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Editor
Mark Zerdin

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PREFACE

As highlighted by the previous edition of *The Mergers & Acquisitions Review*, following the height of the covid-19 pandemic that tested the resilience of companies, the first half of 2021 had begun to tell a promising story for the M&A markets. This promise was realised with 2021 becoming a year for the record books with US$5.9 trillion in deals, a 62 per cent lift from 2020 and the highest value amount in more than a decade. Deal total also rose 0.4 per cent to 34,128.[1]

The figures for the first half of 2022 predictably dropped from 2021's record levels but the overall picture still remains a positive one. The value of global M&A transactions has dropped 21 per cent when compared to the record high of the first half of 2021, but deal values still broke US$2 trillion.[2] The decrease is understandable given macro events such as inflation, interest rates and the Ukraine war, which have created a more challenging market.[3]

Again, the Americas were the leading market for deal value in the first half of 2022 with a total of US$1.1 trillion from 4,771 deals. While these figures represent a 30.7 per cent and 18 per cent decrease, respectively, year-on-year, these figures should be put into the context, whereby not only was 2021 a record-breaking year, but by the fourth quarter activity was already beginning to normalise. In this respect, what has been witnessed to date in 2022 is a correction to more sustainable levels.[4] Across the Americas, the leading sectors for the first half of 2022 were technology, media and telecoms (1,712 deals totalling US$471 billion), energy, mining and utilities (316 deals totalling US$102.6 billion) and real estate (58 deals totalling US$96.6 billion).[5]

European dealmaking has experienced a similar decline in deal count with figures falling 19.7 per cent from 6,182 in the first half of 2021 to 4,963 in the first half of 2022. However, this decline was most prominent in the second quarter, following the invasion of Ukraine and as companies began to take a more risk off approach.[6] Interestingly, deal value has barely slipped at all and, in fact, rose quarter-on-quarter in the second quarter. Over the first half of 2022, there was €579 billion worth of transactions, down by only 6.5 per cent on last year. Private equity again played a large part in maintaining these values, with Blackstone Group

1 Bakertilly, 'Global dealmakers 2022: M&A market update'.
2 AllenOvery, 'M&A Insights H1 2022'.
3 ibid.
4 Mergermarket, 'Deal Drivers: Americas HY 2022'.
5 ibid.
6 ibid.

being particularly active in the megadeal for Atlantia (€42.7 billion) and the recapitalisation of logistics business Mileway (€21 billion).[7] Of the 10 largest deals across the EMEA, private equity accounted for no fewer than half.[8]

The year 2022 has been challenging and will likely continue to be so, with the Ukraine conflict showing no signs of end, inflation biting across the continent and cost of the living crisis drawing major attention. However, the M&A markets have thus far withstood these challenges, with dealmaking and value returning to a 'normal' level, following the heights of 2021. Should the M&A markets continue to remain resilient, the remainder of 2022 may follow the positive outlook displayed in the first half of 2022.

I would like to thank the contributors for their support in producing the 16th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 35 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
November 2022

7 ibid.
8 ibid.

Chapter 35

UNITED STATES

Adam O Emmerich, Mark A Stagliano and Anna M D'Ginto[1]

I OVERVIEW OF M&A ACTIVITY[2]

The year 2021 was a remarkable one on many levels for M&A and the transactional market more broadly. Building on the strong market that began in the middle of 2020 following a sharp, but short, pandemic-driven downturn, 2021 witnessed shattered records across every dimension, including:

a M&A volume and number of transactions, in the United States and globally;
b private equity transactions;
c SPAC offerings and de-SPAC transactions; and
d IPOs.

Total deal volume in 2021 was the highest that it has been since recordkeepers began tracking M&A volume, with over US$5.8 trillion of deals recorded globally for the year. The unprecedented level of activity was all the more remarkable considering the backdrop of the ongoing covid-19 pandemic, a volatile global economy, supply chain disruptions, more aggressive antitrust enforcement and, as the year progressed, the prospect of increasing interest rates.

Heading into 2022, dealmakers and practitioners were cautiously optimistic that robust M&A activity would continue, notwithstanding headwinds that were gathering force. Through the first half of 2022, M&A activity remained strong, although below 2021 levels, with US$2.3 trillion worth of deals announced globally, compared to approximately US$3 trillion, US$1.4 trillion and US$2.2 trillion worth of deals announced over the same time period in each of the previous three years. M&A activity began to slow after the first half of the year, however, as a confluence of factors – including declining share prices and intensified volatility in the stock market, concerns over inflation running at levels not seen in several decades, rapidly increasing interest rates, war in Europe and the possibility of a global recession – undermined business and consumer sentiment and led to hesitancy to agree to major transactions. As a result, just US$692 billion of deals were announced in the third quarter of 2022, compared to US$1.2 trillion and US$1.1 trillion announced in the first and second quarters of 2022, respectively.

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1 Adam O Emmerich and Mark A Stagliano are partners and Anna M D'Ginto is an associate at Wachtell, Lipton, Rosen & Katz. The authors would like to acknowledge the contributions of partners Ilene Knable Gotts, Ryan A McLeod, John R Sobolewski, Tijana J Dvornic and Erica E Bonnett.

2 Data in this section regarding M&A activity comes from Thomson Reuters as of 29 October 2022, unless otherwise indicated.

In addition to broader economic effects, one trend that has remained a priority for US practitioners in 2022 is the more interventionist approach to enforcement of the US antitrust laws adopted by the Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ) (together, the agencies). The agencies have made clear that they view more aggressive antitrust enforcement as one way to provide a check on perceived power imbalances in the US economy.[3] The FTC, currently chaired by Lina Khan, has adopted a number of procedural and substantive changes that have introduced greater uncertainty for parties, including suspending the agency's practice of granting early terminations;[4] sending standard form pre-consummation warning letters advising parties that they act at their own peril in closing a transaction, which may remain subject to ongoing investigation and challenge by the agencies; and repealing the prior administration's vertical merger guidelines, with the intent to adopt guidelines that would seek to better reflect market realities. The DOJ has also been hard at work actively pursuing challenges to transactions both large and small that it views as anticompetitive, with the current head of the Antitrust Division reaffirming the Division's commitment to bringing difficult cases (and rejecting settlements it deems inadequate), even if the government is not ultimately successful in court.[5]

Separate from the enforcement environment, members of the US Congress have offered a number of legislative proposals that, if they were to be enacted, would reshape the doctrinal framework for antitrust analysis. Although there is bipartisan support for increased enforcement, much uncertainty remains regarding whether any of these changes will be enacted in the near term or in their current form.

Another recent development in US M&A that boomed in 2021, only to bust in 2022, is the special purpose acquisition company (SPAC). After explosive growth in 2020 and 2021, offering companies and their owners a third alternative to an IPO or a M&A exit, the SPAC phenomenon slowed dramatically in 2022, with both SPAC IPOs and de-SPAC M&A falling precipitously in response to growing skepticism from market participants and increasing attention from US regulators, in particular the US Securities and Exchange

3 See, e.g., Remarks of Associate Attorney General Vanita Gupta at Georgetown Law's 15th Annual Global Antitrust Enforcement Symposium (14 September 2021) ('I hope companies are, in this moment, paying close attention: anticompetitive mergers should not make it out of the boardroom. If they do, we will not hesitate to challenge those mergers. And, if we litigate, the department – from leadership to our extremely talented career attorneys, economists and staff – is committed to winning these cases.'), https://www.justice.gov/opa/speech/associate-attorney-general-vanita-gupta-delivers-remarks-georgetown-law-s-15th-annual.

4 The agencies cited the transition to a new presidential administration as well as an 'unprecedented' volume of HSR filings in support of the suspension, and noted that they expected the suspension to be 'brief.' See Press Release, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (4 February 2021), https://www.ftc.gov/news-events/press-releases /2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early. To date, the agencies have not given any indication when, or if, the current suspension will be lifted. The prior administration also temporarily suspended early terminations in March 2020 at the beginning of the covid-19 pandemic as the agencies shifted to a new e-filing system, but the suspension was lifted after approximately two weeks. See Resuming Early Termination of HSR Reviews (27 March 2020), https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/resuming-early-termination-hsr-reviews.

5 See Speech, Assistant Attorney General Jonathan Kanter of the Antitrust Division Testifies Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights (20 September 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary.

Commission (SEC) under Chair Gary Gensler. There continues to be a large number of SPAC vehicles that have raised hundreds of millions of dollars through the IPO process and are searching for targets, and while some de-SPAC transactions have been completed this year, the path to consummation is significantly more fraught than it was just months ago.

This chapter will first set out an overview of the legal framework applicable to M&A and describe recent developments in corporate law before discussing foreign involvement in M&A transactions. We will then discuss particularly active areas of M&A, as well as key trends that have emerged, in recent years. Finally, the chapter will discuss recent developments in key practice areas, including financing, employment law, tax law and competition law, before concluding with a discussion of the future outlook for M&A.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The law of M&A in the United States comes from two principal sources: (1) state corporation law and (2) federal securities statutes (i.e., the Securities Act of 1933 and the Exchange Act of 1934). There are numerous other bodies of law that also relate to and inform M&A transactions, including contract law, tax law, antitrust and foreign investment law, and labour and employment law. Finally, the requirements of the main two US stock exchanges (the New York Stock Exchange (NYSE) and Nasdaq) applicable to listed companies are often implicated by M&A transactions.[6]

Within the patchwork of federal and state statutes and regulations that apply to M&A, corporate law is paramount, and is generally informed by the target company's jurisdiction of incorporation. Delaware is the dominant jurisdiction of incorporation in the US, with a long-standing statutory regime that is supplemented by a well-developed body of case law defining the rights and obligations of the various participants in M&A transactions. Corporate issues governed by Delaware (or other applicable state) law include the structure of the transaction, as well as the duties of the board of directors. State law claims are generally enforced in private actions that are led by class-action stockholder plaintiffs' lawyers and they remain a common feature of US M&A, if one that generally amounts to a mere nuisance in most arm's-length transactions.

Under well-established Delaware law, the default standard for review of directors' decisions is the business judgment rule, which protects decisions that are made by directors who have fulfilled their duties of care and loyalty.[7] An enhanced level of scrutiny may apply in certain situations related to M&A decisions, including in the context of a sale of control (in which case, the board's decision-making process and actions may be analysed under the *Revlon* framework to assess whether the directors acted reasonably to maximise shareholder value)[8] and the adoption of defensive measures in response to a threat to corporate control (in which case, the directors have the burden to establish that their process and conduct satisfied

6 For example, generally under state law the shareholders of the buyer are not entitled to vote in approval or disapproval of a transaction that has been approved by the buyer's board of directors. However, if the consideration for the transaction is voting shares of buyer stock, and the stock issuance is equal to 20 per cent or more of the buyer's outstanding shares, then the NYSE and Nasdaq rules require a shareholder vote (even though the vote is not required under Delaware law or the federal securities laws).

7 See Delaware General Corporation Law (DGCL), Section 141(a) ('The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors').

8 See *Revlon, Inc v. MacAndrews & Forbes Holdings, Inc*, 506 A.2d 173, 182 (Del. 1986).

the two-prong *Unocal* test, which looks to the board's grounds for believing that a danger to corporate policy existed and the reasonableness of the defensive measure in response to the threat posed).[9] Delaware's highest level of scrutiny – known as the 'entire fairness' standard – applies in situations where a majority of the board is either interested[10] or non-independent,[11] or in certain situations involving conflicted controlling shareholders.[12] The entire fairness test requires directors to establish the fairness of the price and process of the transaction they approved.

The SEC, an independent agency housed within the federal executive branch, is responsible for the civil enforcement of the federal securities laws and for developing rules to implement them, with a general focus on regulating required disclosures and impermissible trading in the context of transactions. In certain situations, the federal securities laws also provide for private rights of action that are subject to limitations set by Congress. Various provisions of the securities laws, including those related to insider trading, reporting disclosure obligations and prohibitions on making material misstatements, apply generally, while others, including provisions related to the process of soliciting votes of the target shareholders in connection with approval of a transaction, are M&A-specific. Disputes arising out of the federal securities laws are generally adjudicated in US federal district courts in the first instance. In addition to the SEC, numerous other regulators and regulatory regimes are frequently encountered by participants in M&A transactions involving US companies, including the DOJ and the FTC, as noted above, as well as industry-focused regulators such as the Federal Communications Commission, which plays a role in telecommunications deals, and the Federal Reserve, with oversight of bank transactions.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Major topics in state corporate law include the duties of corporate directors in making decisions for the corporation as well as the statutory rights of various participants in M&A transactions. As we will discuss in this section, Delaware courts made important decisions in both of these realms in recent years, first in relation to a shareholder rights plan adopted by a board of directors acting in response to the instability of the covid-19 pandemic, and second in relation to the right of shareholders to demand access to the books and records of a corporation under Delaware statutory law. We conclude this section by discussing developments related to material adverse effect (MAE) litigation, which has come into focus in recent years – first in connection with the covid-19 pandemic and more recently in connection with Elon Musk's well-publicised attempt to terminate his agreement to purchase Twitter.[13]

9 See *Unocal Corp v. Mesa Petroleum Co*, 493 A.2d 946, 955 (Del. 1985).

10 See *In re Tyson Foods, Inc Consol S'holder Litig*, 919 A.2d 563, 596 (Del. Ch. 2007).

11 *NJ Carpenters Pension Fund v. infoGROUP, Inc*, C.A. No. 5334-VCN, 2011 WL 4825888, at *11 (Del. Ch. 6 October 2011).

12 See, e.g., *Ams Mining Corp v. Theriault*, 51 A.3d 1213, 1240 (Del. 2012).

13 The transaction subsequently closed on 27 October 2022.

i Shareholder rights plans

Overview[14]

The shareholder rights plan, or 'poison pill,' remains a vital tool that boards of directors may employ to repel an unwanted or hostile takeover attempt. The shareholder rights plan consists of a dividend of special rights made to the shareholders of the corporation. If a shareholder, acting without the approval of the corporation's board of directors, amasses ownership in excess of a predetermined threshold (usually between 10 and 15 per cent), then the rights held by every other shareholder trigger and convert into the right to purchase the corporation's stock at a price substantially below the then-current market value. Additionally, many rights plans provide that the board of directors may instead choose to exchange one share of common stock for each right held by shareholders other than the shareholder who triggered the poison pill. In either case, the conversion or exchange results in a substantial dilution of the triggering shareholder, which provides a strong incentive for a potential acquiror to negotiate with the board up front, rather than suffer that fate in an unsolicited takeover.

Poison pills are a legitimate defensive device under Delaware law, having been upheld by the Delaware Supreme Court in 1985.[15] Stockholder challenges to poison pills are analysed under the intermediate scrutiny test set forth in *Unocal*, which entails a two-part inquiry:

a whether the board had reasonable grounds for identifying a threat to the corporate enterprise; and

b whether the response was reasonable relative to the threat posed.

Although many companies have such plans 'on the shelf' and ready to be adopted promptly following a takeover threat, companies rarely have standing poison pills in effect these days. Instead, poison pills are generally adopted for a particular reason, including in response to an activist accumulation or hostile threat (or for reasons that may not be directly related to M&A, such as to protect net operating loss (NOL) carryforwards).[16] Of the 100 poison pills adopted by US companies in 2020, 47 per cent were routine adoptions, without any particular threat being publicly identified, 26 per cent were NOL-protective pills, 15 per cent were in response to an activist investor or rapid stock accumulation, and 4 per cent were in response to a hostile offer.

The year 2020 saw a marked increase in the rate of adoption of poison pills, a trend that began at the start of the pandemic as companies sought to ensure they were protected against opportunistic actors seeking to take advantage of volatile equity markets. As the market bounced back from the pandemic-induced downturn, rights plan adoption rates fell closer to pre-pandemic levels; however, recent market volatility has renewed attention on measures to protect against opportunistic acquisition activity.

The Williams Companies stockholder litigation

One company that adopted a shareholder rights plan at the outset of the covid-19 pandemic was The Williams Companies (Williams), a natural gas company whose board feared that activists would seize on its low stock price following the pandemic-driven market sell-off

14 Deal-related statistics in this section come from Deal Point Data (DPD) statistics.

15 See *Moran v. Household Int'l, Inc*, 500 A.2d 1346 (Del. 1985).

16 See *Trilogy, Inc v. Selectica, Inc*, 5 A.3d 586 (Del. 2010) (upholding a NOL pill with a 5 per cent trigger on a Unocal analysis).

to take a sizable position in the company's stock.[17] The rights plan unanimously adopted by the Williams board included a low, 5 per cent ownership trigger, an expansive definition of 'acting in concert,' and a narrow, limited exception for passive investors that exceed the ownership trigger[18] – a set of provisions the Delaware Court of Chancery, when it ultimately considered the plan, labelled 'a more extreme combination of features than any pill previously evaluated'.[19] The Williams board pointed to three justifications in support of the pill:

a the desire to prevent stockholder activism during market uncertainty;

b fear that potential activists might pursue short-term agendas; and

c concern about rapid accumulation.[20]

The Court of Chancery permanently enjoined this rights plan under the second prong of *Unocal*, finding that the 'extreme, unprecedented collection of features' adopted by the Williams board 'created a response that was disproportionate to its stated hypothetical threat'.[21] The court's conclusion hinged on its determination that the combination of features – the 5 per cent trigger, the acting in concert definition, and the passive investor exception – was not reasonable in relation to the board's stated objective; *Williams* did not decide whether the shareholder rights plan was preclusive or coercive. On appeal, the Court of Chancery's decision was unanimously upheld by the Delaware Supreme Court.[22]

According to the *Williams* Court, the combination of features at play in the shareholder rights plan 'increase[d] the range of Williams' nuclear missile range by a considerable distance beyond the ordinary poison pill'.[23] The reasoning and outcome of the *Williams* decision thus confirm that shareholder rights plans are 'situationally specific defenses' that, if not tailored to clearly articulated threats to corporate objectives, are subject to challenge and potential invalidation.[24] Nonetheless, shareholder rights plans that are appropriately drafted and developed on a detailed record in consultation with the company's legal and financial advisers remain a critical – and valid – tool available to corporate boards. Indeed, notwithstanding the outcome of *Williams*, there have been a number of high profile poison pill adoptions in 2022 – including Nordstrom, which announced in September 2022 that it adopted a 364-day shareholder rights plan with a 10 per cent trigger,[25] Twitter, which announced in April 2022 that it adopted a 364-day shareholder rights plan with a 15 per cent trigger in response to an unsolicited, non-binding acquisition proposal from Elon Musk,[26] and Kohl's,

17 *The Williams Cos Stockholder Litig*, No. 2020-0707-KSJM, 2021 WL 754593, at *1 (Del. Ch. 26 February 2021) (McCormick, V.C.).

18 id. at *9.

19 id.

20 id. at *2.

21 id. at *37.

22 See Order of the Delaware Supreme Court in the Williams Cos Stockholder Litig, Case No. 139,2021 (3 November 2021).

23 id. at *35.

24 See generally William Savitt & Ryan A McLeod, 'Court of Chancery Enjoins Anti-Activist Rights Plan' (1 March 2021).

25 See Press Release, Nordstrom Adopts Limited Duration Shareholder Rights Plan (20 September 2022), https://press.nordstrom.com/news-releases/news-release-details/nordstrom-adopts-limited-duration-shareholder-rights-plan#:~:text=Pursuant%20to%20the%20Rights%20Plan,business%20on%20September%2030%2C%202022%20.

26 See Press Release, Twitter Adopts Limited Duration Shareholder Rights Plan, Enabling All Shareholders to Realize Full Value of Company (15 April 2022), https://www.sec.gov/Archives/edgar/

which announced in February 2022 that it adopted a 364-day shareholder rights plan with a 10 per cent (or, in the case of passive institutional investors, 20 per cent) trigger to permit the board to review indications of interest from potential acquirors.[27]

ii Books and records demands in M&A shareholder litigation

Section 220 of the DGCL permits shareholders to make a written demand to inspect the books and records of the corporation. In recent years, Section 220 has increasingly been used by activist investors to obtain material they believe will buttress their campaigns against target companies, and by plaintiffs to investigate purported wrongdoing, including wrongdoing related to proposed M&A activity. As a result, case law determining the boundaries of the rights to use this statutory mechanism has developed as well.

In 2017, for example, the Delaware Court of Chancery in *Lavin v. West Corp* confirmed that shareholders may use Section 220 of the DGCL to investigate suspected wrongdoing by a board of directors in connection with a sale of the company.[28] The *Lavin* court further held that to prevail on such a request, the plaintiff need only prove that the request is reasonably related to the shareholder's interest as a shareholder.[29] In the wake of *Lavin*, plaintiffs considering pursuing damages claims in connection with M&A transactions are increasingly using books-and-records demands to investigate the M&A sale process, and then later using that information to critique the fairness of the process.[30] Activist investors have continued to do the same, as well, such as the lawsuit filed by an investor opposed to Occidental's announced acquisition of Anadarko Petroleum in 2020.

These trends have led the Delaware Court of Chancery to refine the law regarding when the Section 220 inspection right is – and is not – available. For example, in the *Occidental* case, the Delaware Court of Chancery stated that although the standard for inspection under Section 220 is the lowest burden of proof recognised by Delaware law, a plaintiff must still provide some evidence of wrongdoing, beyond mere disagreement with a business decision, to support a books-and-records demand. More generally, recent Delaware decisions have cautioned defendants against overly aggressive obstruction of Section 220 demands, even suggesting that in appropriate cases, fee shifting may be warranted.[31]

iii Material adverse effect litigation

In 2020, the Delaware courts were presented with a number of material adverse effect disputes involving M&A agreements that had been entered into prior to the onset of, and then pressured by the effects of, the covid-19 pandemic. Many of these disputes were resolved (in some cases through price adjustments) before the courts adjudicated on the merits.

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data/1418091/000119312522107462/d296740dex991.htm.

27 See Press Release, Kohl's Board of Directors Provides Update on Review of Unsolicited Expressions of Interest (4 February 2022), https://investors.kohls.com/news-releases/news-details/2022/Kohls-Board-of-Directors-Provides-Update-on-Review-of-Unsolicited-Expressions-of-Interest/default.aspx.

28 *Lavin v. W Corp*, C.A. No. 2017-0547-JRS, 2017 WL 6728702, at *10 (Del. Ch. 29 December 2017).

29 id. at *7.

30 See, e.g., *Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp*, No. CV 2017-0910-MTZ, 2019 WL 479082 (Del. Ch. 25 January 2019).

31 See *Pettry v. Gilead Sciences, Inc*, C.A. No. 2020-0132-KSJM, 2020 WL 6870461, at *30 (Del. Ch. 24 November 2020) ('Fee shifting may be appropriate here. Gilead exemplified the trend of overly aggressive litigation strategies by blocking legitimate discovery, misrepresenting the record, and taking positions for no apparent purpose other than obstructing the exercise of Plaintiffs' statutory rights.').

High-profile covid-19 MAE disputes included Simon/Taubman, where the parties agreed, on the eve of trial, to reduce the price from US$52.50 per share to US$43.00 per share and to other provisions to reduce closing conditionality, and LVMH/Tiffany's, where the parties agreed to settle their pending litigation and to reduce the purchase price from US$135 per share to US$131.50 per share. Covid-19 MAE disputes that were litigated to completion generally reinforced the exceedingly high bar that a buyer seeking to establish an MAE must satisfy – as one example, the Delaware Court of Chancery in *Snow Phipps* found that the pandemic did not constitute an MAE in that case, and therefore ordered the buyer to close the transaction.[32]

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 the covid-19 pandemic. Attention in covid-19 MAE cases has also focused on provisions addressing compliance with interim operating covenants, highlighting the importance of careful attention to how actions taken in response to the pandemic (as well as other extraordinary events, such as the Russia-Ukraine conflict) are treated under these covenants, which has been another area of recent litigation.

More recently, MAE litigation has dominated US M&A news headlines in connection with Elon Musk's attempt to terminate the US$44 billion agreement that he signed to acquire all of the outstanding shares of Twitter, Inc, Musk alleged, among other things, that Twitter's spam accounts exceeded the numbers that it had publicly disclosed. Twitter filed suit in the Delaware Court of Chancery, the predominant forum for M&A litigation in the United States, seeking to force Musk to close. The parties engaged in discovery and pre-trial proceedings for approximately three months before Musk ultimately agreed to close the transaction on the originally agreed terms, and it was completed on 27 October 2022.

The recent flurry of MAE litigation, including the Twitter case, has demonstrated that successful MAE claims remain the exception, rather than the rule, with the Delaware courts having recognised only one instance of an adverse impact of sufficient magnitude to permit an acquiror to walk away from a deal, consistent with the prevailing philosophy that the agreements of transacting parties generally should be respected and enforced.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

In our globalised world, M&A activity often involves, in one way or another, countries around the world. One dimension of foreign involvement is the jurisdiction of the transaction counterparty – if the counterparty is a foreign company, then the parties may face additional complexities as a result of the deal being cross-border. Cross-border deals make up an important part of M&A volume, constituting approximately US$2.1 trillion, or 36 per cent, of overall global M&A volume in 2021, including a number of prominent transactions such as Square's US$29 billion (A$39 billion) acquisition of Afterpay and Canadian Pacific's US$31 billion acquisition of Kansas City Southern. Through 2021 and thus far in 2022, cross-border dealmaking has been impacted by foreign investment and competition merger review regimes, global trade tensions and geopolitical shifts and conflicts, including the ongoing war in Ukraine.

32 *Snow Phipps Group, LLC et al v. KCAKE Acquisition, Inc*, et al., C.A. No. 2020-0282-KSJM, 2021 WL 1714202 (Del. Ch. 30 April 2021).

In the United States, review of foreign investments is conducted by the Committee on Foreign Investment (CFIUS), which is a federal interagency group tasked with assessing foreign investments in US businesses and certain real estate transactions for national security implications. In 2021, CFIUS conducted a review of 272 notices,[33] a significant increase from the 187 notices reviewed in 2020.[34] The scope of review of foreign investments has significantly expanded over the past 10 years, in particular following the passage of the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018, which introduced mandatory notification requirements for certain transactions, including investments in US businesses involving critical technologies, critical infrastructure and sensitive personal data of US citizens where a foreign government has a 'substantial interest' in the acquiror. Even if a mandatory filing is not required, parties may voluntarily file with CFIUS, particularly if control of a US business is to be acquired by a non-US acquiror and the likelihood of an investigation appears reasonably high or if competing bidders are likely to take advantage of the uncertainty of a potential investigation. FIRRMA also permits mandatory or voluntary filers to use an abbreviated declaration in lieu of the full-length notice for transactions that pose little or no material national security concerns.

CFIUS review has historically been associated with critical technology companies. However, supply chain vulnerabilities exposed by the covid-19 pandemic have made close scrutiny of foreign investments in pharma, biotech, medical devices and medical supplies companies more likely. While contracting parties deal with the risk of CFIUS review in a variety of ways, it is not uncommon in cross-border deals to address CFIUS-related execution risk by providing for a reverse termination fee that requires the acquiror to pay a fee to the seller in the event the transaction is terminated as a result of failure to obtain CFIUS approval.

In September 2022, President Biden issued an Executive Order regarding CFIUS's review of potential national security risks associated with inbound foreign investment.[35] This Executive Order was the first since CFIUS was established in 1975 to provide formal direction from the administration on specific risks that CFIUS should take into account when reviewing a transaction. The September Executive Order specifically instructs CFIUS to consider the following national security factors in its reviews:

a effect on the resilience of supply chains; potential harm to US technological leadership in areas that impact US national security; and

b the cumulative effects of multiple transactions involving the same or related parties in the same industry or involving similar technologies, potential cybersecurity risks, and commercial or other access to sensitive data of US persons.

Parties engaging in cross-border deals must consider the potential political implications of their transactions, in particular if the target operates in a sensitive industry; if the acquiror's post-closing business plans contemplate significant changes in investment, employment or business strategy; or if the acquiror is sponsored or financed by a foreign government.

33 CFIUS Annual Report to Congress: Report Period CY 2021, https://home.treasury.gov/system/files/206/CFIUS-Public-AnnualReporttoCongressCY2021.pdf.

34 CFIUS Annual Report to Congress: Report Period CY 2020, https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf.

35 Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States (15 September 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/15/executive-order-on-ensuring-robust-consideration-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states/.

Furthermore, target companies that operate in certain industries, including defence contracting, energy, public utilities, telecommunications and media, financial institutions, transportation, gaming and insurance, may face additional state and federal regulatory hurdles.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

In this section, we will first discuss industries and sectors that have been driving M&A activity in recent years, and then review three developing trends of interest to M&A participants and practitioners.

i Technology M&A[36]

Consistent with trends in recent years, dealmaking in 2022 has been dominated by technology transactions. Through the first three quarters of 2022, global tech deals were responsible for approximately 25 per cent of overall global deal volume and US tech deals comprised approximately 40 per cent of US deal volume. All four of the blockbuster deals over US$20 billion announced in the first three quarters of the year were in technology related sectors:

a Microsoft's US$74 billion acquisition of Activision Blizzard, Inc;
b Elon Musk's US$44 billion acquisition of Twitter, Inc;
c Broadcom's US$61 billion acquisition of VMWare, Inc; and
d Adobe's US$20 billion purchase of Figma, Inc.

Although tech transactions have been a large proportion of M&A activity, the environment for tech companies navigating transformative transactions has become increasingly complex due to headwinds including geopolitical tensions and intense regulatory, media and political scrutiny.

Global regulators are closely examining transactions involving tech companies, in some cases even ordering companies to undo previously consummated transactions, such as the UK Competition and Markets Authority's (CMA) order that Facebook (now Meta) divest Giphy to an approved purchaser and the FTC's late 2020 challenge to Facebook's acquisitions of WhatsApp in 2014 and Instagram in 2012. The FTC recently voted three-to-two to block Meta's acquisition of subscription virtual reality fitness app Within.[37] The FTC's amended complaint focuses on the theory that the acquisition poses a reasonable probability of eliminating potential competition; the challenge remains pending at the time of writing. Furthermore, the FTC launched a task force dedicated to monitoring competition in the tech markets in 2019,[38] and subsequently produced a report on acquisitions by the five large technology companies (Alphabet, the parent of Google, Amazon, Meta, Apple and Microsoft) that were not reported to the agencies under the HSR Act over the time period

36 Data in this section regarding M&A activity comes from Thomson Reuters as of 29 October 2022, unless otherwise indicated.

37 Press Release, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within (27 July 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within.

38 Press Release, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets (26 February 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology.

from January 2010 to December 2019.[39] Finally, various legislative bills currently pending in Congress and regulatory actions under consideration by executive enforcement agencies 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, as further discussed below.

ii Evolving antitrust environment

One of the most significant areas of development in M&A today is antitrust. The change in US presidential administrations in January 2021 and the transition to new leadership at the FTC and the DOJ have ushered in a new approach to merger enforcement, policy priorities and practices. These changes – both procedural and substantive – have led to delays and greater uncertainty for parties engaging in M&A in the United States.

The FTC, currently chaired by Lina Khan, has implemented two important procedural changes. The first procedural change, announced on 4 February 2021 (and prior to Khan's appointment as Chair of the FTC), is the suspension of the discretionary practice of granting early termination of the initial waiting period for HSR filings (as described in Section IX.i) in transactions that do not raise anticompetitive concerns.[40] The FTC cited the transition to a new administration and the 'unprecedented volume' of HSR filings amid the global pandemic when announcing the indefinite suspension, but two FTC Commissioners criticised the change as unnecessarily interfering with the markets and efficient resource allocation.[41] Indeed, in fiscal 2019, early termination was granted in over half of the transactions in which it was sought.[42] Suspension of early terminations has resulted in delays for many transactions, including those that (based on historical approaches, at least) are likely to be of no concern to the antitrust authorities. And notwithstanding the refusal to grant early termination, the FTC continues to have authority to enforce against consummated transactions that are later found to be anticompetitive.

Indeed, as a second procedural change, the FTC announced on 3 August 2021 that it will send pre-consummation warning letters[43] to merging companies alerting them that, notwithstanding the expiry of the statutory waiting period, the FTC's investigation remains open, that the agency may subsequently determine that the deal was unlawful, and that companies that choose to proceed with transactions that have not been fully investigated

39 Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study (September 2021), https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf.

40 Press Release, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (4 February 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early.

41 Statement of Commissioners Noah Joshua Phillips and Christine S Wilson Regarding the Commission's Indefinite Suspension of Early Terminations (4 February 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

42 Hart-Scott-Rodino Annual Report – Fiscal Year 2019, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf.

43 Sample Pre-Consummation Warning Letter, https://www.ftc.gov/system/files/attachments/blog_posts/Adjusting%20merger%20review%20to%20deal%20with%20the%20surge%20in%20merger%20filings/sample_pre-consummation_warning_letter.pdf.

are doing so at 'at their own risk'.[44] Some detractors have expressed concern that these pre-consummation warning letters, considered together with the FTC's suspension of early terminations, are causing the traditional HSR framework to suffer 'death by a thousand cuts'.[45] Relatedly, the FTC announced that it would be expanding the scope of its merger reviews to be 'more comprehensive and analytically rigorous', though the statutory basis for investigating beyond the anticompetitive effects of the merger is unclear.[46]

The procedural changes implemented by the FTC have created delays and tangible uncertainty for parties engaging in M&A transactions. Prior to the implementation of the current practices, parties undertaking a transaction that triggered HSR review were able to do so knowing that, so long as they complied with the statutory requirements of the merger review process (i.e., the filing of required premerger notifications, observance of waiting periods and responsiveness to information requests), they could proceed with their transaction with assurance, as a practical matter, that it would not later be subject to challenge.[47] Now, with the legal import of pre-consummation warning letters being unclear,[48] parties no longer have the ability to obtain early termination, even for transactions that do not pose any anticompetitive concerns whatsoever.[49]

In addition to the procedural changes implemented by the FTC, lack of clarity in the substantive approach to merger enforcement is further complicating the regulatory landscape for parties engaging in M&A. Both agencies have announced that they are working on new enforcement guidelines. In June 2020, the FTC and DOJ jointly issued new vertical merger guidelines, replacing the previous version of the guidelines from 1984.[50] In September

44 Press Release, FTC Adjusts its Merger Review Process to Deal with Increase in Merger Filings (3 August 2021), https://www.ftc.gov/news-events/press-releases/2021/08/ftc-adjusts-its-merger-review-process-deal-increase-merger.

45 Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (9 August 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf.

46 Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave (28 September 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined.

47 Although post-closing challenges are possible under the HSR Act, such challenges have, historically, been rare. This may be another area of change, however – one recent exception is the FTC's high-profile fight to require Facebook to divest assets related to two previously consummated transactions, initially filed 9 December 2020. See Press Release, FTC Sues Facebook for Illegal Monopolization (9 December 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

48 See, e.g., Core-Mark Holding Company, LLC Form 8-K (filed 11 August 2021) (announcing the expiry of the 30-day statutory waiting period and noting that the merging parties 'believe that the [pre-consummation warning] letters they received do not change or expand the FTC's ability under US law to investigate and challenge the Mergers after the expiry of the HSR Act waiting period and after consummation of the Mergers').

49 Some parties have explicitly addressed the risk of receiving a pre-consummation warning letter in their transaction agreement. See, e.g., Membership Interest Purchase Agreement by and among Shank's Extracts, Inc., Jeffrey F. Lehman, Rolling Rock Transit Co. & Universal Corp. (6 September 2021) (allowing purchaser to delay closing by 30 days beyond expiry of the HSR statutory period if a pre-consummation warning letter is received), https://www.sec.gov/Archives/edgar/data/102037/000119312521266242/d216193dex21.htm.

50 See generally Vertical Merger Guidelines (US DOJ and FTC, 30 June 2020), available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

2021, little over one year after the guidelines had taken effect, the FTC (but not the DOJ) voted three to two to repeal the 2020 Guidelines.[51] The agencies subsequently announced, in January 2022, a joint public inquiry designed to modernise the merger guidelines and strengthen enforcement against illegal mergers; this inquiry remains ongoing as at the time of writing.[52] As part of the inquiry, the agencies solicited public input on a wide variety of topics, including whether the current doctrinal distinction between vertical and horizontal mergers remains relevant in light of trends in the modern economy. At this time, it is not clear whether we will see the agencies issue jointly one guideline that would cover both horizontal and vertical mergers, and, if so, whether there will be fundamental changes in the analytic framework applied to mergers. The head of the DOJ Antitrust Division, Jonathan Kanter, recently indicated that changes to the merger guidelines were needed to make them more accessible and comprehensive, and to better reflect the law.[53]

Furthermore, policy changes implemented by the FTC will increase the regulatory burden on merging parties not only in the context of specific transactions, but also for future transactions the companies may wish to pursue. On 25 October 2021, the FTC announced its decision to reinstate its prior practice of requiring acquirors who settled merger enforcement actions to obtain prior approval from the FTC before closing transactions in relevant markets for a period of at least 10 years. Now, in addition to assessing the risk of regulatory challenge and the likelihood of prevailing on such a challenge, merging parties engaging in strategic transactions with antitrust risk will also need to consider the implications of mandatory notification and approval requirements for future transactions in the relevant market.[54]

With so much public attention on antitrust issues, transacting parties must carefully consider the possibility of regulatory challenge and should consider creative solutions to allocate the associated risk in their transaction agreements.

iii SPACs[55]

A SPAC is a company formed for the purpose of raising capital in an IPO to finance a subsequent acquisition. The organisational documents of the SPAC prescribe that the acquisition must be completed within a specified period of time (often two years). At the time that the SPAC completes its IPO, the target company has not yet been identified, but the

51 Press Release, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (15 September 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

52 Press Release, Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers (18 January 2022), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal.

53 See Remarks of Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Keynote at Fordham Competition Law Institute's 49th Annual Conference on International Antitrust Law and Policy (16 September 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham.

54 See Press Release, Proposed Order Marks First Use of Prior Approval Authority Under New Policy Statement Confirming that Prior Approval Is Once Again Standard Practice (25 October 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive.

55 Deal-related statistics in this section come from DPD statistics.

subsequent acquisition will have the effect of taking the target company public. If the SPAC needs additional funds for the acquisition, it may arrange for a private investment in public equity (PIPE), which is often announced at the same time as the acquisition agreement.

SPAC activity exploded in 2020 and 2021, only to implode in 2022. After raising records sums, often by generating attention through their association with industry leaders and celebrities, SPACs have faced a much tougher market in recent months, with a number of prominent SPACs experiencing significant share price declines following 2021 de-SPAC transactions, or, more recently, failing to complete de-SPAC transactions due to excessive redemption levels. While SPACs initially seemed to promise a structure that could allow for more 'marketing' than would be permitted in a traditional IPO, regulators at the SEC made the SPAC boom an area of regulatory and enforcement focus, culminating in the March 2022 proposal of new rules intended to subject SPACs to a disclosure regime that more closely matches the rules that apply to IPOs, as Chair Gensler noted in his Statement on the proposed rules.[56] These rules would, among other things, impose additional disclosure requirements (including regarding SPAC sponsors, conflicts of interest, and de-SPAC transactions) and new financial statement requirements (including with respect to financial projections), and require that disclosure documents in de-SPAC transactions generally be disseminated at least 20 calendar days prior to the shareholder vote on the transaction.[57]

Although the overall rate of SPAC activity remains elevated relative to pre-pandemic years, the volume of SPAC activity has declined significantly since the records that were set in the first quarter of 2021, with a total of just eight SPAC IPOs priced in the third quarter of 2022, compared to 298 SPAC IPOs priced in the first quarter of 2021. Despite this decline, the amount of SPAC dry powder available for acquisitions (approximately US$183.5 billion as of 31 March 2022) and the number of SPACs seeking a target (604 as of the same time period) remain significant and, as a result, SPACs continue to be a feature of the M&A landscape.

iv Activism, ESG and M&A

After a brief lull during the onset of the pandemic, shareholder activists have once again trained their sights on M&A – pushing for companies to do deals, pushing against already announced transactions, and more – and deal-related campaigns remain a significant portion of overall shareholder activism activity. According to a Lazard review of activism trends, over 30 per cent of all activist campaigns in the first half of 2022 had an M&A component. The number of campaigns focused on thwarting or sweetening announced deals was down, consistent with a lower level of deal volume than in prior quarters. Furthermore, the number of demands to 'sell the company' through the first half of 2022 was close to full year totals for 2021 and 2020, reflecting an increasing push by activists for companies to pursue M&A as an alternative to perceived 'failed' standalone strategies.

56 See Press Release, SEC Proposes Rules to Enhance Disclosure and Investor Protection Relating to Special Purpose Acquisition Companies, Shell Companies, and Projections (30 March 2022), https://www.sec.gov/news/press-release/2022-56 and Chair Gary Gensler, Statement on Proposal on Special Purpose Acquisition Companies (SPACs), Shell Companies, and Projections (30 March 2022), https://www.sec.gov/news/statement/gensler-spac-20220330 (noting that the proposed rules are motivated by the Aristotle maxim that like cases should be treated alike).

57 See generally SEC Release Nos. 33-11048; 34-94546 (30 March 2022), https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

In addition to M&A-focused activism, activism related to environmental, social and governance (ESG) matters has been a growing area of attention. Furthermore, as shareholders and other stakeholders have increasingly focused on ESG concerns, those concerns have begun to play a role in M&A transactions,[58] including M&A due diligence, with increased attention on risks related to human capital, diversity, labour practices, community relations, environmental impact and cultural fit.

One tangible illustration of how this has translated into M&A is the development of merger agreement provisions that require a target to represent that there have been no allegations of sexual misconduct among senior executives. As momentum around ESG continues to grow (and backlash against ESG considerations as well), the importance of evaluating transactions with broader stakeholder considerations in mind and considering new technology in transaction agreements to address risks relating to these considerations will only become more important.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Although financing markets were white hot in 2021, that trend has reversed in 2022. Interest rates generally have gone up significantly due to inflation concerns and the Federal Reserve's actions in response. The 'spreads' between treasuries and corporate debt have meaningfully widened. Not only has debt become more expensive, it has become much harder to obtain on a committed basis. Banks that signed up to committed financings of M&A prior to the 2022 debt downturn now hold billions of dollars of unsyndicated debt that is worth less than its originally anticipated value, and have been increasingly conservative about committing funding for new deals. For M&A acquirors seeking financing, especially those that are below investment grade, early planning is essential, and flexibility and creativity are advisable. In some situations that may mean obtaining seller financing, which has been a feature of a number of recent deals; in others that may mean increasing the size of the equity check or obtaining mezzanine financing, such as preferred stock, or both. In the current environment, both M&A buyers and sellers would do well to focus early in the process on financing issues and potential solutions.

VII EMPLOYMENT LAW

As discussed above, ESG factors, in particular considerations related to human capital, are a critical focus in corporate governance and M&A generally. One area of specific focus is increasing diversity on corporate boards and improving the transparency of related disclosures. For example, new listing rules submitted by Nasdaq and approved by the SEC in August 2021 are designed to promote greater transparency regarding board diversity by requiring Nasdaq companies to annually publish in a uniform format statistical information regarding each director's self-identified characteristics, and to have, or explain why the company does not have, at least two 'diverse' directors.[59] The major proxy advisory firms, as well as large

58 See, e.g., Andrew R Brownstein, Steven A Rosenblum, David M Silk, Mark F Veblen, Sabastian V Niles & Carmen X W Lu, 'The Coming Impact of ESG on M&A' (18 February 2020).

59 See SEC Release No. 34-92590 (6 August 2021), https://www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf.

institutional investors, also have policies and guidelines designed to advance board diversity.[60] Legislation adopted by the state of California went even further than disclosure-based policies, affirmatively mandating representation of underrepresented populations on the boards of directors of public companies that are headquartered in California.[61] A California court subsequently held that the legislation violated the California constitution and its future remains uncertain.

These laws, rules and policies reflect the growing consensus among numerous stakeholders that diversity not only improves company governance, but also is positively correlated with financial performance and enhanced investor confidence. Given this growing consensus, merger parties will need to pay particular attention to diversity considerations when considering integration activities and post-closing governance for combined companies.

VIII TAX LAW

For the past five years, individual and corporate taxpayers have adapted to the Tax Cuts and Jobs Act (TCJA) legislation that was enacted at the end of 2017. The change in US presidential administrations in January 2021 and calls for reform to the TCJA by current President Biden created the possibility of yet another significant change in the US business taxation regime. Against this backdrop, companies have developed transaction processes and implemented protective provisions intended to address the potential implications of entering into or closing deals before or after potential tax legislation is enacted or, through grandfathering provisions, is effective.

On 7 August 2022, the US Senate passed the Inflation Reduction Act of 2022 (the IRA), which was subsequently signed into law by President Biden. Key aspects of the IRA include a 15 per cent corporate minimum tax on book income of certain large corporations and a non-deductible 1 per cent excise tax on the fair market value of stock repurchased after 31 December 2022 by publicly traded US corporations (other than real estate investment trusts and regulated investment companies).

Various additional proposals that have been considered by the Biden administration could have a meaningful impact on M&A, including by increasing the tax costs to sellers engaging in transactions, and reducing the benefits buyers are able to model in future acquisitions. Parties on both sides of transactions should carefully monitor legislative developments and incorporate tax considerations into their M&A planning.

IX COMPETITION LAW

As noted above, one of the key developments in M&A in recent years has been changes in the antitrust landscape. This section will further explore that trend, first providing an overview of the current regulatory regime for antitrust approval of transactions in the United States, then discussing major challenges that exemplify the current administration's interventionist

60 See, e.g., Institutional Shareholder Services, United States Proxy Voting Guidelines and Benchmark Policy Recommendations (13 December 2021), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf; Glass Lewis Guidelines: 2022 Policy Guidelines, https://www.glasslewis.com/wp-content/uploads/2021/11/US-Voting-Guidelines-US-GL-2022.pdf?hsCtaTracking=257fcf1c-f11e-4835-81a3-d13fbc7b1f4c%7C1dad2378-213f-45f6-8509-788274627609.

61 See Cal. Assembly Bill No. 979.

approach to M&A enforcement, and concluding with a summary of a few of the proposals currently pending in US Congress that, while perhaps not likely to be enacted in the near term, demonstrate that both political parties are placing greater emphasis on potential changes that could dramatically overhaul the regulatory landscape.

i Overview

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), subject to certain exceptions, parties engaging in transactions that meet specified thresholds[62] have a mandatory obligation to file a notification, which is then reviewed through a clearance process administered by the Antitrust Division of the DOJ and FTC to determine which agency will investigate potential anticompetitive issues. The fact that a transaction is not reportable under the HSR Act does not preclude either the DOJ or the FTC from reviewing and potentially challenging the deal. Furthermore, state attorneys general may also review and challenge transactions. Generally (but not always), state attorneys general challenges are conducted in conjunction with the federal agency handling the transaction.

ii Notable 2021 and 2022 enforcement actions

In 2021 and 2022, the agencies brought a number of high-profile enforcement actions, challenging both pending and consummated transactions, with varying levels of success. Regardless of the outcome of litigation, the threat of regulatory scrutiny (and the likelihood that any enforcement will be aggressive)[63] itself can serve as a deterrent and, in certain cases, enough for parties to abandon a transaction.[64] Although parties may justifiably choose to walk away from a deal in the face of a protracted, public court battle, recent losses, including those discussed below, demonstrate that transacting parties who chose to test nontraditional theories of harm by fighting litigation may ultimately prevail. Furthermore, the agencies' 'just say no' approach to remedy proposals made by merging parties is being put to the test with parties increasingly choosing to 'litigate the fix' – UnitedHealth Group / Change Healthcare, discussed below, being one successful example of such a challenge.

62 The minimum threshold, which is adjusted annually for inflation, is US$101 million for fiscal year 2022. See Premerger Notification Office Staff, HSR Threshold Adjustments and Reportability for 2022 (11 February 2022), https://www.ftc.gov/enforcement/competition-matters/2022/02/hsr-threshold-adjustments-reportability-2022.

63 See Remarks of Jonathan Kanter, Assistant Attorney General Jonathan Kanter Delivers Keynote Speech at Georgetown Antitrust Law Symposium (13 September 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust ('Companies considering mergers that may harm competition should know that the Antitrust Division will not back down from a fight so long as that threat remains.').

64 See, e.g., Press Release, Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation (25 August 2022), https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk; Press Release, Shipping Equipment Giants Cargotec and Konecranes Abandon Merger After Justice Department Threatens to Sue (29 March 2022), https://www.justice.gov/opa/pr/shipping-equipment-giants-cargotec-and-konecranes-abandon-merger-after-justice-department.

Notable enforcement actions include the following.

Booz Allen

In June 2022, the DOJ sued in federal district court to block Booz Allen Hamilton Holding Corp's proposed acquisition of EverWatch Corp, a government solutions company focused on defence and intelligence work.[65] The complaint alleged that if the acquisition was consummated, there would only be one potential provider of operational modeling and simulation services to support the National Security Agency's signals intelligence data missions. The court held a trial on the preliminary injunction motion, following which it denied the motion, finding that there was no direct evidence suggesting the proposed transaction would have a detrimental effect on competition for the NSA contract or otherwise. The DOJ then filed for a stay of the ruling to permit time for an appeal, but the judge denied the motion, instead permitting the parties to close the deal.[66]

UnitedHealth Group / Change Healthcare

In February 2022, the DOJ brought a challenge to UnitedHealth Group's proposed US$12.7 billion acquisition of Change Healthcare. Shortly before the complaint was filed, in an effort to satisfy regulatory concerns about potential elimination of horizontal overlap, UnitedHealth announced its intent to divest Change Healthcare's claims editing business and, prior to the start of the antitrust trial, entered into a definitive agreement with a third-party to sell the business. Following a two-week trial on the merits, the court issued a decision rejecting each of the DOJ's theories of competitive harm and accepting the divestiture offered by UnitedHealth as effectively restoring competition, thereby delivering a resounding defeat to the agency in a high-profile challenge.

US Sugar / Imperial

In November 2021, the DOJ brought a civil action to enjoin United States Sugar Corporation's acquisition of Imperial Sugar Company.[67] The DOJ alleged, among other things, that the transaction would leave an overwhelming majority of refined sugar sales across the Southeast US in the hands of only two producers. Following a bench trial, in September 2022, the federal district court rejected the DOJ's allegations that the merger would reduce competition and result in higher prices and less reliable service, and found it was persuasive that the role that the USDA Federal Sugar Program has in safeguarding against the potential anticompetitive effects of the transaction. The court ultimately denied the DOJ's request for an emergency injunction, stating that the DOJ had not established a strong showing that it was likely to succeed on the merits. The DOJ's appeal of the injunction denial before the Third Circuit Court of Appeals is pending as at the time of writing.

65 Press Release, Justice Department Sues to Block Booz Allen Hamilton's Proposed Acquisition of EverWatch (29 June 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-booz-allen-hamilton-s-proposed-acquisition-everwatch.

66 See Press Release, Booz Allen Completes Acquisition of Everwatch (14 October 2022), https://www.boozallen.com/menu/media-center/q3-2023/booz-allen-completes-acquisition-of-everwatch.html.

67 Press Release, US Department of Justice, Justice Department Sues to Block US Sugar's Proposed Acquisition of Imperial Sugar (23 November 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-us-sugar-s-proposed-acquisition-imperial-sugar.

Illumina / Grail

In March 2021, the FTC filed a complaint challenging Illumina, Inc's US$7.1 billion acquisition of cancer detection test-maker Grail Inc on the grounds that the acquisition would diminish innovation in the US market for early detection cancer tests.[68] After over a year of litigation, the presiding administrative law judge issued an initial decision dismissing the FTC's antitrust charges, finding that the agency had not proved a *prima facie* case when taking into account the supply commitment offered by Illumina.[69] The FTC staff filed an appeal to the full Commission, which remains pending at the time of writing.

American Airlines / JetBlue Joint Venture

In September 2021, the DOJ and six state attorneys general filed a lawsuit seeking to block the 'Northeast Alliance' between American Airlines and JetBlue. The crux of the complaint is that the alliance will eliminate significant competition at key airports and, in effect, result in further consolidation of an industry that is already concentrated.[70] At the time of writing, the litigation is being adjudicated in a bench trial pending in Massachusetts federal court.

iii Executive and legislative developments

There is strong commitment at both the executive and legislative levels of government to vigorously enforcing existing antitrust laws and potentially overhauling the current doctrinal framework.

At the executive level, President Biden issued an expansive Executive Order in July 2021 aimed at promoting competition and lowering prices.[71] The Executive Order requires numerous federal agencies to undertake over seventy initiatives and specifically commits to addressing 'the rise of the dominant Internet platforms.'[72]

At the legislative level, various bills introduced and currently pending in Congress have the potential to fundamentally alter (and, in the words of proponents, modernise) the antitrust landscape in the United States. Senator Klobuchar introduced Section 225, the Competition and Antitrust Law Enforcement Reform Act that, among other things, proposes to shift the

68 Press Release, FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (30 March 2021), https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection-test-maker-grail.

69 In addition, the European Commission (EC) separately reviewed the transaction, following its unprecedented decision to request that the competition authority in France refer the review to the EC even though the transaction had not been notified to the EC since Grail had no active products or European Union revenues. The parties closed the deal in September 2021, notwithstanding the fact that the EC had confirmed that the transaction would face an in-depth Phase II investigation, with Illumina keeping Grail as a separate company pending the EC review and the EC ultimately determining to prohibit the transaction. Press Release, European Commission, Mergers: The Commission Adopts a Statement of Objections in View of Adopting Interim Measures Following Illumina's Early Acquisition of GRAIL (20 September 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4804.

70 Press Release, Justice Department Sues to Block Unprecedented Domestic Alliance Between American Airlines and JetBlue (21 September 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-unprecedented-domestic-alliance-between-american-airlines-and.

71 Executive Order on Promoting Competition in the American Economy (9 July 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

72 id.

burden of proof in certain sufficiently large or consequential transactions from the agencies to the merging parties, who would be required to establish that the acquisition will not materially harm competition, and would lower the threshold to find a merger or acquisition unlawful.[73] Senator Hawley introduced the Trust-Busting for the Twenty-First Century Act, which specifically takes aim at technology companies and prohibits companies worth over US$100 billion from engaging in acquisitions that lessen competition 'in any way.'[74] Senators Lee and Grassley have proposed the Tougher Enforcement Against Monopolists Act, which seeks to modify the standards used to evaluate mergers and would increase the penalties for antitrust violations.[75]

Although there is support across both political parties for reforming the antitrust regime, it is uncertain whether any of the existing proposals will ultimately be enacted. With the United States in the middle of the midterm elections, and soon to begin turning attention to the 2024 presidential election, parties considering transactions should monitor ongoing legislative and regulatory developments for potential transaction implications.

X OUTLOOK

Although the covid-19 pandemic disrupted business-as-usual for companies and individuals across the United States and around the world for much of 2021, dealmaking activity was remarkably strong, with records set in terms of deal volume generally and across many industries. In 2022, as the world continued to emerge from the pandemic, with many companies resuming normal operations and employees returning to at least some in-office work, M&A activity remained significant, but markedly lower than 2021 levels, as companies have been forced to contend with challenges ranging from rising inflation, stock market volatility, increasing interest rates, supply chain disruptions, the prospect of a global recession and growing geopolitical tension, including war in Europe.

While dealmakers face headwinds, there are conditions that are conducive to M&A, including lower public equity market valuations that may make targets more attractive to potential acquirors and large amounts of dry powder amassed by private equity firms, and transactions continue to be agreed, and completed, in the current environment. Dealmakers should continue to carefully analyse the benefits and risks of potential M&A transactions, taking into account the financial and strategic rationales for the deal, and thoughtfully structure transactions to maximise the potential for successful outcomes.

73 Section 225 - Competition and Antitrust Law Enforcement Reform Act of 2021 (introduced 4 February 2021), https://www.congress.gov/bill/117th-congress/senate-bill/225/text.

74 Section 1074 - Trust-Busting for the Twenty-First Century Act (introduced 12 April 2021), https://www.congress.gov/bill/117th-congress/senate-bill/1074.

75 Press Release, Sens. Lee, Grassley Introduce TEAM Act to Reform Antitrust Law (14 June 2021), https://www.lee.senate.gov/2021/6/sens-lee-grassley-introduce-team-act-to-reform-antitrust-law.

Appendix 1

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