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TICK, TICK . . . BOOM!: M&A IN 2021 AND WHAT TO EXPECT IN 2022

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In the Heights: Introduction

Despite a significant decrease in M&A activity in 2020 due to the onset of the pandemic, the second half of 2020 showed signs of recovery in deal activity. That momentum carried into 2021 and sustained what became a historic year for deal making. With the equity markets posting all-time highs, interest rates at record lows, and economic growth recovering from the pandemic-induced downturn, the stars aligned for robust M&A activity this past year.

According to FactSet's *Flashwire US Monthly*, for the 12-month period ended October 31, 2021, the total number of deals in the United States was up over 40% year-over-year (20,283 compared to 14,464 at the same time in 2020). For the first time ever, aggregate deal volume exceeded $5 trillion in 2021.

After largely sitting on the sidelines in 2020, private equity acquirers had record amounts of dry powder to put to work and in 2021 they did just that. In addition, the hundreds of special purpose acquisition companies ("SPACs") that went public in 2020 and 2021 were searching for acquisition targets. Plentiful financing on excellent terms with low interest rates provided acquirers with capital necessary to supplement robust balance sheets, while public strategic buyers were able to use their own stock, with many trading at or near all-time highs, as currency in their deals.

Despite the blazing pace of deal activity, the market did show signs of moderating a bit as the year-end approached. In addition, there were relatively few megadeals—above $25 billion—for a year in which so many deals were happening in so many sectors.

With so many companies trading at record-high share prices in 2021, CEOs and

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their boards had the confidence, and the firepower, that is the "jet fuel" of deal making. This, coupled with pressure from activists, led to record activity levels of transformative deals.

Night of the Kings: SPACs

During the first half of 2021, it was nearly impossible to avoid hearing about the latest craze in mergers and acquisitions. Whether it was Shaquille O'Neal, Colin Kaepernick, or the former president of the United States, everyone seemed to have involvement in the SPAC business. Special Purpose Acquisition Companies, or "SPACs," are "blank check" companies that raise proceeds from public investors by way of an IPO for the purpose of seeking a business combination. The proceeds raised through the IPO are typically held in trust until the ultimate merger or business combination is completed, and the public investors hold redemption rights with respect to those proceeds. The appeal of SPACs is clear—the SPAC completes the IPO process initially as a blank check company without a reportable operating company. The SPAC then merges with a private target company, providing an unconventional means to take the target company public with additional capital and liquidity.

In 2020, SPACs took the market by storm, raising over $83 billion of gross proceeds through IPOs. According to FactSet, SPACs accounted for half of all IPOs in 2020. But calls to deem 2020 "the year of the SPAC" were clearly premature. In the first quarter of 2021 *alone*, 312 SPACs raised $96.4 billion through IPOs.

The music may soon be stopping—or at least slowing down—with respect to the SPAC frenzy, however. As with any phenomenon that generates large amounts of excitement and attention, the proliferation of SPAC IPOs and subsequent business combinations has attracted the attention of regulators and legislators alike. In April, the staff of the SEC issued guidance regarding the ways in which SPACs account for warrants—a common feature of SPAC structures. The SEC has continued to express concern about disclosure to investors and the divergent interests between the SPAC's directors, officers, and sponsor on the one hand, and the public investors on the other hand. In September, the SEC issued further guidance on certain SPAC accounting treatments, which could even require restatement of a SPAC's financial statements. In addition, the typical time period for the SEC to review and

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comment upon SPAC merger proxy statements has significantly lengthened. With respect to Congress, the House has drafted legislation targeting the potentially lucrative arrangement between SPACs and their sponsors. Senator Elizabeth Warren of Massachusetts explicitly called upon the SEC to investigate the so-called "Trump SPAC" for misleading shareholders and disclosure omissions, and the Trump SPAC disclosed such an investigation by the SEC and FINRA in December.

With these headwinds, it is no wonder that the number of SPAC IPOs have fallen dramatically since their peak in the first quarter. As of September 30, only 106 SPACs have gone public, raising approximately $20 billion, since the frenzy of IPOs in the first quarter of 2021.

Regulatory and legislative concerns aren't the only headwinds facing the SPAC market. While the prospect of becoming a public company in a shortened time frame is appealing, target companies often struggle with adjusting to being a publicly-reporting company and having the necessary procedures and personnel in place. SPACs also tend to target early-stage companies that may struggle with proof of concept issues that a mature public company would be well beyond. For instance, the former CEO of Nikola Corp. was indicted in July for defrauding investors based on statements and materials that were allegedly designed to mislead investors about the development of Nikola's products.

A final issue with the SPAC market relates to the actual process of combining with a target company. In a typical SPAC transaction, there is a private placement in public equity ("PIPE") component, in which certain institutional investors and investment funds agree to purchase shares of the SPAC at the same time the business combination is consummated. The purpose of the PIPE is twofold—it provides a market-test of the value of the target company, and it guarantees the target company a specified amount of capital in case a large number of shareholders elect to redeem their shares. In recent months, however, the market for PIPE investors has dried up significantly, requiring creative approaches by which the SPAC can guarantee capital for the target company at closing.

Looking ahead to 2022, we expect to see continued regulatory and legislative scrutiny. 2022 could, however, prove to be a banner year for SPAC business combinations, now that so many have gone public. Traditionally SPACs have a two-year time frame by which they must complete a business combination or return proceeds to their shareholders. As of September 30, 2021, there were 458 SPACs looking for target companies and 318 of those SPACs had less than 18 months to complete the business combination. As these SPACs move toward a business combination with a private target, they'll be looking to the PIPE market to unfreeze or else come up with creative solutions for guaranteeing capital to the target, particularly in light of the increased level of redemptions that SPACs have realized over the past few months.

We Broke Up: Companies Focus on Core Businesses

Carve-out activity in the first several months of 2020 started strong and, if not for the COVID-19 pandemic chilling M&A activity across the board, likely would have continued unabated. Instead, many deals that were shelved during the first half of 2020 came back to life during the more favorable deal environment of 2021. Buoyed by strong economic conditions and pressured by activist investors emphasizing an increased focus on core businesses, public companies, and in particular certain well-known international conglomerates, announced large transformational divestitures

and/or spin-offs in 2021. Activists have seemed to favor these types of transactions as a means of focusing on simplicity and streamlined business models, pushing the companies in which they take positions to prune their portfolios in an effort to maximize and unlock shareholder value. This activist pressure was seemingly more pronounced in 2021 than in years past, given that numerous activists were able to accumulate toe-hold positions in public companies at depressed market prices during 2020, despite somewhat of a hiatus of activist campaigns in the first half of 2020.

According to Deloitte's Divestitures M&A Update for Q3 2021, U.S. divestitures for the third quarter were up 6.6% compared to the same period last year and up 8.4% compared to the second quarter of 2021. Notable divestiture transactions of the past year included October's announcement that Chubb had agreed to acquire Cigna's life, accident, and supplement benefits business in seven different countries for $5.75 billion and more recently in December, Gray Television closing its acquisition of Meredith's local media group, including 17 television stations in 12 local markets for $2.8 billion (after which Meredith will be acquired in full by Barry Diller's IAC for $2.7 billion).

Outside of typical divestiture activity, 2021 also saw the announcement of significant spin-offs and breakups of multinational corporations, in what *Forbes* termed "Death to Conglomerates." In November alone, General Electric, Toshiba, and Johnson & Johnson announced plans to break up their sprawling empires into separate operations. While each signals a potential change of the tides, GE's announcement in particular may be a signal of things to come. GE, like many other of the world's largest corporations historically, pursued an aggressive strategy of growth through acquisitions. Under the leadership of legendary CEO Jack Welch, GE expanded substantially and diversified its portfolio across numerous verticals. However, precipitated by the near-collapse of GE Capital during the financial crisis, GE has spent the better part of the last decade divesting assets in an effort to pay down its debt load. November's announcement appears to be the culmination of those efforts and may provide a helpful blueprint for similarly diversified companies that are seeking to streamline in the future.

Chaos Walking: Unprecedented Legislation and Rulemaking

This fall, the House Rules committee unveiled the Build Back Better Act (the "BBBA"). Along with allocating significant funds to infrastructure and to fight climate change, the BBBA also includes sweeping proposed tax reform that is likely to have a significant impact on M&A activity. Among the proposed changes are a surcharge on income in excess of certain specified thresholds, an expansion of net income tax and "surcharges" on individuals, trusts, and estates with modified adjusted gross income above certain amounts.

Not surprisingly, the year-end saw a flurry of activity as selling companies and selling shareholders alike sought to close transactions during the calendar year in order to take advantage of the current tax regime prior to the likely implementation of tax reform in the new year.

While anticipated tax reform created a strong incentive to get deals done before the year's end, other legislative and regulatory factors created strong headwinds for deal activity. 2021 marked a significant change in approach and priority at the Federal Trade Commission ("FTC"). Led by new chair Lina Kahn, the FTC has taken a more aggressive stance to reviewing and challenging deals. According to a Kahn-authored memo issued to FTC staff in September, the FTC will begin reviewing

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deals holistically, rather than through its conventional means of market-based antitrust concerns.

The regulatory landscape has become even more uncertain since the FTC's pronouncement in August that it would begin issuing "Pre-Consummation Warning Letters" to transaction parties for deals that it could not fully investigate within the 30-day HSR waiting period. Companies that choose to consummate a transaction after receipt of such a letter do so "at their own risk" as the FTC "may subsequently determine that the deal was unlawful." And, in the second half of the year, warning letters were issued in connection with numerous transactions, across several industries from oil and gas to healthcare. In practice however, M&A parties have largely proceeded to close their respective transactions despite these warnings.

Increased legislation and rulemaking in 2021 was not limited to the United States. We also saw a substantial uptick in the activity of foreign direct investment and competition regimes abroad. In the United Kingdom, the Competition and Markets Authority took interest in, and issue with, a number of notable transactions. In November the CMA ordered Facebook (n/k/a Meta) to unwind its $400 million 2020 acquisition of GIF database and search engine GIPHY, despite the fact that GIPHY does not generate any revenue in the UK. The decision is a reminder for transacting parties and practitioners alike that the CMA's jurisdiction is far-reaching. As of the date of this article, the CMA continues to probe Nvidia's proposed $40 billion acquisition of UK-based Arm over antitrust concerns. That transaction has also come under fire by the FTC, which sued to block the deal in December. [See elsewhere in this issue.]

International competition authorities also appear to be cooperating closely in connection with merger reviews, enabling regulators to rely on the legal toolboxes of their international counterparts for assistance. Cooperation appears to be heavily focused on certain key sectors, including pharma and tech. This collaboration, however, does not guarantee that authorities will necessarily find common ground in their approaches to challenging transactions as evidenced by differing views on a number of deals. These include Aon and Willis Towers Watson's proposed merger and Visa and Plaid's proposed tie-up, both of which were terminated in 2021 under regulatory pressure from European authorities (the CMA and EC, respectively) despite going unchallenged by U.S. regulators.

We are also witnessing an increase in activity from various foreign direct investment ("FDI") regimes. FDI regimes tend to be less transparent than their competition regime counterparts, making it more difficult to determine in each instance whether FDI clearance will be required in a given transaction. FDI regimes also differ markedly from jurisdiction to jurisdiction, which can add significantly complexity in the context of cross-border deals.

The regulatory landscape for M&A activity is a complicated one that will require significant planning and resources for transacting parties to navigate properly in 2022 and beyond. Regulatory scrutiny is one of a number of factors that is causing deals to take longer to complete than ever before. It is essential that M&A parties work with financial, legal, and other advisors with proper regulatory and, where applicable, cross-border, experience to help them navigate these choppy waters and negotiate appropriate provisions in acquisition agreements. All of this also emphasizes the critical nature that lobbying will play for some companies going forward, and the importance of effective monitoring of the ever-changing regulatory landscape, both in D.C. and abroad.

The Little Things: Softening of the RWI Market

Representation and warranty insurance ("RWI") has become ubiquitous in private transactions. Like other operators in the M&A space, RWI insurers had to adjust to the heavy deal flow of 2021 and the pandemic-necessitated changes coming out of 2020. Given the significant number of market participants, we are seeing that insurers have become more selective in the policies they underwrite and those policies have become increasingly stringent. Quotes offered have become more detailed and technical, oftentimes providing specific feedback on the representations and warranties in the underlying agreement for which they are offering coverage.

In the wake of 2020, a year in which insurers saw an unprecedented number of claims made as a result of the onset of the COVID-19 pandemic, current policies include significant exclusions and often qualify or otherwise read-out certain representations in their entirety. Notwithstanding the scope of coverage lessening, pricing for RWI has risen due to an increase market demand for insurance, with premiums for RWI policies on the rise.

Given the increase in costs for coverage that is decreasing in scope, it should come as no surprise that buyers and sellers are starting to bypass the use of RWI in favor of traditional indemnity regimes in their private transaction agreements. We expect this trend to continue into the new year, at least until the RWI market reaches a healthy equilibrium once again.

No Sudden Move: State of Play at the Delaware Court of Chancery

At the nation's preeminent court of corporate jurisprudence, 2021 represented a year of important changes. In May, the Honorable Kathaleen St. J. McCormick was sworn in as Chancellor for the Delaware Court of Chancery. McCormick is the first woman to lead the Chancery Court, taking over for Chancellor Andrew Bouchard, who stepped down prior to the conclusion of his 12-year term. Chancellor McCormick's former position of Vice Chancellor was filled by Lori W. Will, a former Wilson Sonsini and Skadden, Arps attorney who previously clerked for then-Vice Chancellor Leo Strine.

Meanwhile, Vice Chancellor J. Travis Laster was nominated for reappointment to his position in October. First appointed in 2009, Vice Chancellor Laster is the Court of Chancery's longest-serving judge currently on the bench and has made an indelible impact on Delaware corporate law, penning a number of landmark decisions during his tenure.

The Chancery Court also handed down several interesting and influential decisions over the course of 2021. In February, then Vice Chancellor McCormick issued a decision enjoining The Williams Companies from continued use of a poison pill that Williams had implemented in response to a significant drop in its stock price due to the effects of COVID-19 and the impact of a pricing war amongst oil producing countries. Among other things, the Court's decision held that the proper standard for assessing adoption of poison pills is that from *Unocal v. Mesa* (intermediate enhanced scrutiny) rather than the business judgment rule, a more deferential standard.

In May, in connection with Brookfield Property Partners' 2018 acquisition of GGP, the Court of Chancery dismissed a class action brought by GGP stockholders against certain directors and officers of Brookfield. The stockholders had alleged that Brookfield, which owned over 35% of GGP's common stock at the time of the deal, controlled GGP and therefore owed fiduciary duties to GGP

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stockholders. The Court found that the plaintiffs failed to properly show minority control, reiterating the high burden of showing that a minority holder exercised control at the time of a transaction. Interestingly, this decision stands in contrast to other recent Delaware holdings relating to minority control, suggesting that such decisions will largely be based on specific facts and circumstances.

Amidst the wave of post-deal litigation stemming from the impact of COVID-19, the Chancery Court also rejected a handful of buyers' claims that targets have suffered material adverse effects. In each of *Bardy Diagnostics, Inc. v. Hill-Rom, Inc.* and *Snow Phipps Group, LLC v. KCAKE Acquisition, Inc.,* the Court's findings reiterated the high standard for finding an MAE, only present in its *Akorn* decision to date. The Court's November decision in *In Re The Boeing Company* provided a helpful roadmap for stockholders seeking to bring duty of oversight claims. In *Boeing*, the company's stockholders adequately pleaded that certain Boeing directors had failed to establish a reporting system in connection with safety issues surrounding the company's 737 MAX planes and the resulting tragic crashes during 2018. Despite the Court acknowledging the difficulty plaintiffs face in bringing duty of oversight actions, Boeing's stockholders were able to sufficiently plead and survive a motion to dismiss.

We Need to Do Something: ESG as the Next Big Thing in Transactional Behavior

In recent years, environmental, social and governance ("ESG") considerations have become an increasing important focus inside corporate boardrooms. To date, that has yet to have the expected impact on M&A activity. According to a recent survey of M&A executives by Bain & Company for their 2022 M&A Report, dealmakers ranked ESG as their lowest priority, but they expect that to change in the very near future. From diligence, to valuation, to post-closing integration, ESG is likely to take on an increasingly important role in how dealmakers view, structure, and consummate transactions. We began to see this in 2021 as ESG started to take on an ever greater role, becoming a catalyst for M&A transactions and changes in the boardroom across numerous sectors.

In the oil and gas industry for example, Royal Dutch Shell was the target of significant public scrutiny concerning ESG this year. First, in May a Dutch court ordered Shell, by means of its corporate policy, to reduce its CO2 emissions by 45% by 2030. The ruling, which was in response to a 2019 lawsuit brought by certain international public interest groups including Greenpeace, would accelerate Shell's already ambitious climate goals, which previously targeted reducing CO2 emissions 20% by 2030, 45% by 2035, and 100% by 2050. In the wake of the court's ruling, in July Shell, through its renewable unit Shell New Energies U.S., announced the planned acquisition of clean energy company Inspire Energy Capital. The deal, which closed in September, is expected to accelerate Shell's mission to drastically reduce CO2 emissions and promote clean energy amongst its customers and suppliers.

Food and consumer products companies have also expressed a desire to prioritize ESG as a driver for M&A. For many of these businesses, sustainability has become a hallmark of their respective acquisition strategies. In April, Olam International, the Singapore-based agri-food business, agreed to purchase U.S. spices and seasonings business Olde Thompson from private equity firm Kainos Capital for $950 million. In connection with the deal, Olam touted how Olde Thompson would help it continue to deliver sustainable, natural, value-added food. Notably, Olde Thompson's facilities utilize solar panels to provide 75% of its energy requirements.

2021 also saw an increased focus on “clean” or “green” de-SPAC targets, many of whom were targeted by SPACs with investment mandates to pursue targets in areas including clean energy, renewables, and sustainability. Numerous of these SPACs reached agreements in 2021, including smart energy storage company Stem’s April merger with a clean energy-focused SPAC and electric charging network company EVgo’s July merger with a climate-focused SPAC. But for each ESG-centric SPAC that announced a merger in 2021, there are countless others that continue to search for an appropriate target to bring public, suggesting that the push to bring ESG-focused companies to the public markets will continue in 2022 and beyond.

According to Refinitiv, climate-change deals tripled to more than $164 billion in the first 11 months of 2021. Clearly there is much more to come.

The World to Come: Looking Ahead to 2022

After a historic year for M&A, the conditions for continued activity appear to be present. The stock market continues to rise, the Fed has yet to raise rates (though recent indications suggest that may change), hundreds of SPACs remain without a target and, despite the discovery of new variants of COVID-19, continued scientific progression has enabled much of the world to safely reopen their economies. Despite these favorable conditions, however, the road ahead is not entirely clear. The regulatory landscape, both in the United States and abroad, is characterized by numerous unknowns that have the potential to slow deal activity. Nevertheless, 2022 is likely to be another strong year for deal making that will be active across all geographies and sectors. It is likely that M&A lawyers will be busy again in 2022.

FTC SUES TO BLOCK $40 BILLION NVIDIA ACQUISITION OF ARM, REINFORCING AGGRESSIVE ENFORCEMENT AGENDA

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On December 2, 2021, the Federal Trade Commission (“FTC” or “Commission”) filed an administrative complaint challenging Nvidia’s $40 billion acquisition of Arm Ltd., a subsidiary of the Softbank Group. The Commission, which voted unanimously in favor of challenging the transaction, stated it is “suing to block the largest semiconductor chip merger in history to prevent a chip conglomerate from stifling the innovation pipeline for next-generation technologies.”[1] Since its announcement in late 2020, the transaction has faced scrutiny around the world in multiple investigations, including before the European Commission (“EC”), UK Competition and Markets Authority, Korea Fair Trade Commission, Japan Fair Trade Commission and China’s State Administration for Market Regulation (“SAMR”).

These ongoing global investigations have prevented the deal from closing, allowing the FTC to challenge the transaction with its administrative process without seeking a preliminary injunction in federal court, a strategy the FTC also used earlier in 2021 in its challenge of Illumina’s proposed acqui-

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sition of Grail, another vertical transaction. The FTC's challenge, along with recent FTC actions and policy changes, sends a signal to expect ongoing aggressive enforcement in technology markets, substantial scrutiny of vertical transactions that could threaten innovation and tactical use of the FTC's administrative procedural powers.

Nvidia's Proposed Acquisition of the "Switzerland" of Semiconductors

Nvidia, a California-based semiconductor manufacturer, announced its proposed acquisition of Arm in September 2020. Nvidia is a market leader in the development of graphics processing units ("GPUs") and has introduced or acquired complementary products that utilize microprocessors that use Arm technology. In particular, Nvidia has seen rapid growth in products used for computing in artificial intelligence, computer-assisted driving and advanced networking applications that utilize Arm intellectual property. Arm creates and licenses IP in the form of microprocessor core designs and "instruction set architecture" that sit at the heart of myriad semiconductor microprocessor chips used in many different applications. Arm architecture is used in microprocessors for everything from smartphones and driver-assistance systems to networking products and a multitude of devices powering the "internet of things." Arm increasingly has become the go-to technology for CPU microprocessors used in applications other than traditional PCs and servers. Because of the ubiquity of the Arm ecosystem, and the fact that its business model is based around a "neutral, open licensing approach," Arm often is viewed as the "Switzerland" of the semiconductor world, according to the FTC complaint.[2]

FTC Vertical Theories of Harm

The FTC's concern over the transaction is not a reduction of competition between the merging parties but rather the potential harm caused by Nvidia's alleged ability to use control of Arm to reduce or blunt competition from Nvidia's rival chipmakers. Nvidia and Arm do not compete with one another—rather, Nvidia licenses IP from Arm for use in Nvidia semiconductor products. Arm licenses its IP widely to downstream partners, including Nvidia and its rivals, who in turn compete with one another in semiconductor markets.[3] Arm invests a great deal of time and energy into supporting its licensees, including in their efforts to create more innovative products using Arm IP, because the more widely their products are used, the more profitable for Arm.[4] The FTC alleges that post-transaction, Nvidia would have the ability and incentive to foreclose competitors by withholding, delaying or degrading access, changing the terms of availability, or otherwise leveraging Arm IP to harm Nvidia's semiconductor chip rivals rather than continuing to neutrally license and develop Arm technology.[5]

The FTC identified three specific product areas where the Nvidia transaction would allegedly lessen competition: data processing units (or SmartNICs) used in networking, automotive advanced driver assistance system computing chips ("high-level ADAS") and Arm-based datacenter CPUs for cloud computing services.[6] Nvidia is an active competitor in each of these areas, and the complaint points out that Nvidia's competitors in these products depend upon Arm IP to develop their own products and do not have feasible alternatives to Arm technology. The FTC considered whether different technologies (such as x-86 and MIPS) were potential alternatives to Arm but determined that they were not realistic options for most competitors in these product areas. Notably, the FTC did not provide market share data for any of Nvidia's positions in each of these markets in the public complaint but alleged that Nvidia's "profits on additional sales in the downstream market are likely

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to be larger than the profits from continuing to neutrally license," providing the alleged incentive to exclude competitors by leveraging its control of Arm licensing and technology development.[7]

The complaint also highlights that Nvidia competitors must routinely share competitively sensitive information with Arm in order to facilitate development and support, and that an Nvidia acquisition might result "in a critical loss of trust in Arm."[8] The FTC alleges that Nvidia could misuse competitively sensitive information shared with Arm to adjust its own semiconductor strategies and that Arm licensees would be less inclined to share competitively sensitive information with Arm, reducing the innovation that exists today. In addition, the FTC claims that Nvidia's ownership of Arm also would reduce innovation in the semiconductor industry by "skewing" the development of new Arm technology in ways that avoid encroaching on Nvidia's interests in the downstream semiconductor markets.

Key Takeaways

Scrutiny of Vertical Deals

The FTC's complaint demonstrates that the agency will continue to challenge vertical transactions that threaten to undermine access to technology that is critical to competition. Antitrust has traditionally presumed that vertical mergers may have procompetitive benefits,[9] including the elimination of double marginalization, combination of complementary functions and elimination of contracting frictions between parties. These benefits can contribute to lower prices to consumers and greater competition, which is why vertical transactions historically have posed less of a concern than horizontal transactions. However, under Chair Lina M. Khan's leadership, the FTC has recently called special attention to potential anticompetitive effects in vertical mergers. In September 2021, in a contentious 3-2 vote, the FTC withdrew from the 2020 Vertical Merger Guidelines ("VMGs"). The accompanying statement issued by the majority challenged the notion that vertical mergers lead to decreases in price, and argued that they may reduce competition along nonprice areas like product quality and innovation. The statement contends that "the 2020 VMGs' flawed discussion of the purported procompetitive benefits (*i.e.*, efficiencies) of vertical mergers, especially its treatment of the elimination of double marginalization ("EDM"), could become difficult to correct if relied on by courts."[10]

While the Democratic-appointed commissioners signaled the FTC will increase its scrutiny of vertical transactions, the complaint against Nvidia/Arm should not be read as evidence of a significant change in enforcement approach. The complaint was authorized by a unanimous 4-0 vote of the Commission, suggesting that this is a deal that would have been challenged regardless of the recent debate within the Commission on vertical transactions. Arm has staked out a neutral position as a licensor that has made it a critical part of the semiconductor developmental process. The FTC's complaint quotes an analyst describing Arm as "a technology enabler for the entire semis industry."[11] Because of Arm's foundational position, downstream rivals have been especially worried about anything that could upset its neutrality. While Nvidia has promised to keep Arm licensing "neutral,"[12] rival chipmakers claimed that the acquisition would incentivize Nvidia to become a "gatekeeper" for Arm technology, and the FTC determined that the risk of Nvidia leveraging access to Arm to disadvantage competitors and reduce innovation was too great.[13]

Effects on Innovation

The FTC's complaint reflects that the agency will

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consider impacts on innovation where a transaction involves an important technology that facilitates the development of new competitive products in an industry. In addition to the potential foreclosure of Nvidia's rivals that are competing with it today, the FTC alleged that transaction also would harm future innovation in the semiconductor industry by warping the trajectory of Arm development to enable Nvidia competitors' new products. This theme is consistent with the FTC's position in its recent challenge of Illumina's acquisition of Grail, which was likewise viewed by the agency as harming innovation by potentially giving Illumina control over a critical input needed by rivals to develop new products.[14]

Use of FTC Procedural Tools

The Nvidia-Arm complaint also is notable for its use of the FTC's administrative litigation process. Part 3 of the FTC Act allows the Commission to challenge antitrust violations—whether mergers or conduct—through its own in-house administrative process.[15] The FTC seldomly uses standalone Part 3 complaints for merger challenges and typically seeks a preliminary injunction in a parallel action in federal court to prevent the parties from closing the transaction. Here, in light of the ongoing investigations outside the U.S., it was unnecessary for the FTC to seek an injunction in federal court at this time because the deal could not close before receiving foreign approvals. The timeline for an administrative trial on the merits is generally much longer than a typical injunction hearing in federal court, allowing the FTC to sue without litigating the merits in the near term while the transaction continues to undergo review in jurisdictions that have the potential to effectively prohibit the transaction without a trial. EC Commissioner of Competition Margrethe Vestager recently noted that the EC is "deeply concerned" and would not be prepared to make a decision until "quite a while" into 2022.[16]

The FTC's tactical use of Part 3 powers is a potential trend to watch, in light of Chair Khan's aggressive enforcement agenda and pledge to use "our full set of tools and authorities."[17] In addition, the FTC recently voted 3-2 to further streamline the process by consolidating more power in the chair.[18] The FTC also noted in its announcement of its complaint that the FTC cooperated closely with staff of the competition agencies in the European Union, United Kingdom, Japan, and South Korea.[19] With rising scrutiny of global technology transactions, close coordination among competition authorities presents a very challenging path for transactions that have competition issues, due to the variety of process tools regulators collectively have that can slow down transactions or preclude them altogether.

FTC Prior Approval Policy

Another issue to monitor will be whether the FTC seeks to impose a prior-approval condition on Nvidia as a part of a settlement or administrative proceeding. Prior approval provisions require advance approval by the FTC of certain future transactions by the involved parties. Since 1995, the Commission only has sought to use such provisions to block future proposed acquisitions in the same geographic and product market without prior FTC approval.[20] However, the Commission recently voted 3-2 to rescind and replace the 1995 policy statement with a broader policy that would seek to impose prior approval more often and potentially beyond transactions in the same geographic and product markets, so that "acquisitive firms . . . think twice before going on a buying binge because the FTC can simply say no."[21] The Commission also noted that it may pursue prior approval remedies even where parties have abandoned a transaction. So far, the agency's focus on expanding prior approval appears to center on horizontal transactions that result in divestitures, but it is pos-

sible the agency also could seek prior approval remedies in vertical cases. If the FTC seeks and successfully obtains an order with such a remedy, it could have the unilateral ability to block covered future acquisitions by Nvidia, in a market the FTC deems relevant, for at least a decade.

The FTC's challenge to the Nvidia/Arm merger reinforces the agency's ongoing intense scrutiny of transactions in technology markets, including vertical transactions that involve inputs that are fundamental to innovation. Merging parties should take note of the potential process and timing challenges associated with navigating global merger reviews in which antitrust agencies coordinate their efforts with their counterparts across borders and have a number of tools to impede the consummation of a transaction.

This article is for educational and informational purposes only and is not intended and should not be construed as legal advice.

ENDNOTES:

[1]FTC Press Release, "FTC Sues To Block $40 Billion Semiconductor Chip Merger" (Dec. 2, 2021). *See*: https://www.ftc.gov/news-events/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger.

[2]*Id.*

[3]*Nvidia Corp.*, No. 9404, Complaint at ¶ 4 (Dec. 2, 2021). *See*: https://www.ftc.gov/enforcement/cases-proceedings/2110015/nvidiaarm-matter.

[4]*Id.*, ¶¶ 24-25.

[5]*Id.*, ¶¶ 9-10.

[6]*Id.*, ¶¶ 58-111.

[7]*Id.*, ¶¶ 9-10.

[8]*Id.*, ¶ 10.

[9]*See* U.S. DOJ & FTC, Vertical Merger Guidelines (2020).

[10]Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, FTC (Sept. 15, 2021).

[11]*Nvidia Corp.*, No. 9404, Complaint, at 62.

[12]Ron Amadeo, "Nvidia Will Keep ARM Licensing 'Neutral,' Wants to License GPU Tech, Too," *Ars Technica* (Sept. 14, 2020).

[13]Sam Shead, "Qualcomm Objects to Nvidia's $40 billion Arm Acquisition," CNBC (Feb. 12, 2021).

[14]*Illumina Inc.*, No. 9401, Complaint at ¶ 11 (March 30, 2021).

[15]*See* Maureen K. Ohlhausen, "Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?," *Journal of Competition Law & Economics*, 623 (2016).

[16]Morten Buttler, "EU 'Deeply Concerned' by Nvidia-Arm Deal, Vestager Says," Bloomberg (Dec. 10, 2021).

[17]*See* Chair Khan's Sept. 22, 2021, memo to the staff and commissioners on "Vision and Priorities for the FTC."

[18]*See* Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter on Actions To Expedite Staff Investigations, FTC (Sept. 14, 2021); Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Issuance of Eight Omnibus Resolutions, FTC (Sept. 14, 2021).

[19]FTC Press Release, "FTC Sues to Block $40 Billion Semiconductor Chip Merger" (Dec. 2, 2021).

[20]Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders, FTC (Oct. 29, 2021).

[21]FTC Press Release, "FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive

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Mergers" (Oct. 25, 2021).

THE DELAWARE SUPREME COURT SPEAKS ON "ORDINARY COURSE" COVENANTS

By Mark E. McDonald, Charles W. Allen, and Kayla Rooney

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The Delaware Supreme Court recently affirmed the Court of Chancery's 2020 decision in *AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC*, which blessed a buyer's termination of a merger agreement on grounds that the target breached its covenant to operate its business in the ordinary course between signing and closing. In this closely watched appeal, the Delaware Supreme Court held that the ordinary course covenant in this case was breached because of the unprecedented steps the target hotel company took in response to COVID-19, even though the court found those steps to have been reasonable and consistent with the actions of others in the same industry. This decision provides important guidance both in terms of how such covenants should be drafted but also how to deal with unprecedented crises between signing and closing.[1]

Background

In September 2019, MAPS Hotel and Resorts One LLC, a subsidiary of Mirae Asset Financial Group ("Mirae" or "Buyer"), signed a Sale and Purchase Agreement to acquire the membership interests in Strategic Hotels & Resorts LLC ("Strategic"), which include owning and overseeing 15 luxury hotel properties in the United States, from AB Stable VIII LLC, a subsidiary of Dajia Insurance Group Ltd., successor to Anbang Insurance Group, Ltd. ("Anbang" or "Seller"), for $5.8 billion. Closing was substantially delayed due to uncertainty regarding title to Strategic's hotel properties, and while the parties were working to resolve those issues, the COVID-19 pandemic hit. Beginning in March 2020, like many in the hospitality industry, Strategic began taking unprecedented steps in response to COVID-19, including closing some of its hotels and drastically reducing services at its hotels that nominally remained open. Anbang and Strategic did not seek Mirae's consent with respect to those actions. On April 17, 2020, the scheduled closing date, Mirae gave formal notice that, among other things, Anbang was in breach of the ordinary course covenant within the Sale and Purchase Agreement and thus Mirae was not obligated to close. Anbang responded by filing a lawsuit in the Delaware Court of Chancery seeking an order of specific performance requiring Mirae to close.[2]

In an extensive post-trial decision issued on November 30, 2020, the Court of Chancery ruled that Mirae was excused from closing and permitted to terminate the Sale and Purchase Agreement because it showed that Strategic's response to the Covid-19 pandemic materially breached the ordinary course covenant, which required, "unless the Buyer shall otherwise provide its prior written consent (which consent shall not be unreasonably withheld, conditioned or delayed), the business of the Company and its Subsidiaries [to be] conducted only in the ordinary course of business consistent with past practice in all material respects."[3] Anbang appealed to the Supreme Court of Delaware.

On appeal, Anbang argued that it satisfied the ordinary course covenant, which did not preclude it or its subsidiaries from taking reasonable, industry-standard steps in response to the pandemic. Anbang

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further argued the Court of Chancery's reading of the ordinary course covenant could not be squared with the Sale and Purchase Agreement's material adverse effect ("MAE") provision because the ordinary course covenant "must give the Seller the freedom to take reasonable, industry-standard responses to systemic risks allocated to [the Buyer] by the MAE provision."[4]

The Decision

Ordinary Course Covenant. The *en banc* Supreme Court affirmed the Court of Chancery's judgment, finding the Court had correctly concluded that Strategic's drastic changes to its hotel operations in response to the COVID-19 pandemic without first obtaining Anbang's consent breached the ordinary course covenant and excused Anbang from closing. The Supreme Court first looked to the definition of "ordinary" when used in conjunction with "course of business"—Black's Law Dictionary defines it as "[t]he normal routine in managing a trade or business"—to determine the proper standard of conduct under the provision and noted that Delaware Courts have interpreted "ordinary course" as "[t]he normal and ordinary routine of conducting business."[5] Turning to the Court of Chancery's factual findings on Strategic's ordinary course and past practices, the Supreme Court deferred to what it considered a "fully-supported" factual finding that Strategic had materially deviated from routine business operations (the "[o]verwhelming evidence" of inconsistent practices included the unprecedented closing of two hotels entirely and severely limiting the operations of 13 others, laying off and furloughing over 5,200 full-time employees and operating with minimal food and beverage service, among others).[6]

Though the Supreme Court did find Strategic's actions in response to the pandemic to be reasonable and consistent with industry-wide practices in response to the pandemic, the Supreme Court found that (1) the ordinary course covenant required Strategic to operate in the ordinary course of *its* own business practices, "measured by its operational history, and not that of the industry in which it operates," and (2) that the covenant did not have a "reasonableness qualifier," so looking to the actions of other hotels in the industry to judge pandemic response would be more analogous to a commercially reasonable efforts provision.[7] The Supreme Court added that Strategic was not "hamstrung" by the ordinary course covenant—it should have sought consent before making any changes, and if consent was "unreasonably" denied, Anbang could have challenged such denial.[8]

Material Adverse Effect Provision. Turning to Anbang's arguments that Buyer and Seller had already allocated the risk of a pandemic through the MAE provision, the Supreme Court agreed with the Court of Chancery's analysis and rejected Anbang's argument. For one, the parties could have, but did not, restrict a breach of the ordinary course covenant to events that would qualify as an MAE, given that there are MAE qualifiers in other provisions of the Sale and Purchase Agreement.[9] Second, the parties chose different materiality standards for the two provisions and made the MAE standard much higher, demonstrating that the parties intended the provisions to act independently.[10] Lastly, the Supreme Court found that the two provisions served different purposes, noting an ordinary course covenant is "included to reassure the Buyer that the target company has not materially changed its business or business practices during the pendency of the transaction," and an MAE provision, by contrast, "allocates the risk of changes in the target company's valuation."[11] The Supreme Court concluded that buyers want to know both that the business is operated in the same way and that the business is worth about the same amount between

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signing and closing, but how a business operates is a fundamental concern distinct from the company's valuation.[12]

Takeaways

- As the cases that have been litigated in the wake of COVID-19 have shown, it is much easier for a buyer to prove that the seller failed to comply with the ordinary course covenant "in all material respects" than it is for the buyer to satisfy the MAE standard. Accordingly, sellers should not rely solely on the allocation of risk in the MAE provision, but should pay careful attention to the ordinary course covenant (both at the drafting stage and before closing).
- At the drafting stage, in order to avoid the ordinary course covenant becoming a "backdoor MAE," sellers should consider tying the covenant to the MAE standard (rather than a mere "materiality" standard, or otherwise specify that actions taken in response to the pandemic or similar unprecedented events that are reasonable and/or consistent with steps taken by others in the same industry will not constitute a breach of the ordinary course covenant).
- Between signing and closing, especially for existing deals without such protections, sellers would be advised to seek the buyer's consent to steps that are arguably not in the ordinary course consistent with past practice and, if the ordinary course covenant allows for it, challenge a buyer's unreasonable denial of, or delay in providing, consent to nevertheless take necessary measures to protect their companies prior to closing.
- At the litigation stage (and in preparation for potential deal litigation), sellers should also consider building a record showing that the steps taken are consistent with not only what others in the same industry are doing but also with the company's response to prior similar crises.

ENDNOTES:

[1]*AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC*, 2020 WL 7024929 (Del. Ch. Nov. 30, 2020) ("*AB Stable I*"), *aff'd* 2021 WL 5832875 (Del. Supr. Dec. 8, 2021) ("*AB Stable II*").

[2]*See AB Stable I*.

[3]*Id.*; the Court of Chancery also concluded that Mirae could terminate the Sale and Purchase Agreement because Anbang breached a condition in the agreement requiring title insurance for the hotel properties. The Supreme Court did not reach this issue in its decision.

[4]*AB Stable II* at *12 (internal citations omitted).

[5]*Id.* at *9.

[6]*Id.* at *10-11.

[7]*Id.* at *10.

[8]*Id.* at *14.

[9]*Id.* at *12.

[10]*Id.* at *13.

[11]*Id.* (internal citations omitted).

[12]*Id.*

THE CHANGING NATURE OF DEAL NEGOTIATIONS

*Suzanne "Suzie" Saxman is a partner in the Chicago office of Seyfarth Shaw LLP, and the chair of the firm's M&A practice group. On December 22, she spoke to **The M&A Lawyer** about recent trends in deal negotiations.*

***The M&A Lawyer**: You recently were a panelist in a webinar entitled "Anatomy of an M&A Transaction,"*[1] *which went into trade secret/*

confidentiality agreements, non-competes, and restrictive covenant-related issues that typically arise in M&A transactions. What's been changing in those fields, over the past few years?

***Suzanne Saxman**:* The speed of transactions has, in some cases, been accelerated. Now in this past year, maybe some of that was being driven by people trying to dodge a bullet with tax increases, or that there's been a more competitive environment. But there's a lot of time pressure. We've always had time pressure in M&A, but I do feel there's a little bit more now, and sometimes you can see parties in a deal process who get caught off guard and aren't quite as prepared.

You want to obviously finish something, whenever your timeline is. You don't want mistakes, you don't want a "we never thought about this" type of situation. You really need to make sure you're very tightly organized and that the process is very tightly managed from the beginning. Everybody who's going to be involved needs to know the timetable, what to be prepared for, when certain people will need to be brought in.

Take restrictive covenants, for example. It's one thing to put a restrictive covenant on sellers but often there's a desire to have key executives—who may not be a party to the definitive agreement—also be under restrictive covenants. So you'll need to think about how's that going to work. What do I already have in place, and do we need to do more? Is it going to cost me more?

***MAL**: As you said, time's always been a factor in deals. Is it even more important now given recent trends?*

Saxman: There's always been more pressure [on M&A] than other normal commercial transactions. Everything tends to be nearly instantaneous, it feels like sometimes. I had a transaction earlier this year—it was a heavily-contested auction, with about eight or nine parties in the pack and one of them made a decision to really step up to the price point that we needed. They indicated they would be closing in 12 days, which is a staggeringly fast amount of time. That didn't use to happen so much. You picked someone, you went into a 30-day period and negotiated and so on. But the ability to close quickly can really distinguish a bidder, and it reduces risk. In that particular case, it ended up being great. I didn't love having to sign a definitive agreement on July Fourth, but it happens sometimes.

***MAL**: Has the COVID era further sped up the pace of deals?*

Saxman: I'm not sure about that. I remember when we first shut down for COVID, colleagues from other departments were sending me emails, "it's too bad you can't sit down in a conference room with 12 people." I was like, "What are you talking about? We haven't done that in 10 years." We've long had electronic data rooms, electronic closing binders: We've closed electronically for at least a decade.

So I don't think COVID impacted M&A: it hasn't changed things much for us. The impact is more from the clients' point of view. All of the sudden they didn't get to hang out with the management team, now you had to meet them on Zoom. Someone said private equity buyers were never going to like that, but guess what: they learned to like it, and quick.

The willingness to connect with people remotely has accelerated, while actual documentation, paper due diligence has been a non-factor. Maybe being unable to visit facilities or meet more people could have impacted things on the business side. But I really didn't see it become an impediment. After all,

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we've had more M&A activity this year than any year ever in history. And remember, there are a lot of companies that went through COIVD fine. It wasn't difficult for their people to work remotely, whether they liked it or not.

From a buyer's point of view, the appetite to buy companies is so strong now. It's a lot easier to buy a company than to go out and hire 100 people to expand a division. It's *much* easier. To grow your workforce, to get into a new market even if it's on the fringe, it's just so much easier to do it in a M&A deal. I don't think that trend is going to change. That said, the market is cyclical—there will come some point, say interest rates going up or something going on in the macro economy, that will become an issue. But I'm in private M&A and we're not as heavily impacted by things like the stock market.

***MAL**: In terms of restrictive covenants in deals, what's been changing? Different language, more sharply defined clauses?*

Saxman: In the context of an M&A deal, nothing's changed that much. I think there's been more when it comes to employment agreements. The highest level of enforceability will be a restrictive covenant in combination with an M&A deal. This is the business as it exists on the closing date: parties do spend more time negotiating a more granular description of that.

To some extent [negotiations] depend on whether your sellers are people who are exiting the business and so don't care whether they've got a five year non-compete, because they're done. But when you're looking at a normal executive work force, they will care, in a big way. They don't know how this deal is going to work out, whether things will be good under the new owner or not.

On a state-by-state basis, some states are becoming more aggressive, and at lower income levels, in not wanting to allow enforceable restrictive covenants. There are more statutory restrictions.

***MAL**: Are factors such as ESG becoming more important? Are buyers growing more wary of a seller that has the potential to be in violation of some sort of environmental or governance regulation?*

Saxman: For middle market transactions, there is a heightened profile, but it's not front page news. You're more likely to get requests in due diligence about your profile, your procedures, if you have an approach to best practices, do you have a view to shifting how you do things. For us, a lot of the targets are business-to-business companies. But if you've got a consumer-facing business, ESG is going to be a bigger issue: your profile and reputation is more about who you are and what your future value is.

***MAL**: Are intellectual property protections becoming more rigorous in deal negotiations?*

Saxman: Yes, especially where we're seeing more businesses whose primary value is in their IP. Whether it's registered IP or their "know-how," there is a lot of scrutiny now, a lot of due diligence. It's no longer going to fly, [a seller] saying, "I don't know what people signed a few years ago." You have to ask yourself: Did we have policies? Did we have clear records? Did we get things re-signed when we updated our forms? Did we get assignment of inventions? Do we know where our people went after they left us? Are there any incidents of them trying to misuse IP after they left?

I think there is more security, and a lot of it's not necessarily centered on registered patents or registered trademarks. It's more really, for lack of a better phrase, "the secret sauce." I think buyers feel like "that's what we're paying you for: your work force and that secret sauce you developed." Highly

skilled people using that sauce makes the business attractive and profitable.

More companies are putting in place heightened due diligence and documentation [requirements]; there's more care involved than before. Having statements in your employee handbook—that doesn't cut it anymore. Nowadays, I want a signed individual NDA; a signed assignment of inventions. I want to know exactly what each individual has signed. I need something where it's not just the general company policy.

There has been a lot of heightened due diligence and a fair amount of negotiation of reps and warranties. Because so many deals have R&W insurance. You may be willing to say something in a rep and warranty, but when it comes to the buyer's due diligence and communication with the rep and warranty carrier, [the latter] will say essentially "if we ensure this risk, we want to be sure there is no risk." That's pushing us in deals to nail down more of these issues, because there may be a reps & warranties policy in place and the carrier's going to be as forceful as anybody. Otherwise you'll have to get a special indemnity, which is exactly what you were trying to avoid to begin with.

MAL*: How about material adverse effect clauses? Where do they stand, especially in the COVID era?*

Saxman: Everybody is making sure they have pandemic/epidemic [clauses]. There is obviously a bit of wordsmithing going on there. I think there's more concern about big time gaps. Because the idea is that the future is unknown, and it really feels like it's unknown right now. I guarantee that we didn't think this year [2021] was going to be worse than last year, and now it doesn't feel like we're getting over this [pandemic] any time soon.

From an M&A point of view, time is not your friend: that is for sure. It's in the gaps where you're really exposed to risk. So if simultaneously signing and closing is what clients prefer, we can do that. If there's an HSR filing, since there's no early termination of the waiting period anymore, we're asking: will you consider filing on a letter of intent?

MAL: *Are recent moves by the FTC and DOJ starting to have an effect on deal negotiations?*

Saxman: Oh, yes. Getting rid of early terminations is terrible, just terrible. I guess they're doing it because they have a staffing problem, but I think they're becoming substantially more aggressive. I haven't yet gotten any of these letters where they essentially say, "proceed at your peril." But I don't want a client to get a letter like that: "We haven't been able to complete our review." If I have a transaction with someone who's a competitor, what does that mean? Am I going to have a problem after I close this deal? That doesn't make me feel good. I don't want that. There's more uncertainty now. In the middle market where we are, it's not as big a factor but it's still a factor, it's still a concern.

MAL*: Any other things you've noticed of late?*

Saxman: When it comes to cross-border deals, I had a client who sold a business in the summer, a manufacturing facility in China. The products weren't sensitive, they were not in defense, we concluded mutually with the bidders and ultimately the bidders determined that it wasn't something that was going to raise issues with the government. But I was little concerned about it. You do wonder how is that process going to go, is there going to be a clear outcome.

Because you don't want to go down the path with one party, put everybody else on ice, and then things fall apart. Having a deal process fall apart is a disaster for a seller: you've got to keep the process moving along to its conclusion. It's not like you can

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go back to all the other bidders and put everything back together—it doesn't tend to work that way.

ENDNOTES:

[1]"Anatomy of an M&A Transaction," December 8, 2021. *Available at*: https://www.youtube.com/watch?v=qPAlQJfaAOg.

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FROM THE EDITOR

The Blockbuster Year

The numbers were already impressive halfway through 2021, but the year-end total volume for global M&A was something else: the market turned in a truly colossal performance.

In 2021, global M&A volume topped $5 trillion for the first time ever, toppling with ease the previous record of $4.55 trillion, set in 2007. M&A valuations stood at $5.8 trillion in 2021, a 64% leap from 2020, as per Refinitiv. Even the sheer number of deals—62,193 in the year, up 24% from 2020—was a stellar performance.

What fueled the boom? Mostly, the same factors that have driven M&A activity since the mid-2010s: low interest rates, a red-hot stock market, many potential buyers with massive cash holdings and looking for opportunities. As Suzanne Saxman, chair of the M&A practice at Seyfarth Shaw, notes in an interview in this issue, the buyer universe of 2021 was greatly driven by practical strategic needs. "It's a lot easier to buy a company than to go out and hire 100 people to expand a division. It's *much* easier."

Among the largest deals of 2021 included AT&T's $43 billion merger of its media businesses with Discovery, Canadian Pacific Railway's $31 billion takeover of Kansas City Southern, the $34 billion leveraged buyout of Medline Industries, and the breakups of General Electric Co. and Johnson & Johnson. That said, the year was notable for its relative *lack* of megadeals above the $25 billion mark.

In *The M&A Lawyer*'s traditional year-in-review piece, Sullivan & Cromwell's Frank Aquila and Melissa Sawyer examine all facets of 2021, from an active antitrust sector to key Delaware cases to the vogue for special purpose acquisition companies. "After largely sitting on the sidelines in 2020, private equity acquirers had record amounts of dry powder to put to work and in 2021 they did just that," the authors write. "In addition, the hundreds of SPACs that went public in 2020 and 2021 were searching for acquisition targets. Plentiful financing on excellent terms with low interest rates provided acquirers with capital necessary to supplement robust balance sheets, while public strategic buyers were able to use their own stock, with many trading at or near all-time highs, as currency in their deals."

Will 2022 keep up the torrid pace? At the start of the year (this issue went to press right after New Year's), there are some potential roadblocks a bit further down the road—the likelihood of the Federal Reserve raising interest rates; the x factor of how the pandemic will affect the global economy in 2022; a potentially major slowdown in the SPAC sector. As Aquila and Sawyer write, "as with any phenomenon that generates large amounts of excitement and attention, the proliferation of SPAC IPOs and subsequent business combinations has attracted the attention of regulators and legislators alike." That said, given how the market persists in defying slowdown expectations, perhaps the safest bet is to expect another record year.

Chris O'Leary

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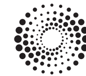
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