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Mergers and Acquisitions—2021

Deal activity (or inactivity) for much of 2020 was driven first by the unprecedented uncertainty and massive global shutdown of the early days of the Covid-19 pandemic, and then propelled by rising markets and confidence as animal spirits anticipated the light at the end of the tunnel, even against a backdrop of political instability and record levels of infection and death. Indeed, for M&A, 2020 was a tale of two halves: the second lowest first-half global M&A volume in the last decade (approximately $1.2 trillion), followed by a 90% increase in the last six months (to approximately $2.4 trillion), for a total deal volume of $3.6 trillion – a relatively modest decline, all things considered, from $3.8 trillion of total volume in 2019. The second quarter witnessed a striking nadir in activity, with less than $120 billion of M&A announced in April 2020, while the fourth quarter saw remarkable volume of $1.3 trillion, a 31% increase over the same period in 2019 and 33% higher than the average fourth quarter volume over the last 10 years. The second-half rebound was due in part to a number of large transactions across a range of industries, including AstraZeneca's $39 billion acquisition of Alexion, Salesforce's $27.7 billion acquisition of Slack, 7-Eleven's $21 billion acquisition of Marathon's Speedway business, Gilead Sciences' $21 billion acquisition of Immunomedics, Siemens Healthineers' $16.4 billion acquisition of Varian Medical Systems and ConocoPhillips' $13 billion acquisition of Concho Resources, as principals and their advisors adapted to remote and virtual dealmaking to agree on and execute transactions.

U.S. targets were involved in 10 of the 20 largest transactions in 2020, with total volume for deals involving U.S. targets amounting to $1.4 trillion, down from $1.8 trillion in 2019. Mega-deals continued a three-year decline, with 36 deals globally over $10 billion in 2020 compared to 44 in 2019 and 53 in 2018, and transactions over $25 billion dropping from 19 deals globally in each of 2019 and 2018 to just 10 in 2020. As in 2019 and 2018, the technology sector continued to drive broader deal activity and represented the largest sector for M&A volume. The financial, energy, industrials and healthcare sectors followed. Global private equity deal volume in 2020 increased approximately 22% over 2019, ending the year at approximately $582 billion. Meanwhile, publicly announced hostile and unsolicited M&A declined significantly, falling to $152 billion in 2020, from $306 billion in 2019.

While the second half of 2020 saw a significant rebound in M&A that has continued into the beginning of 2021, the uncertainty regarding the duration and effects of the Covid-19 pandemic remains, with ongoing economic challenges presenting dealmakers with both risks and opportunities as the world readies to move beyond the pandemic. Companies with strong balance sheets are dusting off prior acquisition deal planning while assessing new opportunities in the wake of the pandemic, while those that operate in industries or markets that have been most affected by Covid-19 or otherwise fallen out of favor may be considering divestitures, restructurings and other strategic transactions to adapt to new circumstances. In addition, the significant changes caused, or rapidly accelerated, by the response to Covid-19 – including everything from consumer shopping habits to the role of technology in the workplace, from energy consumption patterns to real estate utilization, and so much more – are likely to be significant factors in M&A activity over the coming year and beyond.

We review below some of the key themes that drove M&A activity in 2020 and our expectations for 2021.

Innovation in M&A

In an unprecedented year, dealmakers proved adept at responding to the extraordinary challenges brought on by a global lockdown, closed borders and turmoil in financial markets, particularly early in the year. The effect of the Covid-19 pandemic on companies' financial condition, earnings and prospects – as a result of remote workforces, brick-and-mortar locations subject to capacity limits or total closure, reduced consumer spending, etc. – led not only to significant litigation relating to a number of pending transactions, but also to reevaluation and innovation in contractual technology for new deals that have been agreed during the last several months. Material adverse effect definitions have been one area of focus, with close attention paid both to carveouts for changes to non-firm specific conditions (such as pandemics and global economic impacts), as well as disproportionate impact exceptions to those carveouts (including how to measure such impacts and how to compare peer firms that found themselves operating in different pandemic-related regulatory conditions). In addition, dealmakers have revisited interim operating covenant provisions that were once considered routine, including what it means for a company to operate in the "ordinary course" during unprecedented times, what exceptions should be allowed as a result of deviations from standard operating procedure that may be mandated or recommended by government officials, and the bases upon which a buyer should, or should not, be permitted to withhold consent to requests for exceptions, particularly in contexts in which target companies may require rapid responses as they react to fast-moving developments. Although the pandemic will hopefully recede from the forefront in the near future, we expect the lessons learned will ensure that many of these pandemic-driven innovations-by-necessity will remain a fixture as sophisticated parties give careful consideration to risk allocation in the face of the unpredictable.

Technology Transactions

The tech sector continued to lead overall M&A in 2020, with nearly 20% of global M&A volume and 28% of U.S. M&A volume involving a tech company as an acquiror or target, compared to 12% and 16%, respectively, three years earlier. A tech company was a transaction participant in six of the top 20 global deals, and six of the top 20 U.S. deals, in 2020. Notable tech M&A transactions included Salesforce's $27.7 billion acquisition of Slack, Analog Device's $21 billion acquisition of Maxim, the $9.2 billion acquisition of eBay's classifieds business by Adevinta, Uber's $2.7 billion acquisition of Postmates and combination of its autonomous vehicles platform with Aurora, and the $10.2 billion acquisition of RealPage by Thoma Bravo, as well as HP's successful defense against a $34 billion hostile takeover attempt by Xerox.

The past year also witnessed robust tech company IPO activity, with $23 billion raised in 44 IPOs in the United States, reversing a trend of prior years, as a number of companies that had extended private lifecycles chose to take advantage of strong equity capital markets, particularly in the second half of the year, as well as favorable post-IPO trading patterns. In addition, more companies chose the direct listing route in 2020, and while the underwritten IPO remains by far the most prevalent path, direct listings may become more common in light of the SEC's approval of the NYSE's Primary Direct Floor Listing, allowing companies to sell shares in a direct listing (Nasdaq has a similar proposed rule change currently pending with the SEC). As a result of these dynamics, private companies that in prior periods might have explored the path that was most in favor at that time – whether that was a private fundraising round, an IPO or M&A – are in many cases maintaining optionality to determine the best outcome, from a value perspective and for future growth, by taking an "all of the above" approach.

Looking forward, we expect tech M&A to continue to drive a significant portion of overall M&A activity in 2021, with companies inside and outside the sector looking to respond to the impact of Covid-19 and the resulting changes in consumer behavior and workplace dynamics, drive enhanced growth, stay a step ahead of competitors and react to rapid innovation and ongoing disruption. In addition to continued IPO activity, there are likely to be a number of additional special purpose acquisition company (SPAC) transactions in the technology sector in 2021, with one significant deal – Social Finance's $8.7 billion merger with Social Capital Hedosophia – already announced during the first week of the new year. In certain cases, however, this activity will take place against growing scrutiny – not only from U.S. and foreign antitrust regulators, but also from national security authorities, elected officials, consumers and the media – regarding everything from the alleged dominance of certain digital platforms with significant user bases to the personal data that technology companies control. Where these factors may be at play, careful pre-signing diligence and thoughtful risk allocation provisions in transaction agreements will be important to ensuring deals are successful.

Financial Institutions M&A

Global M&A volume in the financial services industry was nearly $518 billion in 2020 and closed the year at a torrid pace. Bank M&A saw a resurgence of larger transactions, particularly in the latter part of the year. The year began with the $6 billion merger of equals between South State and CenterState and closed with PNC's $11.6 billion acquisition of BBVA USA in November and the $22 billion merger of Huntington Bancshares and TCF Financial in December. Other areas of the financial services sector also witnessed significant activity, including the $44 billion acquisition of IHS Markit by S&P Global, the largest transaction agreed to in 2020. Consolidation continued in the securities brokerage industry with the closing of the $26 billion merger between The Charles Schwab Corporation and TD Ameritrade and Morgan Stanley's $13 billion acquisition of E*Trade.

Fintech companies also figured prominently, notably SoFi's $8.65 billion merger with a SPAC, Social Capital Hedosophia, announced earlier this month. That transaction marked an important step forward for SoFi's pursuit of a bank charter and the continuing convergence of fintech and banking. The FDIC's approval in March of Square's application to establish a Utah industrial bank was another step in this direction. Square became the first fintech company to obtain FDIC approval for an industrial bank and, along with Nelnet, the first company since 2007 to do so.

The biggest question facing financial services M&A is the impact of the Biden Administration. No other factor has had more of an impact on financial services M&A than regulation. The financial crisis and the resulting regulatory onslaught significantly reduced the level of bank M&A in particular for years to come. The scope and extent of the Biden Administration's impact can only be assessed once the senior-level appointments are finalized and the legislative agenda becomes clearer.

SPACs

In 2020, SPAC volume, in both offerings and M&A activity, set records, although views differ as to whether the SPAC bonanza will continue this torrid pace. An immense surge of offerings, including many by vehicles with high-profile sponsors, led SPACs to raise a total of $83.4 billion of proceeds from 248 IPOs, dramatically eclipsing the previous records, set in 2019, when SPACs raised $13.6 billion in 59 IPOs. The average size of SPAC IPOs also grew from approximately $230 million in 2019 to more than $336 million in 2020, with five SPACs raising over $1 billion in the past year after none exceeded that mark in 2019. The de-SPAC side of the SPAC lifecycle also witnessed significant activity in 2020, with SPACs announcing 100 acquisitions (compared to just 39 in 2019), nearly half of which were transactions valued at $1 billion or more. With a record amount of SPAC capital chasing private targets, there is more focus than ever on the dilution that comes from the sponsor's "promote," typically set at 20% in a traditional SPAC. Some recent SPAC offerings have seen sponsors experiment with different economic models, taking less upfront dilution, in return for more performance-based upside on the backend, and it remains to be seen whether sponsor economics will evolve in this way or through other innovations.

As SPACs have moved to the mainstream, many large, well-regarded financial institutions and private equity firms have begun to sponsor acquisition vehicles, while a number of prominent former public company executives have established or partnered with SPACs, often with the goal of acquiring targets in their industries of expertise. Not coincidentally, a growing number of de-SPAC deal announcements have been well received by investors, and in recent months, many companies that have gone public through de-SPAC transactions have maintained stock prices well above the SPACs' IPO prices. These developments have helped to separate the blank check vehicles from their historical association with financial underperformance and high-risk transactions and make the SPAC a fixture of the current M&A environment.

SPACs pitch to targets considering a traditional IPO with promises of early price discovery, quicker access to liquidity, the opportunity to partner with respected members of the SPAC management team and prominent PIPE investors, and greater flexibility for transaction-related publicity. Balanced against these potential advantages are a number of considerations, including additional costs as a result of the SPAC structure and the possibility that after the target and the SPAC reach an agreement on key economic terms, those terms will have to be renegotiated, potentially more than once, first to secure the backing of PIPE investors and then to avoid excess redemptions by the SPAC's public shareholders, who ultimately control the fate of the transaction. Whether SPACs maintain their current momentum remains to be seen, but given the record number of SPACs now searching for targets, with record levels of cash to spend, SPACs are likely to continue to play an important role in the deal landscape in the year to come, offering private targets an alternative to M&A suitors and the traditional IPO, with both advantages and risks relative to those other options that must be carefully evaluated by companies and their advisors.

Cross-Border M&A

The Covid-19 pandemic may have closed physical borders, but cross-border dealmaking was nonetheless robust, with $1.3 trillion of deals, representing an increase of 11% over 2019. Approximately 65% of this volume came during the second half of the year. Cross-border deals represented approximately 35% of all M&A in 2020, with major transactions including AstraZeneca's $39 billion acquisition of Alexion, NVIDIA's $40 billion acquisition of Arm, 7-Eleven's $21 billion acquisition of Speedway and Siemens Healthineers' $16 billion acquisition of Varian Medical Systems, as well as the $44 billion S&P Global-IHS Markit transaction.

Looking ahead to 2021 and beyond, we expect cross-border activity to be shaped by a number of dynamics, including emergence from the pandemic; the completion of the Brexit transition period and EU-UK trade deal, which have resolved, at least in part, a significant area of uncertainty that has loomed over international dealmaking over the past several years; and global geopolitical tensions, with U.S.-China relations at the forefront, which may operate both to drive, and dampen, deal activity in key technology, financial services, energy and other sectors, as evidenced by a number of recent high profile cases where governmental authorities have stepped in to demand, or block, significant transactions. As a result of this climate, the premium on advance preparation for the political, regulatory and cultural challenges that cross-border transactions can pose has never been higher.

Private Equity Trends

With a record amount of dry powder available, global private equity deal volume increased approximately 22% in 2020 compared to 2019, ending the year at approximately $582 billion. The increase in activity came in spite of traditional PE acquisitions proving somewhat challenging – during the first half of the year, debt markets were constrained while equity markets experienced significant volatility, and then both recovered in tandem during the second half, with the quick rebound in many companies' stock prices making public acquisition target valuations potentially less attractive. In response to this dynamic, PE firms were creative in putting capital to use in other ways – for example, as a source of liquidity for a number of companies in industries that experienced the most acute impact of the pandemic and found that more traditional avenues of funding from banks or public markets were unavailable on terms acceptable to the company in question, as occurred with the $1.2 billion investment by Apollo and Silver Lake in Expedia. And as M&A bounced back in late 2020, so did more traditional PE acquisitions, with the year ending with the marquis $10.2 billion acquisition of real estate software company RealPage by Thoma Bravo, a transaction that featured a $7.4 billion equity commitment from a single firm, among the largest in recent financial sponsor history. Going forward, we expect PE firms to continue to actively pursue acquisitions while reassessing the prospects of their existing portfolio companies and their eventual exit paths in the wake of Covid-19, a process which may lead to further M&A activity – such as portfolio company sales between PE firms – as the pandemic recedes.

A recent decision in the Southern District of New York, *In re Nine West LBO Securities Litigation Case*, is worth noting with respect to leveraged transactions. In *Nine West*, the court declined to grant a motion to dismiss, finding that the business judgment rule would not shield directors who allegedly acted recklessly in failing to conduct a reasonable investigation into the company's post-sale solvency, taking into account plans for a post-closing carve-out and additional debt incurrence. The court also found that the target's directors could, if the facts alleged are ultimately proven, be held liable for aiding and abetting breaches of fiduciary duties by the company's new directors, as they could be charged with actual or constructive knowledge that the new board members would carry out post-sale transactions that would leave the company insolvent. The decision suggests that, in the leveraged buyout context, when exercising the board's traditional duty to obtain the highest value reasonably available in a sale of the company, directors should be mindful of the post-sale solvency of the company, to the extent contemplated post-closing transactions that may jeopardize the ongoing viability of the corporation are known to the target board.

Activism and M&A

The number of significant activist campaigns fell to 569 in 2020, from 643 in 2019 and 623 in 2018. Likewise, the number of activism campaigns relating to M&A, including demands to pursue strategic alternatives, also declined, finishing 2020 down 37% from 2019 levels.

A number of factors contributed to the decline in activism, including deal-related campaigns, in 2020. Among others, these included the significant threat many companies faced to their financial condition at the outset of the pandemic, which made it difficult for activists to credibly agitate for M&A or other extraordinary actions as their would-be targets were scrambling for liquidity; significant market volatility, which challenged the ability of activists and other shareholders to anticipate stock price performance and potential investor reaction to activists' M&A and other demands; disruption to annual meeting timing and logistics, as well as banking, brokerage and SEC operations, especially during the first half of the year; greater uncertainty with respect to shareholder vote outcomes, as often it was not clear how investors would react to activist campaigns in the midst of ongoing economic dislocation, while boards of directors and management teams were working around the clock to save their companies; and the fact that activists themselves may have had to spend more time reassessing their portfolios, trying to preserve value where the investment thesis (*e.g.*, capital return or M&A) was no longer viable while exploring new opportunities to deploy capital.

Despite these factors, many activists were not deterred – indeed, the number of campaigns fell by less than 12% from 2019 levels, and there were a number of high-profile situations, including Elliott/Public Storage, 40 North/GCP, Ortelius/Rayonier and Sachem/Elanco Animal Health. As the pandemic forced companies to hold virtual meetings, 2020 also saw the first activist proxy fight held via virtual meeting. Despite the lower number of proxy contests, the number of board seats won by activists in proxy contests actually increased substantially in 2020 over 2019. And as we emerge from the pandemic, many of the unprecedented circumstances that affected activist activity in 2020 have already begun to recede, and activist investors are likely to return to pre-Covid tactics, while reorienting their targets and their strategies, in 2021. For example, while certain traditional activist theses, such as leveraged stock buybacks, may face heightened scrutiny in the months to come, we expect activists to be aggressive in exploring new opportunities as a result of the ongoing market and broader economic disruption, including advocating for companies that remain challenged to engage in sales processes, divestitures and separation transactions to accelerate their recoveries, while pushing buy-side M&A for those in a position to go on the offensive, and looking for ways to participate in PIPE deals and other bespoke financing opportunities with companies that continue to need additional liquidity. In addition, as ESG becomes ever more salient, some activists have begun to direct their focus beyond more traditional areas of activist pressure, including, for example, Jeff Ubben's recent launch of Inclusive Capital Partners, with a mandate to focus on environmental and social impact issues, as well as recent calls by newly formed activist investor group Engine No. 1 for Exxon to focus on net-zero emissions energy sources and clean energy infrastructure, a campaign supported by CalSTRS.

ESG

ESG has reached an inflection point, with boards of directors, investors and other market participants and observers focusing on questions regarding corporate purpose and recognizing the critical importance of environmental, social and governance factors in the sustainability and long-term value creation potential of the corporation and, ultimately, broader economic prosperity. As ESG is increasingly incorporated into strategic and operational decision-making, it will likely become increasingly salient in the context of mergers and acquisitions.

For example, as investor focus, and corporate accountability, around ESG metrics continue to increase, those metrics are likely to play a more important role in pre-signing due diligence and the assessment of the pro forma impact of a potential M&A transaction. With growing attention to the importance of human capital to the success of the firm (including the SEC's amendment to Regulation S-K requiring companies to describe their human capital resources), deal-related synergies that are tied to workforce changes may face increased scrutiny, particularly for companies that have received government assistance during the pandemic. Meanwhile, companies seeking to enhance the sustainability of their businesses, for example by switching to cleaner technologies or improving product safety, may find that ESG factors drive their acquisition or disposition strategies. In addition, ESG-related elements of the deal story may feature more prominently in transaction announcements and roll-outs, alongside traditional talking points like economic synergies, in the years to come. As an example, ConocoPhillips and Concho highlighted in the press release announcing their transaction that the combined entity would be the first U.S.-based oil and gas company to adopt a Paris-aligned climate risk strategy.

Antitrust Review

While much of the M&A landscape was disrupted during 2020, U.S. antitrust investigations and challenges to mergers and acquisitions continued unabated. The Federal Trade Commission and the U.S. Department of Justice continued to pursue court challenges in cases that were pending at the beginning of 2020, while the FTC initiated court challenges to block an additional seven proposed, and two consummated, transactions, and the DOJ brought two additional merger challenges. In addition, the FTC and DOJ required remedies in 22 transactions during 2020. Companies also abandoned a number of transactions due to antitrust agency opposition, including three deals that were called off after the agency filed its court challenge but before the court rendered its decision. Transaction participants that sought to rely on financial distress, particularly based on Covid-19 shutdowns, as a basis for clearing deals rarely found success in altering agency enforcement decisions.

Although the number of notifications under the Hart-Scott-Rodino Act was down for six months in 2020, the level of enforcement activity remained intense. Both the FTC and DOJ continued to be focused on adverse effects on innovation or nascent or potential competition concerns as a basis for many of their court challenges. Many cases were premised on narrow market definitions and a focus on unilateral effects. In the few cases the agencies lost, the court concluded that the economic evidence and testimony did not support the market definition asserted by the government. There was enforcement activity in a broad array of industries, with healthcare, pharma and consumer products and services continuing to account for a large percentage of enforcement activity at both the FTC and DOJ.

Change in the leadership of the U.S. antitrust agencies in 2021 will not immediately impact the review process in most transactions because the administration of the antitrust laws in the United States is carried out by professional staff that tend to rely on well-established analytical frameworks. As such, the outcomes of most transactions can generally be predicted. The U.S. antitrust agencies will continue to scrutinize the remedies offered by transaction parties, and to prefer (1) divestitures in lieu of conduct remedies that require ongoing oversight to ensure compliance and (2) acquirors of the divestiture assets to be approved prior to closing rather than permitting divestiture buyers to be identified by the parties and approved by the agency after closing. What is likely to change during the Biden Administration is increased requirements in remedying concerns, particularly in vertical transactions or involving the pharmaceuticals and high-technology sectors. Even in transactions that raise concerns, however, careful planning and a proactive approach to engagement with the agencies can facilitate getting the deal through.

Foreign Investment Considerations

The scope and impact of regulatory scrutiny of foreign investments has increased throughout a number of jurisdictions worldwide. In the United States, the mandate of the Committee on Foreign Investment in the United States (CFIUS) has expanded significantly over the last decade, particularly following passage of the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018, which introduced mandatory notification requirements for certain transactions, including investments in U.S. businesses associated with critical technologies, critical infrastructure, or sensitive personal data of U.S. citizens where a foreign government has a "substantial interest" (*e.g.*, 49% or more) in the acquiror. Critical technology and critical infrastructure are broad and flexible concepts, and FIRRMA expanded their scope to include "emerging and foundational technologies" used in computer storage, semiconductors and telecommunications equipment sectors and critical infrastructure in a variety of sectors.

Supply chain vulnerabilities during the Covid-19 pandemic have also increased the likelihood that investments in U.S. healthcare, pharma and biotech companies will be closely reviewed by CFIUS. In addition, personal data has been a key area of scrutiny for CFIUS – indeed, most of the enforcement actions in 2020 involved concerns about Chinese investors' access to sensitive personal data of U.S. citizens. CFIUS enforcement in these sectors is likely to continue during the Biden Administration. At the same time, the United States is likely to remain open to foreign investment, even in the national security sector. Most foreign investment will still be cleared, including Chinese investments, although they may get close review and possibly require mitigation actions, especially to the extent they involve intellectual property, personal data and cutting-edge or emerging technologies.

Several jurisdictions outside of the United States also have foreign investment regimes in place to review transactions that involve companies with national defense, critical technology and critical infrastructure implications. Not only did the number of jurisdictions with foreign investment laws increase in 2020, but for some jurisdictions, the scope and level of activity notably expanded. For example, significant changes within the European Union – both at the EU and Member State level – were adopted. Also, in November 2020, the government of the United Kingdom introduced a National Security and Investment Bill to the House of Commons, which meaningfully expands the power of the UK government to review and intervene in UK in-bound foreign investment to address actual or potential risks to national security. Similar to foreign investment and national security regimes under CFIUS and in other jurisdictions, this bill provides for expansive powers with little practical guidance as to how it will be administered. As in the United States, the pandemic has increased the focus on domestic supply of medical devices, pharmaceuticals and any products related to Covid-19. As with antitrust review, advanced planning for foreign investment scrutiny can be critical to the timely consummation of the transaction.

Acquisition Financing

By the end of the first quarter of 2020, as the Covid-19 pandemic and fears of a global recession roiled financial markets around the world, a decade-long run of nearly uninterrupted strength came to a grinding halt. U.S. investment grade risk premiums reached their highest levels since the Great Recession; the investment grade bond and commercial paper markets briefly froze; the leveraged loan and high-yield bond markets seized shut; and the amount of U.S. distressed debt ballooned to nearly $1 trillion.

Unlike in the Great Recession, global markets quickly stabilized, and markets and banks proved to be a source of strength for large and mid-sized companies of all credit profiles. By December, the script had reversed: investment grade spreads neared record-tight levels, CCC-rated bonds reached their lowest yields in more than five years, and the amount of U.S. distressed debt fell below pre-Covid levels to $184 billion. In addition, high-yield bond volumes reached their highest December level since 2006. Like other financing transactions, acquisition financing activity came roaring back in the second half of 2020, especially in the fourth quarter, as suspended deals were revived and new deals emerged. Strategic acquirors, such as Salesforce, Nasdaq and PPG, successfully tapped the debt markets for multibillion dollar acquisition financing commitments. And in the private equity space, near-zero interest rates propelled a remarkable, over 20% increase in 2020 deal activity over 2019 levels, to the highest levels since 2007.

2020 was a unique year in many ways, but it demonstrated a well-established maxim for dealmakers: windows can open as quickly as they shut, and the best strategy is to be the right mix of patient and prepared. And 2021, in turn, brings its own questions, including whether and how companies will begin addressing the increase in corporate leverage incurred last year, or whether these leverage levels are simply another “new normal.”

Deal Litigation

In the face of severe disruption to normal court functions, there were nonetheless important litigation developments relevant to M&A in 2020. By mid-summer 2020, courts were holding expedited, virtual proceedings to address disputes relating to pending deals in crisis, in which material adverse effect clauses and interim operating covenants frequently played a central role, both in cases for which decisions were handed down and for transactions that were re-cut in order to resolve ongoing litigation. The disputes involving interpretations of these provisions are likely to have lasting effects on the legal drafting of transaction agreements well beyond the Covid-19 pandemic, with targets and acquirors alike paying careful attention to the constraints that apply to the parties' pre-closing operations and the allocation of risks relating to closing certainty.

Stockholder books-and-records inspection demands were also the subject of important rulings in 2020, reflecting the continued approval of Section 220 as a potential route to pre-complaint discovery in support of potential fiduciary litigation – including increasingly prevalent claims alleging failure of director oversight under the *Caremark* doctrine. In addition to reaffirming the low burden plaintiff stockholders must meet to establish the right to inspect corporate documents, the Delaware courts have drawn attention to conduct by defendant corporations, including, in one recent Section 220 ruling, the Court of Chancery's admonishment of the defendant Gilead Sciences for an "overly aggressive defense strategy" which the court found "epitomizes a trend" to "obstruct [demanding stockholders] from employing [Section 220] as a quick and easy pre-filing discovery tool." In light of such developments, corporations should be prepared for Section 220 demands in the deal context and, when confronted with such requests, should consider carefully whether constructive engagement with demanding stockholders constitutes a more prudent approach than aggressive defensive litigation.

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