PAGES 1-6
Mergers & Acquisitions

PAGES 6-8
Antitrust

PAGES 8-10
CFIUS/ National Security

PAGE 10
Activism

PAGES 10-14
Corporate Governance

PAGES 14-15
Additional Policy Updates

Cravath Quarterly Review

M&A, ACTIVISM AND CORPORATE GOVERNANCE

01

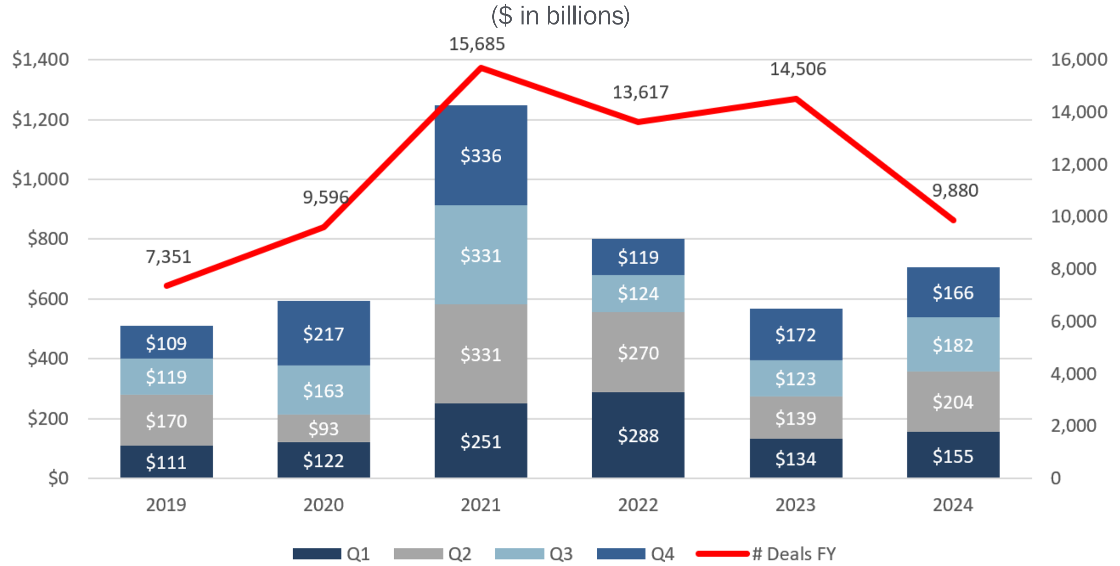
Mergers & Acquisitions

TRENDS[1]

SOURCE Refinitiv, An LSEG Business.

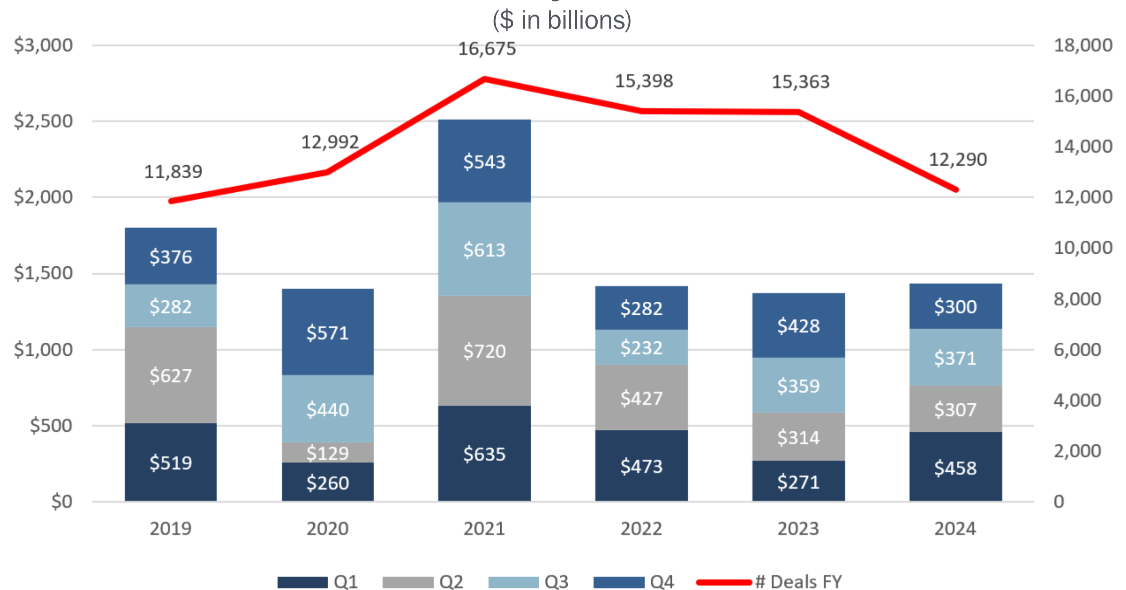
Q4 2024: M&A Volume Increases Year-over-Year, Announced Deal Volume Below $1 Trillion for Tenth Consecutive Quarter

In 2024, global M&A activity totaled ~$3.2 trillion, an increase of ~10% compared to 2023. There were approximately 50,000 deals announced in 2024, a year-over-year decrease of ~14% compared to 2023. Q4 2024, with announced deal volume of $808 billion, marked the tenth consecutive quarter to fall below $1 trillion in announced deal volume.



SOURCE Refinitiv, An LSEG Business.

Private equity buyouts in 2024 reached $706 billion globally, an increase of ~24% compared to 2023. However, there was a decrease in the number of private equity-backed deals, with ~9,900 private equity-backed deals announced in 2024, a ~32% decrease from the ~14,500 deals announced in 2023.



SOURCE Refinitiv, An LSEG Business.

Dealmaking Up Across All Regions

M&A activity for U.S. targets amounted to ~$1.4 trillion in 2024, an increase of ~5% compared to 2023. M&A activity for European targets totaled ~$700 billion in 2024, an increase of 22% compared to 2023 levels and a two-year high. Asia Pacific dealmaking totaled ~$611 billion in 2024, a ~1% increase compared to 2023 and the strongest period for M&A in the region in two years.

LEGAL & REGULATORY DEVELOPMENTS

Cases

Q4 2024 featured a number of notable decisions by the Delaware Court of Chancery.

DIRECTOR OVERSIGHT

IN RE TRANSUNION DERIVATIVE SHAREHOLDER LITIGATION, C.A. NO. 2022-1103-LWW (DEL. CH. OCT. 1, 2024)

In October 2024, the Delaware Court of Chancery dismissed derivative claims that the directors of TransUnion, a consumer credit reporting company, breached their fiduciary duties by failing to ensure compliance with a regulatory consent order issued by the Consumer Financial Protection Bureau (the "CFPB").

In 2015, the CFPB initiated an examination of TransUnion's advertising and marketing practices related to its credit reporting services, ultimately issuing a consent order in January 2017. The consent order detailed TransUnion's violations of the Consumer Financial Protection Act and required certain remediation efforts. TransUnion began to implement some of the proposed changes but refrained from making others based on legal advice from its outside counsel, a former CFPB enforcement attorney, that such changes were not required until TransUnion received the CFPB's confirmation of its compliance plan. Ultimately, the CFPB filed suit in federal court against TransUnion, seeking, among other things, to enforce the terms of the consent order. The federal suit survived a motion to dismiss and remains pending. Several stockholders of TransUnion filed derivative actions in the Delaware Court of Chancery, claiming that the directors breached their fiduciary duties by failing to adequately oversee TransUnion's compliance efforts.

In a memorandum opinion, the Delaware Court of Chancery dismissed the derivative claims. The Court found that TransUnion relied in good faith upon the advice of outside counsel, noting that TransUnion had already begun partially implementing the consent order and that an inadequate response by itself did not suggest "intentional dereliction of duty" and therefore did not support a claim for breach of fiduciary duty. The Court also highlighted that TransUnion's board was regularly informed that TransUnion was cooperating with the CFPB regarding the compliance plan. Given the steps that the TransUnion board took, the Court concluded that the plaintiffs' allegations fell materially short of bad faith and granted the defendants' motion to dismiss.

ENTIRE FAIRNESS

JACOBS, ET AL. V. AKADEMOS, INC., C.A. NO. 2021-0346-JTL (DEL. CH. OCT. 30, 2024)

In October 2024, the Delaware Court of Chancery issued a post-trial opinion concerning the sale of Akademos, Inc. ("Akademos"), a distressed company, to its controlling stockholder where the remainder of the stockholders received no consideration. Finding that the fair value of the common stock held by the other stockholders at the time of the transaction was zero, the Court held that the transaction was entirely fair and that the controlling stockholder did not aid and abet any breaches of fiduciary duties.

Akademos was a private corporation operating virtual bookstores for educational institutions. It was never profitable during more than twenty years of operations. Initially, Akademos was funded by capital from friends, family and angel investors in return for common stock. In 2009, Kohlberg Ventures, LLC (the "KV Fund") invested $2.5 million in exchange for preferred stock with a liquidation preference. The KV Fund made additional investments in Akademos and eventually gained majority voting control. As Akademos continued to face financial difficulties, the KV Fund proposed a cash-out merger in 2020, with the merger consideration being applied solely toward the liquidation preference associated with the KV Fund's preferred stock and the repayment of Akademos's debt, with no consideration distributed to common stockholders. The KV Fund conditioned its offer on the approval of Akademos's three directors that were unaffiliated with the KV Fund and a three-week go-shop period, but not on the approval of a majority of the stockholders that were unaffiliated with the KV Fund. The unaffiliated Akademos directors voted two-to-one to approve the merger, and the go-shop period expired without a competing offer. A group of common stockholders petitioned for appraisal and claimed that Akademos's directors breached their fiduciary duties by approving the merger.

The Delaware Court of Chancery found that the fair value of the common stockholders' shares was zero and that the transaction was entirely fair. The Court rejected the plaintiffs' discounted cash flow analysis because of its reliance on financial projections based on the performance of new business lines the Court deemed speculative, and instead credited the defendants' DCF valuation of $2.4 million, of which $0 was allocable to the common stock after taking into account the contractual rights of Akademos's outstanding debt and preferred stock. Having determined that the common stock was worth zero, the Court also found that the transaction was entirely fair, as common stockholders received equivalent value in the transaction compared to what they had before—nothing. The Court found that the merger offered a fair price given that Akademos had no reasonable prospect of generating value for common stockholders, as the company had never turned a profit in twenty years and had no prospect of turning its performance around given, among other things, a demonstrated lack of available financing. Further, though the entire fairness test involves an inquiry into both fair price and fair dealing, the Court determined that "the fair price evidence [was] sufficiently strong to carry the day without any inquiry into fair dealing," noting that even if the transaction had been forced through "without any process whatsoever…the common stock was so far out of the money that the Merger was entirely fair."

REDOMESTICATION

GUNDERSON V. THE TRADE DESK, ET AL., C.A. NO. 2024-1029-PAF (DEL. CH. NOV. 7, 2024)

On November 6, 2024, the Delaware Court of Chancery found that a decision by the board of The Trade Desk, Inc. ("Trade Desk") to re-domicile Trade Desk to a new state through a conversion was not subject to the supermajority voting provision in its certificate of incorporation. The Court found that the supermajority provision at issue was designed to apply to amendments to the certificate of incorporation and, in line with the doctrine of independent legal significance and Delaware case law, declined to apply this provision to other corporate actions in the absence of clear language in the certificate of incorporation to that effect.

In September 2024, the board of Trade Desk approved the reincorporation of Trade Desk as a Nevada corporation under Section 266 of the Delaware General Corporate Law ("DGCL")—a decision requiring only majority stockholder approval under the DGCL. Trade Desk filed notice of a special meeting to vote on

the conversion, noting in its proxy statement that only majority approval was required.
A stockholder of Trade Desk brought suit in the Delaware Court of Chancery, asserting that the conversion should instead be subject to supermajority approval, citing a provision in Trade Desk's certificate of incorporation requiring supermajority approval to "amend or repeal, or adopt any provision" of the certificate of incorporation. The plaintiff argued that the conversion would amend and repeal the certificate of incorporation and adopt provisions inconsistent with those that could only be amended by supermajority approval under the current certificate of incorporation.

The Court entered a partial final judgment, granting Trade Desk's motion for summary judgment on the relevant counts and allowing the conversion to proceed with a majority voting requirement. The Court looked to the doctrine of independent legal significance, which holds that actions authorized under one section of the DGCL will not be invalidated for causing a result that would not be achievable if pursued through actions under another section of the statute. Pursuant to the doctrine, the Court agreed with Trade Desk's interpretation that the reincorporation could be implemented with a simple majority vote as provided under Section 266 of the DGCL, and that the supermajority vote requirements should not be extended beyond formal amendments to the certificate of incorporation under Section 242 of the DGCL. The Court highlighted the importance of including clear language in corporate certificates when a company wants to extend supermajority voting rights to mergers and other actions.

ENTIRE FAIRNESS

GP-SP HOLDINGS LLC, ET AL. V. WALKER, ET AL., C.A. NO. 9413-VCF (DEL. CH. NOV. 15, 2024)

In November 2024, the Delaware Court of Chancery issued a memorandum opinion holding that the approval of a forbearance agreement by the board of BridgeStreet WorldWide, Inc. ("BridgeStreet") failed to pass entire fairness review due to an indemnity provision negotiated by the board with respect to an unrelated litigation with BridgeStreet's majority shareholder.

BridgeStreet was a Delaware corporation servicing apartments and corporate housing through its operating subsidiaries. Following an unsuccessful sale process to address BridgeStreet's substantial debt, Versa Capital Management, LLC ("Versa") formed a subsidiary, Domus BWW Funding LLC ("Domus"), to purchase BridgeStreet's senior secured debt with hopes of eventually acquiring BridgeStreet. After BridgeStreet defaulted on the debt, it entered into a forbearance agreement with Domus under which Domus agreed to not exercise its right to foreclose for a five-month period so long as additional financial covenants were met. On the same day, Domus entered into an indemnity agreement with BridgeStreet's directors pursuant to which Domus agreed to defend and indemnify BridgeStreet's directors against any claim or proceedings brought by BridgeStreet's largest stockholder, GB-SP Holdings, LLC ("GB-SP"), for claims related to BridgeStreet or its subsidiaries.

BridgeStreet breached the financial covenants in the forbearance agreement one month later. After protracted negotiations with Versa, BridgeStreet's board approved a consensual foreclosure in which BridgeStreet transferred all of its equity interests in its operating subsidiaries to Versa in exchange

for the discharge of $38 million of its outstanding $46 million debt. GB-SP brought suit shortly after, alleging that BridgeStreet's board both violated the shareholders agreement and breached its fiduciary duty of loyalty by entering into the forbearance agreement and approving the consensual foreclosure.

The Court held that, first, the directors in office when the forbearance agreement was negotiated and approved breached the shareholders agreement by withholding requested company financial information and preventing GB-SP from assigning its designee to the board, entitling GB-SP to nominal damages. Second, the Court found that the indemnification provisions of the forbearance arrangement caused all of the directors to have an interest in the transaction, subjecting the transaction to "entire fairness" review. The Court found the transaction not to be entirely fair, ordering the indemnified directors to turn over to BridgeStreet all amounts received from Domus by way of indemnification payments. Third, the Court held that Versa aided and abetted the fiduciary breaches as they exploited the directors' conflicts of interests by offering them complete insulation from liability through the indemnity agreement. Last, the Court found that the directors did not breach their fiduciary duties in approving the consensual foreclosure, noting that the foreclosure was entirely fair given the thorough process and BridgeStreet's financial difficulties.

02

Antitrust

Update on Forthcoming New HSR Rules

As discussed in our Q3 2024 Quarterly Review,[2] on October 10, 2024, the Federal Trade Commission ("FTC"), with the concurrence of the Assistant Attorney General of the Department of Justice ("DOJ"), issued the final version of the new Hart-Scott-Rodino ("HSR") rules (the "HSR Rules"). The HSR Rules represent a significant expansion of the current filing requirements and are expected to require substantial additional time and effort from filers. The HSR Rules will take effect on February 10, 2025.[3] For more information about the HSR Rules, please see our October 15, 2024, memo.[4]

FTC and DOJ Withdraw Antitrust Guidelines for Collaborations Among Competitors (the "Collaboration Guidelines")

On December 11, 2024, the FTC and the DOJ jointly announced the withdrawal of the Collaboration Guidelines, issued in April 2000, explaining that the Collaboration Guidelines "no longer provide reliable guidance about how enforcers assess the legality of collaborations involving competitors."[5] Instead, "[b]usinesses considering collaborating with competitors are encouraged to review the relevant statutes and caselaw to assess whether a collaboration would violate the law."[6] The vote to withdraw the guidelines was 3-2, with Republican Commissioners Andrew Ferguson and Melissa Holyoak dissenting. In his statement, Commissioner Ferguson cited the proximity to the inauguration of a new President as his reason for dissenting, explaining that "[n]ow is the time to facilitate an orderly transition, not to withdraw existing guidance or to push through revised or new guidance."[7] In her dissent, Commissioner Holyoak similarly noted that "the Majority is withdrawing the Collaboration Guidelines right after an administration-changing election, further compounding today's poor policy decision," but also criticized the withdrawal for failing to issue "replacement guidance, or even intimating plans for future replacement," thus "leav[ing] businesses grasping in the dark."[8]

ENFORCEMENT

In October 2024, the FTC and the DOJ released their HSR Annual Report for the fiscal year 2023 data on the HSR Premerger Notification Program.[9] In 2023, 1,805 transactions were reported under the HSR Act. Of the 1,805 transactions reported, 37 transactions (2.1% of all HSR reportable transactions) were subject to a second request.

The report also contained information about merger enforcement actions by the FTC and the DOJ in 2023. The FTC brought 16 merger enforcement challenges in 2023: two in which it issued final consent orders; 10 in which the transaction was abandoned or restructured pre-complaint as a result of an antitrust investigation; and four in which the FTC initiated administrative or federal court litigation.[10] The DOJ worked to block 11 merger transactions in 2023: one in which the DOJ filed a lawsuit in federal court; none in which the DOJ filed a complaint and settlement simultaneously; and 10 in which the parties either abandoned or restructured the transaction pre-complaint in the face of questions from the DOJ.[11]

Federal Trade Commission

In October 2024, the U.S. District Court for the Southern District of New York granted the FTC's request for a preliminary injunction to prevent Tapestry, Inc. ("Tapestry") from acquiring Capri Holdings Limited ("Capri").[12] The FTC had alleged that Tapestry's Coach and Kate Spade brands and Capri's Michael Kors brand are close competitors, especially in the "accessible luxury" space, and that "[t]he deal would eliminate fierce head-to-head competition."[13] In November 2024, Tapestry and Capri announced the termination of their agreement.[14]

In November 2024, Union Health announced that it would "delay its proposed acquisition of Terre Haute Regional Hospital and withdraw its Certificate of Public Advantage ("COPA") application with the Indiana Department of Health."[15] In September 2024, the FTC had voted 5-0 to authorize FTC staff to submit a comment urging the Indiana Department of Health to deny the application. Following Union Health's decision, the Director of the FTC's Office of Policy Planning, Hannah Garden-Monheit, stated that "[t]his was good news for patients and healthcare workers… because the proposed merger would raise healthcare costs, reduce access to quality care, and depress wages for hospital workers."[16]

In December 2024, the U.S. District Court for the District of Oregon granted the FTC's request for a preliminary injunction to prevent Kroger Company ("Kroger") from acquiring Albertsons Companies, Inc. ("Albertsons").[17] The FTC had alleged that the deal would eliminate head-to-head competition between Kroger and Albertsons and substantially lessen competition in labor markets.[18] Following the district court's decision, Kroger and Albertsons announced an abandonment of their proposed transaction.[19] Following the Court's decision, FTC Chair Lina Khan, joined by Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya, issued a statement to "highlight several aspects of the district court's opinion, which advances antitrust analysis and vindicates the FTC's rigorous and reinvigorated approach to merger enforcement."[20] The highlighted aspects of the district court's opinion were its reliance on the 2023 Merger Guidelines, its "rigorous assessment" and rejection of the parties' proposed divestiture as insufficient to mitigate the anticompetitive effects of the merger and its assessment of the FTC's theory that the merger would substantially lessen competition for union grocery store labor and recognition of the FTC's proposed union grocery labor market as a "plausible, relevant market for antitrust purposes."[21]

Department of Justice

In November 2024, the DOJ and four state attorneys general filed a civil antitrust complaint to block UnitedHealth Group Incorporated's ("UnitedHealth") proposed $3.3 billon acquisition of home health and hospice services provider Amedisys Inc. ("Amedisys").[22] The complaint alleges that "the transaction would eliminate competition between UnitedHealth and Amedisys," given that UnitedHealth and Amedisys are "two of the largest home health and hospice providers in the United States."[23] The complaint further alleges that UnitedHealth's proposed divesture of certain facilities to VitalCaring Group "does not alleviate harm in over 100 home health, hospice, and labor markets, which generate at least a billion dollars in revenue annually, serve at least 200,000 patients, and employ at least 4,000 nurses."[24] In its complaint, the DOJ also seeks civil penalties against Amedisys for falsely certifying compliance with its obligations under the HSR Act, alleging that Amedisys had falsely certified compliance with the DOJ's Second Request.[25]

PERSONNEL DEVELOPMENTS

Federal Trade Commission

On December 10, 2024, President-elect Donald Trump announced his selection of current FTC commissioner Andrew Ferguson as the next Chair of the FTC.[26] In a follow-up announcement, President-elect Trump announced his intention to nominate Mark Meador to be a Commissioner of the FTC.[27] Meador is currently a partner at Kressin Meador Powers LLC[28] and previously served as antitrust counsel to Senator Mike Lee (R-UT).[29]

Department of Justice

On December 4, 2024, President-elect Trump announced his intention to nominate Gail Slater as Assistant Attorney General for the Antitrust Division of the DOJ.[30] Slater had previously served in a variety of antitrust roles, including most recently as an economic adviser for Vice President-elect JD Vance.

03

CFIUS/National Security

Update on TikTok Ban

In April 2024, the Protecting Americans from Foreign Adversary Controlled Applications Act ("PAFACA") became law.[31] Among other things, PAFACA required that ByteDance, Ltd. ("ByteDance"), the Chinese-owned parent of TikTok, Inc., which provides the TikTok social media app in the United States, divest its interest in TikTok by January 19, 2025, or face an effective ban of the app in the United States.

ByteDance, TikTok, Inc. and several TikTok content creators and users challenged the constitutionality of PAFACA on, among other things, First Amendment grounds. On January 17, 2025, the Supreme Court unanimously upheld PAFACA, thereby paving the way for the statute's divest-or-ban provision to take effect on January 19.[32]

On January 18 and January 19, TikTok briefly made the app unavailable to users in the United States due to PAFACA. The brief outage ended, however, after then President-elect Trump provided assurances that he would work to delay enforcement of the ban.

Subsequently, on January 20, President Trump issued an Executive Order instructing the Attorney General not to take any action to

enforce PAFACA for 75 days to allow his administration an opportunity to find a path forward that "protects national security while avoiding an abrupt shutdown of a communications platform used by millions of Americans."[33] It is not yet clear how the Trump Administration will seek to resolve this issue.

As of January 23, TikTok cannot be downloaded from the Apple and Google app stores in the United States, but U.S. users who already have the app on their devices are able to continue using TikTok.

Update on Outbound Investment Security Regime

As discussed in our previous Quarterly Reviews,[34] the Biden Administration has been working to establish a new regulatory regime to restrict U.S. persons from investing in certain companies organized or headquartered in, or with certain other defined ties to, the People's Republic of China (including Hong Kong and Macau, the "PRC") that are engaged in certain activities pertaining to: (1) semiconductors and microelectronics; (2) quantum information technologies; and (3) artificial intelligence.

In October 2024, the U.S. Department of the Treasury ("Treasury") issued a final rule to implement the new outbound investment security regime, which went into effect on January 2, 2025.[35]

At a high level, the outbound program consists of two distinct parts: (1) certain transactions falling within the program must be notified to Treasury no later than 30 days following completion of the transaction; and (2) U.S. persons are prohibited from engaging in, or knowingly directing, certain other transactions that fall within the program.

Violations of the outbound program may result in criminal penalties and/or civil penalties, and the Secretary of the Treasury may also take action to nullify, void or otherwise compel the divestment of any prohibited transaction.

Members of Congress continue to debate legislative action with respect to the regulation of outbound investment, including approaches to an outbound investment security regime that differ from the program established by the Biden Administration. It remains to be seen whether action by Congress, or by the incoming Trump Administration, will alter the nascent Biden Administration program.

Final Rule on CFIUS Penalties and Enforcement

As discussed in our Q2 2024 Quarterly Review,[36] in April 2024, Treasury issued a proposed rule to modify certain CFIUS procedures and enhance CFIUS's penalty and enforcement authorities.

On November 18, 2024, Treasury issued a final rule relating to CFIUS's penalty and enforcement authorities, which, among other things:

- expanded the types of information CFIUS can require regarding transactions that were not notified to CFIUS;
- allowed the CFIUS Staff Chairperson to set, as appropriate, a timeline for transaction parties to respond to CFIUS's mitigation proposals;
- expanded the circumstances under which CFIUS may impose a civil monetary penalty due to a party's material misstatement or omission;
- substantially increased the maximum civil monetary penalty available for violations of obligations under the CFIUS statute and regulations; and
- expanded the instances in which CFIUS may use its subpoena authority.[37]

The final rule went into effect on December 26, 2024.

Final Rule on CFIUS's Expanded Real Estate Jurisdiction

As discussed in our Q3 2024 Quarterly Review,[38] in July 2024, Treasury issued a proposed rule to expand CFIUS's jurisdiction over real estate transactions near U.S. military installations.

On November 1, 2024, Treasury issued a final rule expanding CFIUS's jurisdiction over certain real estate transactions:

- within a one-mile radius around 40 additional military installations;
- within a 100-mile radius around 19 additional military installations; and
- between one mile and 100 miles around eight military installations already listed in the CFIUS regulations.[39]

The final rule went into effect on December 9, 2024.[40]

Although the expanded jurisdiction over certain real estate transactions does not affect CFIUS's jurisdiction over (1) transactions that could result in foreign control of a U.S. business or (2) certain non-controlling but non-passive investments in U.S. businesses that deal with critical technologies, critical infrastructure or sensitive personal data, the final rule is nonetheless notable for parties to such transactions as it provides a useful data point for which U.S. installations may be likely to raise proximity concerns.

04

Activism[41]

Observations regarding activist activity levels in 2024 include:

- Global activist activity in 2024 maintained 2023's swift pace with ~300 new campaigns globally, the highest period of activist activity over the past five years.
- There were ~170 new campaigns launched in the United States in 2024, a ~20% increase from 2023 and the largest regional share of global activist activity at ~55% of all new campaigns.
- There were ~60 new campaigns launched in Europe in 2024 (~20% of all new campaigns globally), an increase of ~15% from 2023.
- Activist activity outside the United States and Europe decreased in 2024. The ~75 new campaigns launched outside the United States and Europe in 2024 (~25% of all new campaigns globally) represented a ~30% decrease from 2023.

05

Corporate Governance

SEC UPDATES

Changes in SEC Leadership

On January 20, 2025, Securities and Exchange Commission (the "SEC" or "Commission") Chair Gary Gensler stepped down from his role and resigned from the Commission. Chair Gensler's tenure as Chair spanned nearly four years and began on April 17, 2021.[42]

On December 4, 2024, President-elect Donald Trump announced his intention to nominate Paul Atkins to be the next Chair of the SEC.[43] Atkins served as a commissioner from 2002 to 2008 in addition to serving as a staff member in the 1990s. Atkins currently serves as the Chief Executive Officer of Patomak Global Partners, a consulting firm which he founded in 2009.

On January 17, 2025, Commissioner Jaime Lizárraga resigned from the Commission.[44] Lizárraga's tenure as a commissioner began in July 2022. Assuming Atkins is confirmed by the U.S. Senate and in light of Lizárraga's departure, following Atkins's appointment, the Commission

may be composed of three Republicans (Commissioners Hester Peirce and Mark Uyeda in addition to Chairman Atkins) and one Democrat (Commissioner Caroline Crenshaw), although Commissioner Crenshaw's term has expired and in December 2024 the Senate Banking Committee declined to advance a vote for her renomination.

On January 21, 2025, President Trump designated Commissioner Mark Uyeda as the Acting Chair of the Commission. Acting Chair Uyeda has served as a Commissioner since 2022, and in 2023 was confirmed for a second term expiring in 2028.

SEC Staffing

In late 2024, the SEC announced the following departures of senior staff:

- On October 11, 2024, the SEC announced the departure of Gubir S. Grewal, the Director of the Division of Enforcement.[46] Following Grewal's departure, Sanjay Wadhwa, the Division's Deputy Director, began serving as Acting Director, and Sam Waldon, the Division's Chief Counsel, began serving as Acting Deputy Director.
- On December 13, 2024, the SEC announced the departure of Erik Gerding, the Director of the Division of Corporation Finance, effective December 31, 2024.[47] Upon Gerding's departure, Cicely LaMothe began serving as Acting Director.

SEC Announces Enforcement Results for Fiscal Year 2024[48]

On November 22, 2024, the SEC released enforcement statistics for fiscal year 2024. According to its report, the Commission filed 583 enforcement actions, marking a 26% decrease from the previous year, and obtained orders of $8.2 billion in remedies. The $8.2 billion in remedies included $6.1 billion in disgorgement and prejudgment interest as well as $2.1 billion in civil penalties.

In addition to the financial remedies, the SEC obtained orders against 124 individuals that bar them from serving as officers or directors of public companies. The SEC also received 45,130 tips, complaints and referrals, the most received in one year. Of those notifications, more than 24,000 were whistleblower tips, resulting in $255 million awarded to whistleblowers.

LITIGATION

Corporate Transparency Act Reporting Requirements Temporarily Reinstated, then Again Enjoined

On December 3, 2024, the United States District Court for the Eastern District of Texas issued a nationwide preliminary injunction halting enforcement of, and compliance with, the Corporate Transparency Act ("CTA"). On December 11, 2024, the DOJ filed a motion to stay such preliminary injunction, which was denied on December 17, 2024. The DOJ also filed an emergency motion to stay the preliminary injunction, pending appeal, with the Fifth Circuit Court of Appeals on December 13, 2024, which was granted by a panel of the Fifth Circuit on December 23, 2024.

However, on December 26, 2024, the Fifth Circuit vacated the stay granted on December 23, 2024, which again enjoined the enforcement of the CTA. On December 31, 2024, the DOJ, on behalf of the Treasury, filed an application with the Supreme Court to stay the injunction.

On January 23, 2025, the Supreme Court granted the federal government's request to stay the December 3, 2024, preliminary injunction. However, a separate preliminary injunction issued on January 7, 2025, by a different federal

judge in the Eastern District of Texas remains in effect, maintaining the suspension of the reporting obligations.

The Fifth Circuit issued an expedited briefing schedule with oral arguments scheduled for March 25, 2025.

A recent alert issued by the Financial Crimes Enforcement Network[49] stated that reporting companies are not required to file and will not be subject to liability if they fail to file while the order is in effect; however, reporting companies may still voluntary file.

Additional discussion of the CTA can be found in the Cravath Emerging Company and Venture Capital Insights newsletter, entitled "2023 Recap and 2024 Outlook."[50]

PCAOB UPDATES

PCAOB Staff Report Outlines 2025 Inspection Priorities, Including Related Questions for Audit Committees[51]

On December 9, 2024, the Public Company Accounting Oversight Board ("PCAOB") outlined its 2025 inspection priorities. The report highlighted the staff's continued focus on public companies in industries and sectors with specialized accounting practices or that may be negatively impacted by uncertainties and volatility in the economic and geopolitical environment. The PCAOB also emphasized a focus on public companies in sectors where inspectors have previously found a higher number of deficiencies, or public companies that may have a heightened going concern risk.

In addition to the selection criteria highlighted above, the report also outlined inspection considerations for 2025, which include:

- audit areas with prior execution challenges;
- audit areas where new auditing standards are being applied;
- critical audit matters;
- audit areas with increased use of technology, including use of generative artificial intelligence, at public companies and broker-dealers;
- crypto assets;
- quality control ("QC") procedures, including independence and client acceptance procedures for firms entering alternative practice structures; and
- culture at audit firms.

Importantly for public companies, the report also contains suggested questions for audit committee members to consider that are intended to further two-way communication between audit committees and companies' independent auditors on topics such as internal control over financial reporting, materiality, auditor use of technology, audit evidence and turnover on the engagement team.

PCAOB Adopts New Requirements To Standardize Disclosure of Firm and Engagement Metrics and To Modernize the PCAOB's Reporting Framework[52]

On November 21, 2024, the PCAOB adopted a new set of requirements related to public reporting of standardized firm and engagement metrics and a set of accompanying amendments that update the PCAOB's reporting requirements on audit firms.

The new requirements on firm and engagement metrics require public accounting firms that audit one or more accelerated or large accelerated filers to report metrics relating to those audits and their auditing practices. The new metrics cover eight areas: partner and manager involvement, workload, training hours for audit personnel, experience of audit personnel, industry experience, retention of audit personnel

(firm-level only), allocation of audit hours and restatement history (firm-level only). For firms that serve as lead auditor for at least one accelerated or large accelerated filer, firm-level metrics will be required to be reported annually on a new Form FM. Engagement-level metrics for firms that audit at least one accelerated or large accelerated filer will be reported on a revised Form AP.

The PCAOB also announced reporting amendments designed to improve disclosures on annual and special reporting forms. The amendments enhance disclosure requirements in the areas of cybersecurity, network relationships, governance information, financial reporting and special events reporting. These amendments are subject to SEC approval.

PCAOB Modernization Progress in 2024[53]

On November 4, 2024, the PCAOB posted updated standard-setting and rulemaking agendas that highlighted advancements made in 2024 toward modernizing its standards and rules. The 2024 advancements included:

- adopting QC 1000, designed to encourage improved quality control systems for registered public accounting firms;
- adopting AS 1000, designed to update and integrate a group of standards that outlined the general principles and responsibilities of auditors;
- amendments to PCAOB standards outlining a public accounting firm's duties and responsibilities when using technology-assisted analysis; and
- amending Rule 3502, giving the PCAOB the authority to hold associated persons accountable when their actions contribute to a public accounting firm's violation of the laws, rules and standards that the PCAOB enforces.

CYBERSECURITY

SEC Charges Four Companies with Misleading Cyber Disclosures[54]

On October 22, 2024, the SEC charged four companies—Unisys Corporation ("Unisys"), Avaya Holdings Corp. ("Avaya"), Check Point Software Technologies Ltd. ("Check Point") and Mimecast Limited ("Mimecast") (collectively, the "Charged Companies")—with making materially misleading disclosures related to SolarWinds Corporation's ("SolarWinds") Orion software and other incidents in 2020 and 2021.

The investigations found that the Charged Companies became aware of unauthorized access to their systems, which likely originated from the same threat actor behind the 2020 SolarWinds cybersecurity incident. Each of the Charged Companies agreed to pay a penalty for providing materially misleading statements regarding the unauthorized access.

- The SEC found that Unisys framed actual incidents and risks as hypotheticals. Additionally, the SEC found that Unisys had deficient disclosure controls, which in part contributed to their misleading disclosures. Unisys agreed to pay a $4 million penalty.
- The SEC found that Avaya omitted material information that it knew at the time of filing, including the likely source of the activity, length of the unauthorized activity and the extent of sensitive information that was exposed. Avaya agreed to pay a $1 million penalty.
- The SEC found that Check Point described the incidents only in generic terms and omitted new and material risks. Check Point agreed to pay a $995,000 penalty.
- The SEC found that Mimecast provided misleading statements by quantifying certain information but omitting other material

information related to the scope and impact of the incident. Mimecast agreed to pay a $990,000 penalty.

Commissioners Peirce and Uyeda opposed the charges and accused the Commission of "playing Monday morning quarterback" and engaging "in hindsight review to second-guess the disclosure."[55]

ESG

California Air Resources Board Issues Enforcement Notice[56]

On December 5, 2024, the California Air Resources Board ("CARB") issued an enforcement notice regarding the Climate Corporate Data Accountability Act ("SB 253") (the "Notice"). Under SB 253, in-scope entities must report their Scope 1 and 2 greenhouse gas emissions starting in 2026 covering the prior fiscal year (with Scope 3 emissions due later on). In the Notice, CARB states that it intends to exercise its discretion under California law to not pursue enforcement against reporting entities that provide incomplete reports of their Scope 1 and 2 emissions for the first reporting cycle as long as they "demonstrate good faith efforts to comply with the requirements of the law." This includes "retain[ing] all data relevant to emissions reporting for the entity's prior fiscal year." The Notice makes clear that companies seeking to take advantage of this accommodation should be "actively working toward full compliance," and clarifies that CARB "will provide details on reporting for subsequent year reporting cycles as part of CARB's rulemaking process," which is supposed to conclude by July 1, 2025.

06

Additional Policy Updates

HHS OCR Settlements Related to Violations of HIPAA and Proposed Modification to the HIPAA Security Rule

The U.S. Department of Health and Human Services ("HHS"), Office for Civil Rights ("OCR") reached several settlements with various medical service providers related to alleged violations of the Privacy and Security Rules in Q4 2024. Of particular note are settlements related to (i) Inmediata Health Group's alleged impermissible disclosure of protected health information that was made publicly accessible online, affecting over 1.5 million individuals;[57] (ii) Children's Hospital Colorado's alleged violations following email phishing and cyberattacks in 2017 and 2020;[58] and (iii) Gulf Coast Pain Consultants' alleged systemic Health Insurance Portability and Accountability Act ("HIPAA") Security Rule violations discovered following a breach report in 2019 indicating that a former contractor had impermissibly accessed the company's electronic medical record system.[59]

Following announcement of these settlements, on December 27, 2024, OCR issued a proposed rule to modify the HIPAA Security Rule to strengthen cybersecurity protections for individuals' protected health information.

NYDFS/OAG Cyber Breach Settlements with GEICO and Travelers Insurance, from November 2024

On November 25, 2024, New York Attorney General Letitia James and New York Department of Financial Services ("NYDFS") Superintendent

Adrienne A. Harris announced $11.3 million in penalties against the Government Employees Insurance Company ("GEICO") and the Travelers Indemnity Company ("Travelers") for inadequate data security that compromised the personal information of over 120,000 people.[60] Hackers allegedly exploited vulnerabilities in the companies' online insurance quoting tools to steal drivers' license numbers and other personal data, which were later used for fraudulent unemployment claims during the COVID-19 pandemic. NYDFS and the Office of the Attorney General ("OAG") allege that both companies failed to implement sufficient cybersecurity measures as required by NYDFS regulations. As part of the settlements, GEICO will pay $9.75 million and Travelers $1.55 million, and both companies are required to enhance their cybersecurity practices.

NYDFS Cybersecurity Requirements Took Effect on November 1, 2024

On November 1, 2024, certain requirements of the amended NYDFS cybersecurity regulations for financial services companies took effect.[61] Specifically, "covered entities" (*i.e.*, non-exempt companies regulated by the NYDFS) must now comply with new chief information security officer ("CISO") internal reporting requirements, new cybersecurity oversight responsibilities for company management, expanded data encryption obligations and new requirements pertaining to incident response, continuity and disaster recovery plans. Various other requirements set forth during the regulatory transitional period will take effect in 2025.

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