January 9, 2024

Mergers and Acquisitions—2024

Amid rising interest rates, ongoing fears of a global recession, inflation concerns, volatile share prices, financing market dislocations, geopolitical conflicts and other developments, deal value in the first quarter of 2023 was the lowest for any first quarter in 20 years. The full year saw a 17% decline in global M&A activity compared to 2022. It marked the first year since 2013 that global M&A volume failed to cross the $3 trillion threshold, and represented only 50% of peak 2021 deal value of $5.8 trillion. Transactions involving U.S. targets and acquirers continued to represent a substantial percentage of overall deal volume, with U.S. M&A exceeding $1.26 trillion in 2023 (approximately 44% of global M&A volume), as compared to about $1.5 trillion in 2022 (roughly 43% of global volume).

Despite the overall slowdown in M&A markets, a number of transformative transactions—including several megadeals—were struck. The energy sector saw the two largest deals of the year: Chevron's $53 billion agreement to acquire Hess and Exxon Mobil's $59 billion agreement to acquire Pioneer Natural Resources, both announced in the fourth quarter. Only two other deals crossed the $25 billion threshold: Pfizer's purchase of Seagen for $43 billion and Cisco's agreement to acquire Splunk for $28 billion. These four $25 billion-plus deals compare to six such deals announced in 2022 and 10 in 2021. Similarly, there were 30 $10 billion-plus deals announced in 2023, against 32 in 2022 and 52 in 2021. As in 2022, a significant number of companies turned to separations, divestitures, carve-outs and spin-offs, with nearly 200 $1 billion-plus divestitures and spin-offs announced.

Hostile and unsolicited transactions accounted for approximately 8% of global M&A activity in 2023, compared to about 10% in 2022 and 7% in 2021. Last year's crop of unsolicited approaches broadly vindicated prior experience: serious, well-funded, fairly valued proposals can result in the sale of a target, generally to the highest bidder in a sale process. Opportunistic behavior typically is not rewarded. Takeover preparedness remains critical in today's M&A environment.

There is reason to believe that M&A activity will increase in 2024, especially with an uptick in M&A volume in the last quarter of 2023 and expectations of interest rate reductions and a "soft landing" in the U.S. economy. We review below key M&A themes in 2023 and expectations for 2024.

Energy M&A

The fourth quarter of 2023 saw a boom in M&A in the energy sector, led by Exxon Mobil's $59 billion agreement to acquire Pioneer Natural Resources and Chevron's $53 billion agreement to acquire Hess. Another significant fourth quarter energy deal was Occidental Petroleum's agreement to acquire privately held CrownRock for $12 billion. Overall, the total value of energy deals was $215 billion in the fourth quarter, close to the total volume of energy M&A in the first three quarters combined. With the fourth quarter boom, energy transactions

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outpaced technology transactions as a percentage of overall deal volume in 2023, at 17% and 13%, respectively, for the first time since 2019.

Numerous factors explain the growth in energy M&A, including rising oil prices caused by wars and recognition that the green energy transition is taking longer than anticipated. Amid ongoing international conflict and with many large energy companies maintaining strong balance sheets, 2024 could prove to be another strong year for energy M&A.

Healthcare M&A

Bucking broader market trends, overall healthcare M&A increased approximately 8% from 2022 levels. Given the challenging financing markets and difficult regulatory environment, there was a relative dearth of megadeals in healthcare. Some companies did manage to execute large transactions despite the industry trend, particularly in the pharmaceutical space. Pfizer's $43 billion acquisition of Seagen, which closed in the fourth quarter, was far and away the largest healthcare acquisition of 2023. Other significant transactions included Merck's acquisition of precision medicine-focused Prometheus Biosciences for $10.8 billion and CVS's purchase of Oak Street Health's network of primary care centers for $10.6 billion. AbbVie announced its agreements to acquire both ImmunoGen ($10.1 billion) and Cerevel Therapeutics ($8.7 billion) during a flurry of activity in a one-week period in the fourth quarter, marking the fourth and fifth largest pharmaceutical mergers of the year. Bristol Myers Squibb had a double acquisition spree of its own, landing Karuna Therapeutics ($14 billion) and RayzeBio ($4.1 billion) in one week in December.

Indications are that healthcare M&A will remain a stable source of transactions in 2024, particularly as the largest pharmaceutical companies seek to put available capital to use and strengthen their portfolios in order to deal with looming patent cliffs and, in some cases, to replace declining revenues from Covid vaccines. There is also significant interest in the new crop of GLP-1 drugs—led by Novo Nordisk's Wegovy and Ozempic—with Roche and Eli Lilly also having made acquisitions of clinical stage products. Although there has been a substantial reduction in biotechnology IPOs in this challenging market, numerous biotechnology companies that went public in the hot markets of 2020 and 2021 may now be targets for acquisition, especially given the substantial premiums paid for such companies in 2023 relative to their overall depressed stock prices.

Technology M&A

While the number of M&A deals in the technology sector in 2023 remained roughly consistent with 2022, the lack of blockbuster transactions brought the overall value of technology transactions down 46% year-over-year to about $371 billion, the lowest in six years. Increased antitrust scrutiny is one factor for the decline in technology transactions, even if a number of the FTC's high-profile challenges have been unsuccessful, as discussed below. Nonetheless, technology M&A still played a meaningful role in overall 2023 M&A, accounting for 13% and 15% of global and U.S. deal volume, respectively. Cisco's agreement to acquire Splunk for $28 billion was the largest technology M&A transaction of the year, followed by Silver Lake and the Canadian Pension Plan's acquisition of Qualtrics ($12.5 billion) and Emerson Electric's purchase of National Instruments ($8.2 billion) following an unsolicited offer.

As in 2022, the IPO market for tech companies was mostly halted, with some anticipated IPOs temporarily shelved yet again (e.g., Reddit; Stripe). Certain technology companies, such as British chip designer Arm and grocery delivery company Instacart, which delayed its planned 2022 public offering, completed IPOs despite the difficult market. Overall, there was only one technology IPO that raised at least $1 billion in 2023 (Arm), compared to a dozen in 2021. 2024 may prove more active for technology IPOs, as a number of companies that could command substantial valuations—such as Chinese digital fashion brand Shein and financial technology firm Stripe—may elect to test the markets.

One of the most important current areas of technological development—artificial intelligence—provided the backdrop for the notable governance developments at OpenAI. OpenAI has a unique corporate structure in which a nonprofit parent entity controls governance of the enterprise, with investors having capped profit quasi-equity interests in the business. This mission-centric structure, intended to focus the business on developing artificial intelligence technology to benefit humanity, led to the unexpected, unexplained and short-lived termination of founder Sam Altman's employment in November 2023. Microsoft, which had committed to contribute up to $13 billion to the capped profit entity but had limited governance rights, was reported to have learned of the action just before its public announcement. Upon open revolt by OpenAI's employees, nearly all of whom signed a letter indicating they intended to follow Sam Altman if he were to join Microsoft, as well as strong protests by many of the investors, the prior nonprofit board agreed to rehire Mr. Altman and all but one of its members resigned in favor of a revamped board led by former Salesforce co-CEO Brett Taylor, and including former U.S. Treasury Secretary Larry Summers. (Microsoft also received a board observer seat, and an independent review of the circumstances surrounding Mr. Altman's dismissal and rehiring will be conducted.) It remains to be seen whether OpenAI will retain this governance structure, but in any event, technology companies would be well-advised to focus on proper governance with appropriate protections to preclude behavior that may harm the mission and the reputation of the company.

We expect that emerging technology companies in the AI space will continue to value mission-driven commitments, but at the same time many of the lessons and best practices of corporate governance should be applied, regardless of profit motive.

Cross-Border M&A

Cross-border M&A, like M&A generally, declined in 2023 compared to 2022. Cross-border deals represented 33% ($950 billion) of global M&A, generally consistent with the 35% average of the prior 10 years. Acquisitions of U.S. companies by non-U.S. acquirers totaled $164.5 billion, constituting 6% of global M&A volume. Nonetheless, there were some significant cross-border transactions despite the challenging markets, including Smurfit Kappa and WestRock's agreement to create a $20 billion global leader in sustainable packaging. The final days of the year witnessed another noteworthy cross-border transaction, with U.S. Steel announcing its agreed sale to Japanese steelmaker Nippon Steel for over $14 billion. There were nine cross-border transactions exceeding $10 billion announced in 2023, higher than the seven such transactions in 2022 and approaching the 10 signed during the boom year of 2021.

Another cross-border development of 2023 was the decision by multiple large international companies to list in the United States. CRH, a provider of building materials solutions, delisted from Euronext Dublin and listed on the NYSE in September 2023, and Irish gaming power Flutter Entertainment, owner of FanDuel, has confirmed its intention to do the same in 2024. The combined Smurfit Kappa WestRock also will list on the NYSE, and will move from a premium to a standard listing on the LSE and delist from Euronext Dublin as part of the combination. British chip designer Arm chose to list on NASDAQ in September 2023 in the largest IPO of the year. Meanwhile, the Hong Kong IPO market had a difficult year, at one point going two months without a single IPO.

Antitrust

In 2023, the U.S. antitrust agencies continued to pursue an aggressive enforcement agenda, while advocating for procedural and substantive changes to the antitrust laws. In addition to focusing on mergers involving competing firms, the agencies investigated and challenged transactions implicating other theories of harm, including vertical and conglomerate theories, potential and nascent competition, and labor market theories. In line with a trend that started in 2022, the agencies continued to be skeptical of remedies to settle competition concerns, albeit with some exceptions. In the first divestiture remedy accepted under the current DOJ leadership, the Antitrust Division announced in May a mid-trial merger settlement in the Assa Abloy/Spectrum deal. FTC consents in 2023 involved substantial divestitures and, in most instances, onerous “prior approval” requirements for future acquisitions affecting the same or related markets. In a notable exception to the agency’s general opposition to remedies involving conduct restrictions, in September, the FTC settled its challenge of Amgen’s proposed acquisition of Horizon Therapeutics, based on a novel “bundling” theory, by entering into a consent order that prohibits Amgen from bundling any of its products with Horizon’s medications.

The agencies’ general skepticism of settlements led to an increased number of merger challenges, resulting in a mixed record in court in 2023, with some notable government losses. The FTC suffered a major setback in July, when a federal court in California rejected the agency’s attempt to block Microsoft’s acquisition of Activision Blizzard, finding that the FTC had failed to prove that Microsoft had the incentive to engage in the alleged vertical foreclosure conduct. Similarly, in February, a federal court in California denied the FTC’s request for a preliminary injunction blocking Meta’s acquisition of a virtual reality app developer, Within Unlimited, finding that, while potential competition is a viable theory of harm, the FTC had failed to show that Meta was a likely entrant into the market for virtual reality applications. The FTC did, however, end the year with two significant court victories. On December 15, the Court of Appeals for the Fifth Circuit issued an opinion in the long-running Illumina/Grail case, largely upholding the agency’s challenge to the deal, which started in 2021 when the FTC alleged in an administrative proceeding that Illumina had the incentive and ability to impair entry by, and deter innovation from, rival firms. Shortly after the Fifth Circuit ruling, Illumina announced its intention to divest Grail. Just two weeks later, the U.S. District Court for the Southern District of

New York issued a preliminary injunction preventing IQVIA from acquiring Propel Media pending an FTC administrative trial, finding that the agency had shown that there was a reasonable probability that the proposed transaction would substantially impair competition in the market for healthcare advertising.

In addition to an aggressive enforcement agenda, the DOJ and the FTC have also embarked on a wide-ranging effort to slow down M&A activity through the adoption of new merger guidelines and informal and formal rulemakings. In December, the agencies jointly issued new merger guidelines that underscore the Biden administration's commitment to aggressive enforcement of the antitrust laws. The guidelines significantly lower existing market concentration thresholds at which the agencies will presume a transaction violates the antitrust laws and introduce new share-based thresholds, including for transactions resulting in a combined share of greater than 30% where one party had a share of 10% of more.

The new guidelines also memorialize more expansive theories of harm and introduce new theories, including one based on "serial acquisitions" that targets private equity roll-up strategies and makes clear that the competitive effects of such roll-ups cannot escape scrutiny "even if no single acquisition on its own" is anticompetitive. In September 2023, prior to the adoption of the new guidelines, the FTC filed its first lawsuit based on a "serial acquirer" theory against private equity investor Welsh, Carson, Anderson & Stowe, alleging that, beginning in 2012, Welsh Carson directed a "roll-up scheme" to monopolize and reduce competition for anesthesia services in Texas through the acquisition of over a dozen anesthesia practices. The complaint seeks unspecified "structural relief" that could include unwinding prior consummated deals, which mostly were small enough not to require filings under the HSR Act.

Similarly, in a notice of proposed rulemaking published in June, the FTC unveiled sweeping changes to the reporting obligations under the HSR Act. The proposed changes, which are discussed in our prior memo, reflect a paradigm shift in the antitrust agencies' historical review and investigatory practices, placing the burden on filing parties to advocate affirmatively why a proposed transaction does not violate the U.S. antitrust laws. If adopted as final rules, those changes will materially increase filing burdens and impose significant cost and delay on reportable merger and acquisition activity, even in non-problematic transactions. The FTC must consider hundreds of comments submitted by interested parties prior to issuing a final rule, after which the new rules may still be subject to challenge in federal court.

In 2024, dealmakers will need to be prepared to continue to navigate an evolving regulatory environment and expect to face continued heightened antitrust scrutiny of mergers and acquisitions, anticipating and planning for searching inquiries and associated delays in U.S. antitrust reviews.

European Foreign Subsidies Regulation Regime

In another development that may affect execution risk in M&A deals involving foreign parties, the EU's Regulation on Foreign Subsidies Distorting the Internal Market went into effect in October 2023. The new regulation, which aims to address distortions caused by government subsidies to foreign companies, includes a mandatory notification and review regime for certain acquisitions of EU-based companies by foreign investors that have received subsidies or other contributions from non-EU governments in the three years prior to the deal. The review process will run in parallel to the traditional merger review, and the European Commission will have new investigatory powers and the ability to impose measures to mitigate the effects of foreign subsidies. The new regulation defines government contributions very broadly, including sales of goods or services to any government entity, thus increasing the risk that deals will trigger a notification obligation. We expect that this new screening tool will create new burdens and potential delays for M&A deals involving companies active in the EU.

"Reverse CFIUS"

The Committee on Foreign Investment in the United States ("CFIUS") is an interagency committee of the U.S. federal government that historically has reviewed foreign investments in the United States for potential national security concerns. On August 9, 2023, President Biden issued an Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern, which, for the first time, will give CFIUS authority to also review outbound foreign investments by U.S. businesses. This outbound review process is often referred to as "reverse CFIUS." The Department of the Treasury simultaneously released an Advanced Notice of Proposed Rulemaking with proposed details for the program. The reverse CFIUS program will not take effect until this rulemaking is complete, and it is not proposed that the program apply retroactively. The Executive Order attempts to thread the needle of "taking narrowly targeted actions to protect our national security while maintaining our longstanding commitment to open investment." Accordingly, the reverse CFIUS order exclusively focuses on three technologies: semiconductors and microelectronics; quantum information technologies; and artificial intelligence. At this point, the Biden administration has only identified China, including Hong Kong and Macau, as a country of concern (although the President may modify this list). U.S. investors and companies considering investments in China should carefully monitor the reverse CFIUS rule-making process.

DOJ Leniency

In October 2023, the DOJ provided companies with a potential avenue for more lenient treatment with respect to potential criminal misconduct discovered in the course of M&A negotiations and integration. Under the new Mergers & Acquisitions Safe Harbor Policy, companies that disclose misconduct within six months of closing, whether such conduct occurred pre- or post-acquisition, that fully cooperate, and that remediate such misconduct within one year, will receive the presumption of a declination to prosecute. The DOJ made clear that the new safe harbor policy only applies to criminal conduct discovered in a bona fide, arm's-length transaction and does not impact civil merger enforcement. The new policy places further importance on thorough due diligence and accelerated integration to ensure any misconduct is discovered and reported within the time periods set out by the policy. Given the October 2023 announcement and applicable reporting windows, it remains to be seen how the DOJ intends to implement this new policy in 2024. Companies that suspect potential criminal misconduct by the target during negotiation or after closing of an M&A transaction should consult their advisors to determine whether they may take advantage of this development.

Financial Institutions M&A

Financial institutions M&A was punctuated by the March banking crisis that began with the voluntary liquidation of Silvergate Bank announced on March 8 and reached its apex several days later with the failures of Silicon Valley Bank on March 10 and of Signature Bank on March 12. First Republic Bank failed shortly thereafter on May 1. These failures were three of the four largest in U.S. history and made 2023 the largest ever for bank failures. Around the same time in Europe, troubled Credit Suisse was sold to rival UBS, marking the first merger of two global systemically important financial institutions since the Great Financial Crisis. Taken together, these crises have prompted financial regulators around the world, particularly in the United States, to revisit the state of financial regulation. The Federal Reserve, in a much heralded report examining its supervision and regulation of Silicon Valley Bank, concluded that:

- The bank's board of directors and management failed to effectively manage risk;
- The Federal Reserve did not fully appreciate the extent of the bank's vulnerabilities as it grew in size and complexity;
- When the Federal Reserve did identify vulnerabilities, it did not adequately ensure that the bank addressed them quickly enough; and
- The Federal Reserve's more industry-friendly shift in regulation during the prior Administration impeded effective supervision by lowering standards, increasing complexity and promoting a less assertive supervisory approach.

These findings have and will continue to shape a significantly more aggressive regulatory and enforcement environment. At the same time, the Federal bank regulators have recognized the need for consolidation to further stabilize the banking sector. How this more accommodative stance will fare against the DOJ's more aggressive antitrust policy will play out over coming months.

With respect to open bank M&A, substantial unrealized losses in loan and investment portfolios across the industry largely impeded consolidation, which would have crystallized those losses. Banc of California's rescue of PacWest, supported by Warburg Pincus and Centerbridge, was the only U.S. bank deal announced with a value over $1 billion for the year. The prospect of interest rate cuts by the Federal Reserve later this year could prove to be a catalyst over time.

Insurance M&A followed a similar trend, with overall volumes declining from 2022 after an already steep decline from 2021. Brookfield Reinsurance's acquisition of American Equity ($4.1 billion) was the largest insurance M&A transaction by a substantial margin in a year in which only three insurance transactions exceeded $1 billion in value.

Fintech continued to demonstrate resilience in this challenging environment, with private equity firms playing a significant role. FIS sold a majority stake in Worldpay to GTCR that valued the business at approximately $18.5 billion, and Nasdaq acquired software firm Adenza from Thoma Bravo for approximately $10.5 billion.

Private Equity

Some of the 2023 decline in M&A activity can be explained by the continued slowdown in private equity dealmaking, which faced many of the same headwinds as the broader M&A market. Global private equity deal volume extended its decline from its pandemic heights, notching $1.3 trillion in 2023, compared with $1.7 trillion in 2022 and a record $2.2 trillion in 2021, as sponsors facing choppy financing markets increasingly focused on smaller deals and minority investments. Funds looking to do bigger transactions wrote proportionally larger equity checks; the average equity contribution for large corporate LBOs reached 52% in 2023, an all-time high, while average leverage levels declined to 5.9x, from 7.1x the prior year. Beyond interest rate and financing market challenges, valuation fundamentals and the "expectations gap" between sellers and buyers also deserve their due for the slowdown.

Sponsors fared little better on the sell side. Global private equity exits shrank in value from approximately $783 billion in 2022 to approximately $574 billion in 2023, down more than 25%. Private equity continued to show resilience in 2023, however, as sophisticated dealmakers deployed innovative approaches to fill financing gaps and get deals done, and as a number of sponsors continued their transformation from buyout shops to alternative asset managers offering a broad range of capital solutions both in the M&A context and beyond, including private credit.

Notable take-privates in the first half of 2023 included Apollo's $5.7 billion acquisition of Univar Solutions and Blackstone's $4.1 billion acquisition of Cvent. As public equity markets rallied in the second half of the year, other transaction types took center stage, including corporate carveouts, such as GTCR's acquisition of a majority stake in FIS's Worldpay Merchant Solutions business at an $18.5 billion valuation—one of the year's largest private equity transactions. Sponsors also pursued add-on acquisitions as part of a "buy-and-build" strategy to scale up existing portfolio companies, building a foundation for higher multiples upon an eventual exit. Significant add-ons included the $4.6 billion acquisition of Diversey Holdings by Solenis, a Platinum Equity portfolio company, and the $1.2 billion acquisition of Avantax by the Cetera Financial Group, a Genstar Capital portfolio company. Both carveouts and add-ons, with their added complexities, provided experienced sponsors opportunities to leverage their scale and operational expertise to differentiate themselves in an otherwise challenged deal landscape.

Private equity "club deals," which made a comeback during the pandemic, continued to feature prominently in 2023, as sponsors joined forces in a number of notable transactions, most significantly the $13 billion bid for eBay-backed Adevinta by a consortium of investors led by Permira and Blackstone. As in previous years, traditional activists participated in several high-profile club deals, as sponsors showed a continued willingness to partner both with each other and with other classes of investors. Examples included the $7.1 billion acquisition of Syneos Health by an Elliott-led consortium that included Patient Square Capital and Veritas Capital, and

Apollo's $5.2 billion acquisition of Arconic, which included a minority investment from Irenic Capital Management.

Private equity dealmaking gathered momentum in the second half of 2023, which was far busier than the first two quarters, perhaps reflecting an emerging consensus that interest rates were approaching their peak. As investors gain greater clarity on interest rate trajectories, the syndicated loan market continues its rebound from a tumultuous first quarter, and IPO activity shows green shoots, optimists see reasons to expect relief in the new year from some of the downward pressures seen in 2023.

Financing Markets

Continuing concerns about inflation, recession risk and increases to the federal funds rate muted deal and financing activity in 2023, particularly in the first half of the year. The second half of the year fared somewhat better, with acquirers accepting "higher for longer" as the new normal, and adjusting accordingly. But the general theme was one of market choppiness, reflected in new issuance levels in both investment grade and high-yield debt remaining more in line with the low year of 2022, and far behind the banner year of 2021.

In this context, "direct lenders" played a bigger role than ever, financing 86% of LBOs through the third quarter of 2023 (compared with 65% in 2021), and beginning to make inroads into strategic M&A as well. Historically, direct lenders catered to smaller, riskier companies that could be compelled to accept higher borrowing costs, while investment-grade credit and large-cap leveraged acquisitions were the exclusive purview of the traditional bank and bond financing markets. Today, direct lenders have amassed hundreds of billions of dollars that they seek to deploy in transactions with companies of all types and sizes, even investment-grade issuers. While the traditional financing markets ended the year in "risk on" mode, we expect direct lending to continue to play an increasingly major role not just in LBOs, but in M&A financing writ large.

Activism and M&A

Shareholder activism activity remained robust in 2023 with a 9% increase in global campaigns compared to 2022. In the United States, activist activity increased 14% year-over-year, with much of this increase driven by campaigns at smaller companies; campaigns at companies with at least $1 billion in market capitalization declined by 6% year-over-year. Notable campaigns of 2023 included the "swarm" of activists (Elliott, Inclusive Capital Partners, ValueAct, Third Point) that targeted Salesforce, Carl Icahn's campaign at Illumina and Trian's campaign at Disney. Amid ongoing macroeconomic uncertainty and a tight credit environment, activist campaigns with an M&A thesis increased slightly from 2022 levels and continued to make up a significant portion of overall campaign activity. M&A-themed campaigns in 2023 tended to focus on breakups, divestitures, and termination of previously announced transactions compared to recent years, as "sell the company" and "bumpitrage" activism proved more challenging with a less certain M&A environment.

While the usual players maintained their outsized role, 2023 saw a number of campaigns from newer activists. Indeed, a significant proportion of 2023 campaigns were led by new or occasional activists. Notable examples include Politan Capital's campaign at Masimo, Anson's campaigns at Twilio and Globestar, HG Vora's campaign at Penn Entertainment and Ryan Cohen's campaign at Nordstrom. As demonstrated time and again, no company is too large, too small, too new or too successful to be immune from activism. Activists are increasingly working together—or "swarming"—marquee mega-cap companies, including to push an M&A thesis as reflected by BlueBell Capital, Artisan and Inclusive Capital Partners' collective push for a breakup of Bayer.

The 2023 proxy season brought to life the SEC's new universal proxy rules, which took effect September 1, 2022. The rules require, among other things, the company and dissidents to list the names of all director candidates on their proxy cards, regardless of whether the candidates were nominated by the board or the dissident. During the 2023 proxy season, there were fewer campaigns that went to a vote as compared to the prior year, with settlements up slightly over the previous year. Although the universal proxy rules did not bring about a groundswell in the number of activist campaigns or otherwise materially change the success rate of activist campaigns, the threat of activism campaigns continues to be a relevant factor for boards contemplating acquisitions or on the receiving end of unsolicited M&A.

On the regulatory front, in October 2023, the SEC adopted long-awaited amendments to Regulation 13D-G. The new rules, effective in February 2024, modernize the beneficial ownership reporting requirements by shortening the 13D filing deadline from 10 calendar days to five business days. The SEC also established that amendments for material changes, previously required promptly after the date on which such change occurs, must be filed within two business days, clarified 13D disclosure requirements with respect to derivatives holdings and provided guidance regarding when an investor's use of certain cash-settled derivative securities may confer beneficial ownership. While the new rules could have gone further to fully alert investors in securities to potential changes in corporate control, they are an important step forward for market transparency and address some of the deficiencies in the prior rules, particularly in hostile M&A situations and scenarios where activists have M&A plans or proposals.

Delaware Developments

The Delaware courts had another busy year in 2023, issuing numerous decisions offering important lessons to transaction planners. In a pair of midyear, post-trial rulings, the Court of Chancery awarded damages to former stockholders it found were harmed where buyers exploited management conflicts to skew sales processes. In *In re Mindbody*, the court concluded that a CEO, aided and abetted by a private equity buyer, breached his fiduciary duties after becoming "smitten" with the PE firm by "effectively greas[ing] the wheels for" that firm to win the bid to buy his company. The court held both the CEO and the buyer liable for damages, finding that, but for the fiduciary misconduct, the buyer would have paid a dollar more per share. The court also found against the buyer in *In re Columbia Pipeline*, holding that it exploited management's inexperience and personal interests in obtaining change-of-control payments and awarding upwards of $400 million in damages. The Delaware Supreme Court, however, offered some good news for controlling stockholders, reaffirming that even the onerous "entire fairness" test does not require perfection in deal processes. Considering Tesla's 2016 acquisition of Solar City, the court concluded that even though the alleged controlling stockholder was in communication with the Tesla due diligence team and there was some evidence of at least attempted coercion of the Tesla board, the record supported the trial court's finding of fairness, specifically describing the majority-of-the-minority stockholder approval provision as a "strong indicator of fair dealing."

In another case involving that same controlling stockholder, *Crispo* v. *Musk*, the Delaware Court of Chancery addressed the efficacy of so-called "anti-*Con Ed* provisions," which were intended to ensure that a target can obtain damages for a buyer's breach of a merger agreement based on the agreed merger consideration. The court's opinion concluded that a provision purporting to define a target's damages to include lost premium—a not uncommon feature of merger agreements entered into since the Court of Appeals for the Second Circuit's 2005 *Con Ed* decision—cannot be enforced by the target because the target company itself does not have the entitlement to receive merger consideration, including the premium. We expect M&A practitioners to develop workarounds in response to *Crispo*, to the extent not addressed by further judicial or legislative developments in Delaware.

Maturity in the Representation and Warranty Insurance Market

The use of representation and warranty insurance ("RWI"), particularly in private company M&A transactions, continues to rise and RWI has become fairly ubiquitous in private M&A transactions; indeed, some major brokers have reported tenfold increases in the use of RWI in just the past few years. While in the early days of RWI some market participants were skeptical of RWI, insurers have continued to demonstrate that RWI policies will respond to claims. A number of significant RWI claims were filed in 2023, including a reported $175 million claim by JPMorgan in connection with its acquisition of financial aid start-up Frank and a claim reportedly approaching $1 billion in connection with a breach of a "condition of assets" rep in a telecommunications transaction. We expect buyers will have continued access to favorable RWI terms in 2024, although premium pricing likely will increase from the very low numbers seen in 2023 (with rates having dropped below 3%, and retentions (deductibles) below 1% of enterprise value). In addition, the increased (and substantial) claims activity will cause RWI insurers to continue to have heightened focus on the diligence performed by buyers during the RWI underwriting process.

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As we enter 2024, there is reason to believe that M&A activity will grow. With the Federal Reserve poised to begin reducing interest rates and recessionary fears subsiding as a soft landing appears within reach, many observers are predicting at least a modest resurgence in M&A. However, headwinds remain, including on the geopolitical front, as conflicts continue and many countries, including the United States, head into an election year. The impact of these various trends and economic, financial, regulatory and political developments on M&A in the coming year cannot be predicted with precision. However, in navigating uncertainty, principals and their advisors should carefully analyze the risks and benefits of potential transactions, anticipate takeover threats, proactively address changing shareholder dynamics and emerging regulatory, technological and other risks, remain flexible and creative in transaction structuring, and not be unreasonably discouraged from executing on M&A opportunities that are strategically and financially appealing.

Wachtell, Lipton, Rosen & Katz