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Mergers & Acquisitions

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In-Depth: Mergers & Acquisitions (formerly The Mergers & Acquisitions Review) provides a practical overview of global M&A activity and the legal and regulatory frameworks governing M&A transactions in major jurisdictions worldwide. With a focus on recent developments and trends, it examines key issues including relevant competition, tax and employment law considerations; financing; due diligence; and much more.

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Summary

Introduction

The United States continues to be the largest and most active market for mergers and acquisitions (M&A) activity across the globe. Deals involving both public and private companies across industries are regularly negotiated and agreed, with deal activity enabled by a well-developed set of rules, including state corporation law, federal securities laws and applicable stock exchange regulations, which regulate transactions.

The year 2021 saw unprecedented levels of M&A activity in the United States. In 2022, transaction activity remained high, but noticeably lower than 2021 levels, particularly in the second half of the year. Transaction volume to date in 2023 remains below the same period in 2022, and significantly lower than the records set in 2021. The lower level of transaction volume is due to, among other factors, significant dislocation in financing markets, greater stock market volatility, concerns over inflation, higher interest rates, war in Europe and other geopolitical tensions and the possibility of a global recession, all of which have reduced business and consumer confidence. Furthermore, recent years have seen a shift in the approach taken by the Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ) (together, the agencies) to enforcement of the US antitrust laws, with a marked change in rhetoric, and in various substantive regulatory matters; however, dealmaking has continued, and fundamental doctrines of antitrust law have not changed.

Year in review

i Overview of M&A activity

At the beginning of 2022, dealmakers were cautiously optimistic that the robust M&A market that began in the second half of 2020 and led to a remarkable year for transactions in 2021 would continue. Ultimately, however, 2022 ended up witnessing a slowdown that began with a modest decline in activity during the first half of the year and then decelerated considerably as markets were roiled by the Russia–Ukraine war, inflation constraints and rising interest rates. The first half of the year was active and saw approximately US$2.2 trillion worth of global deals, compared to approximately US$2.7 trillion worth of such deals announced over the same time period in 2021. The year 2022 ended with total deal volume of just US$3.6 trillion globally, however, down from US$5.7 trillion in 2021 but in line with the US$3.5 trillion of volume in 2020 as well as with the five-year average (excluding 2021).

The 2022 slowdown has carried over to 2023, with year-to-date M&A activity remaining well below 2021 levels, and also slightly below 2022 levels. Through the first three quarters of 2023, global M&A volume was approximately US$2 trillion, compared to approximately US$2.9 trillion over the same period in 2022. In addition to depressed overall volume of deal activity, the number of megadeals has also declined, likely owing at least in part to hesitancy of transacting parties to agree to major transactions in the face of more aggressive and unpredictable antitrust enforcement, both in the United States and abroad. That said, green shoots have emerged as the year has progressed, with a sense that inflation may have peaked and rapid interest rate increases may be coming to an end, leading to the announcement of a number of significant transactions in industries, including energy and pharmaceuticals.

ii 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 have 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.[2]

Shareholder rights plans

Overview [3]

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 both cases, the conversion or exchange results in a substantial dilution of the triggering shareholder, which provides a strong incentive for a potential acquirer 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.[4] Stockholder challenges to poison pills are analysed under the intermediate scrutiny test set forth in *Unocal*, which entails a two-part inquiry whether:

1. the board had reasonable grounds for identifying a threat to the corporate enterprise; and
2. 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).[5]

The year 2020 saw a drastic 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 to take a sizable position in the company's stock.[6] 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[7] – 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'.[8] The Williams board pointed to three justifications in support of the pill:

1. the desire to prevent stockholder activism during market uncertainty;
2. fear that potential activists might pursue short-term agendas; and
3. concern about rapid accumulation.[9]

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.'[10] 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.[11]

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'.[12] 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.[13] Nonetheless, shareholder rights plans that are appropriately drafted and developed on a detailed record in consultation with the company's legal and financial advisors remain a critical – and valid – tool available to corporate boards. Indeed, notwithstanding the outcome of *Williams*, there were a number of high profile poison pill adoptions in 2022 and 2023 – including Nordstrom, which announced in September 2022 that it adopted a 364-day shareholder rights plan with a 10 per cent trigger,[14] 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,[15] Kohl's, 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 acquirers,[16] and Nano Dimension Ltd, an Israeli company that has been the target of significant takeover interest and, in January 2023, adopted a 365-day shareholder rights plan with a 10 per cent trigger.[17]

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 that 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 also developed.

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.[18] 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.[19] In the wake of *Lavin*, plaintiffs considering pursuing damages claims in connection with M&A transactions have increasingly used books-and-records demands to investigate the M&A sale process, and then later sought to use that information to critique the fairness of the process.[20] Activist investors have also continued to do the same, 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.[21]

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. 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 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 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; for 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.[22]

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. 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 covid-19 (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.

The most closely watched M&A development of 2022 in the Delaware courts (and perhaps the most closely watched M&A dispute of all time) was Elon Musk's attempt to walk away from his $44 billion purchase of Twitter (now X). 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.

Following this case and other disputes generated by pandemic-related dislocation, it remains the case that buyers seeking to establish a MAE as a basis for terminating a transaction generally must satisfy a very high bar, consistent with the prevailing philosophy in Delaware that the agreements of transacting parties generally should be respected and enforced. The Musk/Twitter saga also was a powerful reaffirmation of market expectations that the Delaware courts will enforce merger agreements in accordance with their terms.

Legal framework

The law of M&A in the United States comes from two principal sources: state corporation law and federal securities statutes (i.e., the Securities Act of 1933 and the Securities 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.[23]

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 United States, 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.[24] 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)[25] 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 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).[26] Delaware's highest level of scrutiny – known as the 'entire fairness' standard – applies in situations where a majority of the board is either interested[27] or non-independent,[28] or in certain situations involving conflicted controlling shareholders.[29] The entire fairness test requires directors to establish the fairness of the price and process of the transaction they approved.

The Securities and Exchange Commission (SEC), an agency housed within the federal executive branch, is responsible for the 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 frequently plays a role in telecommunications deals, and the Federal Reserve, with oversight of bank transactions.

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. In 2022, cross-border deals constituted 32 per cent (US$1.1 trillion) of global M&A, broadly consistent with the average proportion over the previous 10 years (35 per cent). Through 2022 and thus far in 2023, 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.

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 2022, CFIUS conducted a review or assessment of 440 covered transactions (based on a written notice or a declaration),[30] up just slightly from the 436 covered transactions reviewed or assessed in 2021. A total of 286 notices of transactions were subject to CFIUS jurisdiction in 2022 – a drastic increase over the 97 such notices subject to CFIUS jurisdiction in 2013, and the highest number of notices reviewed by CFIUS in the past 10 years.[31] 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 acquirer. 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 acquirer 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 and recent geopolitical tensions 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 acquirer to pay a fee to the seller in the event that 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.[32] 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 2022 Executive Order specifically instructs CFIUS to consider the following national security factors in its reviews:

1. effect on the resilience of supply chains;
2. potential harm to US technological leadership in areas that impact US national security; and
3. 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.

In August 2023, President Biden issued an Executive Order regarding outbound US investments in activities involving sensitive technologies critical to national security (including semiconductors and microelectronics, quantum information technologies and artificial intelligence). The measures called for by the August 2023 Executive Order will be implemented by forthcoming regulations issued by the Department of Treasury, but the publication of the Executive Order represents an important first step in the 'reverse CFIUS' process.[33]

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

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.

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i Industry trends

Technology M&A

Unlike in previous years, the number of blockbuster technology deals in 2023 was relatively depressed. The largest tech deal (and only tech deal in excess of US$10 billion) of the year to date is Cisco's US$27 billion acquisition of Splunk. Compared to the same time period in 2022, which saw the announcement of four blockbuster deals in technology-related sectors (Microsoft's US$74 billion acquisition of Activision Blizzard, Inc, Elon Musk's $44 billion acquisition of Twitter, Inc, Broadcom's US$61 billion acquisition of VMware, Inc, and Adobe's US$20 billion purchase of Figma, Inc), the pullback in large-scale tech M&A demonstrates how the environment for tech companies navigating transformative transactions has become increasingly complex due to headwinds, including geopolitical tensions, intense regulatory, media and political scrutiny, and the impact of higher interest rates on valuations of businesses where investments are premised on future growth rather than current earnings.

The year 2023 has also seen a high number of startup bankruptcies – according to S&P Global Market Intelligence data, through the first half of the year, 54 companies with private equity or venture capital backing filed for bankruptcy. The string of startup bankruptcies was punctuated by the November 2023 bankruptcy filing of WeWork, which at one time enjoyed a US$47 billion valuation, making it one of the most valuable startups in US history at that time.

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. In June 2023, the FTC sued seeking a preliminary injunction to block Microsoft's acquisition of Activision Blizzard. After the motion was denied by the district court (and a motion to block the closing pending the FTC's appeal to the Ninth Circuit Court of Appeals was also denied), the parties closed the transaction in October 2023. In September 2023, however, the FTC took steps to preserve its ability to unwind the deal even though it had already closed.

As further evidence of the regulatory skepticism of tech M&A, the FTC launched a task force dedicated to monitoring competition in the tech markets in 2019,[34] 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 Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) over the time period from January 2010 to December 2019.[35] In September 2023, the DOJ commenced its landmark civil antitrust trial against Google, alleging Google harmed consumers by illegally seeking to stifle competition and protect its monopoly.

Oil, gas and energy M&A

The oil, gas and energy sector has seen significant consolidation in 2023. Activity has been driven both by the flood of investment in clean energy generated by the Inflation Reduction Act of 2022 (the IRA), and a rebound in the prospects of oil and gas companies as energy prices have responded to the ongoing war in Ukraine and other global political developments. In the third quarter, two megadeals, each over $50 billion, were announced: Exxon Mobil's US$60 billion acquisition of Pioneer Natural Resources and Chevron's US$53 billion acquisition of Hess. Other significant oil and gas deals announced throughout the year include Chevron's US$6.3 billion acquisition of PDC Energy, Exxon Mobil's US$4.5 billion acquisition of Denbury, Energy Transfer's US$2.7 billion acquisition of Crestwood Equity Partners, and ONEOK's US$13.6 billion acquisition of Magellan Midstream Partners. Industry observers expect further consolidation in the sector heading into 2024.

ii Active 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.

Procedural Changes

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 in transactions that do not raise anticompetitive concerns.[36] 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.[37] Indeed, in fiscal 2019, early termination was granted in over half of the transactions in which it was sought.[38] 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. Furthermore, 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.

As a second procedural change, the FTC announced on 3 August 2021 that it will send pre-consummation warning letters[39] to merging companies alerting them that, notwithstanding the expiry 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 'at their own risk'.[40] 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'.[41] 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.[42]

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.[43] Now, with the legal import of pre-consummation warning letters being unclear,[44] parties no longer have the ability to obtain early termination, even for transactions that do not pose any anticompetitive concerns whatsoever.[45]

Proposed rulemaking under the HSR Act

Most recently, the FTC published a notice of proposed rulemaking[46] that, if adopted as a final rule, will fundamentally alter the nature of HSR Act practice, materially increase filing burdens and hinder parties' ability to close transactions (even non-problematic transactions) quickly. The HSR Act requires that parties to merger and acquisition transactions meeting certain size thresholds (US$111.4 million for fiscal year 2023) notify the agencies and observe a statutory waiting period before closing. The purpose of the HSR Act is to give federal antitrust authorities notice of certain transactions and, if appropriate, an opportunity to challenge deals in federal court. Since its implementation over 40 years ago, the HSR notification form has been straightforward and efficient, requiring basic information about parties, their operations and the proposed transaction, and the production of relevant documents that can be prepared and filed within two weeks of signing. The FTC's proposed rulemaking would completely redesign the HSR notification process, requiring parties to provide significantly more information than what is currently required, including deal-related documents (e.g., all drafts prepared by or for the supervisory deal team leads, in addition to such documents prepared by or for officers or directors), regular reports prepared in the ordinary course of business that discuss market shares, competition, competitors or markets, a narrative description and documentary support of the transaction rationale and a narrative description of all existing or potential horizontal overlaps and vertical or supply relationships between the filing parties, accompanied by extensive data and documentation.

The proposed changes reflect a paradigm shift in the agencies' historical review and investigatory practices: from a regime focused on review of notified transactions for purposes of making law enforcement decisions to approval regimes akin to those of the European Commission (EC) and China. If enacted, the enhanced filing obligations will require significantly more time and resources of transacting parties, and will require transaction parties and their advisers to redevelop and implement HSR notification readiness and general compliance programmes well in advance of any contemplated transaction.

Publication of Draft Guidelines

On 18 July 2023, the FTC and DOJ issued the long-promised proposed replacement to the existing Horizontal Merger Guidelines and Vertical Merger Guidelines. The agencies' draft guidelines (the Draft Guidelines) do not have any independent legal effect, but are intended to influence the federal courts and to provide guidance as to how the federal antitrust authorities will analyse the competitive impact of transactions and decide whether to challenge them. Although the final guidelines may evolve from the published draft, the major themes will likely remain intact. In a joint statement announcing the Guidelines, FTC Chair Lina Khan and Assistant Attorney General Jonathan Kanter said that the Guidelines contain 'critical updates' to 'respond to modern market realities'. The Draft Guidelines demonstrate a fundamental ideological shift of antitrust enforcement under current agency leadership, including a belief that the 'antitrust laws reflect a preference for internal growth over acquisition', and provide several reasons unrelated to consumer welfare to challenge a deal. The Draft Guidelines also shift from evaluating the economic effects of transactions to market share presumptions of illegality at lower levels of concentration.

For instance, the Draft Guidelines, for the first time since the 1968 Guidelines, have identified a 'tendency towards concentration' as a potential factor in determining a merger's legality, even in moderately concentrated markets, particularly if other 'market characteristics exist' (e.g., exit of a significant competitor). The Draft Guidelines shift to the parties the burden of showing the merger does not harm competition by specifying significantly lower levels of market concentration at which the agencies would presume a transaction violates the antitrust laws (including new share-based thresholds). In addition, the Draft Guidelines memorialise more expansive theories of harm that have been pursued under the current administration.

As a result, transactions involving companies that do not compete but participate in related markets (e.g., vertical and neighbouring) may nonetheless be deemed to substantially lessen competition by weakening or excluding rivals or by providing access to rivals' competitively sensitive information. In vertical deals, the Draft Guidelines mandate a presumption of illegality if the foreclosure share is 50 per cent or more; if less than 50 per cent, the Draft Guidelines specify plus factors to be taken into consideration, including trends towards vertical integration, the nature and purpose of the merger, whether the market is already concentrated and whether the transaction will increase barrier to entry. The approach of the Draft Guidelines ignores the recent vertical case losses (e.g., Microsoft/Activision), which clearly required the government to establish anticompetitive effects in vertical cases rather than being able to rely on presumptions based on market concentration.

In addition, the Draft Guidelines reintroduce the entrenchment theory of harm concept. The agencies will assess whether the transaction permits a 'dominant' firm (i.e., a firm with 30 per cent or more share) to extend its dominant position into a related market or further entrench its already dominant position in the relevant market. Relatedly, the Draft Guidelines will consider whether the transaction will make it harder for rivals to compete, even if those rivals do not buy products or license technology from clients of the transaction parties. The Draft Guidelines also take direct aim at technology firms, including by adopting a holistic approach to reviewing transactions involving multi-sided platforms that includes competition between platforms, on a platform, and to displace a platform that departs from the US Supreme Court's *Ohio v. Amex* decision by not requiring evidence of harm to both sides of a platform.

Proposed modifications to role of FTC ALJ

In June 2023, the FTC proposed rules that, if adopted, would modify its internal procedures to diminish the role of its Administrative Law Judge (ALJ) relative to the agency's Commissioners. The ALJ adjudicates, among other things, the agency's challenges to mergers and acquisitions under the antitrust laws. Under the proposed rule, the ALJ will no longer render an 'initial decision' that can become the decision of the agency in the absence of an appeal. Instead, the ALJ will issue a 'recommended decision' that will be automatically reviewed by the same Commissioners who voted to authorise the administrative complaint in the first place. Parties will no longer appeal the ALJ's decision, but rather submit exceptions to its recommendation.

Reinstatement of prior approval policy

Finally, policy changes implemented by the FTC have increased the regulatory burden on merging parties not only in the context of specific transactions but also for future transactions that the companies may wish to pursue. On 25 October 2021, the FTC announced its decision to reinstate its prior practice of requiring acquirers 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.[47]

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 Special purpose acquisition companies

A special purpose acquisition company (SPAC) is a company formed for the purpose of raising capital in an initial public offering (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 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, a trend that continued in 2023. After raising record sums, often by generating attention through their association with industry leaders and celebrities, SPACs faced a much tougher market beginning in 2022, with a number of prominent SPACs experiencing significant share price declines following 2021 de-SPAC transactions, or failing to complete de-SPAC transactions due to excessive redemption levels. Furthermore, 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.[48] 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.[49] The SEC's final rules are expected to be released in the first half of calendar year 2024, although the proposed rules and increased SEC scrutiny are among the factors that have contributed to the whiplash in SPAC market conditions over the past two years.

iv Activism, ESG and M&A

In response to recent swings in equity market valuations, 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 Barclays review of activism trends, 46 per cent of all activist campaigns in the first half of 2023 had an M&A component (including pushing for a break-up or divestiture (17 per cent), agitating for a sale (16 per cent) and scuttling or sweetening a deal (13 per cent)), up from 30 per cent over the same time period one year prior and above the four-year average of 42 per cent – despite relatively depressed overall M&A levels and weaker financing markets. High-profile activist campaigns with an M&A component have included Starboard Value's campaign for LivePerson to sell itself, ValueAct Capital's campaign for Seven & i holdings to spin-off the 7-Eleven convenience store chain, and Icahn's campaign for Illumina to abandon its acquisition of Grail.

In addition to M&A-focused activism, activism related to environmental, social and governance (ESG) matters has been a growing area of attention. Senior executives and corporate boards have leveraged M&A to advance ESG strategies and are integrating ESG considerations into due diligence and post-transaction integration processes to generate synergies, advance long-term value creation and reduce risk. ESG considerations also continue to play a role in post-transaction integration processes, particularly as corporate governance and culture, human capital management and diversity, equity and inclusion remain core investor and stakeholder concerns. Meanwhile, an 'anti-ESG' backlash has led to efforts to drive investment away from market participants who, detractors claim, improperly prioritise non-financial goals, which may also have implications for companies considering M&A transactions and how their investors will react to deal announcements. As the focus on ESG topics continues to grow, 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.

Financing of m&a: main sources and developments

The year 2022 brought a halt to a nearly unabated 12-year run of booming credit markets and record-low interest rates. Heightened inflation and fears of a recession on the horizon, among other factors, led to a marked contraction in credit availability and a slowdown in dealmaking across sectors and credit profiles that has continued, and has been exacerbated by a regional banking crisis, into 2023. US high-yield bond issuances were down approximately three quarters year-over-year in 2022 – the lowest volume since 2008 – while newly minted leveraged loans fell nearly two-thirds from 2021 levels. Investment-grade bond issuances fared better, but were still down significantly, with new issuances falling roughly 20 per cent year-over-year. By year end, the average interest rate for single-B bonds had risen to 9.2 per cent, up from under 4.7 per cent at the beginning of January, while the average interest rate for BBB bonds more than doubled, from 2.7 to 5.8 per cent over the same period.

Meanwhile, aggressive antitrust enforcement, as described in this chapter, has led to less predictable (and much longer) timelines between signing and closing of acquisitions. These two factors – a volatile and falling credit market and the need for longer-duration acquisition financing commitments – have had a compounding effect, squeezing availability for commitments of the requisite duration and making those that are available more expensive.

In the face of these dynamics, debt-fuelled M&A activity has suffered. However, some M&A acquirers – even those unwilling to pay the higher rates of the day – have found creative ways to pursue new deals, including by turning to direct lenders for acquisition financing (who reportedly participated in the financing for six of 2022's 10 largest announced LBOs), accepting seller financing, funding their transaction with larger or more creative equity financing solutions and carefully structuring deals to allow targets' existing debt to stay in place post-transaction.

For M&A acquirers seeking financing, especially those that are rated below investment grade, early planning is essential, and flexibility and creativity in this area can be key to getting a deal completed.

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 (and upheld by a panel of the Fifth Circuit Court of Appeals in October 2023, which decision is currently subject to petitions for an en banc review by the full Fifth Circuit) 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.[50] The major proxy advisory firms, as well as large institutional investors, also have policies and guidelines designed to advance board diversity.[51] 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.[52] A California court subsequently held that the legislation violated the California constitution and a federal district court found that the statute violated the US Constitution. As a result of the judicial invalidations, the future of the legislation remains uncertain.

These laws, rules and policies reflect the growing attention of numerous stakeholders on diversity topics and their impact on company governance, financial performance and investor confidence. Given this focus, merger parties will need to pay particular attention to diversity considerations when considering integration activities and post-closing governance for combined companies.

Tax law

Since its enactment at the end of 2017, taxpayers have adapted to the Tax Cuts and Jobs Act (TCJA) legislation, which meaningfully changed a number of aspects of US federal income taxation relevant to M&A, particularly in the international arena. Subsequently, 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.

Nonetheless, the IRA, enacted in 2022, includes features that have altered the tax landscape. 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). These provisions could potentially have an impact on M&A transactions by affecting the ongoing tax profiles of the transaction participants or increasing transaction costs. The precise impact, however, remains to be seen. While the US Treasury Department and the Internal Revenue Service have released some guidance to date to address aspects of the new rules that are not covered by the statute, many gaps remain that will need to be addressed in future regulatory guidance.

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 tax benefits buyers are able to realise in future acquisitions. Although at this point meaningful new tax legislation prior to the 2024 election seems unlikely, a number of items will require legislative attention in the near-term, including the many provisions of the TCJA that are scheduled to expire at the end of 2025 and the United States' response to the broad adoption by the European Union and other countries of a new system of global minimum taxation known as 'Pillar 2', which is expected to have a significant impact on US multinational corporations and M&A transactions engaged in by such corporations. Parties on both sides of transactions should carefully monitor legislative developments and incorporate tax considerations into their M&A planning.

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 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.

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 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 HSR Act, subject to certain exceptions, parties engaging in transactions that meet specified thresholds[53] 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 recent enforcement actions

Over the past few years, the agencies have 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)[54] itself can serve as a deterrent and, in certain cases, enough for parties to abandon a transaction.[55] 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 choose 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.

Notable enforcement actions include the following.

Black Knight/Intercontinental Exchange

On 9 March 2023, the FTC, in a four-to-zero vote,[56] authorised staff to bring an administrative complaint to block the proposed acquisition of Black Knight, Inc (Black Knight) by rival home loan original systems (LOS) provider Intercontinental Exchange, Inc (ICE), which was announced approximately 10 months prior in May 2022. Just days prior to the FTC's announcement, the transaction parties had renegotiated the transaction to lower the purchase price from US$13.1 billion to US$11.7 billion and Black Knight proposed to the FTC to remedy the potential competitive harm of the combination by selling its Empower LOS and some related services. In its complaint, the FTC indicated that this proposal did not address the anticompetitive effects in the market for product pricing and eligibility engines software and would not replace the intense competition between ICE and Black Knight in the LOS market. On 17 July 2023, Black Knight announced that it would also sell its Optimal Blue data to resolve remaining FTC concerns. The trial was rescheduled to begin 14 August 2023, but on 7 August 2023, the companies and the FTC filed a joint request to the federal court seeking dismissal of the district court case and the parties entered into a settlement mandating, inter alia, the divestitures to which the parties had agreed with third-parties.

Amgen/Horizon

On 16 May 2023, the FTC filed a lawsuit in the Northern District of Illinois seeking to block Amgen Inc (Amgen) from acquiring Horizon Therapeutics plc (Horizon), claiming that 'the acquisition would allow Amgen to leverage its portfolio of blockbuster drugs to entrench the monopoly positions of Horizon medications used to treat thyroid eye disease (TED) and chronic refractory gout (CRG)'.[57] According to the FTC's theory, the merger would enable Amgen to purportedly use rebates on its existing blockbuster drugs to pressure insurance companies and pharmacy benefit managers (PBMs) into favouring Horizon's Tepezza and Krystexxa products, used to treat TED and CRG, respectively. Scheduled for trial on the preliminary injunction action in district court on 11 September 2023, the ALJ raised during a 19 July 2023 scheduling conference whether any remedy could ameliorate the FTC's concerns, indicating that it could not rule out the possibility of a mutually agreeable settlement until at least one party to the dispute put forward a proposal and both sides had made a good-faith effort to resolve their differences. On 1 September 2023, the FTC announced that it had reached an agreement with Amgen that resolved the FTC's concerns. Under the consent, for 15 years Amgen may not condition the sale of, or rebates on, its drugs on customers also acquiring Horizon's two drugs, Tepezza and Krystexxa.

US Anesthesia Partners, Inc/Welsh, Carson, Anderson & Stowe

On 21 September 2023, the FTC brought a suit in district court charging US Anesthesia Partners, Inc (USAP) and private equity firm Welsh, Carson, Anderson & Stowe (Welsh Carson), with engaging in a multi-year anticompetitive scheme to consolidate anesthesiology practices in Texas, driving up the price of anesthesia services provided to Texas patients, and boosting their own profits. Welsh Carson created USAP in 2012, and through its investment in USAP, which varied between 23 and 50.2 per cent over the relevant period, purportedly engaged in a 'roll-up' scheme, buying nearly every large anesthesia practices in Texas. In total, the FTC alleges that the scheme involved over a dozen practices, 1,000 doctors, and 750 nurses. USAP reportedly supported its 'roll-up' strategy by entering or maintaining price-setting arrangements with other, independent anesthesia groups that shared key hospitals in Houston and Dallas. Under these arrangements, USAP charged its fees for the services even though the services were provided by these independent groups that had been charging lower prices. Finally, the complaint alleges that USAP and Welsh Carson entered into a market allocation with another large anesthesia services provider. The FTC seeks the issuance of a permanent injunction for engaging in similar and related conduct in the future and such other equitable relief, including structural relief, to redress and prevent recurrence of this conduct. The challenge remains pending at the time of writing.

Meta/Within

In late 2022, the FTC voted three-to-two to block Meta's acquisition of subscription virtual reality fitness app Within.[58] The FTC's amended complaint focused on the theory that the acquisition posed a reasonable probability of eliminating potential competition. In January 2023, the district court denied the FTC's motion, finding that it was not 'reasonably probable' that Meta would enter the market for virtual reality dedicated fitness apps if it could not consummate its pending acquisition of Within, and that it therefore had not shown its entitlement to injunctive relief.

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.[59] 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.[60]

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.

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 grounds that the acquisition would diminish innovation in the US market for early detection cancer tests.[61] 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.[62] The FTC staff filed an appeal to the full Commission, which unanimously overruled the administrative law judge's decision. Illumina then appealed to the Fifth Circuit Court of Appeals, an appeal that remains pending as at the time of writing following oral argument earlier this year. In October 2023, the EC ordered Illumina to unwind its completed acquisition of Grail.

Amid the significant uncertainty resulting from the regulatory turmoil, Illumina has become a target of shareholder activists – enduring a campaign by activist Carl Icahn that went all the way to a proxy fight in May 2023, following which the chief executive officer of Illumina resigned from his role at the company.

Airline 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.[63] In May 2023, the federal district court ruled in favour of the DOJ and the six state attorneys general, holding that JetBlue and American Airlines' decision to stop competing in Boston and New York, where they are major players, violated the Sherman Act because it increased fares and reduced choice for American travellers in many domestic markets for scheduled air passenger service.

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.[64] The Executive Order requires numerous federal agencies to undertake over 70 initiatives and specifically commits to addressing 'the rise of the dominant Internet platforms'.[65]

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 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.[66] 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'.[67] 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.[68]

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. The outcome of the 2024 elections could further impact legislative and regulatory developments.

Outlook and conclusions

In 2022, as the world continued to emerge from the covid-19 pandemic, with many companies resuming normal operations and employees returning to at least some in-office work, M&A activity remained significant, but noticeably lower than 2021 levels, particularly as the year progressed. Transaction volume in 2023 to date remains below the same period in 2022, and significantly lower than 2021 levels, owing to significant dislocation in financing markets, antitrust uncertainty, increased stock market volatility, concerns over inflation, higher interest rates, the Russia–Ukraine war and other geopolitical tensions and the possibility of a global recession, all of which have undermined business and consumer confidence and created hesitancy to agree to major transactions.

While dealmakers face headwinds, there are conditions that are conducive to M&A, including a sense that a feared recession may not come to pass and that much of the world is turning the corner on rapidly accelerating inflation and, with it, interest rate increases, 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.

Endnotes

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, Greg Pessin, Tijana J Dvornic and Erica E Bonnett. ^ Back to section

2 The transaction subsequently closed on 27 October 2022. ^ Back to section

3 Deal-related statistics in this section come from Deal Point Data (DPD) statistics. ^ Back to section

4 See*Moran v. Household Int'l, Inc*, 500 A.2d 1346 (Del. 1985). ^ Back to section

5 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). ^ Back to section

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

7 id. at *9. ^ Back to section

8 id. ^ Back to section

9 id. at *2. ^ Back to section

10 id. at *37. ^ Back to section

11 See Order of the Delaware Supreme Court in*the Williams Cos Stockholder Litig*, Case No. 139,2021 (3 November 2021). ^ Back to section

12 id. at *35. ^ Back to section

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

14 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. ^ Back to section

15 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/data/1418091/000119312522107462/d296740dex991.htm. ^ Back to section

16 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. ^ Back to section

17 See Rights Agreement, dated as of January 27, 2023, by and between, Nano Dimension Ltd. and The Bank of New York Mellon, https://www.sec.gov/Archives/edgar/data/1643303/000121390023005680/ea172312ex4-1_nanodimen.htm. ^ Back to section

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

19 id. at *7. ^ Back to section

20 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). ^ Back to section

21 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.'). ^ Back to section

22 *Snow Phipps Group, LLC et al. v. KCAKE Acquisition, Inc, et al*, C.A. No. 2020-0282-KSJM, 2021 WL 1714202 (Del. Ch. Apr. 30, 2021). ^ Back to section

23 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). ^ Back to section

24 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'). ^ Back to section

25 See*Revlon, Inc v. MacAndrews & Forbes Holdings, Inc*, 506 A.2d 173, 182 (Del. 1986). ^ Back to section

26 See*Unocal Corp v. Mesa Petroleum Co*, 493 A.2d 946, 955 (Del. 1985). ^ Back to section

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

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

29 See, e.g.,*Ams Mining Corp v. Theriault*, 51 A.3d 1213, 1240 (Del. 2012). ^ Back to section

30 CFIUS Annual Report to Congress: Report Period CY 2022, https://home.treasury.gov/system/files/206/CFIUS%20-20Annual%20Report%20to%20Congress%20CY%202022_0.pdf. ^ Back to section

31 id. ^ Back to section

32 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/. ^ Back to section

33 Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern (9 August 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/08/09/executive-order-on-addressing-united-states-investments-in-certain-national-security-technologies-and-products-in-countries-of-concern/. ^ Back to section

34 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. ^ Back to section

35 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. ^ Back to section

36 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. ^ Back to section

37 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. ^ Back to section

38 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. ^ Back to section

39 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. ^ Back to section

40 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. ^ Back to section

41 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. ^ Back to section

42 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. ^ Back to section

43 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. ^ Back to section

44 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'). ^ Back to section

45 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. ^ Back to section

46 Notice of Proposed Rulemaking: Premerger Notification; Reporting and Waiting Period Requirements, https://www.ftc.gov/system/files/ftc_gov/pdf/p239300_proposed_amendments_to_hsr_rules_form_instructions_2023.pdf. ^ Back to section

47 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. ^ Back to section

48 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). ^ Back to section

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

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

51 See, e.g., Institutional Shareholder Services, United States Proxy Voting Guidelines and Benchmark Policy Recommendations (13 December 2022), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf; Glass Lewis Guidelines: 2023 Policy Guidelines, https://www.glasslewis.com/wp-content/uploads/2022/11/US-Voting-Guidelines-2023-GL.pdf?hsCtaTracking=45ff0e63-7af7-4e28-ba3c-7985d01e390a%7C74c0265a-20b3-478c-846b-69784730ccbd. ^ Back to section

52 See Cal. Assembly Bill No. 979. ^ Back to section

53 The minimum threshold, which is adjusted annually for inflation, is US$111.4 million for fiscal year 2023. See Premerger Notification Office Staff, HSR Threshold Adjustments and Reportability for 2023 (16 February 2023), https://www.ftc.gov/enforcement/competition-matters/2023/02/hsr-threshold-adjustments-reportability-2023. ^ Back to section

54 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.'). ^ Back to section

55 See, for example, 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-andmaersk#:~:text=China%20International%20Marine%20Containers%20Group,Department's%20Antitrust%20Division's%20thorough%20investigation; 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. ^ Back to section

56 Press Release, FTC Acts to Block Deal Combining the Two Top Mortgage Loan Technology Providers (9 March 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-acts-block-deal-combining-two-top-mortgage-loan-technology-providers. ^ Back to section

57 Press Release, FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses (16 May 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat. ^ Back to section

58 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. ^ Back to section

59 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. ^ Back to section

60 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. ^ Back to section

61 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. ^ Back to section

62 In addition, the 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. ^ Back to section

63 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. ^ Back to section

64 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/. ^ Back to section

65 id. ^ Back to section

66 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. ^ Back to section

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

68 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. ^ Back to section

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