MARKETCHECK

Debevoise & Plimpton

The Debevoise M&A Report | December 2023

Editorial Board

Antitrust Agencies Propose Sweeping Changes to HSR Rules and Merger Guidelines

This past summer, the U.S. Federal Trade Commission and the U.S. Department of Justice's Antitrust Division shook up the U.S. merger review process with two sets of significant proposed changes:

- **Premerger Notification Filings:** In June, the agencies released a Notice of Proposed Rulemaking (Notice) that would make sweeping changes to the rules, instructions, and filing form for premerger notification filings under the Hart-Scott-Rodino (HSR) Act. The proposal would greatly increase the time, burden, and expense of HSR filings by broadening the scope of information, data, and documents parties are required to submit in HSR-reportable transactions.
- **U.S. Merger Guidelines:** In July, the FTC and DOJ released their proposed overhaul of the U.S. merger guidelines that seek to memorialize the Biden administration's tough stance toward mergers. While the guidelines lack the force of law, they have been influential in the courts. The new guidelines reflect the agencies' attempt to reshape antitrust legal standards and deemphasize the economic analysis that has governed antitrust practice over the last several decades and is enshrined in the case law.

Both the new HSR rules and merger guidelines may come into effect as early as the first quarter of 2024, though the precise timing is unclear.

HSR Act Proposed Revisions

Under the proposed revisions to the HSR rules, the agencies would now require expanded upfront disclosure about the deal, its structure, and its effects on competition and labor. The proposal captures much of the information the agencies often seek through Voluntary Access Letters during the 30-day waiting period for that small fraction of deals that present substantive antitrust issues—and even picks up some information now associated with the more burdensome "Second Request" investigation of transactions with significant antitrust issues. It is striking that the new rules would require such substantial information for all deals, particularly those without any substantive antitrust issues.

Data that would be required by the agencies' proposal include, among other things:

- **Structure:** Diagrams of the deal and the parties' relationships and internal structures.
- **Individuals/Entities Having Influence/Access:** Lists of officers, directors, and board observers (and those who appoint them), greater than 5% minority holders, greater than 10% creditors, and greater than 10% holders of non-voting securities.
- **Related Agreements:** Transaction-related agreements (including post-closing transition services agreements, licenses, and employee

Continued on next page

agreements and arrangements), schedules and exhibits; also agreements between the parties but unrelated to deal (*e.g.*, licensing, supply, non-compete, and distribution agreements).

- **Competition-Related Documents:** *Drafts* of 4(c) and (d) documents, periodic strategic business plans by/for officers, directors, and *deal team leads*.
- **Business and Competition:** Detailed narratives and data on business lines and products (including pipeline), competitive impact (horizontal and vertical), and deal strategic rationale and timetable; and additional and more granular data on overlaps (*e.g.*, customer lists, geographies, and previous acquisitions). This information is required whether or not it had been prepared in advance of or in connection with the deal.
- **Labor Market Impact:** Worker data by occupation categories and geographies, and workplace safety data.

If the proposed changes are adopted substantially as drafted, we anticipate that the time and resources needed to prepare an HSR filing would greatly increase, including because of the significant time it would take to collect the newly required information. The FTC acknowledges in its Notice that the estimated time to prepare typical HSR filings would increase four-fold. "Complex" filings, a description the FTC ascribes to approximately 45% of total filings, are estimated to require even more time to complete—over 250 hours, compared to the current estimate of 37 hours.

Merger Guidelines Proposed Revisions

The U.S. merger guidelines lack the force of law, but courts deciding merger challenges historically have looked to them for guidance. The new draft merger guidelines propose sweeping changes, including the following:

- **A New Organizing Framework:** The draft guidelines are organized around 13 principles the antitrust agencies may use when determining whether a merger is unlawful. This differs from the prior merger guidelines, which acted more as a general rubric for how the antitrust agencies evaluate a merger. The organizing principles include sweeping statements, such as "Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets," "Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete," "Mergers Should Not Further a Trend Toward Concentration," and "When a Merger Is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series."
- **A Lowered Bar for When a Merger Is Presumptively Illegal:** The proposed guidelines significantly lower the bar for when the agencies consider a transaction problematic and attempt to set a bright line barring mergers based on increases in concentration alone. For example, the draft guidelines state that a merger that "significantly increases concentration"—where the combined entity's market share is greater than 30%—"presents an impermissible threat of undue concentration regardless of the overall level of market calculation."
- **Expanded Analysis of Potential Competition:** The new guidelines propose a lower threshold for establishing that a merger is illegal by virtue of eliminating a potential competitor—*i.e.*, a party having a "reasonable probability" of entering a market rather than the "clear proof" standard typically applied by courts. This is consistent with the current regulators' increased scrutiny of acquisitions by larger players of small, recent entrants.
- **Rollups Are Spotlighted and Disfavored:** The draft guidelines state that "a pattern or strategy of multiple small acquisitions in the same or related business lines may violate the antitrust laws, even if no single acquisition on its own would risk substantially lessening competition or tending to create a monopoly." As a result, the agencies will "consider acquisitions in light of the cumulative effect of related patterns or business strategies" and examine historical acquisition practices (whether consummated or not) and current and future strategies.

Continued on next page

- **Protection of Labor:** The draft guidelines have a section focused on the impact of a deal on labor. In particular, they state the agencies' position that any loss of competition in the labor market, which may result in lowered wages, slowed wage growth, worsened benefits or working conditions, or other degradations of workplace quality, "is not offset by purported benefits in a separate downstream product market."

Given the drastic changes proposed by the new guidelines, it remains to be seen whether courts will continue to accept them as influential.

Implications and Advice for Dealmakers

The increased burdens, costs, and risks to dealmakers associated with these proposed changes, particularly in strategic deals, are inevitable. There are, however, practical steps dealmakers can take to help mitigate the risks of the new proposals.

- If the amended HSR and merger guidelines are implemented, HSR filings will be much more time-consuming to prepare. Parties should work with antitrust counsel well in advance of filing—even in advance of signing the deal—to begin collecting the necessary information. The parties should also expect and prepare for more involved agency review, more pulls-and-refiles (60 days for HSR), and potentially more Second Requests. These timing elements should also be considered when drafting the transaction documents to ensure the parties are appropriately incentivized to move quickly but nevertheless are able to meet their contractual obligations. It will be unlikely, for instance, that HSR filings can still be prepared within 10 days of signing, which is the customary time period allocated today.
- Companies should be careful not to describe inaccurately the competitive landscape in their marketing and deal materials, even in highly fragmented industries. Moreover, greater care will need to be taken when drafting pitchbooks, confidential information memoranda, and other deal decks, because the agencies' proposal requires submission of *draft* documents in addition to the final versions. It would be prudent for bankers and advisors to send drafts directly to counsel.
- For parties anticipating regular acquisition activity, establishing a method of tracking the proposed new information on a regular basis may help avoid unnecessary delays in preparing HSR filings. Some data can be used regularly without significant tailoring (*e.g.*, structure, subsidiaries, minority holders and creditors, officers/directors, revenue and business lines, labor data, and foreign subsidies), while other data cannot (*e.g.*, transaction details and rationale, competitive impact, overlap data, 4(c) and (d) documents, agreements, and relationships between parties).

In addition to the specific timing elements noted above, sellers and buyers should focus on other antitrust-related provisions in the deal documents.

- Sellers may want to look for longer outside dates and more commitments by buyers to deal with government investigations and ensure deal certainty. This may include more and firmer requests for "hell or high water" obligations and reverse termination fees, even for deals with no obvious competitive overlap.
- Buyers may want to consider whether to commit to a long investigation as opposed to maintaining the freedom to terminate the deal if there is an extended investigation. Buyers should also reassess contractual commitments to litigate or to divest assets to get the deal done. If these proposals become permanent, as we expect they will in some form, it will be a brave new world. While much of the antitrust architecture is already built into acquisition agreements, parties will need to rethink their applicability and tailor them to address the new paradigm.

Author

Michael Schaper
Partner

Are You a Controller – and What Will You Do About It?

Many lines can be drawn to distinguish among public companies—large cap vs. small cap; growth vs. value; financial vs. industrial. When it comes to legal duties, however, perhaps the most important line of distinction separates controlled companies from non-controlled companies. Under Delaware law, controlling stockholders owe fiduciary duties when transacting with the company; non-controlling stockholders do not. As a result, transactions between a controlling stockholder and the company it controls are generally subject to the test of entire fairness—Delaware's most exacting standard of review—while transactions between a company and a non-controlling stockholder are generally subject to the same standard of review as those between the company and a non-stockholder, namely the business judgment rule or, in certain circumstances, some form of enhanced scrutiny.

Although the distinction between the legal obligations of a controlling stockholder and a non-controlling stockholder is sharp, the line between control and non-control is blurrier. An owner of more than 50% of a company's voting power is, absent highly unusual circumstances, a controlling stockholder, but the converse does not hold: lack of majority ownership does not necessarily mean lack of control. Delaware courts have found control potentially to exist at levels well below 50% ownership—for example, 39.8% (*Ross v. Lineage Cell Therapeutics*[1]), 34.8% (*Voigt v. Metcalf*[2]), 26% (*Calesa Associates v. American Capital*[3]), and 22.1% (*In re Tesla Motors, Inc. S'holder Litig.*[4]). On the other hand, Delaware courts have dismissed claims alleging control by stockholders having ownership interests of 31% (*Ancestry*[5]), 33.5% (*In re Rouse Properties, Inc. Fiduciary Litigation*[6]), 35.3% (*In re GGP, Inc. Shareholders Litigation*[7]), 39.5% (*In re Sea-Land Corp. Shareholders Litigation*[8]), and 44% (*Superior Vision Services v. ReliaStar Life Insurance Co.*[9]). Below majority ownership, there is no bright line.

Delaware courts have characterized the control status of a large but less than 50% stockholder as a "highly contextualized" question, dependent on a variety of factors beyond share ownership. Those factors include relationships between the stockholder and individual directors, managers or advisors; the ability of the stockholder to exercise contractual rights to create a particular outcome; the existence of commercial relationships that give the stockholder leverage over the company (*e.g.*, status as a key supplier or customer); and the stockholder's ability to exercise influence on the board through a high-status position (such as a founder or CEO).[10] Statements made by the large stockholder may also be relevant. In a case representing perhaps the lower bound of potential minority control of a Delaware company, the position of non-control asserted by Xianfu Zhu, the CEO, founder, and 17.3% stockholder of Zhongpin, Inc., in a suit challenging the take-private of Zhongpin by Zhu, was significantly undermined by the statement in the company's Form 10-K that Zhu "has significant influence over our management and affairs and could exercise this influence against your best interests." This and other factors led the Court of Chancery to find it reasonably conceivable that Zhu exercised general control over the company's day-to-day operations and over the challenged transaction.[11]

---

1. C.A. No. 2019-0822-AGB (Del. Ch. Sept. 21, 2020).
2. C.A. No. 2018-0828-JTL (Del. Ch. Feb. 10, 2020).
3. C.A. No. 2015-10557-VCG (Del. Ch. Feb. 29, 2016).
4. 2018 WL 1560293 (Del. Ch. Mar. 28, 2018).
5. *In re Ancestry.com Inc. S'holder Litig.*, C.A. No. 7988-CS, at 82, 85 (Del. Ch. Sept. 27, 2013) (TRANSCRIPT).
6. C.A. No. 12194-VCS (Del. Ch. Mar. 9, 2018).
7. C.A. No. 2018-0267-JRS (Del. Ch. May 25, 2021).
8. C.A. No. 8453-VCJ (Del. Ch. May 22, 1987).
9. C.A. No. 1668-VCN (Del. Ch. Aug. 25, 2006).
10. *Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC,* 2018 WL 3326693 (Del. Ch. July 6, 2018).
11. C.A. No. 7393-VCN (Del. Ch. Nov. 24, 2014).

Continued on next page

In contrast, the Court of Chancery recently found, after trial, that Larry Ellison did not control Oracle, despite Ellison's status as the company's "visionary founder" and his ownership of 28% of Oracle's common stock. The challenged transaction involved Oracle's 2017 acquisition of NetSuite, a company in which Ellison owned a 38% interest. The court relied on several specific examples in which either the board or Oracle's management acted in opposition to Ellison to find that Ellison did not have general control over Oracle's day-to-day operations. As to the NetSuite transaction itself, the court noted that while Ellison had the potential to influence the transaction, he did not do so in actuality, evidenced by, among other things, his complete lack of contact with the special committee and recusal from any discussions regarding the transaction. According to the court, "[t]he concept that an individual—without voting control of an entity, who does not generally control the entity, and who absents himself from a conflicted transaction—is subject to entire fairness review as a fiduciary solely because he is a respected figure with a potential to assert influence over directors, is not Delaware law."

Despite the general rule that a transaction between a controlling stockholder and its controlled company is subject to entire fairness, the decision of the Delaware Supreme Court in *Kahn v. M&F Worldwide Corp. (MFW)*[12] provides a path to business judgment rule treatment. That path requires the transaction to be subject, from the outset, to both (1) the approval of an independent special committee, acting with due care, and (2) the uncoerced and fully informed vote of the holders of a majority of the shares not held by the controlling stockholder or its affiliates. While the benefits of obtaining business judgment rule treatment are clear, committing to *MFW* imposes its own risks on the controlling stockholder. Those include the need to get the affirmative vote in favor of the transaction from a majority of what may be a relatively small public float, which may create an inviting target for an activist seeking to extract value by obtaining a blocking position.

How should a large stockholder whose status as a controller is uncertain think about *MFW*? While such a stockholder may avoid entire fairness by establishing its lack of control, that usually requires a full trial. Indeed, in the litigation challenging Oracle's acquisition of NetSuite, the claim that Larry Ellison controlled Oracle had survived a motion to dismiss; the Delaware Court of Chancery's ultimate determination that Ellison did not control Oracle, and thus that the transaction was not subject to entire fairness, came only after a lengthy and undoubtedly expensive trial. Relying on *MFW*, even where control is uncertain, mitigates that risk. At the same time, the fact that the potential controller by definition owns less than one-half of the company's shares may significantly lessen the risk of an insurgent obtaining a blocking position and thus the challenge of obtaining the approval of holders of a majority of the unaffiliated shares.

The ambiguous controller status of a large minority stockholder contemplating a take-private or other transaction with its investee company makes it hard to quantify in advance the litigation risks presented by the potential transaction. The *MFW* protective provisions, however, provide a pathway to minimize those risks, whether in respect of proving a lack of control or of entire fairness. Moreover, while taking the *MFW* path presents its own risks, the same fact that makes controller status ambiguous—lack of majority ownership—may itself lessen the risks one might face on that path.

---

12. 88 A.3d 635 (Del. 2014).

Author

Gregory V. Gooding
Partner

Retaining Employees Below the C-Suite During a Merger

> "Instead of relying solely on a single retention tool, a comprehensive strategy combining multiple approaches can create a more robust retention program."

As the gap between signing and closing of many public company M&A transactions continues to lengthen, merger partners should consider how best to face new challenges retaining crucial talent that inevitably arise. The problem may only get worse: The FTC's recent proposal to overhaul the Hart-Scott-Rodino (HSR) process could lead to even lengthier pre-closing periods even in deals without substantive antitrust issues; the FTC's proposed rules could quadruple the time required to prepare HSR filings, with complex filings taking even longer. Business combinations can be distracting and generate uncertainty for employees on both sides of the deal, affecting productivity or even causing employees to pursue other employment opportunities. High turnover can drain institutional knowledge, decrease productivity, and increase recruitment costs. Both the risks and the costs of this phenomenon heighten over time.

Executive-level retention programs have been a staple of public M&A transactions but have typically been limited to the C-suite. However, in this new paradigm, merger parties have more recently been adopting broader retention programs to retain critical talent, promote deeper workforce engagement, and safeguard institutional knowledge and expertise during the expanding pre-closing period and beyond. We are seeing businesses go beyond the standard one-time transaction awards and offering additional retention incentives with a variety of structures and layering in other retentive devices, such as enhanced severance programs.

Below, we outline some key timing and structure considerations and alternative retention devices for public companies looking to retain talent below the C-suite.

Timing

Executive-level retention programs may be introduced during the pre-signing phase, while retention programs for non-executive employees tend to be established following the deal announcement. This timing avoids bringing too many employees "over the wall" prior to signing. For buyers, it allows sufficient time to identify critical employees and functions necessary for deal completion and successful post-closing integration and performance.

Retention Objectives

The structure of any retention program is based on the objectives of the seller, the buyer, or both. The primary goal is to retain key employees

Continued on next page

through or beyond the deal closing. The parties may also seek to incentivize employees to achieve individual or company performance goals during the pre- or post-closing periods.

Target companies may have minimal post-closing retention structures in place for their employees, requiring a greater focus by the buyer on establishing a retention program. The buyer may need to replace seller incentives that will not continue following the closing of the transaction or, alternatively, establish a new retention program to account for seller awards that will pay out on an accelerated basis on closing. In a volatile market, equity awards held by employees may be underwater or have otherwise experienced a significant decline in value, diminishing the retentive value of these awards.

Structuring Considerations

When structuring a retention program, the timing, form, and amount of the awards require careful consideration.

The most common structure for non-executive employees remains fixed-amount stay bonuses for remaining employed until a specified date or dates—typically the closing or a defined period after. Retention awards can be paid as a lump sum or in installments on specified dates or milestone events. However, for transactions where antitrust or other regulatory concerns may delay the closing by a year or more, we have seen retention awards structured to pay a portion on the first anniversary of the signing date, with the remainder to be paid on or after the closing date. Retention awards often pay out as well if the employee is involuntarily terminated before the payment date. A clawback obligation may be included in the retention award to deter resignations within a specific period and enhance retention benefits to the buyer beyond the closing.

As a supplement to traditional retention programs, performance-based retention awards tie incentives to individual or company-based metrics. These programs can be designed to retain employees who stay through the transaction with meaningful upside for exceptional individual or company performance, which can help keep employees focused on business performance in a longer pre-close period. These programs require careful consideration of the appropriate metrics, targets, amounts, and timing of payments to ensure the objectives of the program are met.

The form of retention awards may be cash- or equity-based, with the latter inherently being performance-based. In cases where equity awards are granted, a portion may vest based on continued employment with the buyer for a period of time following the transaction. The parties may also decide a mix of cash and equity awards is appropriate. Even where sellers have put in place a cash retention program payable at closing, we have seen buyers establishing additional retention pools awarded in the form of equity with time- or performance-based vesting conditions.

The amount of retention awards varies based on program objectives but is often calculated as a specified multiple of base salary, with higher amounts for more senior positions or employees in key functions. For employees at or below the vice president or director level, we have seen retention awards between 25% and 100% of base salary, with higher amounts for the senior vice president level and above.

Alternatives

An alternative retention approach involves establishing a change-in-control severance program, which offers severance (or enhanced levels of severance) in the context of a qualifying termination by reason of the transaction. A qualifying termination will typically include a termination by the company without cause and may also include a termination by the employee for “good reason.” Change-in-control severance programs typically provide these severance

Continued on next page

benefits for up to 90 days before a transaction closing and between one and two years after the closing. Sometimes in the public M&A context, we see a shorter period of enhanced severance benefits (*e.g.*, three to six months) tied to post-closing integration periods. A commitment to paying enhanced severance, on a stand-alone basis or alongside more traditional retention programs, can reassure employees in the uncertain business environment of a prolonged pre-closing period.

Although noncompetes are another potential retention tool, employees generally view them unfavorably. Moreover, federal and state law increasingly limits or prohibits noncompete clauses, potentially diminishing their ultimate retentive value.

Instead of relying solely on a single retention tool, a comprehensive strategy combining multiple approaches can create a more robust retention program. For example, integrating cash-based bonuses with enhanced severance programs can address diverse employee concerns and motivations synergistically during the extended period between signing and closing.

Key Takeaways

- Delays in public company M&A transactions may be increasing due to regulatory approval processes, affecting employee engagement and retention.
- Expanding retention programs to include non-executive employees is becoming more common to safeguard institutional knowledge and talent.
- The structures of these programs differ based on seller and buyer goals. Retention awards can be payable on fixed dates or include performance elements and may be granted in cash or equity. We are seeing a variety of structures in recent transactions, including having a portion of payments being made before closing. Alternative strategies such as change-in-control severance programs can also play a role in retaining talent during longer pre-closing periods.

Authors

Simone S. Hicks
Partner

Alison E. Buckley-Serfass
Counsel

The Blurbs

War on Noncompetes: Impact on Section 280G Planning for M&A

Post-employment noncompetes are under attack at both the federal and state levels. Post-employment noncompetes restrict a worker's ability to work for or start a competing business in a specified geographical area for a period following employment. The Federal Trade Commission (FTC) has proposed a sweeping ban, and states continue to propose and adopt legislation to limit them. A federal or applicable state prohibition on noncompetes would significantly affect how companies protect trade secrets and retain employees. Importantly, in public company M&A transactions, such a prohibition could also have adverse tax consequences for sellers and employees related to parachute payments, which are payments made to executives in connection with a change in control of the company.

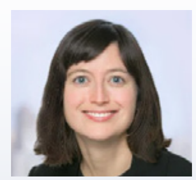
Section 4999 of the Internal Revenue Code imposes a 20% excise tax on excess parachute payments to individuals. Section 280G prevents employers from deducting these excess parachute payments. However, parachute payments generally do not include reasonable compensation for services to be performed on or after the change in control. Reasonable compensation can include payments made to an executive in exchange for a noncompete, assuming certain conditions are satisfied. In many cases, attributing a portion of the change-in-control payments made to an executive to a noncompete meaningfully reduces the amount of parachute payments and, at times, entirely avoids the imposition of the 20% excise tax.

A ban on noncompetes would eliminate this strategy to mitigate the executive's excise tax and the company's loss of deduction. As a result, public company targets in M&A transactions would need to rely on alternative strategies to reduce excess parachute payments. Options may include accelerating payments (such as payment of annual bonus or vesting equity awards) into the year prior to the closing to increase "safe harbor" amounts or treating other amounts payable to executives (such as base salary increases or regular bonuses tied to company performance) as reasonable compensation for services prior to or after the change in control, although this will not reduce parachute payments to the same extent as relying on a noncompete. Companies that recently completed transactions may need to revisit prior Section 280G calculations that involved noncompete periods that would have continued beyond the effective date of any noncompete ban.

In addition, as part of general Section 280G planning, we continue to recommend that public companies include cutbacks in executive employment, severance, equity, change in control, retention, and other arrangements. "Better off" cutbacks reduce parachute payments to an amount that does not trigger the excise tax unless the executive is better off receiving all of the parachute payments and paying all income and excise taxes. This kind of provision can still result in an employer losing the ability to deduct excess parachute payments but is significantly less expensive to the company than a gross-up (which is viewed negatively by shareholders) and less punitive to the executive than a full cutback.

Author

Simone S. Hicks
Partner



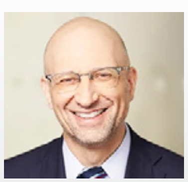
Alison E. Buckley-Serfass
Counsel

Artificial Intelligence in the M&A Process

Companies of all sorts are increasingly adopting artificial intelligence (AI) for use in their core business functions. Determining the appropriate valuation of these companies is necessarily dependent on being able to properly assess their use of AI, from both a commercial and regulatory compliance perspective. AI diligence therefore has become a particularly important part of the M&A process, as buyers endeavor to determine (1) which of the target's AI programs are actually in production and which are only in development; (2) whether the programs in production have been successful; (3) what are the measures of those successes; (4) what business and operational risks are associated with those AI programs; (5) whether those AI programs carry any legal risks, including risks relating to privacy, contractual compliance, intellectual property, bias, and transparency; and (6) what steps have been taken to mitigate those risks. AI diligence questions for M&A often include those shown at right.

While any list of diligence questions must be carefully tailored to the particular target business, the 10 inquiries at the right are a good place to start. Today's buyers proceed at their own peril if they fail to delve into their target's AI uses, capabilities, and risks.

Author



Avi Gesser
Partner

1. Which use cases are in production and which are in development?

2. How have the use cases in production performed over time and how is that performance measured?

3. What data has been used to train the AI, and what data will be needed to operate the model?

4. Does that data have to be shared with any third parties? What are the contractual terms with those parties that protect the confidentiality and use of that data?

5. What are the sources for that data?

6. What steps have been taken to confirm the rights to use that data for those purposes?

7. What polices and governance/compliance structures exist relating to AI?

8. What audit or quality-control procedures exist to ensure the AI is consistently providing high-quality outputs?

9. What IP risks exist for core AI use cases (*e.g.*, infringement risks, loss of IP protection for inputs or outputs), and what steps have been taken to mitigate those risks?

10. What regulatory risks exist for core AI use cases (*e.g.*, cyber, privacy, anti-discrimination, recordkeeping, etc.), and what steps have been taken to mitigate those risks?

Sunsetting Tax Provisions Change the Value of Tax Attributes

Sunsetting tax rules may reduce the ability of U.S. taxpayers to quickly depreciate their acquired assets and deduct all of the interest expense on their acquisition debt, but well-advised acquirers can mitigate the effect of these changing rules. The 2017 Tax Cuts and Jobs Act (TCJA) is the main driver for the changing calculus on interest expense and depreciation as sunsetting provisions kicked in this year and last year.

The TCJA introduced a bonus depreciation rule permitting U.S. taxpayers to immediately expense the cost of most depreciable property other than goodwill or certain long-dated property like real estate. This increased the attractiveness of acquiring such property from unrelated persons, as U.S. taxpayers could immediately deduct the cost and use it to reduce their taxable income.

While property acquired from 2018 to 2022 was eligible for 100% bonus depreciation, the statute provides that the amount of bonus depreciation available begins to step down by 20% per year for property acquired in or after 2023. That means that while 80% of the cost of depreciable property acquired in 2023 will be subject to bonus depreciation, only 60% of the cost of depreciable property acquired in 2024 will be subject to bonus depreciation, decreasing each year so that there will be zero bonus depreciation for most property acquired in or after 2027. To the extent that acquired property does not qualify for bonus depreciation, it will be subject to the regular depreciation rules, delaying the tax savings associated with depreciation and reducing their present value.

The diminishing benefit of the bonus depreciation rule is exacerbated by another rule introduced by the TCJA that limited the tax savings associated with depreciation by capping deductible interest expense. A U.S. taxpayer's interest deduction is limited pursuant to section 163(j) of the Internal Revenue Code to 30% of its "adjusted taxable income," which, since 2022, is calculated after reduction for depreciation and amortization. By reducing adjusted taxable income, depreciation in turn reduces the interest deduction a U.S. taxpayer can take. For a business subject to these rules, $1 million of depreciation would have the effect of reducing interest deductions by $300,000, reducing the tax savings associated with the depreciation.

The overall impact of these sunsetting provisions is to make depreciable tax basis less valuable to U.S. acquirers than it was prior to 2023, both because they cannot take depreciation deductions as quickly and because the deductions they are able to take reduce their interest expense deductions.

Mitigating the Impact

While U.S. acquirers may not be able to speed up depreciation deductions, well-advised taxpayers can try to structure their acquisitions to maximize the tax impact of their interest expense. For instance, while interest expense is subject to the 30% limit under section 163(j) of the Code, costs capitalized into inventory are not and instead reduce taxable income when inventory is later sold. Taxpayers that would otherwise have interest expense limited may get a better result if they are able to capitalize the expense and should consider treating the ultimate inventory-producing entities as co-borrowers of the acquisition debt to facilitate that capitalization treatment.

Separately, a U.S. taxpayer acquiring a partnership should consider whether it is able to leave the partnership in existence post-acquisition, which would cause the purchase price paid to give rise to depreciable basis step-up pursuant to section 743 of the Code. Any such depreciation is an attribute of the partner rather than the partnership. Therefore, the partnership itself can still deduct interest expense based on an adjusted taxable income number that is not reduced by the partner-level depreciation, maximizing the ability to deduct such interest expense.

Authors

Michael Bolotin
Partner

Peter F.G. Schuur
Partner

Due Diligence Considerations Arising in the Wake of the Supreme Court's Recent Affirmative Action Decision

On June 29, 2023, the U.S. Supreme Court ruled that the use of race as a factor in both Harvard's and University of North Carolina's admissions process was unconstitutional. The Court's decision invalidating race-conscious admissions practices has set the stage for challenges to workplace diversity initiatives. There has been a noticeable uptick in so-called **"reverse discrimination" lawsuits** in recent months, as well as public criticism by certain advocacy groups, lawmakers and politicians of workplace diversity, and equity, and inclusion (DEI) initiatives. Given the heightened risk of lawsuits by employees, applicants, or shareholders and of regulatory inquiries, it is prudent for prospective buyers to consider workplace diversity initiatives during the due diligence process.

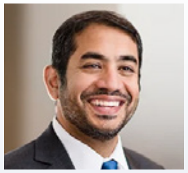
Most buyers already undertake limited legal due diligence of discrimination risks. Expanding this diligence to cover DEI-related risks can be as straightforward as determining whether the target has been subject to any threatened or actual claims, litigation, government audits, or inquiries related to diversity or its specific diversity programs. Additional steps to identify and explore latent risks might include the following:

- reviewing affirmative action plans or other race-conscious employee programs and other arrangements to ensure compliance with federal, state, and local employment laws;
- reviewing race-conscious compensation arrangements (*e.g.*, executive bonuses tied to diversity goals) to ensure compliance with federal, state, and local employment laws; and
- assessing whether the target is considering (or has recently made) changes to its diversity or hiring initiatives in response to recent scrutiny or other considerations.

These additional steps can also supplement a prospective buyer's due diligence of human resources, ESG, and organizational culture by providing insights into workplace culture, retention, hiring, and compensation.

We regularly advise clients in assessing and enhancing their initiatives to promote diversity, while also carefully mitigating legal risk. For a deeper dive into the implications of the Supreme Court's recent affirmative action decision for private-sector employers, please refer to our recent Debevoise in Depth: The Supreme Court's Upcoming Affirmative Action Decision: Potential Implications for Private-Sector Employers.

Authors



Jyotin Hamid
Partner

Tricia Bozyk Sherno
Counsel

Have Predictions about the Universal Proxy Been Borne Out?

The first full proxy season following the effectiveness of Rule 14a-19 under the Securities Exchange Act, which requires the use of universal proxy cards in contested director elections, ended in August. Based on the experience of our public company clients and our review of publicly available data, we have evaluated some of the predictions that were made about the universal proxy regime and sought to identify some initial indicators as to how proxy contests may evolve.

Many predicted that the universal proxy would increase the number of proxy contests launched, largely because of the expected decrease in cost. However, the number of proxy contests during the 2023 proxy season that went to a vote dropped to only 13 as compared to 17 in the prior period (October through June).

Some predicted that the universal proxy would benefit activists by making it easier to support at least some of their candidates without necessarily committing to the activist's entire slate. The relatively small sample size from the 2023 season suggests it is too early to tell whether the universal proxy has meaningfully tipped the scale in favor of activists, but activists did win more partial slates (four) in the 2023 season than they did in the prior season (only one).

Did the use of the universal proxy decrease the costs of launching a contest, as so many anticipated? After all, the stockholder's nominees would appear on the company's proxy card, and the stockholder could use the internet to deliver proxy materials. And yet, in 2023, the average spending on activist campaigns did not materially change and may even have slightly increased over the prior year. It appears that activist stockholders committed to successful campaigns continue to be willing to spend large sums on proxy solicitation efforts.

Finally, because the universal proxy allows stockholders voting by proxy to choose individual nominees from a menu instead of having to choose a full slate, some thought that the result would be a greater focus on the strengths and weaknesses of individual nominees.

Those forecasters seem to have been right. Many recommendations made by proxy advisory firms this past season noted individual nominee qualifications or qualities, such as the long tenure of certain board members and the relevant experience of an activist stockholder's nominees. This focus on individual qualifications continues a trend that predates adoption of the universal proxy rule, but it appears likely that the universal proxy has deepened it.

Author

William D. Regner
Partner

Industry Updates

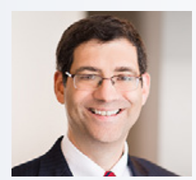
Healthcare

One theme permeating the healthcare and life sciences industry these days is the growing impact of state regulation on transactions in the space. There is no better example than the recently enacted California Health Care Quality and Affordability Act, which established the California Office of Health Care Affordability (OHCA). Unlike prior iterations and statutes in a few other states, OCHA does not have the explicit ability to block California healthcare transactions. However, as written, the provisions relating to timing of OCHA's process could have a chilling effect on these transactions.

For instance, the statute seems to call for notification to OHCA of a covered transaction 90 days prior to the *signing* of the deal. That is of course completely unworkable. Fortunately, OHCA in its rulemaking clarified that the notification must be made 90 days before *closing*, which makes more sense. But after it is notified, OHCA has 60 days to determine whether to conduct a cost and market impact review—which can be tolled to the extent the transaction is being reviewed by other regulators, including the FTC and DOJ—and then has an additional 120 days to complete its review. Following a 10-business-day public comment period, OHCA has 15 days to produce a final report. The parties may not close for 60 days after the delivery of the report. All told, transactions OCHA determines call for a cost and market impact report could take on the order of 8-10 months to clear, but it could be significantly longer. Combined with ambiguity as to what entities and transactions are actually covered, and the transaction parties' obligations to reimburse OHCA for all of its "reasonable" costs and expenses without a cap, this timeline may dissuade parties from moving forward with what could otherwise be healthy, beneficial deals.

The good news is that, based on our discussions with OCHA to date, the regulators seem thoughtful, practical, and receptive to the concerns of players in the industry. Healthcare companies with interests in California will want to pay close attention to OHCA's final emergency regulations, and to think carefully about the risks and resources that may be involved in transactions—including exits—in California. The statute becomes effective for deals closing after April 1, 2024.

Author



Andrew L. Bab
Partner

Insurance

Public company M&A activity in the insurance industry remained somewhat depressed in 2023, consistent with U.S. M&A activity more broadly. However, there were pockets of activity that illustrated the continuation of key trends in the sector. Brookfield Reinsurance inked two large public transactions in 2023—the $1.1 billion acquisition of specialty P&C insurer Argo Group and the $4.3 billion take-private of the remaining 80% of American Equity Investment Life, a leading annuity company. In addition, Antarctica Capital agreed to acquire Midwest Holding, a technology-driven life and annuity platform, and Prosperity Life Group, backed by Elliott Management, agreed to acquire National Western Life Group in a $1.9 billion transaction. Private equity interest in acquiring insurance companies and blocks of business remains strong, especially in the life and annuity segments, although the National Association of Insurance Commissions is continuing its (nonexclusive) focus on private equity in the insurance space. In 2024, M&A opportunities in the insurance industry could be driven by a number of economic and regulatory factors, including the changing interest rate environment, the withdrawal by major insurers from key markets, such as California and Florida, a potential renewed interest in the U.S. market from Japanese insurers, and recent heightened review of life and annuity reinsurance and M&A transactions by the Bermuda Monetary Authority.

Author

Andrew G. Jamieson
Partner

Banking

M&A activity involving acquisitions of large banks (*i.e.*, $100 billion or more in assets) was slow in 2023 and likely will remain so in 2024, mostly due to ongoing economic and regulatory uncertainty, which creates specific headwinds for this industry. The economic issues arise primarily from the Federal Reserve's dramatic increase in interest rates, which has depressed the value of bank assets and resulted in deposits moving to money market funds offering higher returns. Even before the bank failures of this past spring, large bank M&A activity was negatively affected by the more hawkish tone of the Biden administration toward mergers and the resulting more cautious approach taken by bank regulators. The trio of regional bank failures earlier this year—Silicon Valley Bank, First Republic Bank, and Signature Bank—which encouraged federal bank regulators to impose more capital and other requirements on, and increase enforcement actions against, large banks. Nonetheless, these increased burdens make it even more likely that significant large regional bank M&A will occur when there is greater clarity as to the industry's regulatory landscape (expected in 2024), resulting from the need for these banks to achieve economies of scale to offset their increased operational costs and compete with the "Wall Street banks." In contrast, smaller bank M&A continues to thrive, with increasing support from private equity, driven by this same need for economies of scale but without the same level of adverse regulatory headwinds.

Author

Alison M. Hashmall
Counsel

BANKER'S CORNER

Spike in Contingent Value Rights

Pivotal Software Appraisal Case

Selected Recent SEC Comments Relating to Financial Advisors

Spike in Contingent Value Rights

Contingent value rights (CVRs) have recently become all the rage in the life sciences arena. By some measures, more than 50% of life sciences deals in the past six months have included a CVR, and certainly a good third of 2023 life sciences deals have. CVRs have been a staple of life sciences deals for some time, but they were used sparingly in the past. Only when there seemed to be an unbridgeable value gap were CVRs introduced into negotiations, and often, the parties found a way to meet in the middle rather than live with the complexities and risks of CVRs.

Why the sudden spike? While undoubtedly due in part to the weak deal environment, we are also starting to see some buyers, particularly in auctions, offering CVRs in their original bids as a way to improve their offer prices and get a leg up over their competitors. There is also an element of getting aboard the train—if so many others are using them, why shouldn't I?

CVRs provide value, typically cash payments, to selling stockholders if specified milestones are hit following the closing of the transaction—for instance, FDA approval of a drug, generation of a certain level of revenues, or commencement of a clinical trial. Financial advisors typically include a valuation of the CVR as part of their fairness analysis—but not always. Sometimes CVRs are treated as "gravy," allowing the bank to reach its fairness conclusion by considering only the upfront consideration. When banks do take CVRs into account, they rely heavily on management's judgments of probability of success and other measures.

As one might imagine, CVRs can attract litigation. In October, 2019 Sanofi settled a lawsuit over alleged breaches of the CVR agreement entered into in connection with Sanofi's 2011 $20 billion acquisition of Genzyme. The former Genzyme shareholders complained that Sanofi deliberately slow-walked approval of Genzyme's Lemtrada (a multiple sclerosis drug), resulting in the failure of milestones to be achieved. Genzyme shareholders could have been entitled to up to an additional $3.8 billion if Sanofi met the FDA approval milestone and annual sales goals. Sanofi met neither, triggering the lawsuit, resulting in a $315 million settlement.

More recently, Celgene shareholders sued Bristol Myers Squibb for $6.4 billion, similarly alleging that BMS took or failed to take actions intended to delay FDA approval of its cancer drug Breyanzi. BMS had acquired Celgene for $80.3 billion in cash and stock (and a CVR) in 2019.

What can be done to mitigate the risk of litigation as CVRs become the life sciences flavor of the month? First, it is not a coincidence that the litigation against Sanofi and BMS involved two of the largest megadeals in the space. Large transactions with significant CVR payouts provide a greater incentive for shareholders to complain. Perhaps CVRs should be reserved for smaller deals.

Continued on next page

Second, it likewise does not seem coincidental that the CVRs in the Sanofi and BMS deals traded publicly. It has historically been rare for CVRs to trade publicly, and that trend has not changed in the recent uptick of CVR activity. While there are circumstances in which the securities laws may require registration of a CVR depending on the triggers, in general, life sciences CVRs can be structured to avoid a registration requirement. Presumably, acquirers like Sanofi and BMS register and list their CVRs because they believe the liquidity will increase their attractiveness to the target's shareholders.

Tradability of CVRs allows hedge funds and other sophisticated investors to accumulate the CVRs in the market, putting these investors in a better position to institute litigation than an unconnected group of less sophisticated shareholders. While most CVR agreements permit only the trustee to commence litigation, they also typically allow holders of a specified percentage of CVRs—usually in the range of 30% to a majority—to force the trustee to act. Acquirors should think hard about whether to allow their CVRs to trade. Either way, requiring a higher percentage of CVRs to authorize the trustee to bring claims should lessen the risk of litigation.

Establishing clear and easily determinable milestones can also mitigate litigation risk. For instance, tying payment to clinical milestones, which can be challenging to define crisply, may lead to disputes as to when and whether those milestones have been met. Revenue targets are usually easier to judge, so long as the parties agree on a clear definition of "net sales."

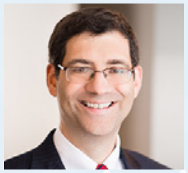
Both the Sanofi and BMS litigations turned on the efforts covenant in the CVR agreement. More often than not, the CVR agreement will include a concept of "diligent efforts" requiring the buyer to work diligently to achieve the milestones—where diligence is defined by comparison with either the ordinary-course diligence used by players in the parties' industry or the level of diligence exhibited in similar circumstances by the buyer itself. The definition in either case tries to hone in on the efforts used in comparable circumstances, but perfection is impossible to achieve. This approach opens the door to potential disputes.

There are other ways to manage efforts. One approach is for the buyer to limit its promises to an entirely objective measure—number of dedicated employees, amount of funds to be committed each year to the project, and the like. Another is for the buyer to disclaim any obligation whatsoever, something a seller might agree to if the parties' interests are aligned (as they might be, for instance, if the milestone is tied to revenue goals).

Recently, we have seen several CVRs include a covenant that obligates the buyer simply to refrain from intentionally acting to thwart the achievement of the milestones, a formulation often included in private deals with earnouts. While this approach doesn't eliminate the risk of litigation, by imposing only a negative obligation on the buyer, there are fewer circumstances where a dispute might arise.

As bankers propose CVRs to their clients or react to a proposal from the other side, they should recognize the pitfalls, as well as the benefits, of the instrument. It is important to draft the agreement carefully to limit the risk of post-closing litigation.

Author



Andrew L. Bab
Partner

Continued on next page

 (continued from page 17)

Pivotal Software Appraisal Case

Delaware courts have repeatedly held that in appraisal actions, the analysis of fair value should "begin with the market evidence" and that among market-based indicators, deal price (less synergies) is "first among equals."[1] Deal price is not dispositive, certainly, but as long as it represents an "unhindered, informed, and competitive market valuation," it must be given significant weight. When a controlling shareholder of a company seeks to acquire the rest of that company, the deal price is not "unhindered" and does not reflect a "competitive market valuation" given that the controlling shareholder's unwillingness to sell forecloses market competition.

In the recent appraisal matter, *HBK Master Fund L.P. v. Pivotal Software, Inc.*,[2] the court addressed the novel question of whether deference to deal price is still merited in the context of a controlling shareholder squeeze-out merger where *MFW* protections[3] were properly implemented. Controller squeeze-out transactions subject to properly implemented *MFW* protections are reviewed under the deferential business judgment rule rather than the entire fairness standard, which would otherwise apply.

The *MFW* protections are intended to restore the arm's-length nature of the transaction by disabling the controlling shareholder from using its position to dictate the outcome of negotiations and the shareholder vote. But are those protections enough to restore deference to deal price in an appraisal action involving a controller transaction?

Unsurprisingly, the court said no. Citing then-Vice Chancellor Strine in the Court of Chancery's original *MFW*[4] decision, the court noted that appraisal was touted as a "safety valve": the *MFW* court was comfortable with its decision to apply the business judgment rule standard to a controller transaction subject to the *MFW* protections in part because unhappy shareholders could seek an appraisal remedy. But, the court argued, if it is required to give deference to deal price, there is "little daylight between *MFW* and appraisal."[5] In other words, minority shareholders would not have the safety valve expected by Strine.

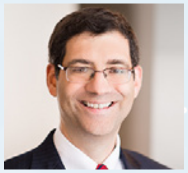
Separately, the *Pivotal Software* appraisal court held that unaffected stock price—which other appraisal courts have relied on as market evidence of value—has limited relevance in the case of a controlled company and that "the presence of a controlling stockholder provides reason to be skeptical of arguments touting market efficiency." The court noted, among other things, law review articles asserting that "the market for corporate control is … absent [from controlled companies] because the controller can veto any transaction that it disfavors" and that market participants "value the firm based on the plans of the controller" and will price in expectations as to how the controller will manage the firm, for better or for ill.

Pivotal Software is unlikely to move the needle much on how controller deals are done. But it is useful for financial advisors to be aware of the workings of Delaware appraisal actions in order to advise their clients as to what to expect and perhaps guide them during the process accordingly.

---

1. *See, e.g.*, *In re Appraisal of Regal Ent. Gp.*, 2021 WL 1916364 (Del. Ch. May 13, 2021); *Fir Tree Value Master Fund L.P. v. Jarden Corp.*, 236 A.3d 313 (Del. 2020).
2. C.A. No. 2020-0165-KSJM (Del. Ch. Aug. 14, 2023).
3. The *MFW* protections apply to a controller transaction that is conditioned ab initio on approval by an independent special committee acting with due care and a majority of the unaffiliated shareholders. *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).
4. *In re MFW S'holder Litig.*, 67 A.3d 496 at 503 (Del. Ch. 2013).
5. *Pivotal Appraisal* at 60.

Author



Andrew L. Bab
Partner

Continued on next page

Selected Recent SEC Comments Relating to Financial Advisors

Transaction Details	SEC Comment Letter	Company Response
Motive Capital Corp de-SPAC merger with Forge Global, Inc. **Signing Date:** September 13, 2021 **Motive Financial Advisor:** Houlihan Lokey **Nature of Transaction:** de-SPAC Merger, with Forge as the Target Company and Motive as the SPAC	Motive must clarify that the Houlihan Lokey fairness opinion does not address the fairness of any consideration that the Motive shareholders will receive and addresses only the fairness to the company.	Motive revised its disclosure to reflect that the Motive shareholders are not receiving any consideration and that the fairness opinion did not address the fairness of the merger consideration to any shareholders of Motive.
Black Knight, Inc. merger with Intercontinental Exchange, Inc. **Signing Date:** May 4, 2022 **ICE Financial Advisor:** J.P. Morgan **Nature of Transaction:** Take-Private Transaction of Black Knight	ICE should clarify the criteria J.P. Morgan used to select comparable companies and disclose if J.P. Morgan excluded from the analyses any companies that met the selection criteria. This has become a repeat comment from the SEC.	ICE informed the SEC that no selected companies identified as meeting J.P. Morgan's selection criteria were excluded from its financial analyses. Also, ICE disclosed that J.P. Morgan selected companies: (i) that provide similar services to similar end users and (ii) that have a financial profile similar to that of Black Knight.
Covetrus, Inc. merger with Corgi Bidco, Inc. **Signing Date:** May 24, 2022 **Covetrus Financial Advisor:** Goldman Sachs **Nature of Transaction:** Take-Private Transaction of Covetrus	Any filing person that has based its fairness determination on the analysis of factors undertaken by others must adopt the analysis as its own in order to satisfy its disclosure obligation. If a party receives valuation materials from a third party—in this case a prospective lender that ultimately received a financial advisory fee—the disclosure must include a summary of the analyses.	Covetrus' revised disclosure indicated that the Covetrus Transaction Committee and Board expressly adopted the Goldman Sachs fairness opinion as its own. Covetrus included a summary of the lender's valuation materials in its disclosure.
StoneMor Inc. merger with Axar Capital Management, LP **Signing Date:** May 24, 2022 **StoneMor Financial Advisor:** Duff & Phelps **Nature of Transaction:** Take-Private Transaction of StoneMor	StoneMor should file as an exhibit the presentation that Duff & Phelps made to the Conflicts Committee in this transaction.	StoneMor filed the Duff & Phelps presentation as an exhibit to the Schedule 13E-3.

Continued on next page

Selected Recent SEC Comments Relating to Financial Advisors (continued)

Transaction Details	SEC Comment Letter	Company Response
LEGATO Merger Corp. II SPAC merger with Southland Holdings, Inc. **Signing Date:** May 25, 2022 **Legato Financial Advisor:** Cassel Salpeter **Nature of Transaction:** SPAC Merger, with Southland as the Target Company and Legato as the SPAC	Legato should provide a clear explanation as to why the Cassel Salpeter fairness opinion was obtained by the Legato Board for this transaction.	Legato revised the disclosure to indicate that the Board sought this opinion in order to obtain a view from a third party with experience in SPAC business combination transactions.
Anzu Special Aquistion Corp I merger with Envoy Medical Corporation **Signing Date:** April 17, 2023 **Financial Advisor:** N/A **Nature of Transaction:** SPAC Merger, with Envoy as the Target Company and Anzu as the SPAC	Anzu must describe the Board's reasoning in deciding to forego obtaining a fairness opinion and describe the relevant expertise of the Board members.	Anzu revised the disclosure to indicate that the Board consists of two lawyers, each with an extensive background in corporate finance and transactions. Also, Anzu disclosed that the Board did not believe a discounted cash flow analysis was an appropriate valuation methodology for Envoy, given Envoy's innovative technology roadmap, potential strategic value, and current stage of commercialization. Thus, the Board did not believe a third-party fairness opinion was necessary.

Deal Nook

On October 9, 2023, Prosperity Life announced that it had entered into a definitive agreement pursuant to which its subsidiary, S. USA Life Insurance Company, Inc., would acquire National Western Life Group, Inc. in an all-cash transaction valued at approximately $1.9 billion. The cash merger consideration of $500 per share will be funded through a combination of Prosperity Life's liquidity, a capital commitment from affiliates of Elliott Investment Management L.P., and borrowing under existing facilities or debt commitments. National Western stockholders owning approximately 29.7% of the total voting power signed voting and support agreements in connection with the merger.

As is customary in the current vintage of public deals in the insurance sector, the parties carefully allocated regulatory risk through a "burdensome condition" clause that addressed topics such as permitted deviations from the key terms of Prosperity Life's business plan, requests from regulators for information from Prosperity Life's indirect equityholders and related persons, and requirements from regulators to change Prosperity Life's "ultimate control person" from the one already approved by the Arizona Department of Insurance.

We have seen intense negotiations by merger parties of "burdensome condition" clauses, especially in transactions in which the buyer is a private equity firm or private-equity-adjacent. This trend is likely to continue as insurance regulators continue to focus on the role of private equity in the insurance industry and is likely to extend into other areas given the FTC's recent proposal to overhaul the HSR process.

Author

Andrew G. Jamieson
Partner

Debevoise Quarter

Below are links to articles and publications of interest.

Special Committee Report, February 2022, Issue 3

Special Committee Report, August 2022, Issue 4

Special Committee Report, January 2023, Issue 5

Special Committee Report, July 2023, Issue 6

Delaware Holds Target Cannot Recover Lost-Premium Damages, November 2, 23

NYSE Proposes Relaxed Shareholder approval Requirements for Sales to Substantial Security Holders, Oct 9, 2023

DOJ Announces Six-Month "Safe Harbor" Policy for Acquisition-Related Disclosures October 6, 2023

2023 Proxy Season in Review, August 1, 2023

Delaware Clarifies Standard for Reviewing Board Inference with Election Contests, July 11, 2023

The Mindbody Problem, March, 17, 2023

Insurance Industry Corporate Governance Newsletter, November 7, 2023

FCPA Update, November 2023

Asset Management M&A: Current Trends and Key Legal Considerations, November 2023

2024 Executive Compensation To-Do List for Public Companies, December 8, 2023

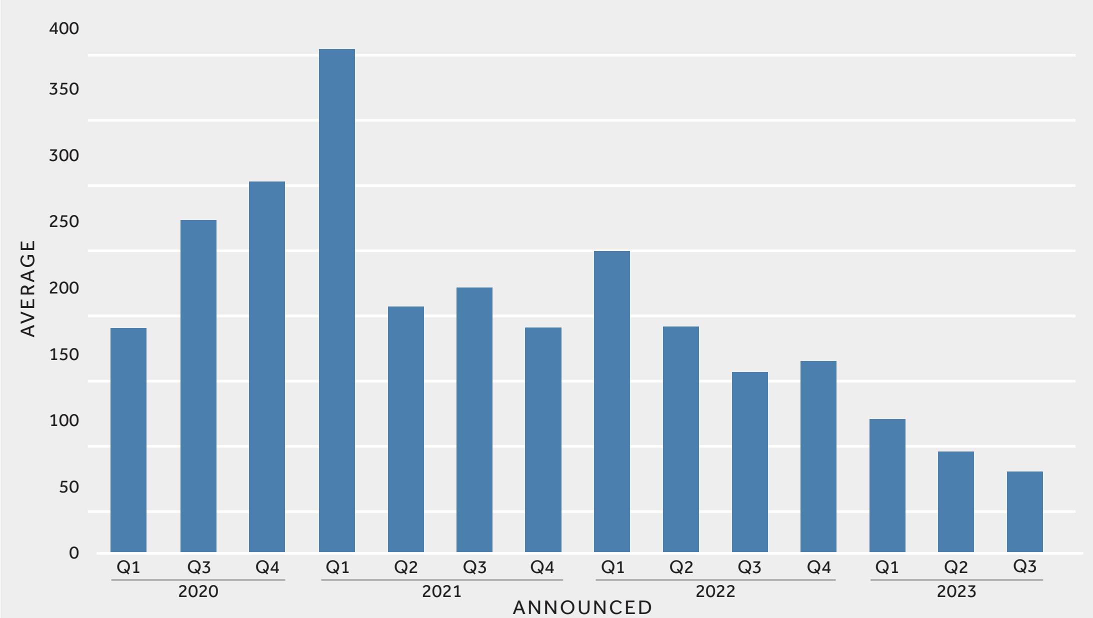
The Charts

Antitrust Termination Fees

		Antitrust Termination Fee ($m)						Antitrust Termination Fee as a Percentage of Equity Value					
Announced	# Deals with Fee	Average	25th Percentile	Median	75th Percentile	Min	Max	Average	25th Percentile	Median	75th Percentile	Min	Max
2020	23	359.6	57.5	184.0	550.0	10.0	1,250.0	4.2	3.2	4.0	5.6	0.8	8.0
2021	39	291.1	83.8	200.0	350.0	10.0	1,000.0	5.6	3.9	5.3	7.0	2.3	12.2
2022	36	406.2	76.2	160.0	386.6	10.0	4,500.0	5.9	3.7	5.3	7.1	1.7	13.3
2023	26	330.3	63.8	151.5	321.2	8.4	2,224.0	5.0	4.0	5.0	6.1	1.2	10.9
All	124	345.4	73.8	170.3	401.6	8.4	4,500.0	5.3	3.6	5.1	6.5	0.8	13.3

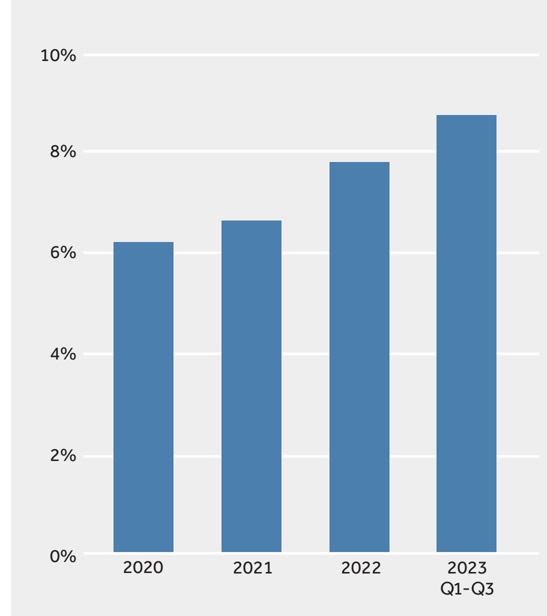
Source: DealPointData.com   Based on deals in which a definitive agreement was reached.

Days Pending between Sign and Close



Source: DealPointData.com   Target Type: Private or Public
Based on deals announced between 01/01/2020 and 09/30/2023 with antitrust termination fees.

Percentage of Announced Deals with Antitrust Termination Fees



Source: DealPointData.com

Crossword Puzzle

Across

1 Regulator that sought to block MSFT's acquisition of ATVI

4 Blank check company

6 Strict standard of review

8 Chief in Wilmington

10 Type of opinion for spin-offs

Down

1 Court of _______

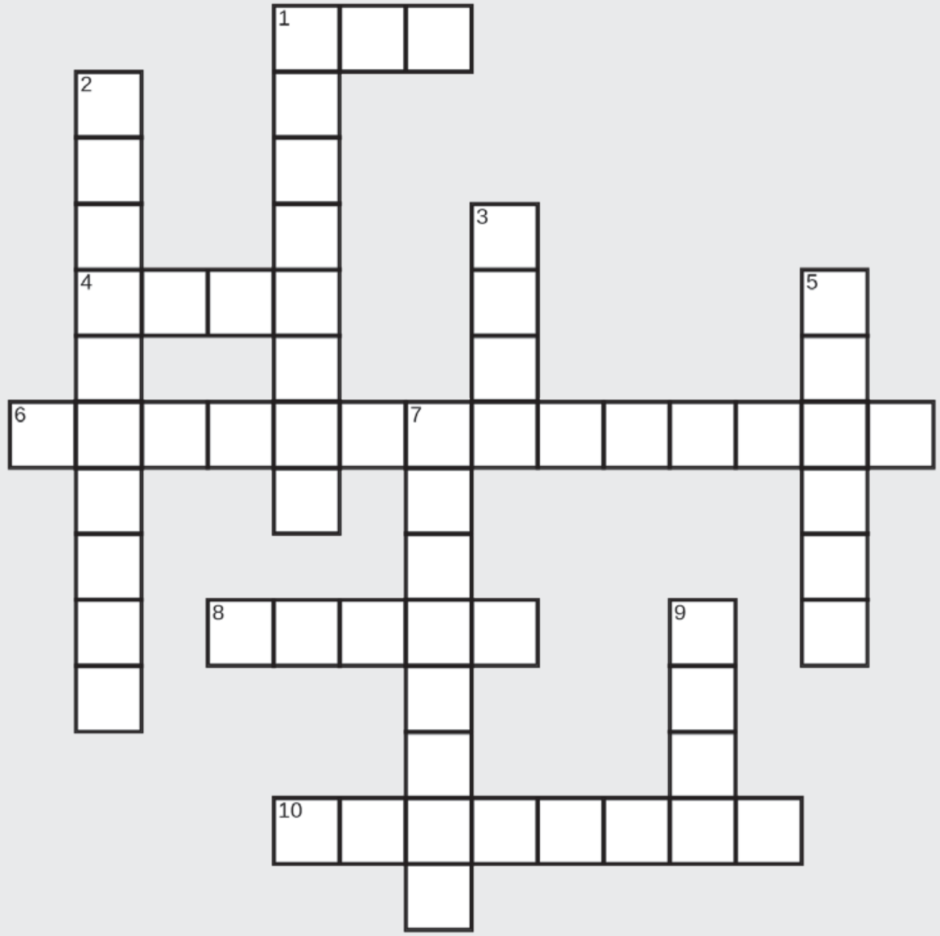
2 Defensive strategy used by Twitter

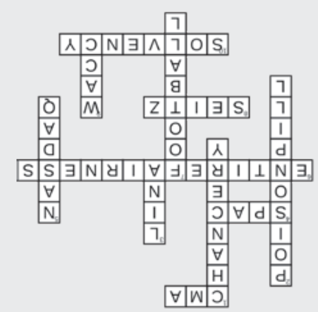
3 Khan of the FTC

5 Exchange for tech companies

7 _______ Field

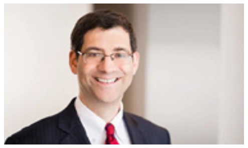
9 Cost of equity and debt (abbrev.)





M&A Partners

Christopher Anthony
New York
canthony@debevoise.com
+1 212 909 6031

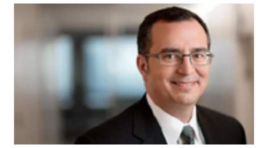


Andrew L. Bab
New York
albab@debevoise.com
+1 212 909 6323

E. Raman Bet-Mansour
London
rbetmansour@debevoise.com
+44 20 7786 5500

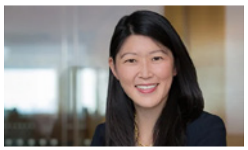
Paul S. Bird
New York
psbird@debevoise.com
+1 212 909 6435

Dominic Blaxill
London
dblaxill@debevoise.com
+44 20 7786 5497



Ezra Borut
New York
eborut@debevoise.com
+1 212 909 7271

Geoffrey P. Burgess
London
gpburgess@debevoise.com
+44 20 7786 9075



Jennifer L. Chu
New York
jlchu@debevoise.com
+1 212 909 6305

Michael Diz
San Francisco
madiz@debevoise.com
+1 415 738 5702

E. Drew Dutton
New York / Hong Kong
eddutton@debevoise.com
+1 212 909 6718 /
+852 2160 9800

Spencer K. Gilbert
New York
skgilbert@debevoise.com
+1 212 909 6265

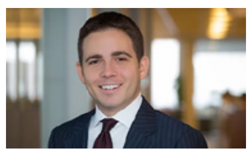
Michael J. Gillespie
New York
mjgilles@debevoise.com
+1 212 909 6463

Gregory V. Gooding
New York
ggooding@debevoise.com
+1 212 909 6870

David Grosgold
New York
dgrosgold@debevoise.com
+1 212 909 6203

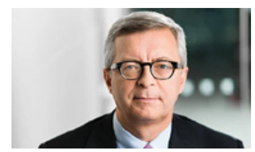
Uri Herzberg
New York
uherzberg@debevoise.com
+1 212 909 6342

Emily F. Huang
New York
efhuang@debevoise.com
+1 212 909 6255

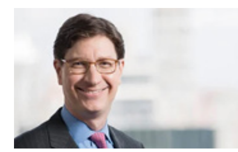


Andrew G. Jamieson
New York
agjamieson@debevoise.com
+1 212 909 6250

Alan Kartashkin
London
akartashkin@debevoise.com
+44 20 7786 9096
+44 20 7786 9000



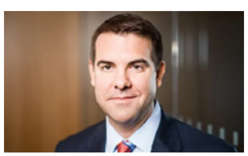
Maurizio Levi-Minzi
New York
mleviminzi@debevoise.com
+1 212 909 6306



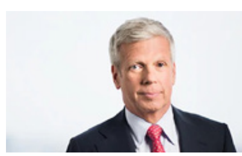
Jonathan E. Levitsky
New York
jelevitsky@debevoise.com
+1 212 909 6423

Nicholas F. Potter
New York
nfpotter@debevoise.com
+1 212 909 6459

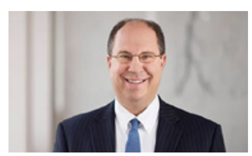
William D. Regner
New York
wdregner@debevoise.com
+1 212 909 6698



Kevin Rinker
New York
karinker@debevoise.com
+1 212 909 6569



Jeffrey J. Rosen
New York
jrosen@debevoise.com
+1 212 909 6281



Paul D. Rubin
Washington, D.C.
pdrubin@debevoise.com
+1 202 383 8150

Kevin M. Schmidt
New York
kmschmidt@debevoise.com
+1 212 909 6178

Aly Love Simons
San Francisco
alsimons@debevoise.com
+1 415 738 5726

Katherine Durnan Taylor
New York
ketaylor@debevoise.com
+1 212 909 6426