involved a failure to timely accrue for and disclose material loss contingencies. In settling negligence-based antifraud violations on August 24, 2021, the company agreed to pay a $6 million penalty.

Among the other accounting cases brought by the Commission in the latter half of 2021 was the settled enforcement action against Kraft Heinz Co. and two former senior executives arising out of a long-running expense management scheme. According to the SEC's order, Kraft improperly recognized unearned discounts from suppliers and maintained false supplier contracts — then publicly touted the resulting "cost savings." The settlement terms included negligence-based antifraud violations of Section 17(a), internal accounting controls and books-and-records violations, and a $62 million civil penalty. More recently, on December 6, 2021, the SEC charged American Renal Holdings, Inc., a national provider of dialysis services, and three of its executives with securities fraud and other misconduct. According to the SEC's complaint, filed in the Southern District of New York, the company engaged in a so-called "cookie jar" scheme which involved using opportunistic revenue adjustments to create the false impression that the company had beat, met, or come close to meeting its numbers.

B. Antitrust Enforcement

As we predicted last year, antitrust enforcement began ramping up in 2021 and will likely continue apace in the coming years. With the Senate's confirmation of Lina Kahn as FTC Chair in June 2021 and of Jonathan Kanter as AAG for the DOJ's Antitrust Division in November 2021, companies can expect to see aggressive antitrust enforcement, on both the civil and the criminal sides, aimed not simply at conduct that increases prices or reduces competition, conventionally defined, but also at enterprises that the new administration deems so large and powerful as to be market-distorting. In a recent speech, AAG Kanter underscored the message that his Division will use more aggressive tactics in seeking to preserve competition and be willing through litigation to revisit settled antitrust law precedents.

Some of the actions launched last year, including the lawsuit filed by the FTC against Facebook alleging that the company engaged in an illegal "buy-or-bury scheme" to maintain its dominance, and the Antitrust Division's suit to block Penguin Random House's acquisition of rival publisher Simon & Schuster, are emblematic of this new thinking, as are several high-profile ongoing investigations of large tech companies. We do not see this trend abating any time soon, unless litigation challenges lead to court rulings finding that these newly deployed theories are not legally or factually tenable. The litigation results to date have been mixed. Just two weeks ago, the trial court in the Facebook case, while substantially narrowing the scope of the FTC's theory, ultimately denied the company's motion to dismiss in part.

C. Cybersecurity

The Biden administration has declared cyber threats a "top priority and essential to national and economic security." In 2021, the White House even published an unprecedented open letter urging corporate leaders to treat the risk of cyberattack as a threat not just to data security but to core business operations generally. The threat becomes more acute every year, but the Covid-19 pandemic, with its mass shift to remote work arrangements and increased reliance on cloud-based operations and virtual commerce, has accelerated our collective vulnerability. Among the notable attacks of 2021 were the massive SolarWinds breach and the ransomware attack that shut down one of the country's largest pipelines for refined petroleum products.

The enforcement response to cyber threats increasingly has extended beyond pursuit of the prime malefactors — the cybercriminals and their backers who initiate and coordinate the attacks — to focus on the detection of, response to, and disclosure of cyberattacks. In other words, the lens increasingly has become trained on companies that can expect to find themselves targets of cybercrime. We saw this, for example, with the SEC enforcement action against First American Financial Corp., the no-admit-no-deny settlement of which was announced in June 2021. According to the SEC, technical experts at FAFC, a real estate settlement services provider, discovered a vulnerability in the company's systems but failed to report it up the chain, disclose it, or remediate it. The vulnerability was addressed only months later, after a journalist highlighted it, and the company's public response failed to disclose that the problem had been discovered earlier. The SEC charged FAFC with failure to maintain disclosure controls and procedures, in violation of Rule 13a-15(a).

A similar enforcement action was announced in August, this time against Pearson plc, which provides academic performance assessment services. According to the SEC, Pearson made misleading, boilerplate public disclosures about cyber risks that failed to acknowledge — much less highlight — a breach that had resulted in the unauthorized extraction from its systems of substantial personal data concerning students and school administrators. When the media discovered the breach, Pearson responded with what the SEC called materially misleading statements designed to downplay the scale and seriousness of the intrusion.

The SEC is not the only agency focused on shoring up cyber defenses through enforcement actions directed at corporate cyber compliance programs and disclosures. In October, DAG Monaco announced a new Civil Cyber-Fraud Initiative targeted at companies who "fail to follow required cybersecurity standards," thereby "put[ting] all of us at risk." The Initiative, which will be led by the Civil Division's Commercial Litigation Branch, Fraud Section, is tasked with using the False Claims Act — and its attendant whistleblower provisions — to identify and pursue actors who knowingly "provid[e] deficient cybersecurity products or services," misrepresent their cybersecurity practices and procedures, or fail to monitor or report breaches.

We expect that 2022 will bring more in this vein, and that companies will come under even greater pressure not only to ensure that their cybersecurity systems and disclosures withstand close scrutiny but also to cooperate with government efforts to identify and redress cyberattacks. A company's best defense against these looming regulatory and litigation risks is to run regular cyber preparedness drills, periodically test and enhance the efficacy of cybersecurity systems, and put effective procedures in place to ensure that information about breaches and risks is surfaced to the right levels within the organization so that decisions about disclosure obligations, if any, are made with complete and up-to-date information.

Another development we expect in 2022 is increased cooperation among agencies focused on cybersecurity, on the one hand, and cryptocurrency, on the other — especially since the latter is so often used to facilitate cyber breaches. Indeed, the same day the DAG announced the Civil Cyber-Fraud Initiative, she also announced the creation of a new National Cryptocurrency Enforcement Team. The idea behind the NCET is to combine DOJ's expertise in combatting money laundering and cybercrime under one umbrella and "tackle complex investigations and prosecutions of criminal misuses of cryptocurrency, particularly crimes

committed by virtual currency exchanges, mixing and tumbling services, and money laundering infrastructure actors."

D. ESG Disclosure

Many commentators over the past year have noted the increased focus on corporate ESG disclosures, and we expect this trend will be accompanied by an increase in SEC enforcement and other litigation risks for companies whose disclosures in this area are found to be inaccurate or misleadingly incomplete. One important signal of this increased attention came on March 4, 2021, when the SEC announced the creation of a Climate and ESG Task Force within its Division of Enforcement. The Task Force's stated ambition is to identify misstatements in companies' disclosures of climate risks, find gaps in existing disclosure requirements, and analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies. The SEC's Acting Corporation Finance Director has elaborated that new disclosure requirements will focus on three areas: diversity, equity, and inclusion; climate change; and human capital management. And, in August 2021, SEC Chair Gensler announced that the Commission is actively considering near-term rulemaking that would mandate climate change-related disclosures, including as to oversight and management of climate-related risks and opportunities. Although no new rules have yet been promulgated, the SEC released a sample letter in September with requests it may make of companies to ensure they comply with prior SEC guidance on climate change disclosures. This year we are also seeing Corporation Finance letter inquiries to numerous companies seeking clarification and/or amendment of climate change disclosures.

In an important speech in November 2021, Commissioner Crenshaw noted that, "with ESG now front and center, the reliability of corporate ESG risk disclosures, and their potential impact on and connectivity to financial statements, is critical." Crenshaw's conception of ESG is very broad, encompassing cybersecurity and climate risk. As she put it, "I do not think I am alone in wanting to understand how companies are determining whether and how financial statements are impacted by climate change risk; how assumptions used to reach these determinations are set, tested, and reevaluated over time; and how any existing disclosures are being formulated." With this spotlight on ESG disclosures, companies must take particular care to adequately vet their accuracy and reliability. As companies strive to expand their disclosures in this area, the risk of misleading statements may increase, along with an increased number of shareholder suits and government enforcement proceedings.

E. FCPA

By the usual statistical measures, 2021 was a significantly down year for FCPA enforcement. In brief, DOJ and the SEC together resolved three corporate investigations involving FCPA charges, two of which were joint resolutions involving the same companies. The third was an SEC-only resolution. The DOJ resolutions were by DPA and the SEC cases by settled administrative proceedings. DOJ and the SEC also resolved related criminal and civil investigations into Credit Suisse AG's financing of projects in Mozambique that involved substantial corrupt payments to foreign officials and other misconduct, but the cases were charged under the criminal wire fraud statute on the DOJ side and the anti-fraud and internal accounting control and books and records provisions of the federal securities laws on the SEC

side. The enforcement theory was that Credit Suisse defrauded investors in the financing instruments it helped to issue to fund the projects, including by failing to make proper disclosures about the risks of corruption in the underlying projects.

Total financial penalties in 2021 for corporate FCPA resolutions were also significantly down from recent years, with DOJ and the SEC imposing a total of some $183 million in penalties, disgorgement, and prejudgment interest. After offsets paid to foreign enforcement authorities in resolution of parallel investigations, recovery totaled about $160 million. (The Credit Suisse case involved an additional total of approximately $275 million in fines, penalties, and interest paid to DOJ and the SEC after giving credit for payments to foreign and other U.S. enforcement authorities.)

No declinations were issued in 2021 pursuant to DOJ's FCPA Corporate Enforcement Policy, and, on the individual side, DOJ brought criminal cases against 18 defendants — on the low end of the historical range for such cases.

The real action in 2021, however, was what the new administration said and did to lay the groundwork for what we expect will be vigorous FCPA enforcement in the coming years. In March, media reports noted that the number of prosecutors in DOJ's FCPA unit had hit a record level, and that the unit had also hired an attorney with substantial private sector compliance expertise, including service on the monitor team for DOJ's 2016 FCPA resolution with Brazilian petrochemicals firm Braskem, one of the largest resolutions in history. In June, President Biden issued a National Security Study Memorandum which declared the fight against corruption abroad a "core national security interest." The NSSM set in motion an intergovernmental review process aimed at developing a comprehensive and coordinated strategy across governmental departments and agencies to significantly enhance the government's ability to address foreign corruption and hold those responsible for it accountable.

In speeches, announcements, and other actions in 2021, U.S. authorities underscored the President's message that fighting foreign corruption would be a major priority. These included the issuance of Treasury Department sanctions against three foreign individuals and 64 related companies for involvement in corruption in Bulgaria, the creation of a joint task force to coordinate and enhance enforcement efforts against corruption and human and narcotics trafficking in Mexico and the Northern Triangle of Central America, and a signal to corporate America from a senior DOJ official speaking at a prominent anti-corruption conference that the DOJ intended to be more active in developing its own FCPA case leads, as opposed to simply relying on corporate self-reporting.

In early December, the Biden administration issued the U.S. Strategy on Countering Corruption presaged by the NSSM. The Anti-Corruption Strategy, which is described as a "whole-of-government approach to elevating the fight against corruption," rests on the following "five distinct, mutually-reinforcing strategic pillars": (i) modernizing, coordinating, and resourcing U.S. government efforts to fight corruption; (ii) curbing illicit finance; (iii) holding corrupt actors responsible; (iv) preserving and strengthening the multi-lateral anti-corruption architecture; and (v) improving diplomatic engagement and leveraging foreign assistance resources to advance policy objectives. The "pillars" are supplemented by

enumerated action items, which are detailed in an extensive appendix. We highlight two key takeaways for corporations:

First, consistent with the U.S. government's decades-long efforts to promote anti-corruption enforcement by foreign governments, the Anti-Corruption Strategy emphasizes efforts to enhance existing international institutions and frameworks (such as the OECD), and the development of new mechanisms for international cooperation — including more extensive information sharing — with both governmental and non-governmental parties, including investigative journalists who seek to identify and expose international corruption.

Second, the Anti-Corruption Strategy highlights efforts to protect the U.S. financial system and U.S. investment from exploitation by illicit actors, who launder or shelter the proceeds of corruption, by deploying new tools, such as the creation of the beneficial ownership registry of certain domestic and foreign companies registered to do business in the U.S. as provided by the Corporate Transparency Act ("CTA") and use of the pilot whistleblower program under the Kleptocracy Asset Recover Awards Act, both of which were enacted in January 2021. In December 2021, FinCEN issued the first of three proposed rulemakings — focused on the beneficial ownership reporting standards and requirements — to implement the CTA's requirements. The Anti-Corruption Strategy also calls for (i) new Treasury regulations adding reporting requirements on real estate transactions; (ii) re-visiting minimum AML and suspicious activity reporting standards — first proposed in 2015 — for investment advisors overseeing investment vehicles such as hedge and private equity funds; (iii) consideration of additional tools, including by legislation if needed, to address service providers such as trust companies, incorporators, corporate service providers, lawyers, accountants, and registered agents/corporate nominees involved in facilitating sheltering and investment of illicit proceeds; and (iv) assessment of additional enhancements to the current federal AML regime. As these efforts are likely to have significant effects on banks, investment firms, and others in the financial, wealth management, and related sectors, it will be important to monitor developments and ensure that on-boarding and AML monitoring programs are kept up-to-date.

While it remains to be seen just how fast and effectively the government is able to implement its new Anti-Corruption Strategy, much of which may depend on appropriate funding, we believe corporate boards of directors and senior management should take the administration at its word regarding a coming era of more aggressive anti-corruption enforcement. This aggressive rhetoric concerning anti-corruption efforts is, of course, consistent with the administration's broader messaging described above reflecting a more determined approach to white-collar and regulatory enforcement by DOJ, the SEC, and other U.S. enforcement authorities. It is worth remembering in this regard that the FCPA Corporate Enforcement Policy has *not* been changed, and thus continues to provide an opportunity for companies to secure either prosecution declinations when they promptly self-report or significant fine reductions when they provide complete cooperation even in an investigation initiated by DOJ.

F. Sanctions

In October 2021, Department of the Treasury issued the results of a broad-based review of the economic and financial sanctions programs it administers that had been initiated by the Biden administration. In affirming the importance of sanctions as a powerful tool to address

national security and other government interests, the review called for action along the following lines to ensure continued effectiveness of sanctions in light of developments, such as digital assets, new payment systems, and the rise of strategic economic competitors, that have given rise to new ways of hiding cross-border transactions and evading the reach of current sanctions: ensuring that (i) sanctions are used to pursue specific objectives within a larger strategic framework; (ii) where possible, efforts are made to maximize sanctions effectiveness through multilateral coordination with allies and engagement with other stakeholders, including financial institutions and other companies; (iii) sanctions are calibrated to mitigate unintended economic, political and humanitarian consequences; (iv) sanctions are easily understood, enforceable and, where possible, can be reversed as appropriate; and (v) the Treasury's sanctions-related technology, workforce, and infrastructure are modernized.

As reflected in the Treasury's review, the use of sanctions has steadily increased over the last 20 years, and this trend can be expected to continue as sanctions are imposed in service of national security and other policy and enforcement goals. Indeed, the Anti-Corruption Strategy cites the use of economic sanctions, especially in coordination with partner governments, as a key tool to curtail foreign corruption. As a result, it is important for financial institutions and companies doing business internationally to stay abreast of sanctions (and related export control) developments and ensure that such developments are reflected in their compliance programs as appropriate.

Role of State AGs

In last year's memorandum, we predicted that state AGs would remain active in their regulatory oversight, having become increasingly empowered during the past administration. That has proved true, as state AGs continue to vigorously pursue enforcement actions across a variety of sectors including consumer protection — with notable focus on opioids and vaping — and antitrust. In a sign that this trend will persist, a bipartisan coalition of 32 state AGs sent a letter to Congress in September 2021 proclaiming their support for six bills that would strengthen the ability of state AGs to pursue antitrust actions. As we have noted, investigations by state AGs are notoriously challenging to navigate as each state AG may have his or her unique enforcement priorities and, given the political nature of the state AG position, considerations other than simply the merits can affect how investigations are resolved.

Conclusion

Both DOJ and the SEC are emphasizing self-reporting and cooperation. As Director of Enforcement Grewal noted in a recent speech, boards of directors and management "also have a key role to play in spotting and addressing emerging risks, and that's both by ensuring that your proactive compliance efforts continue even after violative conduct has occurred and by working with us in addressing that conduct. Firms' cooperation with our investigations, including through voluntary self-reporting of potential violations, benefits all market participants."

In keeping with that admonition, and with the stage set in 2022 for greater regulatory and criminal enforcement over the remainder of the Biden administration, we offer the same advice as we have in the past, with perhaps even greater emphasis: well-managed

companies and attentive boards of directors would be wise to continue investing in the design, implementation, and periodic evaluation of a robust compliance program tailored to the company's business activities and regulatory and legal risks, as those evolve over time. Effective compliance programs provide the surest foundation for preventing misconduct from arising in the first place or nipping potential legal and compliance issues in the bud before they blossom into a full-blown corporate crisis. And should misconduct occur, an effective compliance program that enables early detection and timely remediation will best position a company to achieve the most favorable resolution at the close of any resulting investigation. Good compliance, as we've often said, is fundamental to securing business success and stability.

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Some Thoughts for Boards of Directors in 2022

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Some Thoughts for Boards of Directors in 2022

The focus on climate change and other ESG issues, and on stakeholders generally, has been prompting boardroom deliberations around the recurring theme: "How do we take into account ESG and other stakeholder considerations, while at the same time addressing the expectations of our shareholders for robust financial results, stock price appreciation and dividends or other returns of capital? What is our legal responsibility?" Nearly every board-level corporate governance discussion we have had this past year has involved some version of these questions and the balancing act that they entail.

The proxy fight loss by Exxon earlier this year and the settlement of shareholder derivative litigation against the Boeing board are cogent illustrations of the significance of this challenge. Moreover, starting in 2016 with the publication by the World Economic Forum of The New Paradigm of corporate governance, and intensifying in 2019 with the shift away from shareholder primacy to stakeholder governance by the Business Roundtable, this has been the subject of intense discussion not only in boardrooms, but also in academia, the halls of legislators and regulators and by special interest groups.

The answer to this question when it was raised previously in the context of takeover defense, and the answer articulated more recently in the context of The New Paradigm of corporate governance, is that this is a classic business judgment question for the board of directors. The framework and guiding principles for a board's exercise of its business judgment are anchored in the purpose of the corporation, which provides actionable guideposts for corporate and fiduciary conduct and can be summarized as:

> The purpose of a corporation is to conduct a lawful, ethical, profitable and sustainable business in order to enable its success and increase in value over the long term. This requires consideration of all the stakeholders who are critical to its success (shareholders, employees, customers, suppliers and communities) as determined by the corporation and its board of directors using their business judgment and with regular engagement with its shareholders, who are essential partners in supporting the corporation's pursuit of its purpose. Fulfilling this purpose in this manner is fully consistent with the fiduciary duties of the board of directors, and the concomitant stewardship obligations of shareholders.

Viewed through this lens, the fundamental purpose of a for-profit corporation, and, accordingly, the decision-making calculus of boards, must include value-creation. However, corporations do not exist in a vacuum, but rather in a complex ecosystem of stakeholders. Every corporation relies on a multitude of stakeholder contributions and interests in order to operate effectively and create value. As with all business strategy, risk and operating decisions, it is essential to take into account the corporation's relationships with and the well-being of employees, customers, suppliers, communities and, more broadly, society and the environment at large.

Indeed, one takeaway from the ongoing Covid-19 pandemic has been the erosion of silos and the emphasis on the interconnectedness and co-dependencies of various constituents—for example, the far-reaching business and economic implications when the health and safety of employees are jeopardized, the ripple effect of bottlenecks and vulnerabilities in supply chain networks, and the sense of community that has been a motivating factor in the embrace of vaccines, masks and other behaviors aimed at reducing transmission rates. In this environment, many costs and risks that were previously viewed as externalities—including, but not limited to, climate change and environmental sustainability—are increasingly being taken into account by both corporations and investors as directly relevant to business strategy, risks and operations and financial results. The evaluation and weighing of these factors have also been facilitated by technological advances in processing and distilling large amounts of multi-dimensional data, so that increasingly attenuated linkages can be identified and quantified.

With all that said, the task and legal duty of a board of directors is fundamentally unchanged; it must use care and diligence and exercise its business judgment in weighing risks and opportunities to chart the path forward for the corporation. While the landscape of considerations that shareholders and other constituents expect directors to bear in mind has become increasingly broad and more complex, directors continue to be governed by the same legal duties.

In addition to the focus on ESG issues and stakeholder governance, the perennial themes of effective board functioning will be as important as ever—including with respect to board leadership, structure and composition, activism and defense preparedness, risk management, crisis management, succession planning and executive compensation. We recently highlighted these themes in our September 1, 2021 memo, Spotlight on Boards, which is attached.

September 1, 2021

Spotlight on Boards

The ever-evolving challenges facing corporate boards prompt periodic updates to a snapshot of what is expected from the board of directors of a public company—not just the legal rules, or the principles published by institutional investors and various corporate and investor associations, but also the aspirational "best practices" that have come to have equivalent influence on board and company behavior. The ongoing coronavirus pandemic and resulting economic and social turbulence, combined with the wide embrace of ESG, stakeholder governance and sustainable long-term investment strategies, are propelling a decisive inflection point in the responsibilities of boards of directors. The 2016 and 2020 statements of corporate purpose by the World Economic Forum and the 2019 embrace of stakeholder capitalism by the Business Roundtable, together with current statements of policy by most of the leading corporations, institutional investors, asset managers and their organizations, as well as governments and regulators in and outside the United States, lead us to summarize the purpose of the corporation:

> The objective and purpose of a corporation is to conduct a lawful, ethical, profitable and sustainable business in order to ensure its success and grow its value over the long term. This requires consideration of, and regular engagement with, all the stakeholders that are critical to its success (shareholders, employees, customers, suppliers, communities and society at large) as determined by the corporation and its board of directors using their business judgment. Fulfilling this purpose in such a manner is fully consistent with the fiduciary duties of the management and the board of directors and the stewardship duties of shareholders (institutional investors and asset managers), who are essential partners in supporting the corporation's pursuit of its purpose.

The salient question has shifted from *whether* a board of directors should take into account the interests of stakeholders other than shareholders, to *how* a board should do so. The focus of investors and organizations concerned with corporate social responsibility, ESG and sustainability is pervasive and intense. It has commanded the attention of investment banks, public relations firms, investor

relations firms, law firms, management consultants and other advisors. As a report from McKinsey notes, "A large spotlight is shining on corporate actions these days, and all stakeholders have growing expectations. A board's involvement in defining purpose helps meet those expectations."

In this environment, directors need to grapple with a host of questions about the practical implications of this new paradigm, such as adjusting existing board functioning to reflect stakeholder governance, defining corporate "purpose" and shaping corporate culture, integrating ESG considerations into long-term business strategy and measuring and delivering sustainable value to all stakeholders. Directors are also facing questions about what, if any, modifications should be made to communications and engagement efforts with shareholders and other stakeholders. In addition, the current pandemic has heightened the emphasis on effective and adaptive crisis management, and events of the past year have shone a light on the role of all market participants in combatting social and racial inequality. The legal rules as to directors' duties have not changed. What have changed are the expectations of investors and other stakeholders for (1) greater transparency, (2) deeper board engagement and oversight, (3) greater opportunity to engage with directors and (4) responsible investor stewardship to further long-term, sustainable value creation.

Boards should:

- Maintain a working partnership with the CEO and management and serve as a resource for management in charting the appropriate course for the corporation;

- Set the "tone at the top" to create a corporate culture that not only gives priority to ethical standards, professionalism, integrity and compliance in setting and implementing both operating and strategic goals, but that also is a reflection of, and a foundation for, the corporation's purpose;

- Choose the CEO, monitor the CEO's and management's performance and develop and keep current a succession plan that takes into account the objectives and challenges that the corporation faces;

- Oversee corporate strategy (including purpose, culture and vision) and the communication of that strategy to investors, recognizing that investors want to be assured about not just current risks and problems, but also threats to long-

term strategy from global, political, climate, social, economic and technological developments;

- Oversee and understand the corporation's risk profile, as well as its management of short-, medium- and long-term risks, including climate-related risks, and how risk is taken into account in the corporation's business decision-making and strategic planning, and recognize that they have a duty to respond to red flags warning of imminent risks, if and when they arise (see our memo, Risk Management and the Board of Directors);

- Determine the appropriate level of executive compensation and incentive structures with the basic objective of having and retaining the best management available, and with awareness of the potential impact of compensation structures on business priorities and risk-taking, taking into account ESG goals and current stakeholder, proxy advisor and public and political views on compensation;

- Be prepared to deal with crises, including macro events such as a pandemic, a natural disaster like an earthquake or hurricane, a liquidity squeeze, a long-term recession or a breakdown in international relations;

- Be prepared to take an active role in matters where the CEO may have a real or perceived conflict, including in the context of takeovers and attacks by activist hedge funds focused on the CEO;

- Oversee management's development of analyses and metrics to understand the impact of ESG and stakeholder interests on the value and strategy of the corporation, and oversee the integration and balancing of these interests to promote the long-term success of the corporation; keeping in mind that in performing this oversight function of balancing and allocating among all the stakeholder interests, directors are fully protected by the business judgment rule;

- Recognize that investors (including activists) and certain proxy advisors are monitoring the board's oversight and responsiveness to ESG governance and comparing the corporation's performance on ESG to that of its peers;

- Have a lead independent director or a non-executive chair of the board with clearly defined duties and responsibilities who can facilitate the functioning of the board, serve as a liaison between the independent directors and management, and assist management in engaging with investors, other stakeholders, their advisors like S&P, ISS, SASB and with regulators;

- Together with the lead independent director or the non-executive chair, determine the agendas for board and committee meetings and work with management to ensure that appropriate information and sufficient time are available for full consideration of all matters;

- Recognize that shareholder engagement has become a central component of corporate governance, and participate, as appropriate, in proactive outreach efforts to communicate with and listen to shareholders and other stakeholders;

- Work with management to anticipate possible takeover attempts and activist attacks and keep response playbooks up-to-date in order to be able to address these attempts or attacks more effectively, if they should occur; in this regard, it may be prudent to meet at least annually with the team of the corporation's executives and outside advisors that will advise the corporation in the event of a takeover proposal or an activist attack;

- Be open to management inviting a stakeholder or even an activist, under appropriate circumstances, to meet with the board to present the stakeholder's or activist's opinion of the strategy and management of the corporation;

- Evaluate the performance of individual directors, the board and board committees on a regular basis and consider the optimal board and committee composition and structure, including board refreshment, expertise and skill sets, independence and diversity;

- Review corporate governance guidelines, committee charters and workloads and tailor them to promote effective board and committee functioning; and

- Determine that appropriate records of the foregoing are timely created and maintained.

Corporations should seek to:

- Have a sufficient number of directors to staff the requisite standing and special committees to meet investor and other stakeholder expectations for experience, expertise, diversity and periodic refreshment;

- Consider whether the corporation would benefit from the addition of management or board committees focused on finance, risk management, compliance and ESG and stakeholder governance;

- Compensate directors commensurately with the time and effort that they are required to devote and the responsibility that they assume, taking into account the possible impact on the objective of long-term growth in value;

- Have directors who have knowledge of, and experience with, the corporation's businesses and the key developments and drivers that impact those businesses, even if this results in the board having more than one director who is not "independent";

- Have directors who are able to devote sufficient time to preparing for and attending board and committee meetings and engaging with investors and other stakeholders;

- Have directors who recognize that institutional investors and other third-party ESG activists will monitor the composition of the board of directors for expertise on particular aspects of ESG (such as climate and diversity) and for presence on the board of known opponents of an ESG issue;

- Provide directors with all the data that is necessary for making sound decisions regarding performance, strategy, compensation, ESG issues, financial stability and stakeholder allocation;

- Provide directors with regular tutorials by internal and external experts as part of expanded director education, and to provide directors with the information and expertise they need to respond to disruption, evaluate current strategy, strategize beyond the horizon and integrate and balance the interests of stakeholders; and

- Maintain a collegial relationship among and between the corporation's senior executives and the members of the board that facilitates frank and vigorous discussion and enhances the board's role as strategic partner, evaluator and monitor.

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