M&A Report

2024

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2024 M&A Report – What's Inside

While the 2022 M&A market was buoyed by deal carryover from 2021 and more conducive market conditions in the first half of the year, the 2023 M&A market felt the impact of the Federal Reserve's most aggressive interest rate hikes in more than 25 years. In addition to rising interest rates, uncertainty regarding the trajectory of the economy, regulatory headwinds, and geopolitical tensions all weighed on the M&A market in 2023.

The number of reported M&A transactions worldwide decreased by 20%, from 49,992 deals in 2022 to 39,774 in 2023. Global reported M&A deal value contracted 22%, from $3.0 trillion to $2.34 trillion. Average deal size was $58.9 million in 2023, down 2% from $60.1 million in 2022.

GEOGRAPHIC RESULTS

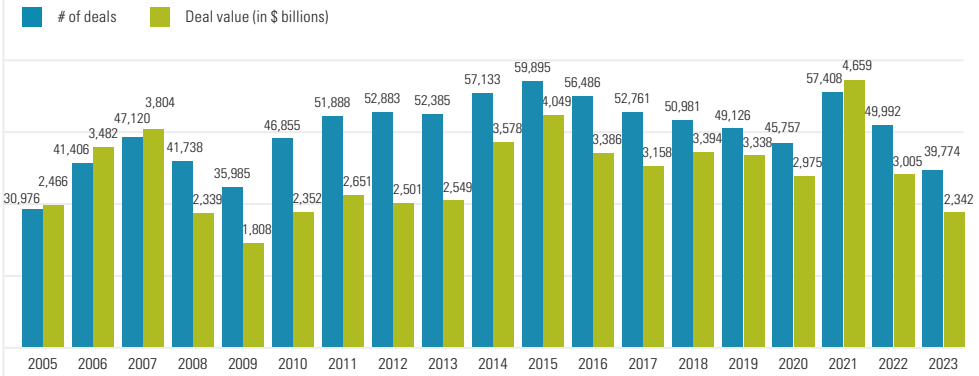
Deal volume and value were down across all major geographic regions in 2023.

— ***United States:*** Deal volume declined by 24%, from 21,338 transactions in 2022 to 16,147 in 2023. US deal value fell by 15%, from $1.76 trillion to $1.50 trillion. Average deal size increased by 12%, from $82.5 million to $92.8 million. The number of billion-dollar transactions involving US companies fell by 8%, from 286 in 2022 to 262 in 2023, while their total value decreased by 7%, from $1.22 trillion to $1.14 trillion.

— ***Europe:*** The number of transactions in Europe declined by 24%, from 19,226 in 2022 to 14,616 in 2023. Total deal value dropped by 20%, from $1.02 trillion to $810.7 billion, although average deal size increased by 5%, from $52.9 million to $55.5 million. The number of billion-dollar transactions involving European companies contracted by 10%, from 188 in 2022 to 170 in 2023, while their total value declined by 15%, from $637.7 billion to $538.9 billion.

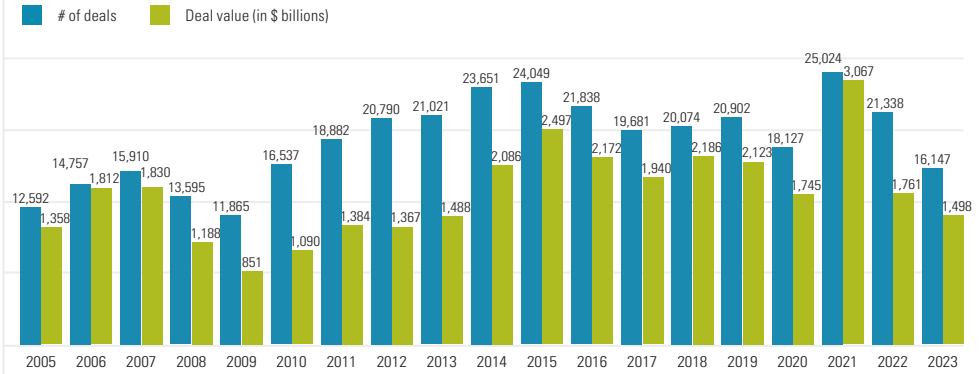
— ***Asia-Pacific:*** In the Asia-Pacific region, deal volume dipped by 6%, from 10,931 transactions in 2022 to 10,277 in 2023. Total deal value in the region shrank by 32%, from $887.7 billion to $606.7 billion, resulting in an average deal size that fell 27%, from $81.2 million to $59.0 million. The number of billion-dollar transactions involving Asia-Pacific companies declined by 26%, from 144 in 2022 to 106 in 2023, while their total value contracted by 38%, from $526.3 billion to $325.2 billion.

Global M&A Activity – 2005 to 2023



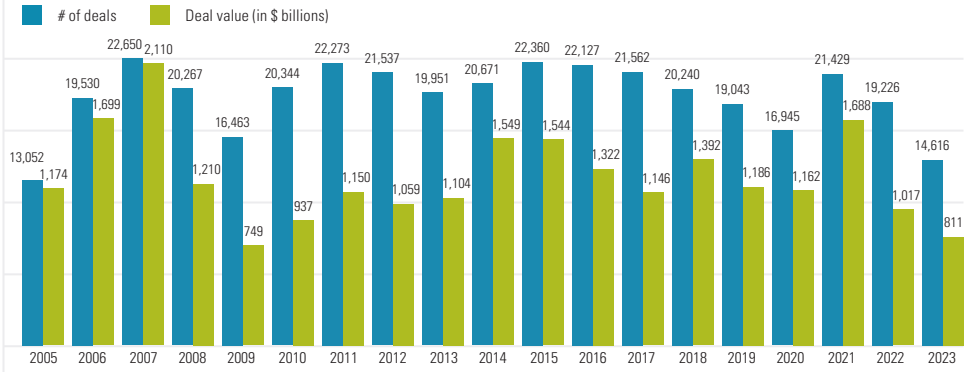
Source: S&P Global Market Intelligence

US M&A Activity – 2005 to 2023



Source: S&P Global Market Intelligence

European M&A Activity – 2005 to 2023



Source: S&P Global Market Intelligence

SECTOR RESULTS

M&A transaction volume decreased across all primary industry sectors in 2023 while deal value trends were varied.

— ***Technology:*** Global transaction volume in the technology sector decreased by 19%,

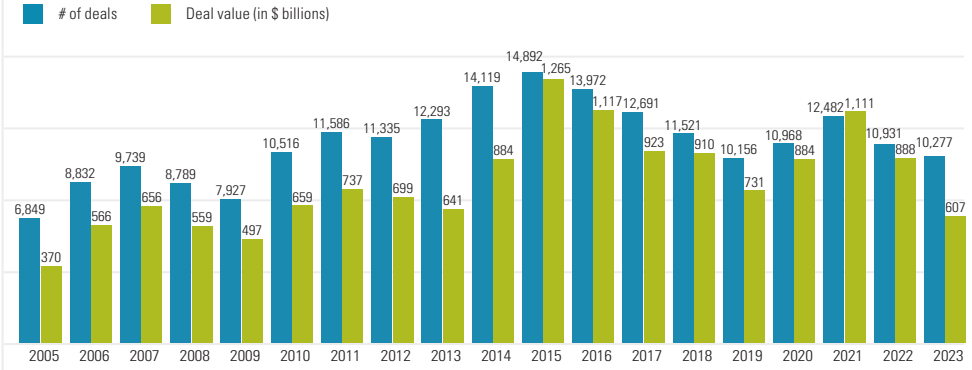
from 8,902 deals in 2022 to 7,174 deals in 2023. Global deal value slumped by 45%, from $558.6 billion to $307.6 billion. Average deal size slid 32%, from $62.8 million to $42.9 million. US technology deal volume decreased by 21%, from 3,799 to 3,000 transactions, while total US technology deal value fell 58%, from $444.3 billion to $187.0 billion, resulting in a 47% decrease in average deal size, from $117.0 million to $62.3 million.

— ***Life Sciences:*** Global transaction volume in the life sciences sector decreased by 15%, from 1,432 deals in 2022 to 1,222 deals in 2023, while global deal value jumped 44%, from $171.9 billion to $247.5 billion. Average deal size increased by 69%, from $120.1 million to $202.5 million. In the United States, deal volume declined by 20%, from 704 to 566 transactions, while deal value increased by 37%, from $152.8 billion to $208.7 billion, resulting in a 70% increase in average deal size, from $217.1 million to $368.7 million.

— ***Financial Services:*** Global M&A activity in the financial services sector decreased by 21%, from 2,722 deals in 2022 to 2,137 deals in 2023. Global deal value was down 50%, from $330.9 billion to $165.1 billion, resulting in a 36% decrease in average deal size, from $121.6 million to $77.3 million. In the United States, financial services sector deal volume contracted by 22%, from 1,407 to 1,097 transactions, while total deal value dropped 14%, from $84.7 billion to $72.5 billion. Average US deal size increased by 10%, from $60.2 million to $66.1 million.

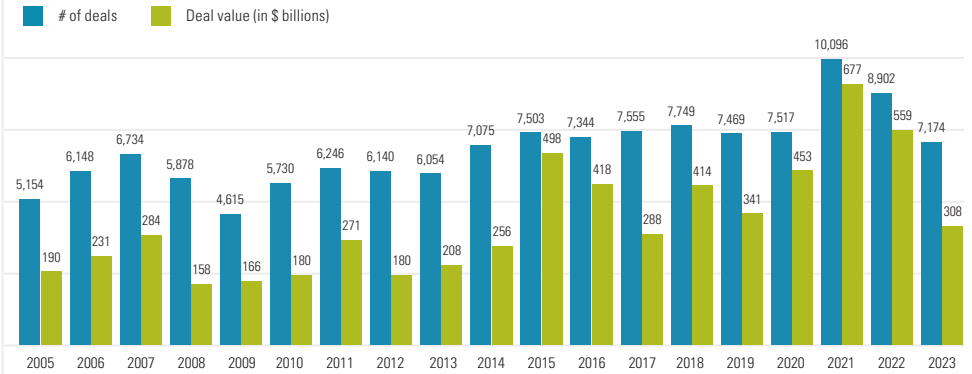
— ***Telecommunications:*** Global transaction volume in the telecommunications sector fell by 18%, from 663 deals in 2022 to 546 deals in 2023. Deal value increased by 20%, from $79.2 billion to $95.2 billion, resulting in a 46% increase in average deal size, from $119.5 million to $174.4 million. US telecommunications deal volume decreased 21%, from 204 to 161 transactions, while deal value almost tripled from $21.8 billion to $64.1 billion. The average US telecommunications deal size jumped from $106.8 million to $397.9 million.

Asia-Pacific M&A Activity – 2005 to 2023



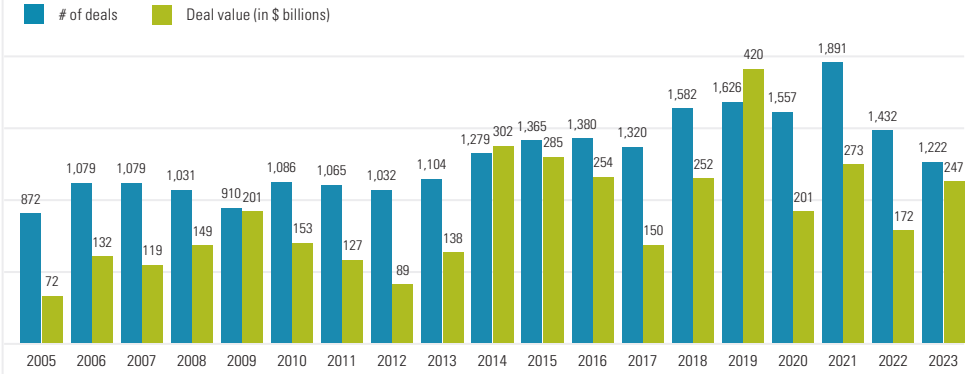
Source: S&P Global Market Intelligence

Technology M&A Activity – 2005 to 2023



Source: S&P Global Market Intelligence

Life Sciences M&A Activity – 2005 to 2023



Source: S&P Global Market Intelligence

OUTLOOK

Given the challenging conditions of 2023, the decline in M&A activity is unsurprising, but the year ended on a somewhat positive note, as total deal value in the fourth quarter of 2023 was the highest since the second quarter of 2022.

Important factors that will affect M&A activity over the coming year include:

— ***Macroeconomic Conditions:*** Global GDP growth slowed from 6.0% in 2021—the strongest growth rate in almost 50 years—to 3.5% in 2022 and 3.1% in 2023. Following growth of 5.9% in 2021

and 2.1% in 2022, US GDP growth was expected to slow further in 2023, but the economy showed remarkable resilience with 2023 US GDP growth coming in at 2.4%. Despite the Federal Reserve having raised interest rates 11 times since the start of 2022 to their highest levels in 22 years, higher borrowing costs have yet to tamp down consumer spending; inflation appears to have moderated, resulting in hopes that the Federal Reserve will cut interest rates in 2024; and there is growing optimism of avoiding a recession and achieving a "soft landing." Higher interest rates have, however, led to tighter lending conditions and increased the cost of debt-financed acquisitions.

— ***Valuations:*** Rising interest rates have pressured company valuations. Certain sectors, such as technology, accustomed to low interest rates to fuel their growth have seen dramatic declines while other sectors have seen a more moderate retrenchment. From an acquirer's standpoint, depressed valuations create attractive buying opportunities to improve their market position. For VC-backed companies that are seeking exits, they face the conundrum of selling in the trough of the market or the prospect of a down round if a new capital infusion is required. The net effect of these competing tensions on M&A deal flow in 2024 is hard to discern.

— ***Regulatory Environment:*** In light of heightened national security concerns, as well as an aggressive US antitrust enforcement environment, parties can expect that transactions involving foreign buyers or raising antitrust concerns will be subject to intense regulatory scrutiny, leading to longer closing timelines and greater closing risk, all of which may continue to chill deal activity.

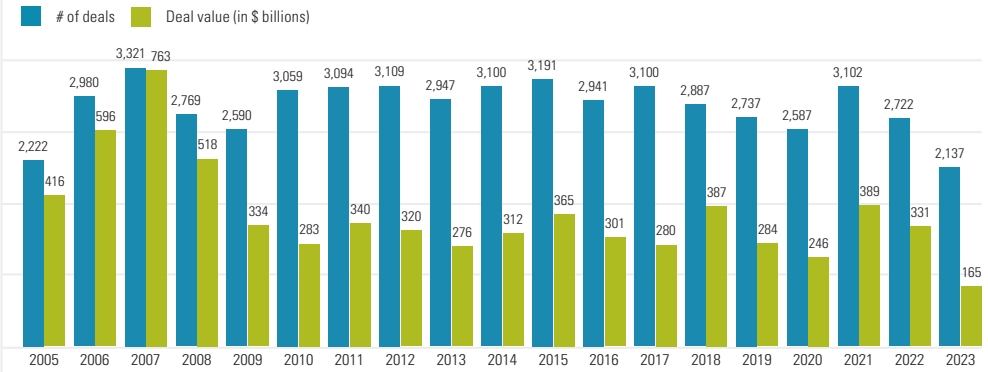
— ***Private Equity Activity:*** On the buy side, private equity firms, which were buoyed by the $556.1 billion in global fundraising in 2023—just above the $548.8 billion in 2022 and the third-highest annual figure in history—continue to hold record levels of "dry powder." On the sell side, PE firms face pressure both to exit investments and return capital to investors, and to deploy newly committed capital, even if returns are dampened by increased levels of equity investment in acquisitions and higher borrowing costs.

— ***Strategic Buyers:*** Challenging macroeconomic fundamentals and decelerating global GDP growth concerns are likely to prompt business leaders to reassess their plans. Strategic acquisitions remain a compelling way to transform businesses and fuel growth and are likely to continue to play an important role in the M&A market in the coming year.

— ***VC-Backed Exits:*** The number of reported US acquisitions of VC-backed companies decreased by 26%, from 1,285 in 2022 to 953 in 2023, while reported proceeds declined 15%, from $65.18 billion to $55.13 billion—the lowest deal value since the $52.57 billion in 2018. VC-backed companies and their investors often prefer the relative ease and certainty of a company acquisition to the lengthier and more uncertain IPO process. Many VC-backed companies that last raised money as valuations peaked in 2021 are likely to now be below that valuation. In the coming year, the volume of VC-backed company sales will depend in part on whether founders and investors expect valuations to become more favorable, and on factors such as the availability of capital for those companies that seek to stay private and market receptivity to VC-backed IPOs.

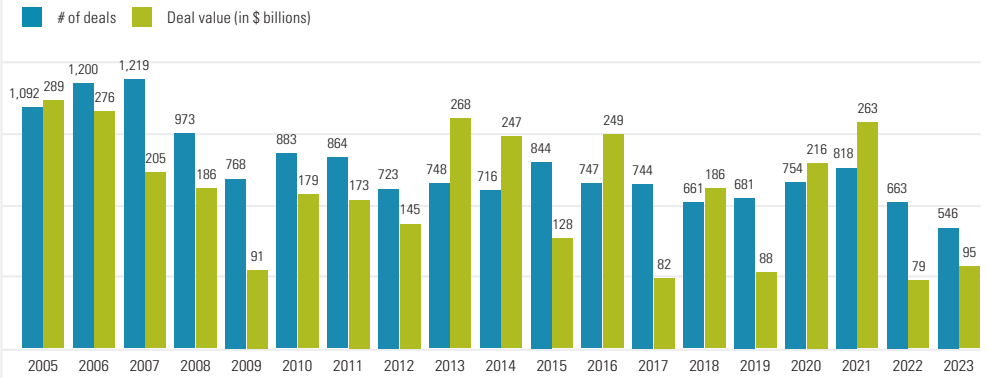
— ***SPAC Mergers:*** Regulatory scrutiny (including in the wake of final rules adopted by the US Securities and Exchange Commission in January 2024) and poor returns for SPACs that have completed business combinations continue to weigh heavily on the SPAC market. In 2023, there were only 98 mergers involving SPACs, compared to 100 in 2022 and 199 in 2021, and it seems likely this trend will continue. ■

Financial Services M&A Activity – 2005 to 2023



Source: S&P Global Market Intelligence

Telecommunications M&A Activity – 2005 to 2023



Source: S&P Global Market Intelligence

Established public companies typically maintain at least some takeover defenses, although the prevalence of several defenses previously considered to be standard has declined over the past decade in response to pressure from institutional investors.

Despite the decline in takeover defenses among established public companies, most IPO companies continue to implement anti-takeover provisions (understanding that such measures may in the future need to be dismantled). In 2022 and 2023, however, adoption rates by IPO companies for many takeover defenses declined markedly from historical norms, likely due at least in part to the unusual characteristics of the IPO market during this period—deal flow was significantly depressed, offering sizes were much smaller and IPO companies had far less annual revenue.

Common takeover defenses include:

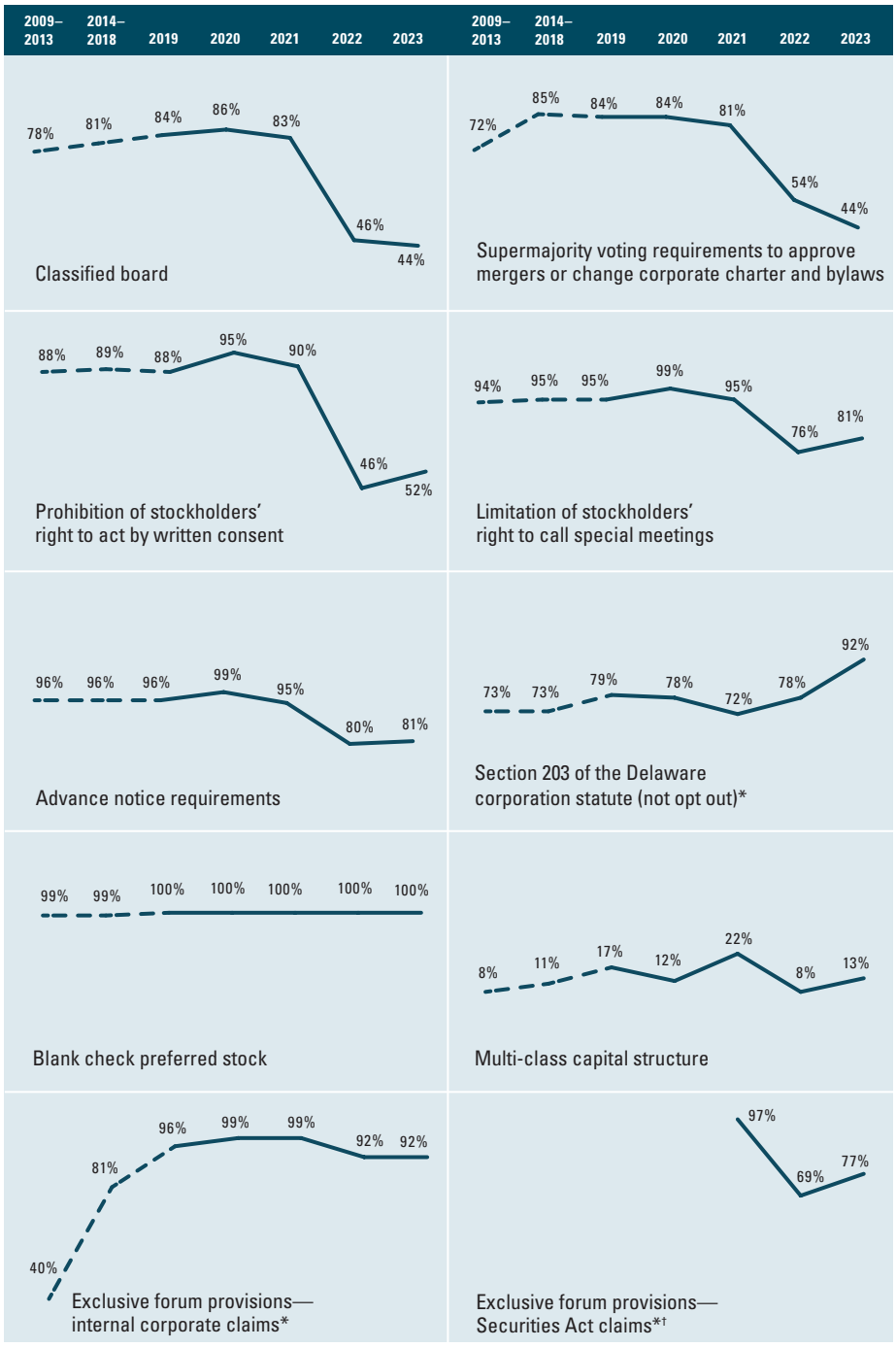
CLASSIFIED BOARDS

Supporters of classified boards—in which directors serve staggered three-year terms—believe that this structure enhances the knowledge, experience and expertise of boards by helping ensure that, at any given time, a majority of the directors will have experience and familiarity with the company's business. These supporters believe classified boards promote continuity and stability, which in turn allow companies to focus on long-term strategic planning, ultimately leading to a better competitive position and maximizing stockholder value. Opponents of classified boards argue that annual elections for all directors increase director accountability to stockholders, which in turn improves director performance, and that classified boards entrench directors, foster insularity and impede efforts to expand board diversity.

SUPERMAJORITY VOTING REQUIREMENTS

Advocates for supermajority vote requirements to approve mergers or amend the corporate charter or bylaws claim that these provisions help preserve and maximize the value of the company by ensuring that important corporate actions are taken only when it is the clear will of the stockholders. By contrast, proponents of a majority-vote standard believe it makes the company more accountable to stockholders and that improved accountability leads to better company performance. Supermajority requirements are also viewed by their detractors as entrenchment devices used to block initiatives that are supported by holders of a majority of the company's stock but opposed by management and the board. In practice, supermajority requirements can be almost impossible to satisfy, especially for a company with a meaningful number of noninstitutional stockholders.

TRENDS IN TAKEOVER DEFENSES AMONG IPO COMPANIES



*Delaware corporations only
†2021–2023 only

Source: WilmerHale analysis of SEC filings from 2009 to 2023 for US issuers

PROHIBITION OF STOCKHOLDERS' RIGHT TO ACT BY WRITTEN CONSENT

Written consents of stockholders can be an efficient means to obtain stockholder approvals but can result in a single stockholder or a small number of stockholders being able to take action without prior notice or any opportunity for other stockholders to be heard. If stockholders are not permitted to act by written consent, all stockholder action must be taken at a duly called stockholders' meeting for which stockholders have been provided information about the matters to be voted on and given an opportunity to ask questions.

LIMITATION OF STOCKHOLDERS' RIGHT TO CALL SPECIAL MEETINGS

If stockholders have the right to call special meetings of stockholders—rather than waiting until the next annual meeting to propose matters for stockholder action—one or a few stockholders may be able to call a special meeting, which can result in abrupt changes in board composition, interfere with the board's ability to maximize stockholder value, or result in significant expense and disruption. A requirement that only the board or specified officers or directors are authorized to call special meetings of stockholders could, however, have the effect of delaying until the next annual meeting actions that are favored by the holders of a majority of the company's stock.

REASONS TO ADOPT TAKEOVER DEFENSES

Companies adopt takeover defenses to help:

- ensure stability and continuity in decision-making and leadership that will enable the company to focus on long-term value creation;
- provide the board with adequate time to evaluate and react in an informed manner to unsolicited acquisition proposals;
- provide negotiating leverage for the board; and
- maximize overall stockholder value by providing economic disincentives against inadequate, unfair or coercive bids.

PREVALENCE OF TAKEOVER DEFENSES

	IPO COMPANIES, 2019–2023	ESTABLISHED PUBLIC COMPANIES, YEAR-END 2023	
		S&P 500	RUSSELL 3000
Classified board	78%	11%	43%
Supermajority voting requirements to approve mergers or change corporate charter and bylaws	77%	17% to 33%, depending on type of action	15% to 53%, depending on type of action
Prohibition of stockholders' right to act by written consent	84%	68%	73%
Limitation of stockholders' right to call special meetings	93%	30%	51%
Advance notice requirements	94%	99%	96%
Section 203 of the Delaware corporation statute (not opt out)*	76%	89%	N/A
Blank check preferred stock	100%	95%	96%
Multi-class capital structure	17%	7%	11%
Exclusive forum provisions—internal corporate claims	98%*	56%**	64%**
Exclusive forum provisions—Securities Act claims†	92%*	N/A	N/A

*Delaware corporations only
**Not limited to Delaware corporations
†2021–2023 only

Source: IPO company data is based on WilmerHale analysis of SEC filings from 2019 to 2023 for US issuers. Established public company data is from FactSet's SharkRepellent database at year-end 2023.

ADVANCE NOTICE REQUIREMENTS

Advance notice requirements provide that at a stockholders' meeting stockholders may only consider and act upon director nominations or other proposals that have been specified in the meeting notice and brought before the meeting by or at the direction of the board, or by a stockholder who has delivered timely written notice to the company. Advance notice requirements afford the board ample time to consider the desirability of stockholder proposals, ensure that they are consistent with the company's objectives and, in the case of director nominations, provide important information about the experience and suitability of board candidates. These provisions could also have the effect of delaying until the next stockholder meeting actions that are favored by the holders of a majority of the company's stock. Investors generally do not object to advance notice requirements as long as the advance notice period is not unduly long.

SECTION 203 OF THE DELAWARE CORPORATION STATUTE

Unless it opts out of Section 203, a public company incorporated in Delaware is limited in its ability to engage in a "business combination" with any "interested stockholder" for three years following the time that the person became an interested stockholder without board approval. In general, an interested stockholder is any stockholder that, together with its affiliates, beneficially owns 15% or more of the company's stock. A public company incorporated in Delaware is automatically subject to Section 203 unless it opts out in its original corporate charter or pursuant to a subsequent charter or bylaw amendment approved by stockholders. Remaining subject to Section 203 helps eliminate the ability of an insurgent to accumulate and/or exercise control without paying a control premium but could prevent stockholders from accepting an attractive acquisition offer that is opposed by an entrenched board.

DIFFERENCES IN ANTI-TAKEOVER PRACTICES AMONG TYPES OF IPO COMPANIES

	ALL IPO COMPANIES	VC-BACKED COMPANIES	PE-BACKED COMPANIES	OTHER IPO COMPANIES
Classified board	78%	88%	88%	39%
Supermajority voting requirements to approve mergers or change corporate charter and bylaws	77%	88%	84%	37%
Prohibition of stockholders' right to act by written consent	84%	92%	96%	48%
Limitation of stockholders' right to call special meetings	93%	98%	99%	76%
Advance notice requirements	94%	97%	99%	79%
Section 203 of the Delaware corporation statute (not opt out)*	76%	94%	32%	71%
Blank check preferred stock	100%	100%	100%	99%
Multi-class capital structure	17%	16%	20%	16%
Exclusive forum provisions—internal corporate claims*	98%	99%	100%	90%
Exclusive forum provisions—Securities Act claims*†	92%	95%	100%	68%

*Delaware corporations only
†2021–2023 only

Source: WilmerHale analysis of SEC filings from 2019 to 2023 for US issuers

BLANK CHECK PREFERRED STOCK

When blank check preferred stock is authorized, the board has the right to issue preferred stock in one or more series without stockholder approval under state corporate law (but subject to stock exchange rules) and has the discretion to determine the voting, dividend, conversion and redemption rights and liquidation preferences of each such series. The availability of blank check preferred stock can eliminate delays associated with a stockholder vote on specific issuances, thereby facilitating financings and strategic alliances. The board's ability, without further stockholder action, to issue preferred stock or rights to purchase preferred stock can also be used as an anti-takeover device.

MULTI-CLASS CAPITAL STRUCTURES

While the majority of companies go public with a single class of common stock that provides the same voting and economic rights to every stockholder, some companies employ a multi-class capital structure under which the company's founders or other pre-IPO stockholders hold shares of common stock that are entitled to multiple votes per share, while the public is issued a separate class of common stock that is entitled to only one vote per share or no voting rights at all. Use of a multi-class capital structure can enable the holders of the high-vote stock to retain voting control of the company and to pursue strategies to maximize long-term stockholder value. Critics believe that a multi-class structure entrenches the holders of the high-vote stock, insulating them from takeover attempts and the will of public stockholders, and that the mismatch between voting power and economic interest may increase the possibility that the holders of the high-vote stock will pursue a riskier business strategy.

EXCLUSIVE FORUM PROVISIONS FOR INTERNAL CORPORATE CLAIMS

Exclusive forum provisions stipulate that the Court of Chancery of the State of Delaware is the exclusive forum in which internal corporate claims arising under Delaware state law may be brought by stockholders against the company. Proponents of these provisions are motivated by a desire to adjudicate such claims in a single jurisdiction that has a well-developed and predictable body of corporate case law and an experienced judiciary. Opponents argue that these provisions—which have been expressly authorized by the Delaware corporation statute since 2015—deny aggrieved stockholders the ability to bring litigation in a court or jurisdiction of their choosing.

EXCLUSIVE FORUM PROVISIONS FOR SECURITIES ACT CLAIMS

Prior to 2020, in response to the growing trend of plaintiffs bringing federal securities law class-action lawsuits in state courts, a handful of IPO companies incorporated in Delaware adopted "federal forum" provisions requiring stockholders to sue in federal court, rather than state court, over alleged violations of the Securities Act of 1933. Adoption of federal forum provisions has soared on the heels of a 2020 Delaware Supreme Court decision confirming the validity of the technique. Federal forum provisions are intended to help a company avoid duplicative litigation filings and steer cases to federal courts more accustomed to hearing federal securities claims, while opponents argue that the provisions prevent stockholders from seeking recourse in state courts they may view as more receptive to their claims. ■

STOCKHOLDER RIGHTS PLANS

A traditional stockholder rights plan (sometimes referred to as a "poison pill") is a defensive measure designed to deter any acquisition of shares exceeding a specified ownership threshold without board approval. The rights plan gives all stockholders (other than a stockholder acquiring shares of common stock in excess of the specified threshold) a contractual right to purchase additional securities of the company at a substantial discount, thereby significantly diluting the acquiring stockholder's economic and voting power. When combined with a classified board, a rights plan makes an unfriendly takeover particularly difficult. Poison pills are almost unheard of among US IPO companies and are quite uncommon among established public companies.

Counsel of Choice for Mergers and Acquisitions

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casella	Verde	GENERAL CATALYST	Eaton Vance	ACACIA COMMUNICATIONS, INC.	mks Technology for Productivity	ENDURANCE International Group	Houghton Mifflin Harcourt	Bottomline Technologies
Acquisition of GFL Environmental **$525,000,000** **June 2023**	*Combination with* TLGY Acquisition Corporation **$365,000,000** **June 2023**	*Acquisition of Livongo by* Teladoc Health **$18,500,000,000** **October 2020**	*Acquisition by* Morgan Stanley **$7,000,000,000** **March 2021**	*Acquisition by* Cisco Systems **$4,500,000,000** **March 2021**	*Acquisition of* Atotech **$4,400,000,000** (financing counsel) **August 2022**	*Acquisition by* Clearlake Capital Group **$3,000,000,000** **February 2021**	*Acquisition by* Veritas Capital **$2,800,000,000** **April 2022**	*Acquisition by* Thoma Bravo **$2,600,000,000** (co-counsel) **May 2022**
revvity	Decibel THERAPEUTICS	wex	TMX	Emisphere	Merchants FLEET	SoFi	FORTIVE	
Sale of Applied, Food and Enterprise Services businesses to New Mountain Capital **$2,450,000,000** **March 2023**	*Acquisition by* Regeneron **$213,000,000** (including contingent payments) **September 2023**	*Acquisition of* Payzer **$250,000,000** **November 2023**	*Acquisition of* VettaFi **$848,000,000** **January 2024**	*Acquisition by* Novo Nordisk **$1,350,000,000** (counsel to special committee) **December 2020**	*Acquisition by* Bain Capital and Abu Dhabi Investment Authority **Undisclosed** **October 2022**	*Acquisition of* Galileo Financial Technologies **$1,200,000,000** **May 2020**	*Acquisition of* ServiceChannel **$1,200,000,000** **August 2021**	
ThermoFisher SCIENTIFIC	exonics THERAPEUTICS	TECAN.	ALTIOSTAR	FORENDO PHARMA	Akamai	RUDOLPH TECHNOLOGIES	ADORE ME	XLFleet
Sale of anatomical pathology business to PHC Holdings **$1,140,000,000** **June 2019**	*Acquisition by* Vertex Pharmaceuticals **$1,000,000,000** (including contingent payments) **July 2019**	*Acquisition of* Paramit **$1,000,000,000** **August 2021**	*Acquisition by* Rakuten **$1,000,000,000** **August 2021**	*Acquisition by* Organon **$954,000,000** (including contingent payments) **December 2021**	*Acquisition of* Linode **$900,000,000** **March 2022**	*Merger with Nanometrics to form* Onto Innovation **$1,400,000,000** (enterprise value) **October 2019**	*Acquisition by* Victoria's Secret **$700,000,000** (including post-closing payments) **December 2022**	*Acquisition of* Spruce Power **$600,000,000** **September 2022**
Blue Apron	AVEO ONCOLOGY	spectris	AMPLITUDE Healthcare Acquisition Corporation	TIDAL THERAPEUTICS	AKOUOS	PRIORITY	TechTarget	
Acquisition by Wonder Group **$103,000,000** **November 2023**	*Acquisition by* LG Chem **$566,000,000** (implied equity value) **January 2023**	*Sale of Red Lion Controls to* HMS Networks **$345,000,000** **Pending** **(as of March 20, 2024)**	*Combination with* Jasper Therapeutics **$475,000,000** **September 2021**	*Acquisition by* Sanofi **$470,000,000** (including contingent payments) **April 2021**	*Acquisition by* Eli Lilly **$610,000,000** (including contingent payments) **December 2022**	*Acquisition of* Finxera Holdings **$407,000,000** **March 2021**	*Combination with* Informa Tech's Digital Businesses **Up to $1,200,000,000** (transaction value before synergies) **Pending** **(as of March 20, 2024)**	

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Under the Biden Administration, M&A has faced increased antitrust scrutiny. The Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DOJ) have been vocal about their desire to ramp up antitrust enforcement and eager to challenge M&A transactions in court. Statistically, only a small number of deals face antitrust headwinds: less than 2% of reported transactions are the subject of a "second request," and the balance receive little to no antitrust scrutiny. Nevertheless, parties to M&A transactions are well-advised to take seriously the antitrust agencies' aggressive stance. The agencies continue to enforce aggressively when they believe a transaction raises anticompetitive concerns, including based on novel theories and despite mixed results in court.

Three recent developments merit particular attention because they change decades-old policies and create new challenges for M&A: (1) the proposed new HSR notification form, which will significantly expand the burden of preparing HSR filings; (2) the new Merger Guidelines, which reflect the aggressive approach the agencies have been taking to merger analysis; and (3) the emergence of the "fix-it-first" strategy in light of the agencies' reluctance to resolve competitive concerns through negotiated consent decrees that provide for divestitures or other remedies.

PROPOSED HSR NOTIFICATION FORM CHANGES

In June 2023, for the first time in 45 years, FTC and DOJ proposed a fundamental overhaul of the HSR pre-merger notification form. The HSR form historically has been straightforward, calling for relatively little information but requiring an often-substantial document submission.

The proposed new form would simultaneously (1) move HSR notifications closer towards other jurisdictions' notification regimes (such as those of the European Union or China) by requiring for the first time detailed narratives regarding key aspects of the substantive antitrust assessment—including horizontal overlaps, vertical relationships and strategic deal rationale—and (2) substantially expand the existing document submission requirements. Currently, parties need only provide final versions of "Item 4(c) and 4(d)" documents—i.e., documents prepared by or for an officer or director that analyze the transaction with respect to competition, markets or synergies. The proposed changes would sweep in documents that parties ordinarily would not provide absent a specific agency request for those documents, including certain draft 4(c) documents or documents prepared by or for "supervisory deal team lead(s)" with 4(c) content. Certain ordinary-course strategic documents (e.g., business plans) also would be required. The proposal would also require significantly expanded disclosures of other information, such as prior acquisitions and minority stakes.

If the proposed revisions are adopted—and we expect the proposal will remain largely intact—HSR notifications will be much more burdensome and require substantially more preparation time and consideration. That will materially expand the time to closing and transaction costs for many transactions. Additionally, the parties will need to take at the time of notification critically important positions regarding overlaps and non-horizontal relationships, which will frame any subsequent investigation or litigation and potentially have implications for reviews of future transactions. The expanded document submissions will require that businesses be even more vigilant to avoid creating vague, incomplete or otherwise misleading documents that could trigger an extended investigation. It will be even more crucial for companies to have robust training and monitoring programs for both deal-related and high-level ordinary-course document creation.

The proposed HSR form likely will not become effective until the second quarter of 2024, but companies must assume that transactions under current consideration will be notified under the new HSR form.

NEW MERGER GUIDELINES

In December 2023, FTC and DOJ jointly released their final Merger Guidelines, which summarize the procedures and enforcement practices the agencies use to investigate mergers. The agencies issued the Guidelines after a nearly two-year process, and they make significant changes from the prior guidelines. Key changes include:

- ***Market Concentration:*** The Guidelines adopt significantly lower market concentration thresholds at which mergers are presumed to harm competition. For example, a market consisting of five companies each with a 20% market share is "highly concentrated," where previously it would be only "moderately concentrated." The Guidelines also introduce a new presumption of competitive harm if the merged firm would have more than a 30% market share and the merger increases the Herfindahl-Hirschman Index (HHI) by more than 100.
- ***Vertical Mergers:*** The Guidelines for the first time address in the same document both "horizontal" transactions (M&A among competitors) and "vertical" transactions (where one party makes an input that can be used in the other party's product). The Guidelines reflect the agencies' aggressive approach to vertical deals. They articulate potential harms from a merger that combines firms in a vertical relationship. Those include, among other things, the merged firm: (1) withholding critical inputs from or disfavoring downstream competitors; (2) foreclosing sales opportunities from upstream competitors; and (3) gaining increased visibility into competitors' sensitive information.
- ***Potential Competition:*** The Guidelines express a preference for "making" versus "buying," claiming that "[i]n general, expansion into a concentrated market via internal growth rather than via acquisition benefits competition." Accordingly, the Guidelines devote substantial attention to the elimination of potential competition, including both "actual potential competition" (where one of the merging parties has set plans to enter a market) and "perceived potential competition" (where current competitors are disciplined by a perception that one or more merging parties might enter). Potential competition will likely continue to receive substantial attention in merger reviews, given

how frequently acquirers with internal R&D capabilities contemplate "make or buy" decisions in the M&A context.

— ***Dominant Firms.*** The Guidelines emphasize that "mergers can violate the law when they entrench or extend a dominant position" but do not explain what "dominant position" means in the merger review context. Additionally, the Guidelines discuss a potential "conglomerate" concern that a merger could enable the merged firm to extend a dominant position from one market into a related market by, for example, tying or bundling sales of two products.

— ***Serial Acquisitions.*** The Guidelines state that a firm may violate antitrust law through a series of acquisitions of smaller firms in the same or related sectors. It is unclear whether this means that the agencies might challenge a series of acquisitions as cumulatively unlawful even if no individual acquisition on its own would be anticompetitive.

— ***Partial Ownership and Minority Investments.*** The Guidelines articulate ways in which acquisitions of partial ownership and minority investments could harm competition.

The new Merger Guidelines largely reflect the agencies' current approaches to merger reviews. It is less clear, however, whether courts will follow this guidance. Agency guidelines are not legally binding, and courts have generally followed them only insofar as they find them persuasive. Unlike previous merger guidelines, the new Guidelines do not reflect bipartisan consensus. There are also questions about whether the Guidelines would survive a change to a Republican administration, which could result in very different approaches to merger enforcement.

EMERGENCE OF THE "FIX-IT-FIRST" STRATEGY

Until recently, the US antitrust agencies commonly resolved competitive concerns regarding proposed mergers by entering a consent decree with the merging parties that included remedies. The merging parties might sell off overlapping assets to address agency concerns, but the transaction would be allowed to proceed. DOJ and FTC, however, have made clear that they will sharply limit resolutions through consent decrees with remedies, preferring to challenge transactions outright. Since 2022, DOJ has agreed to resolve a merger case through a consent decree only once. The FTC has approved consent decrees with remedies to resolve merger cases since 2022, but it also is articulating a more restrictive approach.

The agencies' disfavoring of remedies has dramatically changed the merger review landscape for transactions that may raise antitrust concerns, leading parties increasingly to contemplate "fix-it-first" strategies. With fix-it-first, the parties modify the transaction to address antitrust concerns, typically by entering an agreement with a third party to sell divested assets, without entering a consent decree with the agency. The agency can then either clear the transaction based on the proffered remedy or litigate over the remedy's adequacy and sometimes over whether the transaction may lessen competition in the first place.

Where there is a remedy that is workable as a business matter and consistent with deal objectives, a well-considered fix-it-first remedy can bring several potential benefits, including (1) decreasing the likelihood of prolonged antitrust litigation; (2) providing upfront certainty regarding the scope of the divestiture; (3) avoiding the compliance burdens of an agency consent decree; and (4) in some cases, avoiding a fire sale at depressed prices at the end of the merger review process.

A fix-it-first strategy can be difficult to execute, however. Among other things, parties should carefully assess how a potential remedy may affect deal objectives and practical challenges for a potential divestiture or other remedy. Those challenges will often include (1) finding a way to extract selected assets from the rest of a merging party's business and (2) identifying potential buyers capable of competing effectively with the divested assets.

If the parties decide to employ a fix-it-first strategy, timing considerations will be critical. They will almost invariably face difficult decisions regarding the balance between seeking to persuade the agency—or ultimately a court—that the transaction will not harm competition and beginning the divestiture sales process to minimize closing delays or the risk of going past the transaction's end date. The parties should ensure that the regulatory provisions in the applicable transaction documents faithfully reflect the parties' understanding of critical topics such as regulatory efforts clauses, remedy commitments, the end date and reverse termination fees. ■

A MIXED RECORD IN COURT

FTC and DOJ already have been pushing the envelope and pursuing merger challenges based on less traditional theories than are reflected in the final Merger Guidelines priorities. But the agencies' record in court has been mixed.

— **Potential Competition.** The perceived potential competition theory was at the heart of the FTC's unsuccessful challenge of Meta's acquisition of the virtual reality company Within. The FTC recently relied on the actual potential competition theory to challenge Sanofi's proposed exclusive license to Maze Therapeutics Inc.'s therapy for treatment of Pompe disease, which the FTC alleged would have eliminated a nascent competitor. The parties abandoned the transaction a few days after the FTC sued.

— **Vertical.** The agencies have lost two recent vertical cases in court: Microsoft's acquisition of Activision and UnitedHealth's acquisition of Change Healthcare. But they have successfully blocked, or caused the termination of, other recent vertical deals, notably Lockheed's proposed acquisition of Aerojet, Nvidia's proposed acquisition of Arm and Illumina's acquisition of Grail.

— **Conglomerate concerns.** In an especially aggressive move, the FTC in May 2023 sought to block Amgen's acquisition of Horizon Therapeutics based on a "conglomerate" concern that Amgen could use its large drug portfolio to offer bundled discounts or rebates contingent on the customer buying one or both of Horizon's drugs, which were alleged to hold monopoly positions, thereby excluding competition from incipient competitors to Horizon's drugs. This was the first time in over 40 years that a US antitrust agency challenged a transaction based on a conglomerate theory of competitive harm. The parties ultimately settled through a consent decree, with Amgen agreeing not to offer certain types of bundled discounts involving legacy Horizon drugs.

DOJ M&A Safe Harbor Policy

A Brief Overview of the Recently Announced Policy

On October 4, 2023, DOJ announced a safe harbor policy that may shield companies from criminal prosecution for misconduct they uncover at companies they are acquiring or have recently acquired. Under the M&A Safe Harbor Policy, DOJ will presumptively decline to prosecute acquiring companies that voluntarily self-report misconduct they discover within six months from the date of closing, cooperate with DOJ and "fully remediate" the misconduct within one year from the date of closing.

The policy, which will be applied across the entire DOJ (particularly in areas implicating cybersecurity, technology and national security), adds timelines and more precise standards to a similar policy that had previously been applied in the Foreign Corrupt Practices Act (FCPA) Unit of DOJ and follows previous policy revisions aimed at encouraging voluntary self-disclosures of criminal misconduct by similarly offering potential declinations of prosecutions. The M&A Safe Harbor Policy is also the latest in a series of policy and guidance updates from DOJ regarding corporate compliance programs that are aimed at incentivizing companies to discourage and disclose corporate malfeasance. The policy is, however, DOJ's most focused effort regarding M&A transactions across industries and enforcement areas.

BACKGROUND

In January 2023, Kenneth A. Polite Jr. announced revisions to DOJ's FCPA Corporate Enforcement Policy and expressly extended its application to all corporate criminal matters handled by DOJ's Criminal Division. Similar to the M&A Safe Harbor Policy, the revised and expanded Corporate Enforcement Policy offers a presumption of a declination to companies that voluntarily self-disclose misconduct to the DOJ, fully cooperate, timely and appropriately undertake remedial measures, and disgorge any profits from unlawful conduct, but the policy does not provide timelines and other specifics.

M&A SAFE HARBOR POLICY

The M&A Safe Harbor Policy builds on the Corporate Enforcement Policy by implementing a department-wide framework that focuses specifically on the M&A process. This is intended to create greater consistency across DOJ. To be eligible for a declination under the M&A Safe Harbor Policy (which applies to antitrust, sanctions and other criminal violations), an acquiring company must:

- self-report misconduct committed by the acquired company within six months from the date of closing, regardless of whether the illegal activity was identified before or after the acquisition; and
- fully remediate the misconduct within a year of the closing date.

These baseline time frames are subject to a reasonableness analysis and may be extended by DOJ depending on the facts and circumstances of a particular transaction.

The policy provides that aggravating factors—which include involvement by executive management in misconduct, significant profits from misconduct, and egregious or pervasive misconduct—at the acquired company will not have any impact on the acquiring company's ability to obtain a declination. At the same time, aggravating factors may prevent an acquired company from receiving a declination based on a self-disclosure from an acquiring company. Furthermore, misconduct disclosed under the M&A Safe Harbor Policy will not be taken into consideration for any future recidivist analysis for the acquiring company.

The policy applies only in the criminal context and does not affect civil merger enforcement.

Even before the M&A Safe Harbor Policy was announced, recent enforcement actions demonstrate the premium DOJ has placed on voluntary self-disclosure in the M&A context. For example, in December 2022, Safran S.A. received a declination of prosecution with disgorgement after it voluntarily disclosed information about improper pre-acquisition payments to consultants made by two companies Safran acquired, cooperated with the ensuing investigation and remediated the issues.

KEY CONSIDERATIONS

The M&A Safe Harbor Policy underscores the importance of robust due diligence during the acquisition process to make sure an acquiring company understands potential criminal exposure at the target company. Including compliance issues as a regular part of the diligence process, and not an afterthought as a deal is about to close, is key to identifying and addressing relevant risks.

While incentivizing voluntary self-disclosures through the presumption of declinations, the M&A Safe Harbor Policy does have specific requirements as to the timing of disclosure and remediation. Although DOJ suggested there may be some flexibility in these deadlines, companies should expect the deadlines will be enforced in the absence of discussions and assurances from DOJ and in situations involving ongoing or imminent harm (particularly in the area of national security), companies should not delay self-disclosure if they wish to take full advantage of the policy.

Acquiring companies should act diligently during the M&A process to identify criminal misconduct at acquired companies and consider the benefits and risks of potential disclosure to DOJ. At the same time, companies must remain mindful that DOJ has specified that the policy applies to only "criminal conduct discovered in bona fide, arm's-length M&A transactions" and "does not apply to misconduct that was otherwise required to be disclosed or already public or known to [DOJ]."

The M&A Safe Harbor Policy provides potentially helpful incentives to disclose malfeasance and avoid prosecution, but companies should proceed cautiously to ensure they are eligible for the policy's benefits. They should also be mindful that restitution and disgorgement, as well as a public recitation of the facts, will be required even if DOJ declines prosecution. ■

A Comparison of Deal Terms in Public and Private Acquisitions

Public and private company M&A transactions share many characteristics but also involve different rules and conventions. (Business combinations involving SPACs or other "shell companies" are subject to additional considerations that are not discussed below.)

GENERAL CONSIDERATIONS

Public and private company acquisitions differ in various fundamental respects:

- ***Structure:*** An acquisition of a private company may be structured as an asset purchase, a stock purchase or a merger. A public company acquisition is generally structured as a merger, often in combination with a tender offer for all-cash acquisitions.
- ***Letter of Intent:*** If a public company is the target in an acquisition, there is usually no letter of intent. The parties typically go straight to a definitive agreement, due in part to concerns over creating a premature disclosure obligation. Sometimes an unsigned term sheet is also prepared.
- ***Timetable:*** The timetable before signing the definitive agreement is often more compressed in an acquisition of a public company. However, more time may be required between signing and closing to prepare and circulate a proxy statement for stockholder approval (unless a tender offer structure is used), to comply with notice and timing requirements, and to obtain antitrust clearances that may be unnecessary (or easier to obtain) in smaller, private company acquisitions.
- ***Confidentiality:*** The potential damage from a leak is much greater in an M&A transaction involving a public company, and rigorous confidentiality precautions are taken accordingly.
- ***Litigation Risk:*** Litigation against the target, its board of directors and/or the acquirer is much more common in acquisitions of public targets than private targets. The board of a public target almost always (and the board of the acquirer sometimes) obtains a fairness opinion from an investment banking firm.

DUE DILIGENCE

When a public company is acquired, the due diligence process differs from the process followed in a private company acquisition:

- ***Availability of SEC Filings:*** Due diligence typically starts with the target's SEC filings, enabling a potential acquirer to investigate in stealth mode until it wishes to engage the target in discussions.
- ***Speed:*** The due diligence process is often quicker in an acquisition of a public company because of the availability of SEC filings, thereby allowing the parties to focus quickly on the key risks and transaction points.

MERGER AGREEMENT

The merger agreement for an acquisition of a public company reflects a number of differences from its private company counterpart:

- ***Representations:*** In general, the representations and warranties from a public company are less extensive than those from a private company, are qualified in some respects by the public company's SEC filings, may have higher materiality thresholds, and do not survive the closing.
- ***Exclusivity:*** The exclusivity provisions are subject to a "fiduciary exception" permitting the target to negotiate with a third party making an unsolicited offer that may be deemed superior and, in certain circumstances, to change the target board's recommendation to stockholders.
- ***Closing Conditions:*** The "no material adverse change" and other closing conditions are generally drafted so as to limit the target's closing risk and give the acquirer little room to refuse to complete the transaction if regulatory and stockholder approvals are obtained.
- ***Post-Closing Obligations:*** Post-closing escrow or indemnification arrangements are extremely rare.
- ***Earnouts:*** Earnouts are unusual, although a form of earnout arrangement called a "contingent value right" is not uncommon in the life sciences sector.
- ***Deal Certainty and Protection:*** The negotiation battlegrounds are the provisions addressing deal certainty (principally the closing conditions) and deal protection (exclusivity, voting agreement, termination and breakup fees).

TIPS TO MINIMIZE LITIGATION RISK

Although a public target's board may not be able to avoid litigation entirely, a sound process will allow the target to anticipate and deflect many common challenges to proposed acquisitions:

- Hire qualified (and unconflicted) advisors to steer the process and lead the negotiations with potential buyers.
- If potential conflicts exist, establish a committee of disinterested directors and task them with active oversight of the process.
- Give due consideration to the array of financial and/or strategic parties that should be solicited and share information with bidders on equal terms.
- Keep bidding competitive, and instruct management not to discuss the terms of their future employment or compensation with potential buyers until authorized by the board (typically after the price and other major terms are in place).
- Negotiate hard over the price and deal terms, which should be sufficiently flexible to permit the board to comply with its fiduciary duties.
- Contemporaneously prepare minutes of board and committee meetings in order to help demonstrate the robustness of the process.
- Make fulsome disclosures in the proxy statement, and involve litigation counsel to review the disclosures in advance.

SEC INVOLVEMENT

The SEC plays a significant role in acquisitions involving a public company:

- ***Form S-4:*** In a public acquisition, if the acquirer is issuing stock to the target's stockholders, the acquirer must register the issuance on a Form S-4 registration statement that is filed with (and possibly reviewed by) the SEC.
- ***Proxy Statement:*** Absent a tender offer, the target's stockholders, and sometimes the acquirer's stockholders, must approve

the transaction. Stockholder approval is sought pursuant to a proxy statement that is filed with (and often reviewed by) the SEC. Public targets (subject to certain exceptions) must provide for a separate, nonbinding stockholder vote with respect to all compensation each named executive officer will receive in the transaction.

— ***Tender Offer Filings:*** In a tender offer for a public target, the acquirer must file a Schedule TO and the target must file a Schedule 14D-9. The SEC staff reviews and often comments on these filings.

— ***Other SEC Filings:*** Many Form 8-Ks and other SEC filings are often required by public companies engaged in M&A transactions.

— ***Public Communications:*** Elaborate SEC regulations govern public communications in the period between the first public announcement of the transaction and the closing of the transaction. Most written communications in connection with a business combination transaction must be filed with the SEC.

IMPACT OF R&W INSURANCE

Representation and warranty insurance (R&W insurance) provides coverage for indemnification claims arising from misrepresentations by the seller in the sale of a company. The use of R&W insurance continues to be prevalent, particularly in sales of privately held companies backed by venture capital or private equity investors, although usage declined somewhat in 2022 and early 2023 compared to 2021, according to studies conducted by SRS Acquiom (a provider of post-closing management services).

The presence of R&W insurance in private company acquisitions influences the negotiated outcomes of various deal terms. Below is a brief summary of the principal effects of buy-side R&W insurance, based on studies conducted by SRS Acquiom.

— ***Financial Terms:***

- Indemnification escrows are significantly smaller (or eliminated entirely).
- Among deals with purchase price adjustments, a separate escrow to secure the purchase price adjustment is much more likely.

— ***Representations and Warranties:***

- The seller is much less likely to provide a "10b-5" representation.
- "Pro-sandbagging" provisions allowing the buyer to seek indemnification for the seller's misrepresentations even if the buyer knew of the misrepresentations prior to closing are much less likely.
- Deals are much more likely to provide that materiality qualifications in representations and warranties are disregarded for purposes of determining both breaches and damages.

— ***Liability Provisions:***

- "Non-reliance" and "no other representations" provisions, which are intended to limit or eliminate seller liability based on extra-contractual statements, are more likely.
- Seller representations and warranties are much less likely to survive the closing; when they do survive the closing, they have a median survival period of 12 months.
- Any indemnification obligations of the seller are much more likely to be subject to a "deductible" (in which the seller is liable only for damages in excess of a specified threshold amount) than a "tipping basket" (in which the seller is liable for all damages once the threshold amount has been reached).

COMPARISON OF SELECTED DEAL TERMS

Set forth below is a comparison of selected deal terms in public target and private target acquisitions based on data from the MarketStandard database of SRS Acquiom and the most recent deal points

"10b-5" Representation	
PUBLIC (ABA)	Not reported
PRIVATE (ABA)	7%
PRIVATE (SRS ACQUIOM)	23%

Standard for Accuracy of Target Representations at Closing	
PUBLIC (ABA)	
"MAC/MAE"	97%
Other standard	3%
PRIVATE (ABA)	
"MAC/MAE"	74%
"In all material respects"	23%
"In all respects"	2%
PRIVATE (SRS ACQUIOM)	
"MAC/MAE"	41%
"In all material respects"	55%
"In all respects"	4%

Inclusion of "Prospects" in MAC/MAE Definition	
PUBLIC (ABA)	2%
PRIVATE (ABA)	10%
PRIVATE (SRS ACQUIOM)	16%

Fiduciary Exception to "No-Shop/No-Talk" Covenant	
PUBLIC (ABA)	100%
PRIVATE (ABA)	9%
PRIVATE (SRS ACQUIOM)	–

Opinion (Nontax) of Target's Counsel as Closing Condition	
PUBLIC (ABA)	Not reported
PRIVATE (ABA)	1%
PRIVATE (SRS ACQUIOM)	4%

Appraisal Rights Closing Condition	
PUBLIC (ABA)	2%
PRIVATE (ABA)	81%
PRIVATE (SRS ACQUIOM)	47%

Acquirer MAC/MAE Closing Condition	
PUBLIC (ABA)	100%
PRIVATE (ABA)	93%
PRIVATE (SRS ACQUIOM)	98%

studies available from the Mergers & Acquisitions Committee of the American Bar Association's Business Law Section. The SRS Acquiom data is for acquisitions of private targets by US public companies with purchase prices ranging from $25–$750 million in which SRS Acquiom served as shareholder representative and that closed in 2022 or the first half of 2023. The ABA private target study is based on publicly available agreements for acquisitions of private targets by public companies with purchase prices ranging from $30–$750 million that were completed (or for which definitive agreements were executed) in 2022 or the first quarter of 2023. The ABA public target study is based on merger agreements for transactions with US public company targets with total deal consideration in excess of $200 million that were completed in 2021, 2022 and the first half of 2023 (excluding de-SPAC transactions and transactions involving targets majority-owned by the buyer, real estate investment trusts, business development companies and companies formed in US territories).

The chart on page 14 compares the following deal terms in acquisitions of public and private targets:

— ***"10b-5" Representation:*** A representation to the effect that no representation or warranty by the target contained in the acquisition agreement, and no statement contained in any document, certificate or instrument delivered by the target pursuant to the acquisition agreement, contains any untrue statement of a material fact or fails to state any material fact necessary, in light of the circumstances, to make the statements in the acquisition agreement not misleading.

— ***Standard for Accuracy of Target Representations at Closing:*** The general standard that will be applied to assess the accuracy of the target's representations and warranties set forth in the acquisition agreement for purposes of the acquirer's closing conditions:

- A "MAC/MAE" standard provides that each of the representations and warranties of the target must be true and correct in all respects as of the closing, except where the failure of such representations and warranties to be true and correct will not have or result in a *material adverse change/effect on the target*.
- An "in all material respects" standard provides that the representations and warranties of the target must be true and correct *in all material respects* as of the closing.
- An "in all respects" standard provides that each of the representations and warranties of the target must be true and correct *in all respects* as of the closing.

— ***Inclusion of "Prospects" in MAC/MAE Definition:*** Whether the "material adverse change/effect" definition in the acquisition agreement includes "prospects" along with other target metrics, such as the business, assets, properties, financial condition and results of operations of the target.

— ***Fiduciary Exception to "No-Shop/No-Talk" Covenant:*** Whether the "no-shop/no-talk" covenant prohibiting the target from seeking an alternative acquirer includes an exception permitting the target to consider an unsolicited superior proposal if required to do so by its fiduciary duties.

— ***Opinion of Target's Counsel as Closing Condition:*** Whether the acquisition agreement contains a closing condition requiring the target to provide an opinion of counsel (excluding opinions regarding the tax consequences of the transaction).

— ***Appraisal Rights Closing Condition:*** Whether the acquisition agreement contains a closing condition providing that appraisal rights must not have been sought by target stockholders holding more than a specified percentage of the target's outstanding capital stock. (Under Delaware law, appraisal rights generally are not available to stockholders of a public target when the merger consideration consists solely of publicly traded stock.)

— ***Acquirer MAC/MAE Closing Condition:*** Whether the acquisition agreement contains a closing condition excusing the acquirer from closing if an event or development has occurred that has had, or would reasonably be expected to have, a "material adverse change/effect" on the target, either as a standalone closing condition or through the bring-down at closing of a "no material adverse change/effect" representation. ■

POST-CLOSING INDEMNIFICATION CLAIMS

Based on an SRS Acquiom study analyzing post-closing indemnification claims in more than 700 private target acquisitions with fully released escrows during the period from the fourth quarter of 2020 through the second quarter of 2022:

— *Frequency of Claims:* 30% of all transactions had at least one post-closing indemnification claim (excluding purchase price adjustments) against the escrow. Claim frequency was lowest (16%) in deals valued at more than $500 million and highest (37%) in deals valued between $50 million and $100 million. At 31% to 32%, claim rates were very similar among US public buyers, US private buyers and US private equity buyers.

— *Size of Claims:* Median claim size as a percentage of the escrow ranged from a high of 13% for regulatory compliance claims to less than 1% for transaction fees/costs and capitalization claims. On average, claim size as a percentage of the escrow was highest on deals valued at more than $500 million (89%) and on deals with US private buyers (68%), and lowest on deals valued between $100 million and $200 million (23%) and on deals with US private equity buyers (29%).

— *Subject Matter of Claims:* Overall, the overwhelming majority of claims were for breaches of representations and warranties (71%) and transaction fees/costs (27%).

— *Bases for Misrepresentation Claims:* Most frequently claimed misrepresentations involved tax (45%), employee-related (12%), undisclosed liabilities (11%), capitalization (9%), intellectual property (6%) and financial statements (4%).

— *Resolution of Claims:* Contested claims were resolved in a median of 4.4 months. Fraud claims (median of 20 months) and breach of fiduciary duty claims (median of 18.6 months) took the most time to be resolved, while claims for purchase price adjustments were resolved the quickest (median of 0.7 month).

— *Purchase Price Adjustments:* 92% of all transactions had mechanisms for purchase price adjustments. Of these, 88% had a post-closing adjustment (favorable to the buyer in 48% of transactions and favorable to target stockholders in 40% of transactions).

— *Expense Fund:* 96% of all deals had expense funds. The average size was $348,000 (0.58% of transaction value) in deals with earnouts and $203,000 (0.33% of transaction value) in other deals.

We reviewed all merger transactions between 2019 and 2023 involving VC-backed targets (as reported in PitchBook after 2019 and in Dow Jones VentureSource or PitchBook for 2019) in which the merger documentation was publicly available and the deal value was $25 million or more. Based on this review, we have compiled the following deal data:[1]

Characteristics of Deals Reviewed		2019	2020	2021	2022	2023
The number of deals we reviewed and the type of consideration paid in each	Sample Size	20	25	45	22	15
	Cash	60%	60%	24%	41%	40%
	Stock	0%	8%	18%	5%	20%
	Cash and Stock	40%	32%	58%	54%	40%
Deals With Earnout		**2019**	**2020**	**2021**	**2022**	**2023**
Deals that provided contingent consideration based upon post-closing performance of the target, achievement of milestones by the target or other contingencies concerning the value of target (other than balance sheet adjustments)	With Earnout	40%	28%	42%	41%	27%
	Without Earnout	60%	72%	58%	59%	73%
Deals With Indemnification		**2019**	**2020**	**2021**	**2022**	**2023**
Deals where the target's shareholders or the buyer indemnified the other post-closing for breaches of representations, warranties and covenants	With Indemnification					
	By Target's Shareholders	80%	88%	76%[2]	86%	67%
	By Buyer	45%	32%	29%	68%	47%
Deals With Representation and Warranty Insurance		**2019**	**2020**	**2021**	**2022**	**2023**
Deals that expressly contemplate representation and warranty insurance	With Representation and Warranty Insurance	25%	68%	47%	50%	33%
Survival of Representations and Warranties		**2019**	**2020**	**2021**	**2022**	**2023**
Length of time that representations and warranties survived the closing for indemnification purposes (subset: deals where representations and warranties survived the closing for indemnification purposes)[3]	Shortest	12 Mos.	12 Mos.	12 Mos.	12 Mos.	12 Mos.
	Longest	24 Mos.	18 Mos.	24 Mos.	24 Mos.	24 Mos.
	Most Frequent	18 Mos.	12 Mos.	12 Mos.	12 Mos.	12 & 18 Mos. (tie)
Caps on Indemnification Obligations		**2019**	**2020**	**2021**	**2022**	**2023**
Upper limits on indemnification obligations where representations and warranties survived the closing for indemnification purposes	With Cap	100%	100%	100%	100%	100%
	Limited to Escrow[4]	86%	81%	90%	78%	80%
	Limited to Purchase Price	0%	0%	0%	0%	0%
	Exceptions to Limits[5]	100%	95%	100%	89%	100%
	Without Cap	0%	0%	0%	0%	0%

[1] For certain transactions, certain deal terms have been redacted from the publicly available documentation and are not reflected in the data compiled in this table.

[2] Excludes two transactions that do not provide for indemnification but permit setoff against contingent consideration.

[3] Measured for representations and warranties generally; specified representations and warranties may survive longer.

[4] Includes two transactions in 2021 and one transaction in 2023 where the limit was below the escrow amount.

[5] Generally, exceptions were for fraud, willful misrepresentation and certain "fundamental" representations commonly including capitalization, authority and validity. In a limited number of transactions, exceptions also included intellectual property representations.

Escrows		2019	2020	2021	2022	2023
Deals having escrows securing indemnification obligations of the target's shareholders (subset: deals with indemnification obligations of the target shareholders)	With Escrow	94%	90%	91%	89%	90%
	% of Deal Value					
	Lowest[6]	10%	8%	5%	7%	5%
	Highest	13%	15%	18%	15%	10%
	Most Frequent	12%	15%	10%	8%	6%
	Length of Time[7]					
	Shortest	12 Mos.	12 Mos.	12 Mos.	12 Mos.	12 Mos.
	Longest	36 Mos.	24 Mos.	36 Mos.	30 Mos.	24 Mos.
	Most Frequent	12 Mos.	12 Mos.	12 Mos.	12 Mos.	12 & 18 Mos. (tie)
	Exclusive Remedy	64%	68%	53%	73%	56%
	Exceptions to Escrow Limit Where Escrow Was Exclusive Remedy[5]	100%	92%	100%	91%	100%

Baskets for Indemnification		2019	2020	2021	2022	2023
Deals with indemnification only for amounts above a specified "deductible" or only after a specified "threshold" amount is reached	Deductible	56%	52%[8]	71%[9]	53%[8]	80%
	Threshold	44%	29%[8]	26%[9]	32%[8]	10%

MAE Closing Condition		2019	2020	2021	2022	2023
Deals with closing condition for the absence of a "material adverse effect" with respect to the other party, either explicitly or through representation brought down to closing	Condition in Favor of Buyer	100%	100%	97%	100%	91%
	Condition in Favor of Target	35%	24%	37%	29%	18%

Exceptions to MAE		2019	2020	2021	2022	2023
Deals where the definition of "material adverse effect" for the target contained specified exceptions	With Exception[10]	100%	100%	95%[11]	100%	100%

[6] Excludes transactions that also specifically referred to representation and warranty insurance as recourse for the buyer.

[7] Length of time does not include transactions where such time period cannot be ascertained from publicly available documentation.

[8] A "hybrid" approach with both a deductible and a threshold was used in another 10% of these transactions in 2020 and 11% of these transactions in 2022.

[9] A 50/50 cost sharing approach was used in another 3% of these transactions in 2021.

[10] Generally, exceptions were for general economic and industry conditions.

[11] The only transaction(s) not including such exceptions provided for a closing on the same day the definitive agreement was signed.

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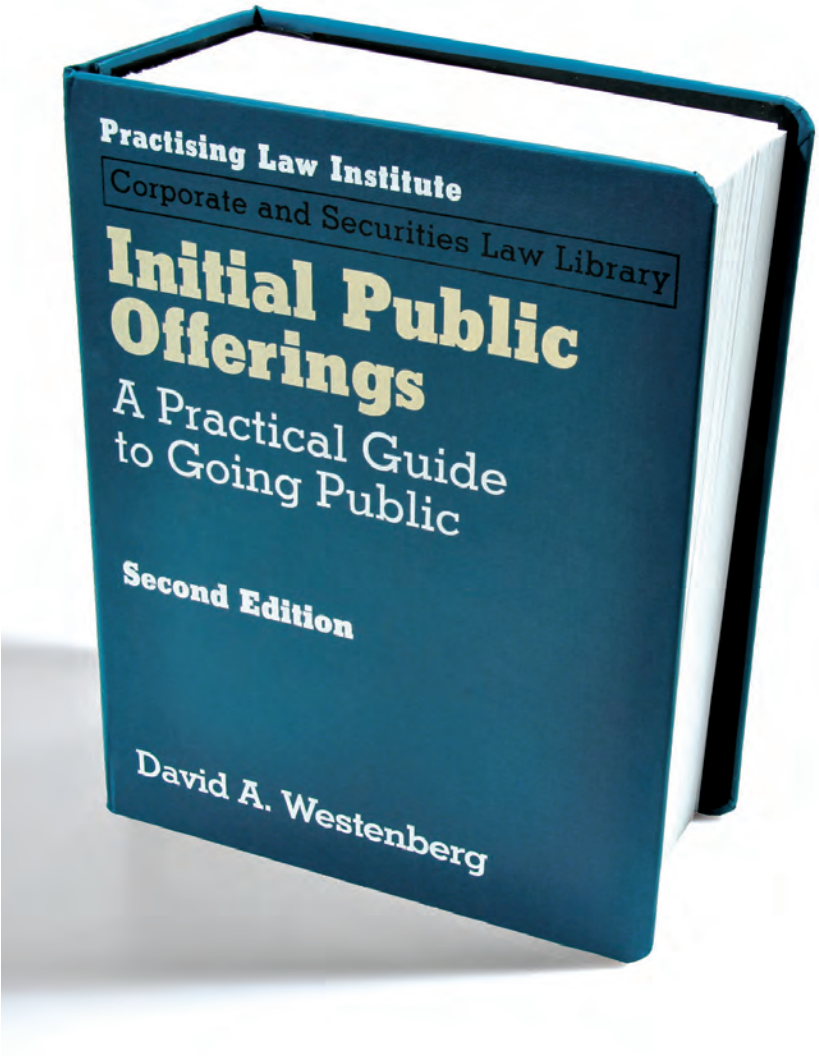

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Data Sources: M&A data is sourced from S&P Global Market Intelligence. WilmerHale compiled the data for sales of VC-backed companies from PitchBook.

Special note on data: The M&A data discussed in this report is based on announced transactions excluding transactions that are subsequently terminated. As a result, reported M&A data for a given year may be adjusted over time to reflect the removal of terminated transactions and the inclusion of previously unannounced transactions.

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