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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.

Over the past two years, deal volume relative to the historic levels seen in the immediate post-pandemic period has been subdued, owing to, among other factors, concerns over inflation, higher interest rates, war in Europe and other geopolitical tensions, the possibility of a global recession, regulatory scrutiny in the United States and abroad, and dislocation in financing markets and stock market volatility, all of which have reduced business and consumer confidence. In the face of these headwinds, however, dealmaking has continued, as transacting parties have continued to pursue growth and synergies through strategic transactions.

Year in review

Overview of M&A activity

US M&A activity for the first half of 2024 was down noticeably from the previous few years. Despite the relative slowdown in M&A activity in recent years, there are indications that the pace of dealmaking is accelerating, propelled by factors including the Federal Reserve beginning its much anticipated reduction in interest rates, the increased likelihood of a 'soft landing' in the US economy, lower inflation in the United States and other markets, and the US presidential election in November 2024. According to data provided by Dealogic, the total value of global M&A in the third quarter of 2024 (US$902.1 billion) was significantly higher than that in the same period in both 2023 (US$743.6 billion) and 2022 (US$721.4 billion).

The quantum of deal volume was boosted by large global deals and mega-transactions, as the number of announcements in the third quarter of 2024 remained well below levels from two years earlier, with 8,556 deals signed in the third quarter of 2024 – comparable to the 8,521 deals signed in the third quarter of 2023 but well below the mark of 10,305 deals announced in the third quarter of 2022. A number of significant transactions have been announced across industries, including financials, energy, consumer and healthcare.

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. Most recently, a Delaware Court of Chancery decision regarding the board approval process for review of merger agreements threatened to upend market norms, before the Delaware legislature amended

the Delaware General Corporation Law (DGCL) to reinstate long-standing market practice. Other significant Delaware decisions in recent years include a decision regarding a shareholder rights plan adopted by a board of directors acting in response to the instability of the covid-19 pandemic, as well as a decision regarding 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]

Recent Delaware court decisions and legislative response

In February 2024, the Delaware Court of Chancery struck down corporate actions that it held violated the DGCL in two important decisions that ran counter to long-standing market practice:

1. *Activision Blizzard*:[3] in considering a former Activision stockholder's claims that Activision's approval process in its merger with Microsoft violated certain provisions of the DGCL, the Court held that certain market practices for board and stockholder approval of mergers were not in compliance with the DGCL. Among other things, the Court found that Section 251(b) of the DGCL requires the board to approve 'an essentially complete version of the merger agreement', and that the version of the merger agreement approved by Activision's board was not 'essentially complete' because it was missing, among other things, the surviving company's charter, the disclosure schedules and a 'key open issue' regarding pre-closing dividends.
2. *Moelis*:[4] in considering a challenge to certain pre-approval requirements and board composition provisions that the board of directors of Moelis granted to the company's founder in a stockholders' agreement, the Court struck down multiple provisions of the agreement as improperly contravening Section 141(a) of the DGCL and the inherent governance authority of the board of directors.

In response to these controversial decisions, the Delaware legislature passed amendments to the DGCL to conform to market practice, including, among other things, to permit boards to approve merger agreements in 'substantially final form' rather than final form and clarify that disclosure schedules are not deemed part of the merger agreement (and therefore need not be submitted to or approved by the board) unless the merger agreement provides otherwise, and authorise corporate boards to enter into stockholders' agreements with stockholders that grant certain governance rights. The amendments were signed into law in July 2024 and became effective in August 2024.

Shareholder rights plans

Overview

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.[5] 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) carry-forwards).[6]

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 activism activity, unsolicited takeover approaches and market volatility have 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.[7] 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[8] – 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'.[9] 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.[10]

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.'[11] 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.[12]

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'.[13] 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.[14] 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 2023 and 2024 – including The Container Store Group, which announced in October 2024 that it adopted a 364-day shareholder rights plan with a 20 per cent trigger in response to rapid and significant accumulation of the company's common stock by a single stockholder,[15] Southwest Airlines, which announced in July 2024 that it adopted a 364-day shareholder rights plan with a 12.5 per cent trigger in response to an announcement that activist Elliott Management had accumulated a significant economic interest in the company's common stock,[16] and Nano Dimension Ltd, an Israeli company that was 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 carve-outs for pandemics. 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.

One of the most closely watched M&A developments in the Delaware courts in recent years (and perhaps all time) was Elon Musk's attempt to walk away from his US$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 Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ) (together, the agencies), 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 2023, cross-border deals constituted 33 per cent (US$950 billion) of global M&A, broadly consistent with the average proportion over the previous 10 years (35 per cent). Through 2023 and thus far in 2024, 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 2023, CFIUS conducted a review or assessment of 342 covered transactions (based on a written notice or a declaration),[30] down from the 440 covered transactions reviewed or assessed in 2022. A total of 233 written notices of transactions were subject to CFIUS jurisdiction in 2023 (a noticeable increase over the 97 such notices subject to CFIUS jurisdiction in 2013), with approximately 55 per cent of notices proceeding to investigation in 2023.[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 pharmaceuticals and companies that own resources, or produce products, that are critical to new energy and other emerging technologies or defence applications 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 that, for the first time, will give CFIUS authority to also review outbound US investments in activities involving sensitive technologies critical to national security (including semiconductors and microelectronics, quantum information technologies and artificial intelligence), representing an important step in the 'reverse CFIUS' process.[33] The measures called for by the August 2023 Executive Order will be implemented by regulations issued by the Department of Treasury, which were published in draft form in June 2024 along with a solicitation of comment from the public.[34] The reverse CFIUS programme will not take effect until this rulemaking is complete, and it is not proposed that the programme apply retroactively.

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 controlled, 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 developing trends of interest to M&A participants and practitioners.

Industry trends

Technology M&A

Consistent with 2023 trends, the number of blockbuster technology deals in 2024 was relatively depressed. The largest tech deal (and only tech deal in excess of US$10 billion) announced year to date is Hewlett Packard Enterprise's US$14 billion acquisition of Juniper Networks. Compared with the same time period just two years ago 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 US$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, as well as intense regulatory, media and political scrutiny.

Global regulators are closely examining transactions involving tech companies, in some cases even ordering companies to undo previously consummated transactions, such as the UK Competition and Markets Authority's (CMA) order that Facebook (now Meta) divest Giphy to an approved purchaser and the FTC's late 2020 challenge to Facebook's acquisitions of WhatsApp in 2014 and Instagram in 2012. 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. However, the FTC has continued to seek to unwind the deal even though it has closed, pursuing an appeal of the district court's decision with the Ninth Circuit Court of Appeals.

As further evidence of the regulatory scepticism of tech M&A, the FTC launched a task force dedicated to monitoring competition in the tech markets in 2019,[35] 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.[36] 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. Nearly a year after the trial commenced, the district court issued its decision, in which it agreed with the DOJ and concluded that Google had acted monopolistically. It is expected that the Court will announce a decision on remedies by August 2025.

Artificial intelligence continues to be one of the most important current areas of technological development, as highlighted by, among many other things, the meteoric rise of Nvidia and OpenAI's noteworthy governance developments. Artificial intelligence has driven a number of significant M&A transactions, as companies look to either enhance existing artificial intelligence capabilities or acquire artificial intelligence capabilities to transform existing businesses. In October 2024, Microsoft increased its investment in OpenAI in a US$6.6 billion funding round that valued the startup behind ChatGPT at US$157 billion and, in February 2024, Microsoft announced a new partnership with French start-up Mistral AI. In September 2023, Cisco announced its US$28 billion acquisition of cybersecurity software firm Splunk, which has significant artificial intelligence capabilities; in January 2024, Hewlett Packard Enterprises announced its US$14 billion acquisition of Juniper Networks, a leader in artificial intelligence-native networks; and in March 2024, Amazon announced an additional US$2.75 billion investment in artificial intelligence startup Anthropic, increasing Amazon's total stake to US$4 billion. Developments in artificial intelligence may continue to drive technology M&A in the years to come.

Oil, gas and energy M&A

The oil, gas and energy sector saw significant consolidation in 2023, a trend that has continued into 2024. Activity has been driven by the flood of investment in clean energy generated by the Inflation Reduction Act of 2022 (the IRA), 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, and recognition that the green energy transition is taking longer than anticipated.

Two US$10 billion plus oil and gas deals have been announced to date in 2024: Diamondback Energy's US$26 billion acquisition of Endeavor Energy and ConocoPhillips' US$22.5 billion acquisition of Marathon Oil. Significant oil and gas deals announced during 2023 included Exxon Mobil's US$60 billion acquisition of Pioneer Natural Resources and US$4.5 billion acquisition of Denbury, Chevron's US$53 billion acquisition of Hess and US$6.3 billion acquisition of PDC Energy, Energy Transfer's US$2.7 billion acquisition of Crestwood Equity Partners, and ONEOK's US$13.6 billion acquisition of Magellan Midstream Partners.

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 ushered in a new approach to merger enforcement, policy priorities and practices. In addition to an aggressive enforcement agenda, the DOJ and the FTC 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, as well as substantial changes to the HSR notification form, which in the aggregate have led to delays and greater uncertainty for parties engaging in M&A in the United States. This in turn has affected dealmaking terms, including, for example, causing greater reluctance among buyers to agree to 'hell or high water' regulatory efforts commitments and resulting in longer outside date periods by which transactions must be completed as well as the inclusion of meaningful reverse break fees.

Procedural changes

The FTC, currently chaired by Lina Khan, implemented two important procedural changes early in Khan's tenure that created delays and increased uncertainty for parties engaging in M&A transactions.

The first procedural change, announced on 4 February 2021 (and prior to Khan's appointment as chair of the FTC), was 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.[37] Three-and-a-half years later, the FTC in October 2024 finally announced that it will lift the suspension on early termination of HSR waiting periods, effective once the final changes to the rules regarding HSR reporting obligations (discussed below) go into effect, which is expected to occur in mid-January 2025. Notably, Khan's statement accompanying the announcement 'question[s] the wisdom of using agency resources' on discretionary early termination requests, and urges Congress to revisit and extend waiting period timelines.[38]

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] 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.[41]

Reporting obligations under the HSR Act

In October 2024, the FTC finalised changes to the HSR premerger notification form and associated instructions that 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. In the absence of judicial intervention, the final rule will become effective 90 days after publication in the Federal Register (i.e., approximately mid-January 2025).

The HSR Act requires that parties to merger and acquisition transactions meeting certain size thresholds (US$119.5 million for 2024) 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 almost 50 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 new rulemaking, although not as extensive and burdensome as the initial proposal, requires parties to provide significantly more information than is currently required, including additional deal-related documents created by or for 'supervisory deal team leads' in addition to officers and directors, regular reports prepared in the ordinary

course of business for the board of directors or the CEO that discuss market shares, competition, competitors or markets, disclosure of investors in the buyer, including those with management rights, 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 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. The enhanced filing obligations will place the burden on filing parties to develop detailed explanations and analyses and gather significant amounts of factual material, requiring considerably more time and resources of transacting parties. As a result, transaction parties and their advisers will need to redevelop and implement HSR notification readiness and general compliance programmes well in advance of any contemplated transaction.

2023 Merger Guidelines

In December 2023, the FTC and DOJ jointly issued new merger guidelines that underscore the Biden administration's intention to aggressively enforce the antitrust laws.[42] The agencies' guidelines (the 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. The new Guidelines demonstrate an increased focus on vertical and conglomerate transactions, competition for labour, potential competition, transactions involving private equity and technology companies, and market trends toward concentration.

Significant changes reflected in the Guidelines include:

1. Structural presumptions: the Guidelines significantly lowered existing market concentration thresholds at which the agencies will presume a transaction violates the antitrust laws and introduce a new share-based threshold: transactions resulting in a combined share of greater than 30 per cent or a Herfindahl-Hirschman Index (HHI) (a traditional measure of market concentration) of over 1,800 points, in each case, where there is a change in HHI of 100 points or more, will be presumed unlawful. These presumptions can be rebutted or disproved, but the more the concentration or share metrics exceed these thresholds, the stronger the evidence needed to rebut or disprove them.
2. Market observability: the Guidelines note that analytical or surveillance tools used to track or predict competitor prices or actions, such as pricing algorithms, may increase market observability and, in turn, make a market more susceptible to coordination.
3. Ecosystem competition: the Guidelines acknowledge the concept of 'ecosystem competition,' whereby a dominant firm offering a variety of products or services may be partially constrained by a firm offering niche or partially overlapping products or customer bases. This is particularly true during what the agencies describe as technological transitions.

Reinstatement of prior approval policy

In addition to the developments described above, 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 also need to consider the implications of mandatory notification and approval requirements for future transactions in the relevant market.[43]

Focus on interlocking directorates

In 2022, the DOJ adopted an initiative to enforce the ban against 'interlocking directorates', including investigating the placement of executives on boards of companies by private equity firms.[44] The agency expressed concerns that board seats on rival companies in the same sector could influence those companies to act in ways that reduce vigorous competition. This focus has manifested in the merger context as well – as one example, the FTC conditioned its clearance of Exxon's acquisition of Pioneer on Exxon's agreement to, among other things, bar Pioneer's CEO from its board because he had allegedly made previous efforts to coordinate oil production levels with other oil producers and OPEC, and bar for five years from the board other Pioneer officials, except those specifically named by the FTC.[45]

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.

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 and 2024. 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.[46]

These rules were finalised in January 2024 and became effective on 1 July 2024. The final rules, 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.[47] The evolution of the final rules and increased SEC scrutiny are among the factors that have contributed to the whiplash in SPAC market conditions over the past three years.

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, 36 per cent of all activist campaigns in the first half of 2024 had an M&A component (including pushing for a break-up or divestiture (28 per cent of campaigns with an M&A component), agitating for a sale (42 per cent) and scuttling or sweetening a deal (30 per cent)), down from 46 per cent over the same time period one year previously. The fall in M&A activism campaign activity can be attributed in part to lower levels of M&A campaigns in the United States, with only 42 per cent of M&A campaigns having originated in the United States, compared with the four-year average of 56 per cent. High-profile activist campaigns with an M&A component commenced in 2024 include Jana's campaign for software provider Rapid7 to pursue a sale and Barington Capital's campaign for Mattel to explore strategic alternatives for Fisher-Price and American Girl.

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 has grown, 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 has only become more important.

Financing of m&a: main sources and developments

Following an uneven period of deal activity in 2023 and the early months of 2024, the US financing markets – across both syndicated and leveraged loans, and both investment grade and high-yield bonds – were, as a general matter, the most bullish they have been in two years (or more), with spreads tight, and repricing and refinancing activity increasing.

Sustained higher interest rates prior to the rate cuts announced by the Federal Reserve in September 2024 pressured already challenged businesses that incurred significant debt in the days of 'lower for longer'. Some challenged companies unable to access regular-way debt at a workable price – or at all – have turned to 'liability management', a growing practice that involves complex structuring of new financing options within the limitations imposed by a company's existing capital structure. And those companies least equipped to navigate the prevailing environment have ended up in Chapter 11, as sustained higher rates have driven a notable uptick in corporate bankruptcy activity, which increased over 70 per cent year on year from 2022 to 2023.

Meanwhile, the rapid and consistent expansion in the size and role of direct lending in financing markets continued in 2023, with 86 per cent of loans for leveraged buyouts (LBOs) made by direct lenders, compared with 65 per cent in 2021. The trend continued through the first quarter of 2024, with private credit financing 85 per cent of LBOs, and only 15 per cent of sponsors tapping the syndicated market. Banks have taken note of private credit's ascendance – and its returns, which, on average, exceeded those offered by equity buyout funds since the beginning of 2022 – and have begun expanding into the space. Some announced partnerships with existing alternative asset managers, including Citi's partnership with Apollo for a US$25 billion private credit and direct lending programme and Wells Fargo's strategic relationship with Centerbridge Partners.

At the same time, aggressive antitrust enforcement, as described in this chapter, has led to less predictable (and much longer) timelines between signing and closing of acquisitions, which has squeezed availability for commitments of the requisite duration and made those that are available more expensive.

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, listing rules submitted by Nasdaq and approved by the SEC in August 2021 (which were subsequently invalidated by the Fifth Circuit Court of Appeals in December 2024) 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.[48] The major proxy advisory firms, as well as large institutional investors, also have policies and guidelines designed to advance board diversity.[49] Legislation adopted by the state of California went even further than disclosure-based policies, affirmatively mandating representation of under-represented populations on the boards of directors of public companies that are headquartered in California.[50] 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. This uncertainty regarding the future of board diversity requirements has occurred at a time when ESG, and the extent to which it should be considered by asset managers, through regulation and law, and in boardrooms, is under attack by a polarised and politised anti-ESG movement.

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 IRA, enacted in 2022, included features that further 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.

Various additional proposals that have been considered by legislators over the years could, if enacted, 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. In particular, 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 II'. 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.

Overview

Under the HSR Act, subject to certain exceptions, parties engaging in transactions that meet specified thresholds[51] 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.

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. The agencies' recent merger investigations and challenges demonstrate a willingness to explore and test in federal court more expansive theories of harm. Regardless of the outcome of litigation, the threat of regulatory scrutiny (and the likelihood that any enforcement will be aggressive)[52] itself can serve as a deterrent and, in certain cases, enough for parties to abandon a transaction.[53]

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 that choose to test non-traditional 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.

Kroger/Albertsons

On 26 February 2024, the FTC voted three-to-zero to challenge Kroger Company's (Kroger) acquisition of Albertsons Companies, Inc (Albertsons), the largest proposed supermarket merger in US history,[54] in a preliminary injunction action that was joined by nine state attorneys general. The FTC indicated that the transaction would eliminate competition and lead to higher grocery prices as well as lower quality products and services. The challenge marks the most aggressive attack of a merger based on labour concerns – in a press

release, Henry Liu, Director of the FTC's Bureau of Competition, stated that '[e]ssential grocery store workers would also suffer under this deal, facing the threat of their wages dwindling, benefits diminishing, and their working conditions deteriorating'.[55]

The district court trial on the preliminary injunction motion concluded in September 2024, and the challenge remains pending at the time of writing.

Spirit/JetBlue

On 7 March 2023, the DOJ and a collection of state attorneys general sued to stop the then-pending acquisition of Spirit Airlines, Inc (Spirit) by JetBlue Airways Corporation (JetBlue), pursuant to a merger agreement signed by the parties nearly a year earlier following a bidding war between JetBlue and Frontier. The DOJ alleged that if the Spirit/JetBlue merger were allowed to proceed, prices would increase on routes where the two airlines competed, as JetBlue sought to acquire and eliminate its main ultra-low-cost competitor, which would deprive travellers of choice.[56]

On 16 January 2024, in a notable victory for the DOJ, the district court enjoined the transaction, finding that the deal would harm a narrow category of fliers, specifically those relying on Spirit for ultra-low fares. However, the district court limited its injunction to the transaction as agreed by the parties in July 2022, and declined to opine on any future renegotiated transaction between the two companies as the DOJ had requested. Following the district court's decision, the parties announced they had mutually agreed to terminate their merger agreement, with JetBlue paying Spirit a US$69 million termination fee.

Black Knight/Intercontinental Exchange

On 9 March 2023, the FTC, in a four-to-zero vote,[57] 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 previously 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. A few days before the trial was scheduled to begin, the companies and the FTC filed a joint request 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)'.[58] 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 into favouring Horizon's Tepezza and Krystexxa products, used to treat TED and CRG, respectively.

On 1 September 2023, the FTC announced that it had reached an agreement with Amgen that resolved the agency'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 anaesthesiology practices in Texas, driving up the price of anaesthesia 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 anaesthesia practice 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 anaesthesia 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 alleged that USAP and Welsh Carson entered into a market allocation with another large anaesthesia services provider. The FTC sought the issuance of a permanent injunction for engaging in similar and related conduct in the future and other equitable relief, including structural relief, to redress and prevent recurrence of this conduct.

On 13 May 2024, the district court dismissed the FTC's challenge, marking a significant victory for the private equity sector—and an important loss for the FTC's 'serial acquirer' theory.

Meta/Within

In late 2022, the FTC voted three-to-two to block Meta's acquisition of subscription virtual reality fitness app Within.[59] 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.

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.[60] 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.[61] 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, which found that there was substantial evidence to support the claim for a relevant market of products not yet in existence, but also concluded that the FTC should have evaluated whether Illumina's proposed remedy sufficiently mitigated the alleged harm such that the transaction was no longer likely to substantially lessen competition.

Following the Fifth Circuit's decision, Illumina announced that it had decided to divest Grail, and completed the divestiture in June 2024.

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.[62] The Executive Order requires numerous federal agencies to undertake over 70 initiatives and specifically commits to addressing 'the rise of the dominant Internet platforms'.[63]

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.[64] 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'.[65] 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.[66]

Although there is support across both political parties for reforming the antitrust regime, it is unlikely at this time that any of the existing proposals will ultimately be enacted. The outcome of the 2024 elections could further affect legislative and regulatory developments. However, regardless of the outcome of the elections, certain of the policy changes embraced by the FTC and DOJ could have a long-lasting effect on merger and conduct antitrust enforcement due, in part, to President Biden's 'whole-of-government' approach to competition policy that has facilitated the review of proposed transactions and business conduct by a number of other agencies and departments, including the Department of Labor (DOL),[67] the Department of Defense and the Department of Transportation (DOT).[68]

Outlook and conclusions

Although M&A activity has been depressed in recent years, there are indications that activity is beginning to pick up in the final months of 2024 and optimism that at least a modest resurgence will continue into 2025, supported by lower interest rates and the easing of recessionary concerns. However, headwinds remain, including volatile share prices, antitrust uncertainty and geopolitical conflict in a number of regions across the globe.

While dealmakers face challenges, transactions continue to be agreed, and completed, in the current environment. Dealmakers should continue to anticipate takeover threats, carefully analyse the benefits and risks of potential M&A transactions, taking into account the financial and strategic rationales for the deal, proactively address changing shareholder dynamics and emerging regulatory, technological and other risks, 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 Ilene Knable Gotts, Franco Castelli, Ryan A McLeod, John Sobolewski, Tijana J Dvornic and Erica E Aho. ^ Back to section

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

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4 *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, C.A. No. 2023-0309-JTL, 2024 WL 747180 (Del. Ch. 23 February 2024). ^ Back to section

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

6 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

7 *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

8 ibid. at *9. ^ Back to section

9 ibid. ^ Back to section

10 ibid. at *2. ^ Back to section

11 ibid. at *37. ^ Back to section

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

13 ibid. at *35. ^ Back to section

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

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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 ibid. 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. 30 April 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 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

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^ Back to section

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43 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), www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive. ^ Back to section

44 See Press Release, 'Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates' (19 October 2022), www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially. ^ Back to section

45 See Press Release, 'FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal' (2 May 2024), www.ftc.gov/news-events/news/press-releases/2024/05/ftc-order-bans-former-pioneer-ceo-exxon-board-seat-exxon-pioneer-deal. ^ Back to section

46 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), 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), 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

47 See generally SEC Release Nos. 33-11265 and 34-99418 (24 January 2024), www.sec.gov/files/rules/final/2024/33-11265.pdf. ^ Back to section

48 See SEC Release No. 34-92590 (6 August 2021), www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf; *Alliance for Fair Board Recruitment v. SEC*, 5th Cir. en banc, No. 21-60626 (11 December 2024). ^ Back to section

49 See, e.g., 'Institutional Shareholder Services, United States Proxy Voting Guidelines and Benchmark Policy Recommendations' (January 2024), www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf; Glass Lewis Guidelines: 2024 Policy Guidelines, www.glasslewis.com/wp-content/uploads/2023/11/2024-US-Benchmark-Policy-Guidelines-Glass-Lewis.pdf. ^ Back to section

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

51 The minimum threshold, which is adjusted annually for inflation, is US$119.5 million for 2024. See Federal Trade Commission, 'New HSR thresholds and filing fees for 2024' (5 February 2024), www.ftc.gov/enforcement/competition-matters/2024/02/new-hsr-thresholds-filing-fees-2024. ^ Back to section

52 See Remarks of Jonathan Kanter, 'Assistant Attorney General Jonathan Kanter Delivers Keynote Speech at Georgetown Antitrust Law Symposium' (13 September 2022), 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

53 See, for example, Press Release, 'Statement Regarding the Termination of Qualcomm's Proposed Acquisition of Autotalks' (25 March 2024), www.ftc.gov/news-events/news/press-releases/2024/03/statement-regarding-termination-qualcomms-proposed-acquisition-autotalks; Press Release, 'Statement Regarding the Termination of Amazon's Proposed Acquisition of iRobot' (31 January 2024), www.ftc.gov/news-events/news/press-releases/2024/01/statement-regarding-termination-amazons-proposed-acquisition-irobot; Press Release, 'Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation' (25 August 2022), www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and maersk#:~: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), www.justice.gov/opa/pr/shipping-equipment-giants-cargotec-and-konecranes-abandon-merger-after-justice-department. ^ Back to section

54 See Press Release, 'FTC Challenges Kroger's Acquisition of Albertsons' (26 February 2024), www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons. ^ Back to section

55 ibid. ^ Back to section

56 Press Release, 'Justice Department Sues to Block JetBlue's Proposed Acquisition of Spirit' (7 March 2023), www.justice.gov/opa/pr/justice-department-sues-block-jetblue-s-proposed-acquisition-spirit. ^ Back to section

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

58 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), www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-d
^ Back to section

59 Press Release, 'FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within' (27 July 2022), 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

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

61 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 EU 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

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

63 ibid. ^ Back to section

64 Section 225 – Competition and Antitrust Law Enforcement Reform Act of 2021 (introduced 4 February 2021), www.congress.gov/bill/117th-congress/senate-bill/225/text. ^ Back to section

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

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

67 On 28 August 2024, the DOJ, DOL, FTC, and National Labor Relations Board signed a Memorandum of Understanding (MOU) to further communications and coordination, particularly during the review of mergers that may threaten competition in labour markets. See Memorandum of Understanding Between the U.S. Dep't of Labor and the Fed. Trade Comm'n (30 August 2023), www.ftc.gov/system/files/ftc_gov/pdf/23-mou-146_oasp_and_ftc_mou_final_signed.pdf, which seeks to strengthen their partnership through greater cooperation and coordination in information sharing, investigations and enforcement activity, training, education, research, and outreach in protecting and promoting competition in labour markets and promoting the welfare of American workers. For an undisclosed reason, a month later, on 29 September 2024, the FTC withdrew from this MOU. ^ Back to section

68 The 'whole-of government' approach was taken in the Alaska Airlines/Hawaiian Airlines combination. Although the DOJ cleared the transaction after an extensive investigation without formally imposing any conditions, a few weeks later, the DOT cleared the same deal only after Alaska agreed, among other things, to maintain certain routes and preserve the value of loyalty points. See Press Release, 'USDOT Requires Alaska and Hawaiian Airlines to Preserve Rewards Value, Critical Flight Service as Merger Moves Forward' (17 September 2024), www.transportation.gov/briefing-room/usdot-requires-alaska-and-hawaiian-airlines-preserve-rewards-value-critical-flight. ^ Back to section

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