Debevoise & Plimpton

MARKETCHECK

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"In each case, the first step is to assemble a strong team of experienced financial advisors, legal counsel, proxy solicitors, and public relations experts."

What to Think About if You're Thinking About Going Private

Going private transactions take many forms, including a takeover bid by a large stockholder, an acquisition by a strategic acquirer, a financial sponsor-led leveraged buyout, and combinations of the three. The future is unpredictable, but after surveying participants at the recent Tulane M&A conference, we see prospects for an upturn in activity in 2024. Lending markets are reopening, the U.S. economy seems to be coming in for a soft landing, extraordinary levels of "dry powder" wait to be deployed by financial sponsors (approximately $2.2 trillion in the U.S., according to Preqin), and a period of limited activity has generated a pipeline of deals waiting for the right market environment. Recent record high stock market prices may dampen some of that interest, and certain deals present heightened regulatory hurdles in the current environment. Still, this seems like an opportune moment to dust off the going private playbook.

So, if you are a public company considering such a transaction, what steps should you take to get ready? What are the risks and how can they be managed? And how will this process play out?

Getting Going

Going private transactions can be initiated in multiple ways: a company can begin a sale process, a buyer might make an unsolicited inquiry, or a controlling stockholder could make a proposal. In each case, the first step is to assemble a strong team of experienced financial advisors, legal counsel, proxy solicitors, and public relations experts. Next steps include negotiating non-disclosure agreements with the potential buyers (generally, including a "standstill" agreement not to acquire the company's securities other than through a negotiated transaction or take other actions to affect the target board's decision process), setting up a data room to share information for due diligence (including mechanisms to prevent premature sharing of competitively sensitive information), and putting in place appropriate procedures for the transaction.

While the parties may prefer to conduct negotiations without public scrutiny, discussions often become known before announcement—either through leaks or a participating 5% or greater stockholder's need to file an amendment to its Form 13D filing disclosing a change of investment intention—so a public communications strategy is important. Generally, a suitable statement can be prepared in advance for use if needed.

Conflicts may be present in transactions in which controlling stockholders or the target's affiliates (including members of senior

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management who have partnered with a financial sponsor) are part of the buyer group or have an interest or are seeking a benefit in the deal that is not available to other stockholders. These should be managed through appropriate procedural mechanisms. Options to consider include recusal of conflicted directors, forming a special committee of the board to lead the company's work in responding to the proposal, and where possible, deferring consideration of management's go-forward roles and compensation arrangements until later in the process—after price has been agreed. It is not always obvious at the outset whether and to what extent a transaction will present these issues, but the decisions made at the start can be important. These matters should be considered early in the process.

Duties of the Board

Directors of a Delaware corporation owe duties of care and loyalty to the corporation and its stockholders.[1] In the context of a sale of the corporation, the board's decisions may be reviewed to determine whether directors sought to achieve the best price reasonably available for the stockholders.[2] In transactions where there is no controlling stockholder, majority approval of the transaction by a vote of fully informed, uncoerced and disinterested stockholders will typically result in the board's actions being reviewed under the deferential business judgement rule.[3]

While an auction or other pre-signing market check is a common feature of these processes, the board has flexibility to take into account facts and circumstances in determining the best way to achieve the goal of getting the best price reasonably available.[4] For example, is there a serious risk of losing an attractive offer if the process is delayed to assess interest from other potential bidders?[5] Are financial advisors providing guidance that the proposed price is at the upper end of the valuation range? Given that the company will ordinarily have the ability to consider topping bids during the period after signing subject to a payment of a termination fee—is the fee at the lower end of the range? Might a post-signing "go shop" period during which the target is permitted to solicit other bidders and the termination fee is further reduced provide additional comfort?[6] No one factor is determinative.

Because transactions in which a controlling stockholder is the buyer or is otherwise receiving a material special benefit in the deal can raise conflicts of interest, they receive the most stringent standard of review from Delaware courts and require that the board demonstrate that both the price and process for the transaction are fair to the company and its stockholders. As a practical matter, cases adjudicated under this "entire fairness" standard are unlikely to be resolved at the motion to dismiss stage, meaning that expensive and time-consuming factual discovery should be expected before a dispositive motion or trial. The so-called *MFW* procedural protections conditioning the transaction from the outset (or *ab initio* as the leading case describes it) on the approval of both (i) an independent, disinterested special committee that is fully empowered to negotiate (or reject) a transaction and (ii) majority approval by a vote of the fully informed, uncoerced and disinterested stockholders can help protect the interests of the minority stockholders and restore for the board and the controlling stockholder the protection of the business judgement rule.[7]

1. We are focusing here on Delaware corporations, but similar rules—albeit with sometimes important variations—will apply to corporations formed in other jurisdictions.
2. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).
3. *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 314 (Del. 2015).
4. *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1286 (Del. 1989).
5. *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 119 (Del. Ch. 2007)
6. *In re The Topps Co. S'holders Litig.*, 926 A.2d 58, 86-87 (Del. Ch. 2007)
7. *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

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The *ab initio* requirement forces parties to make a number of decisions at the start. First, is the relevant transaction actually one that involves adversity with a controller? The initial question is whether a large stockholder is in fact a controller. In close cases, the Delaware law can have an "I know it when I see it" quality, taking into account both the percentage of the company's vote held by the stockholder and a softer qualitative assessment of the perceived dominance of the putative controller over the board's relevant decisions.[8] Second, assuming a conflicted-controller transaction is at hand, is *MFW* a practical or desirable course? If a company has a small public float or a concentrated disinterested stockholder base, for example, there is a possibility that an activist stockholder could try to leverage its voting power to exert "hold up" value, thereby putting the deal at risk. The company, together with legal counsel and financial advisors, should weigh these risks against the prospect of litigation under the "entire fairness" standard. Choosing to empower an independent special committee without requiring a vote of disinterested stockholders is one option. Doing so may shift the burden of proof to plaintiffs in stockholder claims, and perhaps more important, can help set the groundwork to defend the transaction as entirely fair.

Litigation Risk

Stockholder litigation typically arises following the announcement of even the most pristine take private transaction. Disclosure claims asserting that the disclosures in the proxy or tender offer documents are in various ways inadequate are to be expected. Since the Delaware Court of Chancery's 2016 *In re Trulia* decision, which discourages disclosure-only settlements, unless the resulting supplemental proxy disclosures are "plainly material,"[9] the locus of disclosure cases has shifted to federal court and cost of settlement for routine disputes has decreased. Still, claims continue to be brought even when the alleged deficiencies are insubstantial. Such claims can also be a wedge for plaintiffs to argue that the business judgment rule does not apply because the stockholder vote was not fully informed as *MFW* and *Corwin* require. Breach of duty claims, which often allege an unfair price or process, can be more significant depending upon the facts—particularly in a case involving a deal that is subject to "entire fairness" review. In transactions where the consideration is paid other than entirely in publicly traded stock, stockholders may also demand a judicial determination of the fair value of their shares by bringing an appraisal claim. All of these claims will typically be preceded by a books and records demand under Section 220 of the Delaware General Corporation Law, giving the plaintiffs a factual basis to develop their complaints. The likelihood of scrutiny by the plaintiffs' bar should focus the mind of all participants on ensuring that the process is thoughtfully organized and well documented and that the board and any special committee are diligent in carrying out their duties.

Deal Structures

Take private transactions can be structured as either "one-step" or "two-step" transactions. In a "one-step" merger, the parties negotiate a merger agreement and file a merger proxy with the Securities and Exchange Commission (SEC) before submitting the agreement for approval by stockholders. A "two-step" transaction begins with a tender offer by the purchaser to acquire the shares of the stockholders directly, and then if the requisite majority tender thresholds is reached, the purchaser consummates a "short-form" merger to squeeze out any stockholders who did not respond to the tender offer. Filing a

8. Debevoise & Plimpton LLP, *Special Committee Report*, Issue 6 (July 2023), available [here](#).
9. *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884, 898.

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merger proxy and obtaining a stockholder vote can take up to two or three months (or more) to complete, while a tender offer can be completed in 20 business days after commencement, so a "two-step" merger can be an attractive option if speed is a priority. Depending on the nature of the transaction, however, regulatory approvals can dictate a longer period between signing and closing and sponsor-backed leveraged buyouts are cumbersome to accomplish through a tender offer, in which case a "one-step" merger is more common.

From Signing to Closing

Following signing, public disclosures must be filed with the SEC providing background and detail related to the transaction to allow the stockholders to make an informed decision when voting or tendering their shares. Such disclosures must include the material terms of the transaction, as well as a summary of all material communications between the parties during negotiations, so it is important to establish a process to record the occurrence and substance of these discussions. Take private transactions involving affiliates may require that companies comply with heightened disclosure obligations.

Until the stockholders have approved the transaction or the tender offer has closed, the deal isn't done. The board of directors must consider any proposal that may be, or lead to, a superior deal, and this will be expressly allowed under the merger agreement. Particularly in contested deals, proxy solicitors and public relations advisors can play a crucial role in getting the right deal over the finish line and managing the spotlight under which the board and management will find themselves.

In addition to stockholder approval, the other principal condition to the closing of a take private transaction is receipt of regulatory approvals—ranging from antitrust compliance to foreign investment regimes, such as CFIUS and other more industry- specific rules. If the buyer is a strategic or a financial sponsor with an existing portfolio company that is a competitor of the target, the allocation of these risks can be among the most important issues in the deal. A variety of techniques have developed, ranging from "efforts" covenants to reverse termination fees payable to the target if the deal cannot be closed. In recent years, regulators have become more aggressive, resulting in sometimes lengthy sign to close periods. For a target company, it can be important to ensure that there is a plan to finance the deal even if closing is delayed and that it has the flexibility to operate its business without undue interference from the buyer.

Summing Up

Participating in a going private transaction is a defining event for a public company's board and senior management team. The deals can be high profile and are often executed under tight timelines. Given the complexity and the many ways in which innocent missteps are possible, our most important advice is to assemble your team of specialized advisors (financial advisors and legal counsel first of all) for an initial consultation earlier than you think you will need them.

Authors

Jonathan E. Levitsky
Partner

Marisa Demko
Associate

Everything You Ever Wanted to Know About Up-Cs and TRAs But Were Afraid to Ask (Part I)

I. Introduction

Over the past decade, the Umbrella Partnership Corporation (Up-C) structure has become commonplace for public offerings of entities, particularly private equity portfolio companies, that are taxed on a "flow through" basis (e.g., limited liability companies and partnerships). The result is that the tax, economic, and fiduciary complexities of the structure have received increasing attention from participants, public stockholders, and the courts.

An Up-C structure allows investors in an entity that is treated as a partnership for tax purposes to access the public securities markets while preserving for pre-IPO owners many of the tax benefits and efficiencies of the partnership structure. A key feature of Up-Cs is an agreement between those owners and the new public holding company known as a Tax Receivable Agreement (TRA). A TRA governs the benefits flowing from a feature of partnership taxation which provides that when an interest in an LLC or partnership is sold in a taxable transaction, the holder of that interest going forward has the benefit of a "stepped-up" tax basis in the assets of the entity. Under a TRA, when the pre-IPO investors exit from the investment, they transfer their units to the public company in a taxable exchange for public shares (on a 1:1 basis) which then are typically sold into the market for cash. The TRA provides that those exiting investors are entitled to a share (generally 85%) of the actual tax savings realized by the public company from the basis step-up that resulted from that taxable exchange of units. In effect, the structure creates a tax benefit on the exchange of a holder's units which is then shared 85/15 between the exchanging holder and the public stockholders.

As with any evolving deal structure, increased use brings increased scrutiny. With the passage of time, issues have arisen— both in planning and negotiations and in litigation—concerning the treatment of distributions, the propriety and terms of TRAs, the circumstances under which TRAs are terminated and the amounts payable in connection with such terminations, and related matters. In the fist part of this two-part article, we describe the Up-C structure in some detail and highlight certain issues. Then, in the second part, which will appear in the next issue of Market Check, we will analyze recent litigation involving such structures and further identify various complexities to which transaction planners and their advisors should be sensitive.[1]

II. Structure and Benefits of Up-C IPOs

A traditional Initial Public Offering (IPO) of a corporation does not lead to any change in tax status or offer opportunities to create or optimize tax benefits for the prior owners. It is perfectly possible to IPO a business conducted by an LLC essentially in the same manner by rolling it up into, or locating it 100% beneath, a corporation and then taking that corporation public, without any of the benefits or complexities of an Up-C. However, for the pre-IPO owners of the significant number of private equity portfolio companies that are treated as pass-through entities for U.S. tax purposes, the Up-C benefits—particularly the ability to receive distributions without tax and to receive cash flow from a TRA—are very hard to resist.

In an Up-C IPO, the sponsor creates and takes public a holding company (PubCo) that uses the

1. If you would like more information in advance of installment two of this article, please do not hesitate to reach out to one of the authors.

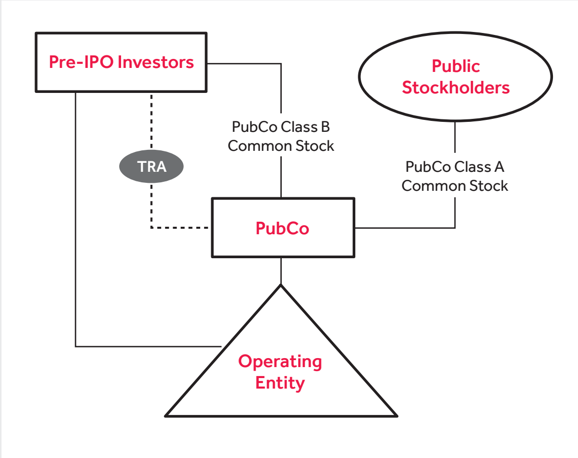
Continued on next page

proceeds of the offering to acquire interests in the portfolio company LLC (often the initial stake is ~30–40%). The sponsor and other pre-IPO investors retain the balance of the membership interests in the operating entity.

PubCo typically issues two classes of shares: (1) Class A common stock, which is issued to public investors and carries the economic entitlements of ownership in PubCo but only a small percentage of the voting rights; and (2) Class B common stock, which is issued to pre-IPO investors and carries a majority of the voting rights in PubCo, but no economic rights (as these investors continue to hold their economic interests via interests in the operating pass-through entity).

In connection with the IPO, PubCo and the pre-IPO investors enter into an exchange agreement allowing pre-IPO investors to exchange their interests in the operating company for cash or publicly traded shares of Class A common stock, typically on a 1:1 basis. In addition, pre-IPO investors and PubCo enter into a TRA entitling pre-IPO investors to a percentage of any tax benefit derived by PubCo from the Up-C structure following a sale of the pre-IPO investor's units to PubCo.

The following figure illustrates the resulting structure after consummation of the Up-C IPO:



TRA terms have become increasingly standardized as the use of the Up-C structure has proliferated. As noted, realized cash tax benefits are typically shared 85/15. Most of the payout occurs in the first 16 years, and there are generally change-of-control provisions under which the TRA must be bought out on the consummation of certain fundamental transactions. In a number of instances, the buyout price can be significant and may be payable regardless of whether PubCo actually receives any tax benefits.

The Up-C puts the pre-IPO owners in a different position from the public owners of the PubCo stock. By virtue of the TRA, those owners may, and often do, have different interests and economics than does the public. The TRA may function as a kind of poison pill, making certain transactions that might be advantageous to the public more difficult or expensive for third parties to consummate. The pre-IPO owners may also favor transactions that preserve, or favorably monetize, the TRA over other transactions that might be more favorable to the public. Their situation differs from that of the public in other respects as well. For example, pre-IPO owners often receive distributions from the operating partnership to cover their taxes from the business and obtain an increased tax basis in their interest in the operating company over time, reducing their tax on an eventual exchange.

Finally, the 16-year payout period in most cases will extend well past the termination date of the sponsor's closed-end investment fund. As a result, sponsors understandably look for options to monetize their TRA entitlements before the end of the contract's lengthy term—an incentive which stockholder plaintiffs may contend puts

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Everything You Ever Wanted to Know About Up-Cs and TRAs But Were Afraid to Ask (Part I) (continued from page 6)

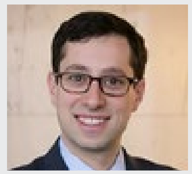
those sponsors in a fiduciary bind. While a relatively nascent market exists from trading in TRAs, the buyer of the TRA has in certain cases been the related PubCo itself. Valuing TRA rights can be difficult because their value is subject to a number of contingencies, including the PubCo's tax position and changes in law that change tax rates or the manner in which the tax base is determined.

The plaintiff's bar has increasingly focused on Up-Cs in general and the role of TRAs and TRA exit transactions in particular. This focus has resulted in increased litigation challenging transactions in which a company purchases a sponsor's TRA interests, transactions in which an early TRA termination was triggered, and transactions in which the pre-IPO and PubCo holders arguably receive different benefits. The second installment of this article will discuss recent litigation developments arising out of TRA exit transactions and companies employing an Up-C structure, and will suggest strategies as to how to navigate the associated risks.

Authors

Stephen M. Jordan
Partner

Jeffrey J. Rosen
Partner



Zachary H. Saltzman
Partner

Shannon Rose Selden
Partner

Matthew J. Sorensen
Associate

> "Though there remain headwinds to bank M&A transactions, the combination of stabilizing interest rates, greater insight into the regulatory environment and regulators' renewed focus on bank merger policy suggests a viable path for bank M&A in 2024."

Bank M&A Considerations for the New Environment

M&A activity among large banks (those with $100 billion or more in assets) was muted in 2023 in part as a result of the spring failures of Silicon Valley Bank (SVB), Signature Bank and First Republic Bank, and the resulting supervisory and regulatory fallout. M&A activity in 2023 also was impacted by regulatory uncertainty related to the Department of Justice's (DOJ) and banking agencies' approach to evaluating bank merger applications, the myriad market impacts of higher interest rates, and the lingering effects of COVD-19 (including higher office vacancy rates).

Though regulatory and market uncertainty remains, 2024 shows signs of an improving landscape for bank M&A. Capital One's recently announced acquisition of Discover is hopefully a glimmer of the future. In addition, a stabilizing interest rate environment, the apparent completion of the banking agencies' post-SVB examination sweep, and some additional insight as to the regulatory environment suggest a path forward for large bank M&A transactions, although commercial real estate concerns may persist for some banks.

Regulatory Landscape for Bank M&A

Regional Bank Failures; Supervisory and Regulatory Fallout

SVB was closed by its state regulator and placed in Federal Deposit Insurance Corporation (FDIC) receivership on Friday, March 10, 2023. Seeking to avoid broader market stress, federal regulators invoked emergency powers in response to the failure of SVB and that of Signature Bank the following Sunday. Still, regional banks continued to experience instability and deposit outflows, leading to the failure of First Republic Bank and its government-assisted sale to JPMorgan Chase in the beginning of May 2023.

Regulators responded to these historic failures by targeting banks with assets of $100-$250 billion with confidential supervisory findings related to capital, liquidity and other matters.[1] Though we understand this post-SVB examination sweep may be nearing completion, bank boards and management face pressure to remediate issues identified by

1. Hannah Levitt, Fed Ramps Up Demands for Corrective Actions by Regional Banks, *Bloomberg* (Aug. 30, 2023), available here.

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supervisors. Moreover, depending on their severity, these findings may informally or formally restrict a bank's ability to engage in significant transactions, at least in the near term.

In addition, the banking agencies released several proposed rules following last year's bank failures with a common theme of eroding the tailoring of prudential standards across large banking organizations. This reduction in regulatory tailoring, combined with the need for economies of scale that would be useful in building out compliance capabilities, may drive consolidation in the banking industry. These regulatory changes, particularly the agencies' proposed increases in capital requirements, may also create opportunities for banks to partner with private equity firms as banks pursue M&A transactions.

Bank Merger Act Factors

Competitive Factors. When considering a bank merger application, the Bank Holding Company Act and the Bank Merger Act (Bank Merger Statutes) require the relevant banking agencies to consider a number of factors, including effects on competition.[2] In evaluating competitive factors, the banking agencies are required to request a report from the DOJ outlining its view on the competitive effects of the transaction. Over the last several years, the agencies have been reconsidering their approach to analyzing these statutory factors, partly in response to an Executive Order from President Biden directing the DOJ and banking agencies to "adopt a plan … for the revitalization of merger oversight."[3]

In this context, Jonathan Kanter, the Assistant Attorney General for the DOJ's Antitrust Division, suggested last summer that the DOJ would consider a broader range of competitive factors beyond deposit concentration in a more fact-specific manner (though it is not clear how this analysis will be operationalized). Since then, the DOJ (together with the Federal Trade Commission) has released updated general (i.e., non-bank centric) merger guidelines reflecting the Biden administration's stricter approach to antitrust issues. Moreover, in March 2024, the FDIC included in a Proposed Statement of Policy on Bank Merger Transactions, an approach to evaluating competitive factors largely in the same spirit as Kanter's speech. Neither the DOJ nor the banking agencies have yet released final bank-specific antitrust guidelines, though the DOJ and banking agencies are consulting on them.

Other Statutory Factors. The banking agencies are also continuing their review of the Bank Merger Statutes' other factors. In March, 2003, the FDIC released a Proposed Statement of Policy on Bank Merger Transactions following the Office of the Comptroller of the Currency's (OCC) release in late January, 2024, of a notice of proposed rulemaking on bank mergers. The proposals set forth how the FDIC and OCC would evaluate the Bank Merger Act's statutory factors. Due to the type of banks for which the FDIC has primary supervisory authority, its proposal is likely to have less of a *direct* impact on large bank M&A transactions than the OCC's.

The OCC's proposed policy statement discusses certain indicators that would be consistent or inconsistent with OCC approval of an application. In addition, both the OCC's and FDIC's proposals outline the criteria these agencies would use in evaluating the Bank Merger Statutes' factors, including the financial and managerial resources of the institutions, the financial stability impacts of the transactions and the convenience and needs of the community to be served. Though the proposals build on existing agency practice in some areas, they would represent a shift in approach in others. For example, the proposals provide that in evaluating the convenience and needs factor, the agencies would consider job losses or reduced job opportunities, which

2. 12 U.S.C. §§ 1828(c); 1842(c).
3. E.O. 14036 of July 9, 2021, 86 Fed. Reg. 36987, 36992.

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bank regulators have previously stated were not within the scope of their review. In addition, the FDIC's proposal appears to go even further than the OCC's by saying the FDIC would expect a combined bank to *better* meet the community's convenience and needs than absent the merger.

Overall, the proposals do not create a clear roadmap for bank M&A transactions, but they do provide some insight into the banking agencies' views and indicate that they are once again focused on bank merger policy.

Recent Private Equity Activity May Provide Partnership Opportunities for Banks

Private equity firms remain interested in engaging in the banking sector. Though their ability to directly invest in banks is restricted by law, typically to less than 25% of the voting stock of a bank, private equity firms continue to take minority stakes in banking organizations. For example, several private equity firms recently announced they would make a $1 billion equity investment in New York Community Bancorp. As bank M&A activity accelerates, banks may wish to consider seeking out private equity firms to facilitate transactions, including by:

- Making equity investments to facilitate an acquiring bank's acquisition of another bank by "filling the hole" in the capital structure.
- Purchasing loan portfolios or other assets, or synthetically taking on credit risk from bank balance sheets through instruments such as credit-linked notes, helping optimize bank balance sheets ahead of potential deals.

Path Forward and Key Takeaways

Though there remain headwinds to bank M&A transactions, the combination of stabilizing interest rates, greater insight into the regulatory environment and regulators' renewed focus on bank merger policy suggests a viable path for bank M&A in 2024. Based on the current regulatory landscape, we suggest banks considering significant transactions take the following steps to better position themselves for success:

- Demonstrate and communicate progress to supervisors related to remediation of any supervisory issues.
- Consider engaging with third-party investors, such as private equity firms, to help optimize the bank's balance sheet prior to pursuing deals or to facilitate an acquisition.
- Develop more comprehensive antitrust analyses that address more products and services.
- Build compelling cases illustrating the community benefits of a proposed transaction and actively engage with community groups to build support.
- Engage in open and transparent communications with regulators before and during the application process.

Authors


Gregory J. Lyons
Partner


Tejas N. Dave
Associate


Clare K. Lascelles
Associate

Con Ed Provisons after *Crispo*

If a buyer fails to close the deal when required, can the target company claim that the lost merger premium is part of its damages? In its 2005 *Consolidated Edison, Inc. v. Northeast Utilities*[1] decision, the Second Circuit held that—at least under New York law, when stockholders are not specified third-party beneficiaries of a merger agreement—the answer is no. Since then, so-called *Con Ed* provisions, which contractually define a target company's damages against a defaulting buyer to include lost merger premium, have been prevalent in merger agreements.

Then, on October 31, 2023, the Delaware Court of Chancery in *Crispo v. Musk et al*.[2] held that certain *Con Ed* provisions were unenforceable on the grounds that such damages would not be expectation damages but rather a penalty.[3] The court reasoned that lost premium is an entitlement of the stockholders, not the target company, and that the target company could not recover for the lost premium because the merger agreement did not convey third-party beneficiary status to its stockholders.

In her opinion, Chancellor McCormick provided an overview of the development of *Con Ed* provisions, explaining that three primary approaches have emerged. The **first approach** is to provide expressly in the merger agreement that stockholders are third-party beneficiaries. However, an unqualified grant of third-party beneficiary status to stockholders, the court noted, could increase litigation volume and affect the ability of a target's board to "control the litigation asset [against the defaulting buyer] and secure a favorable outcome." The **second approach** is to provide that a target company is the agent of the stockholders for purposes of recovering lost premium damages on the stockholders' behalf. The court cautioned that this approach, however, rested "on shaky ground" because a contracting party cannot unilaterally appoint itself as agent for a non-party for purposes of controlling that party's rights. The **third approach**, which the *Crispo* court found unenforceable, is to simply define a target company's damages to include lost premium (without also providing for third-party beneficiary status for stockholders).

In response to the *Crispo* decision, on March 28, 2024, the Council of the Corporation Law Section of the Delaware State Bar Association proposed amendments to the Delaware General Corporation Law (DGCL) that would provide that the parties to a merger agreement may expressly specify the "penalties or consequences" of a party's failure to perform, which could include a requirement to pay the target company's lost premium damages. The proposed DGCL amendments would also provide that the parties to a merger agreement may expressly appoint a representative for the target company's stockholders and grant such representative "the exclusive authority to enforce the rights of such stockholders" under the merger agreement, with such appointment and grant made effective upon the stockholders' adoption of the merger agreement. If enacted in their current form, the proposed DGCL amendments would come into effect on August 1, 2024, and clarify some of the key issues raised by *Crispo*. But, in the meantime, while the Delaware legislature considers the proposed DGCL amendments, how have practitioners been drafting *Con Ed* provisions in the 65[4] U.S. public target merger agreements that have been filed since the *Crispo* decision?

1. *Consolidated Edison, Inc. v. Northeast Utilities*, 426 F.3d 524 (2d Cir. 2005).
2. *Crispo v. Musk et al.*, A.3d, 2023WL7154477 (Del. Ch. Oct. 31, 2023).
3. *See* this Debevoise Debrief for our initial summary of the *Crispo* decision.
4. Search Results, Deal Point Data, https://www.dealpointdata.com/ (last visited March 29, 2024).

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Con Ed Provisions after *Crispo* (continued from page 11)

First Approach: Third-Party Beneficiary Provisions. Post-*Crispo* merger agreements continue to steer clear from unqualified grants of third-party beneficiary status for the stockholders. However, approximately 32% (21 of the 65 agreements) contained a third-party beneficiary provision that granted stockholders third-party beneficiary status for the limited purpose of recovering lost premium damages.

Second Approach: Agency Provisions. Out of the 21 agreements granting limited third-party beneficiary status to stockholders under the second *Con Ed* approach, 20 of them also provided that the target company could seek lost premium damages on behalf its stockholders. The vast majority (17 of the 20 agreements) explicitly stated that only the target company may seek such damages as the "agent" of the stockholders, whereas only three of the 20 agreements did not refer to the target company as an "agent." One agreement required stockholders to subsequently elect an agent to enforce any claim on their behalf. The market's continued adoption of the second *Con Ed* approach is interesting given the *Crispo* court's observation that such approach rested on shaky grounds. Practitioners have already begun adopting potential solutions to base contract privity on a more solid foundation. One approach is to include a charter provision designating the target company as the stockholders' agent for purposes of recovering lost premium damages.[5] Charter amendments, however, are likely to be a prospective solution for companies initially going public rather than a change proposed for already public companies for various reasons, including because it is challenging to amend the charter of a company that is already public and because doing so might be interpreted as signaling that a potential sale is in the offing. Another approach could be to clarify that the stockholders' vote to adopt the merger agreement includes a ratification of the agency designation set forth in the merger agreement. While this approach was not addressed by the *Crispo* court, it is consistent with the proposed DGCL amendments, and may help a court support an agency designation because it would indicate that the source of the grant of agency was the stockholders rather than the target company.

Third Approach: "Lost Premium" Provision. With respect to the third approach, only one post-*Crispo* merger agreement provided that a target company's damages include lost premium damages without also providing for third-party beneficiary status for stockholders with respect to such damages. The relative unpopularity of this approach on a stand-alone basis comes as no surprise, given the outcome of *Crispo*.

Overall, the most common post-*Crispo* approach appears to be a combination of all three prior *Con Ed* approaches. Approximately 26% (17 of the 65 agreements) contained elements of all three approaches. Given that it has only been five months since *Crispo* was decided, it remains to be seen how practitioners will continue to respond to the decision and, if adopted, the proposed DGCL amendments.

5. The Debevoise M&A team represented the Special Committee of the Board of Directors of Sirius XM Holdings Inc. in connection with its agreement with Liberty Media Corporation to combine SiriusXM with Liberty Media's Liberty SiriusXM tracking stock group, announced in December 2023. The charter for the new SiriusXM public holding company in that transaction included such a provision.

Authors

William D. Regner
Partner

Katherine Durnan Taylor
Partner

Natalie Mauch
Associate

Jason Zhang
Associate

The Blurbs

Tulane Key Takeaways

There was a sense of cautious optimism among M&A practitioners at the Tulane Corporate Law Institute that 2024 would see increased levels of activity after lackluster deal-making years in 2022 and 2023. However, that optimism was somewhat tempered by uncertain economic prospects, regulatory headwinds and several recent Delaware cases that called into question accepted market practices.[1]

2023 was a tale of two halves – a slow first half followed by a significantly busier second half. Political uncertainty, rising interest rates, choppy equity markets and restrictive debt financing markets stalled M&A activity in the first half to $268 billion in volume, with M&A in technology, media and telecom being hit especially hard. M&A activity in the second half rebounded to $417 billion in volume – with 8 of the 10 largest deals of 2023 being announced in the second half – due to a more stable interest rate environment, improved equity markets and more availability of debt financing through private credit. Notwithstanding all of the challenges, 2023 still saw the third highest deal volume of all time, although the transactions that were completed were smaller than the "mega deals" of recent bull cycles.

The prevailing sentiment at the conference was that U.S. M&A would continue to accelerate in 2024 as financing markets strengthen, companies face pressure from activists to consolidate, private equity sits on a record amount of dry powder and the Fed considers interest rate cuts. This forecast has been borne out in the early data as M&A deal value in the first two months of 2024 was up 150% compared to the first two months of 2023.

However, a significant headwind inextricably linked to the overall M&A outlook continues to be the challenging regulatory environment. There was discussion at the conference of U.S. antitrust agencies taking a broader enforcement mandate and having increased skepticism toward remedies. Inbound and outbound cross-border investment continue to raise complexities in many cases, and participants forecast continued robust CFIUS enforcement regardless of the outcome of the 2024 presidential election. Although average second request timing actually decreased to 11 months in 2023 from 15 months in 2022, this may have been due to the chilling effect regulatory enforcement has had on transactions with complex antitrust issues. Practitioners discussed the importance of advance planning to address elongated timelines – protecting buyers from value degradation and financing lapsing while at the same time giving target companies sufficient latitude to keep their workforce focused and incentivized.

Another key theme of the conference was whether Delaware has put itself at risk of losing its distinctive status as the capital of corporate law. Delaware has always been known for fielding an excellent, efficient and creative judiciary, a flexible legislature and statutory structure that reflect a deep commercial understanding of how our corporate system works and the complex interrelationship among management, directors and stockholders, and perhaps most importantly, a legal system that offers consistency, reliability and a significant degree of certainty. Some, however, said that Delaware has imperiled its pride of place with a series of recent opinions that have shaken the corporate bar not only by upending historical market practice and offering

1. We note that amendments were recently proposed to the General Corporation Law of the State of Delaware (DGCL). Several of these amendments are intended to address some of the uncertainty created by these recent Delaware cases. To see language of the proposed changes to the DGCL, click here.

Continued on next page

questionable logic to support their holdings, but also by failing to provide a clear blueprint as to how to comply with the law. The Delaware Developments panel reviewed a number of recent cases, but it is perhaps the *Moelis* case[2] that raised the greatest concern. In that case, Vice Chancellor Laster found that a long list of pre-approval rights built into a stockholders agreement interfered with Delaware's core principle that it is the board (and not the stockholders) that has the obligation and right to manage the affairs of a corporation. Companies and stockholders have been negotiating arrangements like the one in *Moelis* for decades. Some expressed the view that if the Delaware courts can overturn such a common market practice, then nothing is sacred. Others have complained that practitioners cannot glean from the opinion what collection of pre-approval or consent rights would pass muster under the law.[3]

The Conflicts, Controllers, Entire Fairness & Delaware panel, featuring Debevoise litigation partner Maeve O'Connor, also reviewed several recent Delaware cases that have upset settled practice, including *Tornetta v. Musk, Moelis*, *Oracle*,[4] *Tesla Motors*[5] and *Sears Hometown*.[6]

Does this alleged loss of consistency and certainty mean that corporations are going to flee to Nevada, leaving Delaware in the dust? Elon Musk tweeted: "Never incorporate your company in the State of Delaware" (Musk's post famously followed the decision in *Tornetta v. Musk*[7]). The general consensus, however, is that Delaware has always been bold in upholding the law even if doing so means upending market practice, and the courts will ultimately work out a reasonable, clear and practical framework for these issues as it has done with so many other challenges in the past. The proposed DGCL amendments illustrate that Delaware will be commercial and solution oriented when confronted with these types of challenges. In 1988, Marty Lipton expressed a view eerily similar to Musk's, and yet, companies are still incorporating in Delaware by the droves. Dealmakers do not expect that to change anytime soon.

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2. *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, No. 2023-0309-JTL (Del. Ch. Feb. 23, 2024).
3. The DGCL amendments address some of the uncertainty and disruption of market practice created by *Moelis*, demonstrating the efficiency and flexibility of the Delaware system.
4. *In re Oracle Corp. Deriv. Litig.*, C.A. No. 2017-0337-SG (Del. Ch. May 12, 2023), which addressed whether Larry Ellison was a conflicted controller of Oracle in its acquisition of NetSuite.
5. In re Tesla Motors, Inc. S'holder Litig., No. 181, 2022 (Del. June 6, 2023), which addressed whether Tesla's acquisition of SolarCity was entirely fair.
6. *In re Sears Hometown and Outlet Stores, Inc. S'holder Litig.*, 2024 WL 262322 (Del. Ch. Jan. 24, 2024), addressing the fiduciary duties of controlling stockholders when exercising influence on corporation decisions.
7. *Tornetta v. Musk*, 2024 WL 343699 (Del. Ch. Jan. 30, 2024).

Authors

Andrew L. Bab
Partner

Andrew G. Jamieson
Partner

Jonathan E. Levitsky
Partner

Leaving Delaware? It May Cost You

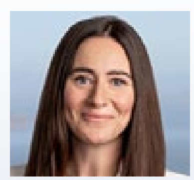
Delaware has long been the favored jurisdiction of incorporation for U.S. companies, due in large part to the well-established and balanced laws governing Delaware entities and the reputation of the Delaware judiciary in predictably enforcing those laws. Not surprisingly, some states have made a play to lure companies away from Delaware, and Nevada has been among the most successful, becoming the second most popular state of incorporation for U.S. companies.[1] Nevada's success can be attributed partly to its lower franchise taxes, but also to the state's ongoing effort to position itself as the jurisdiction with the greatest protection for officers and directors. These protections arguably result in lower litigation costs by reducing the options available to stockholders for bringing claims against fiduciaries of a Nevada corporation. Elon Musk reincorporated X (f/k/a Twitter) in Nevada last year and, after the Delaware Court of Chancery rescinded Musk's Tesla compensation package earlier this year, has publicly encouraged other companies to leave Delaware in favor of Nevada or Texas.

For those considering reincorporating outside of Delaware, what process should be followed and what are the potential ramifications? The Delaware Court of Chancery weighed in on that question in *Palkon v. Maffei et al*.[2] when it denied a motion to dismiss claims that the TripAdvisor board's decision to convert the company from a Delaware corporation to a Nevada corporation breached the fiduciary duties of TripAdvisor's directors and its controlling stockholder and CEO/Chairman, Gregory Maffei. The court found that the plaintiffs adequately pled that the conversion was a self-interested transaction because Nevada offers fewer litigation rights to non-controlling stockholders and greater litigation protection to the directors and Maffei—including, for example, not subjecting controller transactions to a test of entire fairness—thereby affording the defendants a non-ratable benefit. Because TripAdvisor's board did not employ any of the protective devices articulated by the Delaware Supreme Court in *Kahn v. M&F Worldwide Corp. (MFW)*[3] (i.e., approval of the conversion by a duly empowered special committee of independent and disinterested directors and a fully informed majority-of-the-minority vote in favor of the conversion), and because the stockholders were not compensated for the reduction in their litigation rights, the court found that the conversion should be judged under the test of entire fairness.

Nonetheless, the court declined to enjoin the conversion, finding that monetary damages would provide an adequate remedy if the plaintiffs ultimately prevail on the merits. The court found that monetary damages could be calculated by comparing TripAdvisor's trading price before and after the announced conversion. This calculation was reliable, in the court's mind, because: (1) no aspects of the company were changing outside of its internal governing law and (2) at the time of announcement, nothing prevented the company from implementing the conversion (i.e., there was no majority-of-the-minority vote).

Where does this decision leave companies seeking to flee Delaware in favor of a jurisdiction like Nevada that offers fewer opportunities for stockholders to hold directors and controlling stockholders responsible for their actions (or inactions)? If the Delaware company has a controlling stockholder, to avoid the application of entire fairness review it would need to employ the protections articulated in *MFW* or perhaps demonstrate that the controller is not receiving a non-ratable benefit from the reincorporation. But, where the transaction ultimately fails the test, plaintiff stockholders may be entitled to monetary damages, or under different fact, the entire fairness test applies and the court may enjoin the conversion. If the company does not have a controller, the court suggested that adequate disclosure regarding the process and reasons prior to a favorable stockholder vote should be sufficient under *Corwin*[4] to grant business judgment rule deference to a board's decision to convert.

Author



Caitlin Gibson
Counsel

1. Theo Francis and Erin Mulvaney, Elon Musk Isn't the Only Billionaire Fighting Delaware, *The Wall Street Journal* (Feb. 11, 2024), available here.
2. C.A. No. 2023-0449-JTL (Del. Ch. Feb. 20, 2024).
3. 88 A. 3d 635 (Del. 2014).
4. *Corwin v. KKR Financial Holdings LLC*, C.A. No. 9210-CB (Del. Ch. Oct. 14, 2014).

Delaware Addresses Fiduciary Duties for Controllers Exercising Stockholder-Level Voting Power

Earlier this year, in *In re Sears Hometown & Outlet Stores, Inc. S'holder Litig.*,[1] Delaware Vice Chancellor Laster held that when controllers exercise their stockholder-level voting power to change the company's status quo, their duty of care prohibits them from acting with gross negligence and their duty of good faith requires them not to intentionally harm the company or its minority stockholders. Vice Chancellor Laster decided that enhanced scrutiny was the appropriate standard for a court's review of whether a controller's duties in that context had been satisfied. Both the articulated duties and the corresponding standard of review seem to set forth novel articulations of Delaware law, with potentially far-reaching implications.

The *Sears* case involved an effort by Eddie Lampert, the controlling stockholder of Sears, to adopt a bylaw intended to block an independent committee of the Sears board from liquidating an unprofitable Sears business. The bylaw would prevent the board from executing a liquidation without obtaining two separate approvals (30 days apart). Lampert also removed two members of the committee that supported the liquidation plan.

According to Vice Chancellor Laster, "when exercising stockholder-level voting power, a controller owes a duty of good faith that demands the controller not harm the corporation or its minority stockholders intentionally. The controller also owes a duty of care that demands the controller not harm the corporation or its minority stockholders through grossly negligent action." While this articulation of controlling stockholder duties appears novel, the Vice Chancellor cited prior Delaware decisions that qualified the general rule that controllers are free to vote against a change to the status quo and free to refuse to sell their shares as they see fit. The Vice Chancellor found in these qualifications support for the idea that controllers voting to change the status quo or selling their shares, owe "limited but enforceable duties."

After articulating the controller's fiduciary duties, the Vice Chancellor considered the appropriate standard of review for a court determining whether those duties had been satisfied. The court decided that enhanced scrutiny should apply, despite the Vice Chancellor's acknowledgment that transactions involving a controller have historically been subject to either business judgment review or the test of entire fairness. Vice Chancellor Laster likened the Sears situation to one where the court reviews directors' actions under enhanced scrutiny, "when directors face subtle conflicts and situational pressures that could undermine the integrity of their decisions, and when they take action that invades space traditionally reserved for the stockholders." According to Vice Chancellor Laster, by intervening in the liquidation plan, Lampert was exercising power typically reserved for the board. He faced a subtle conflict because, while his actions affected stockholders equally, Lampert—through his control of the parent company of Sears—had several business agreements with Sears (including services agreements whereby the parent company provided inventory procurement, logistics and various other types of management services to Sears) and

1. C.A. No. 2019-0798-JTL (Del. Ch. Jan. 24, 2024).

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those arrangements may have skewed his judgment. Accordingly, Lampert was required to show that his actions were taken in good faith and were reasonable in response to the perceived threat posed by the liquidation plan.

Reviewing the controller's actions under enhanced scrutiny, Vice Chancellor Laster found that Lampert acted in good faith to achieve a legitimate objective. The Vice Chancellor noted Lampert's credible trial testimony and his belief that the liquidation would harm the company and its minority stockholders, particularly since the committee had not adequately accounted for the third-party liabilities that would be triggered by the liquidation plan. The Vice Chancellor also found that Lampert's bylaw adoption was reasonable in light of the perceived threat, noting that the bylaw amendment—while drastic—was adopted to prevent the liquidation when it became clear that Lampert had no alternatives and that the committee would unilaterally implement the liquidation if he did not intervene. Finding that Lampert's actions were taken in good faith and were reasonable in response to the perceived threat, the court determined that Lampert did not breach his fiduciary duties.

Despite its ultimate conclusion, the *Sears* decision is troubling because it may invite challenges to controlling stockholder actions outside the realm of obviously conflicted transactions. Historically, stockholder litigation against controllers has focused on conflicted transactions between a company and its controller or in which the controller is receiving a non-ratable benefit; those transactions are generally reviewed under the entire fairness test.[2] By articulating new fiduciary duties for controllers outside of conflicted transactions, this decision increases the risk that non-conflicted controller actions will be challenged. Furthermore, because it is unclear what types of actions could be viewed as constituting a change in the company's "status quo," any number of affirmative controller votes could be fodder for future stockholder challenges.

2. Conflicted transactions involving a controller are subject to entire fairness review unless the protective devices articulated by the Delaware Supreme Court in *Kahn v. M&F Worldwide Corp.*, 88 A. 3d 635 (Del. 2014) have been properly implemented.

Author

Caitlin Gibson
Counsel

CFIUS Developments and Forecast: What You Need to Know for 2024

The Committee on Foreign Investment in the United States (CFIUS) is increasingly examining M&A activity across a wide swath of industries. With several recent U.S. government initiatives focused on national security concerns stemming from U.S. data, technology, and advanced clean energy technologies, dealmakers and their advisers must closely monitor regulatory changes and guidance, which will have an impact on CFIUS reviews. We provide a brief overview of some recent developments here and look ahead to what may be on the horizon.

The Post-FIRRMA CFIUS Landscape

Since the enactment of the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018, CFIUS has undergone remarkable changes.

The implementing regulations expanded the scope of transactions subject to CFIUS review to include certain noncontrolling, nonpassive investments in critical technologies, critical infrastructure, or sensitive personal data (collectively defined in the regulations as TID U.S. businesses) and certain real estate transactions, in addition to the control transactions historically subject to CFIUS jurisdiction. The regulations also introduced mandatory filings for certain transactions involving TID U.S. businesses.

Subsequent executive action has further broadened CFIUS's reach. In September 2022, President Biden issued Executive Order 14083, expanding the list of national security factors CFIUS is required to consider, including the impact of a proposed transaction on nondefense U.S. supply chain resiliency and U.S. technological leadership, indicating a particular focus on microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy and climate adaption technologies, and directing the Office of Science and Technology Policy to periodically publish a list of industries of national security concern for CFIUS's consideration.

More recent Executive Orders suggest increased attention to transactions involving bulk sensitive personal data, as well as the possible expansion of U.S. government jurisdiction to reach certain outbound transactions in countries of concern. Additionally, Congress has encouraged CFIUS to expand its national security lens to include agricultural transactions and now requires CFIUS to include the Secretary of Agriculture as a member of CFIUS with respect to agriculture-related transactions.

CFIUS has also taken steps to enhance its monitoring and enforcement capabilities, including most notably through the publication of the CFIUS Enforcement and Penalty Guidelines by the U.S. Department of the Treasury. These guidelines specify that failure to make a mandatory filing, violation of a mitigation agreement entered into with CFIUS, or material misstatements or omissions of information or certifications filed with CFIUS may trigger imposition of monetary penalties, and identify aggravating and mitigating factors CFIUS may consider in determining an appropriate penalty. While there have been only a limited number of penalties issued to date, the numbers are expected to increase. In remarks at the 2023 annual CFIUS conference, Assistant Secretary of the Treasury for Investment Security Paul Rosen stated that CFIUS had issued two civil monetary penalties in 2023—the same number as issued in all of CFIUS's operating history—and had "several more pending at various stages."

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Implications for M&A Activity

Dealmakers operating in this evolving landscape have increasingly been required to conduct extensive analyses of the potential national security risks arising from M&A activity. The CFIUS spotlight is now shining brightly upon industries that had previously been viewed as outside of CFIUS's interest, including the following:

1. A Broader Cross-Section of Data Transactions. Following on CFIUS's prohibition or mitigation of various insurance transactions involving sensitive personal data, CFIUS can be expected similarly to enhance its review of transactions involving other types of sensitive personal data such as geolocational and other information stored on internet-connected automobiles. The increasing focus on protecting U.S. personal data is evident in recent executive orders issued by President Biden to address concerns surrounding the export of bulk sensitive data and information stored on internet-connected automobiles. With these executive orders, the U.S. government is sending a strong signal that its concerns regarding U.S. personal data is only increasing.

2. Agricultural Transactions. In the past, CFIUS routinely cleared agricultural transactions involving countries of concern, such as Shuanghui's $7.1 billion acquisition of Smithfield. However, similar transactions can expect to face significant scrutiny in the current national security climate, particularly if the acquiring party has any significant business relationships with governments or companies from countries of concern.

3. Advanced Clean Energy Technologies. In the past eighteen months, we have seen CFIUS take extraordinary actions with regard to transactions involving advanced clean energy and related technologies. For example, following the acquisition of a 51% ownership by Borqs Technologies Inc. (Borqs) in Holu Hou Energy LLC (HHE), a U.S. energy storage system company, CFIUS requested that the parties submit a post-closing joint voluntary notice with CFIUS and, ultimately, informed the companies that the investment by Borqs raised national security concerns related to the potential acquisition of technology by China and, therefore, Borqs must divest its interest.

As CFIUS continues to broaden its view of the industries from which U.S. national security risks may arise, more deals are finding themselves in the government's crosshairs. Accordingly, a deep and informed understanding of which industries CFIUS is likely to scrutinize is necessary in order to identify and address potential CFIUS challenges at the earliest stages of any potential transaction.

Author

Rick Sofield
Partner

Industry Updates

Tech

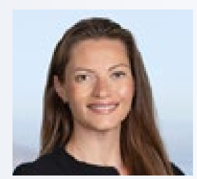
Interest rates, valuation gaps, heightened regulatory challenges, market volatility and geopolitical turmoil were the stories of 2023—particularly in explaining the historic plummet of Tech M&A, traditionally the most active M&A market. Even last year's increases in M&A activity in other industries, such as, energy, healthcare and media, could not make up for Tech M&A's decline in aggregate value and deal volume.

What does this mean for 2024? There is a glut of assets that should increase Tech M&A activity this year. Venture capital and private equity need to move investments out of aging funds, and strategics want to shed units that are no longer a part of their go-forward plans to make room for other more promising targets.

Despite those pressures, however, the causes of the slowdown in 2023 remain. How does the industry overcome the challenges that overwhelmed it in 2023 and start moving the glut of assets? We are hopeful that the market is settling into a new normal. Interest rates and capital markets seem to have stabilized. Private equity is remembering how to operate (and be successful) in a world of much higher interest rates. Similarly, business continues notwithstanding the devastating impact of wars in Ukraine and Gaza—both of which are important contributors to the tech economy. Increased antitrust enforcement may stave off some of the largest deals, but many of the companies waiting to go to market likely would not receive a high level of scrutiny in any event.

Which targets go first? Companies that have shown that they can be, even a little, profitable. Growth is incredibly important in tech, but profitability will make it easier to close the valuation gap. Once the gates open a bit, competition for deals should start to increase along with a more regular cadence and increase in deal volume.

Author



Aly Love Simons
Partner

Real Estate

As a capital-intensive industry, real estate across all sectors has been heavily impacted by the high interest rates that have lingered over the past two years, with M&A activity by public REITs reaching an especially low point in 2023. Although eight public REIT M&A deals were announced last year, their combined transaction value—$39.81 billion—represents less than half of the aggregate deal value of similar transactions that took place in 2022.

Compared to previous years, 2023 saw a higher proportion of public-to-public REIT mergers versus privatizations as high interest rates made borrowing an unattractive (or, in some cases, an impossible) option for many companies. Six of the eight public REIT deals agreed to in 2023 were all-stock public-to-public transactions, many of which involved larger REITs acquiring smaller competitors (e.g., Extra Space Storage, Inc.'s acquisition of Life Storage Inc. for $16 billion in July 2023). Thus, while 2023 was marked by relatively low levels of M&A activity for public REITs, such transactions nevertheless offered an avenue for modest growth for some REITs in an otherwise stagnant real estate market.

While there may be an uptick in take-private transactions if interest rates drop and ultimately stabilize in 2024, some might speculate that public REITs are better poised to bounce back after bearing the brunt of valuation declines over the past couple of years. This prediction is supported by precedent, as REITs have consistently outperformed private real estate in prior years where the Federal Reserve has lowered interest rates after a period of sustained increases. Additionally, public REIT valuations are considered to be largely corrected, whereas the private real estate market likely remains overvalued and may take up to 12–18 months to recalibrate. Time will tell whether public REITs attract more investor interest later in 2024.

Authors

Peter J. Irwin
Partner

Alison L. Cooney
Law Clerk

Financing

The close of 2023 marked the end of a year of both highs and lows for the financing markets. Activity early in the year was soft, as markets and investors dealt with several successive hiccups, while the second half of the year brought optimism as an increasing number of deals were brought to market.

To date, 2024 has brought a renewed level of activity to the public financing markets, with many new financings, refinancings, incremental debt issuances and dividend recaps being completed early in the first quarter of the year. According to Pitchbook | LCD, through the first quarter of this year, debt issuance in the leveraged loan market was approximately $325 billion, the highest level in the last three years and issuance in the high-yield bond market raced to approximately $85 billion. In addition, due to increased in-flows into CLO funds and similar investment vehicles, we have seen a downward trend in financing costs. We expect this trend to persist as investors continue to enjoy the period of relative stability in the financing markets.

While the outlook for public financing markets is strong, trends are susceptible to both macro and micro distributions. Most notably, the ongoing wars in Ukraine and Gaza, the upcoming U.S. presidential election and changes in monetary policy to address inflationary concerns could all have an impact on market conditions. For companies with near or medium term financing needs, it will be important to closely monitor market conditions and remain opportunistic while conditions are more stable.

Author

Ryan T. Rafferty
Partner

Environmental, Social, and Governance

ESG-related stockholder proposals are facing new challenges, despite the Securities and Exchange Commission's (SEC) efforts to make it more difficult to exclude the proposals under Rule 14a-8. On January 21, 2024, ExxonMobil Corporation (Exxon) sued two of its investors in an effort to block a stockholder proposal seeking to accelerate the company's efforts to reduce greenhouse gas emissions from being presented at the company's annual meeting. Although the investors, Arjun Capital and Follow This, ultimately withdrew their proposal, Exxon asked the U.S. District Court for the Northern District of Texas to proceed to trial.

Exxon claimed that the defendants "hijack the shareholder proposal process to advance their social causes with serial filings each year at the expense of investors who focus on generating returns." The lawsuit seeks to bypass SEC Rule 14a-8, which provides a number of bases for excluding stockholder proposals, including if a stockholder has presented a substantially similar proposal in the past. In this instance, Exxon claims that its stockholders put forth substantially similar proposals in 2022 and 2023, which received only 27.1% and 10.5% of the vote, respectively, and that the SEC's approach to Rule 14a-8 is not preventing substantially similar proposals from being put forward year after year.

The lawsuit comes at a time when the total number of stockholder proposals—and especially ESG-related proposals—submitted to public companies has been increasing. According to SEC Commissioner Mark Uyeda, the number of ESG-related stockholder proposals submitted in 2023 increased by 52% compared to 2021, while the number of these proposals voted on at public companies' annual stockholder meetings increased by 125%, although the level of support for ESG-related proposals has declined in recent proxy seasons.

Following their withdrawal of the proposal, Arjuna Capital and Follow This have argued that because the proposal at the heart of the litigation was withdrawn, and because they have committed to not resubmit the proposal in the future, Exxon's case is moot and should be dismissed.

However, Exxon argues that the decision to withdraw the proposal will not prevent a similar one from being filed in the future, and it seeks a court order preventing the stockholders from doing so.

Depending on the outcome of this case, companies may have an alternative to the SEC Rule 14a-8 no action process for excluding ESG and other stockholder proposals—the courts. Given the cost of litigation, the case may also serve to deter stockholders from submitting proposals in the future.

Author

Ulysses Smith
ESG Senior Advisor

2024 Vision: This Year's Top Five Issues to Watch in Healthcare and Life Sciences Regulation

Throughout 2023, healthcare and life sciences industry stakeholders contended with growing economic and financial uncertainties, heightened state and federal enforcement efforts and an increasingly complex regulatory environment. One quarter into 2024, it appears these challenges will continue and, in many cases, become more severe. Below, we discuss five of the top issues we are following in this space.

Expect Increased Enforcement, Targeting Private Equity

In a speech on February 22, 2024, Principal Deputy Assistant Attorney General Brian M. Boynton outlined the Department of Justice's (DOJ's) intention to investigate the role that private equity (PE) firms and other investors play in facilitating healthcare fraud and abuse committed by their portfolio companies. On March 5, 2024, the DOJ, together with the Federal Trade Commission (FTC) and the Department of Health and Human Services, launched a joint inquiry into the "impact of corporate greed in healthcare." In light of Mr. Boynton's remarks, it is critical that PE firms proceed with caution to protect themselves and their investments—including by consulting when necessary with counsel who are experienced in healthcare fraud and PE governance.

The government's heightened False Claims Act (FCA) enforcement follows on the heels of its heightened antitrust scrutiny. Last year, the DOJ and the FTC (collectively, the agencies) took action to translate the Biden administration's tough antitrust rhetoric into policies with significant impact on consolidation within the healthcare industry:

- The agencies announced their withdrawal of certain "outdated" antitrust policy statements related to enforcement in healthcare markets, particularly the provision of "safety zones" for hospitals involved in mergers, joint ventures and purchasing arrangements, and exchanges of price and cost information. The removal of safety zones in healthcare mergers eliminates a source of predictability and suggests potential scrutiny of transactions previously within the safety zones.
- The agencies released updated merger guidelines, which for the first time address private equity roll-up strategies, transactions involving multi-side platforms, and the protection of labor. The new guidelines lower the bar for when horizontal mergers will be presumptively illegal.

Agency guidelines provide the industry with a glimpse into how the agencies evaluate proposed transactions but lack the force of law. We anticipate that in 2024, as the agencies' enforcement policies are tested in court, some clarity is likely to emerge in what has become an increasingly uncertain antitrust landscape.

States Exerting Increased Authority Over Healthcare Mergers

State lawmakers are continuing to expand their healthcare transaction review and approval authorities, creating an increasingly complex and potentially restrictive regulatory environment. Intended to address competition, access and cost in the healthcare industry, a growing number of states—including California, Connecticut, Illinois, Massachusetts, Minnesota, Nevada, New Hampshire, New York, Oregon, Rhode Island and Washington—have enacted laws and regulations requiring certain healthcare entities to provide written notice to the relevant state authority for comprehensive review—and in some cases, approval—prior to closing. Such state reviews/approvals can be incredibly costly and time-consuming for transacting parties given the vast scope of information that must typically

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be submitted with the notice. Further, sufficiently large transactions are likely to trigger review in multiple states and at the federal level; the ability in certain states to toll the review period during concurrent review by other reviewing entities can result in significantly delayed closing dates. States will undoubtedly continue to expand their regulatory authority over healthcare transactions, meaning that healthcare entities should keep an eye on triggers for these numerous, ever-changing notice requirements, and plan for (much) lengthier transaction timelines.

Artificial Intelligence Is Rapidly Evolving—So Are AI Regulations

As artificial intelligence (AI) becomes increasingly prevalent in the healthcare and life sciences industries, stakeholders must monitor a complex and evolving framework of foreign and domestic enforcement agencies, as well as foreign, state and local laws and regulations, to fully appreciate the opportunities and risks that AI presents. For example:

- The FTC, which regulates deceptive and misleading advertising claims, has identified the following areas of focus for enforcement: (i) exaggerations regarding what AI products can do; (ii) promises that AI-enabled products outperform non-AI products; (iii) the identification of foreseeable risks; and (iv) whether products actually use AI at all. The agency intends to ramp up its scrutiny and enforcement of AI marketing in 2024.
- The Food and Drug Administration (FDA), which regulates the use of AI in medical devices, as well as drug and biological product development, issued draft guidance on "predetermined change control plans" (PCCPs) to ensure flexibility without sacrificing safety and efficacy. The PCCP framework would allow premarket submissions to include anticipated modifications to AI-enabled medical devices and methods for implementation without resubmitting the device for review; if finalized, PCCPs would allow improvements to devices to be made more quickly than under the traditional marketing authorization process.

Companies and investors using AI should carefully monitor these developments and actively engage with regulators to ensure compliance.

MAOs in the Crosshairs

With the number of eligible beneficiaries enrolled in Medicare Advantage plans skyrocketing (from 19% in 2007 to 51% in 2023), both the Centers for Medicare and Medicaid Services (CMS) and the DOJ have focused their attention on the operation of such plans. CMS has indicated it is likely to focus on particular areas of concern in 2024, such as:

Competition: CMS is focused on perks that certain Medicare Advantage Organizations (MAOs) are providing to agents, which may lead them to drive beneficiaries to particular plans.

Prior Authorization: CMS is concerned that some MAOs are using prior authorization as a "tool" to improperly avoid paying for medically necessary services, particularly in disadvantaged communities.

Advertisements: CMS recently put rules into effect that are aimed at ensuring truthful advertising.

The DOJ is likely to continue addressing allegations of fraud committed by MAOs through the FCA. As illustrated by a recent nine-figure settlement involving an MAO, the DOJ is focused on alleged schemes aimed at increasing risk

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adjustment payments from CMS via the use of inaccurate diagnostic codes (i.e., reporting that members are sicker than they actually are in an effort to receive additional payments).

FTC Steps Up Its Scrutiny of Digital Health Companies

The proliferation of mobile health apps has made enforcement of the Health Breach Notification Rule (HBNR) a top priority for the FTC. The HBNR requires personal health record vendors and related entities to notify affected consumers, the FTC and, in certain scenarios, the media when consumers' identifying health information is disclosed without consent.

Last year, the agency issued a Notice of Proposed Rulemaking on proposed changes to the HBNR that would clarify both its application and the circumstances that constitute a breach of security (the Proposed Rule). The Proposed Rule, among other things, defines health data broadly, covering "traditional health information (such as diagnoses or medications), health information derived from consumers' interactions with apps and other online services (such as health information generated from tracking technologies employed on websites or mobile applications or from customized records of website or mobile application interactions), as well as emergent health data (such as health information inferred from non-health-related data points, such as location and recent purchases)."

The Proposed Rule follows several high-profile HBNR enforcement actions and, if finalized, would allow the FTC to take an increasingly aggressive enforcement approach in 2024. Companies and other stakeholders in the digital healthcare space should carefully evaluate their exposure under the HBNR, determine what health information is being shared with third parties and whether proper consents are being collected, and emphasize a compliance-focused approach to health data collection and sharing.

Authors

Andrew L. Bab
Partner

Kim T. Le
Counsel

BANKER'S CORNER

Advisor Conflicts: Different Standards for Special Committee Independence and Proxy Disclosure

Aiding and Abetting Liability of Financial Advisors

Selected Recent SEC Comments Relating to Financial Advisors: Take Private Transactions

Advisor Conflicts: Different Standards for Special Committee Independence and Proxy Disclosure

Sitting *en banc*, the Delaware Supreme Court last week held that the financial advisors to a special committee of independent directors formed to consider a controller take-private suffered from conflicts that failed to be adequately disclosed in the target's proxy statement.[1] Among the undisclosed conflicts was a $470 million proprietary stake held by the financial advisor in funds managed by the controller.[2] The lower court, in concluding that the special committee did not fail to use due care in selecting its financial advisor, noted that the financial advisor's stake represented only 0.1% of its total portfolio and that it was not grossly negligent for the special committee to believe that such a relatively small investment would not impair the financial advisor's independent judgment. Based on that conclusion, the lower court further determined that the stake was not sufficiently material such that the failure to disclose it in the proxy tainted the approval of the transaction by the unaffiliated stockholders.[3]

The Delaware Supreme Court did not dispute the lower court's determination that the special committee had acted properly in selecting advisors. However, it distinguished between the analysis required to reach that determination and the analysis required to determine whether the conflicts were sufficiently material under Delaware law that they should have been disclosed to the stockholders. The lower court had peremptorily dismissed the disclosure claim on the strength of its conclusion that the conflict was not significant enough to impugn the judgment of the special committee in hiring the financial advisor. The Supreme Court, by contrast, pointed out that the disclosure claim turns on whether a reasonable investor would have viewed the undisclosed conflict to have significantly altered the total mix of information made available. The Supreme Court, citing earlier precedents, wrote that "[t]here is no rule that conflicts of interests must be disclosed only where there is evidence that the financial advisor's opinion was actually affected by the conflict." Here, the Court found it reasonably conceivable that investors would consider the financial advisor's nearly half-billion-dollar investment in the controller-managed funds to be important and that investors had the right to consider it.

1. *City of Dearborn Police and Fire Revised Ret. Sys. v. Brookfield Asset Management Inc. et al*, C.A. No. 2022-0097 (Del. March 25, 2024).
2. The Court also called out the fact that the financial advisor was actively representing the controlling stockholder's affiliates in unrelated matters, a fact that was also not explicitly disclosed.
3. The legal advisor was also tainted with conflicts, in particular the undisclosed fact that it was concurrently representing the controlling stockholder in an unrelated matter.

Continued on next page

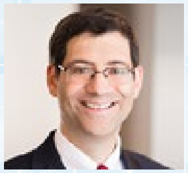
The Supreme Court distinguished the proprietary nature of the financial advisor's investment from a different case in which a financial advisor managed a $336 million stake in the buyer of its client.[4] In that case, most of the investment was held on behalf of the advisor's clients rather than for its own account, and the lower court concluded that the investment was not material. While the distinction between a proprietary investment and an investment made for a client's account was not the principal basis for the Supreme Court's holding in the more recent case, it certainly helped guide the Court's analysis.

It is not uncommon in a financial advisor's proxy disclosure to say something akin to what was disclosed in the proxy in this case: the financial advisor "*may* have committed and *may* commit in the future to invest in private equity funds managed by" the controlling stockholder (italics added). Does this disclosure cover the investments the financial advisor actually holds currently in the controlling stockholder's private equity funds? Not according to the Supreme Court, which wrote that "[t]he use of 'may' in the Proxy is misleading because [the financial advisor] had indeed already invested nearly half a billion dollars." Beware the boilerplate.

The key takeaway for financial advisors and their clients is that even if a special committee properly concludes that a conflict does not disqualify the committee's chosen advisor, the conflict may nonetheless need to be disclosed in the proxy statement.

4. See *In re Micromet, Inc. S'holders Litig.*, 2012 WL 68175 (Del. Ch. 2012).

Author



Andrew L. Bab
Partner

Aiding and Abetting Liability of Financial Advisors

Earlier this year, the Delaware Superior Court unsealed its opinion in *Phage Diagnostics, Inc. v. Corvium, Inc.*,[1] raising once again the specter of financial advisor aiding and abetting liability in the context of M&A transactions. The case is a reminder that regulators and courts often consider financial advisors to be gatekeepers and may hold them, explicitly or implicitly, to a higher standard than others.

Phage concerns fraudulent misrepresentations made by or on behalf of Corvium to Phage in the context of Corvium's sale of its pathogen detection systems business. The court found both Corvium's investment banking firm and the individual banker jointly and severally liable for false statements made by the banker to his counterparty as to the competition faced by Phage in the Corvium transaction.

The banker, the court found, lied to Phage's advisors about the existence of competing offers, making misrepresentations that went beyond mere "puffery." Corvium's banker told his counterpart that, in light of that competition, Phage could seal the deal by increasing its offer from $10 million to $12 million. The court held that:

> [Corvium's banker's] statement … was a factual representation that there were other offers … [Corvium's banker] knew that this statement was false. The statement was made to induce Phage to increase the offer from $10 million to $12 million. [Corvium's banker] named $12 million as the topping number necessary for the deal to close. Phage justifiably relied on the misrepresentation. The resulting damages are $2 million.

1. C.A. No. N19C-07-200 MMJ [CCLD].

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Aiding and abetting liability requires proof of three elements: (1) underlying tortious conduct; (2) knowledge of the conduct; and (3) substantial assistance. Interestingly, it is not clear from the opinion whether Corvium itself knew that its banker had lied. Nonetheless, as principal and the beneficiary of the banker's fraudulent misrepresentation, Corvium was tagged with its agent's conduct—the secondary actor effectively generates the underlying tortious conduct of the principal, and then bears liability for aiding and abetting that conduct.

It is worth taking this opportunity to briefly review a few of the more important aiding and abetting cases brought over the years against financial advisors. In the 2011 *Del Monte* case,[2] the Delaware Court of Chancery found that Del Monte's financial advisor was focused on engineering a transaction that would permit the financial advisor to provide acquisition financing to a private equity buyer and obtain lucrative financing fees. The advisor was found to have steered parties into a club bid in violation of provisions in their confidentiality agreements prohibiting that conduct without Del Monte's approval; to have put the company in play without authorization or discussion with the board; and to have put its own desire to participate in the acquisition financing above its obligations to Del Monte and its board. Moreover, the court found that the financial advisor failed to advise the board of these activities. Nevertheless, as a result of the actions of its agent, the board was found to have violated its fiduciary duty by failing to have run a fair and reasonable process. The financial advisor, having knowingly and substantially contributed to this breach, was held to have aided and abetted the breach. The fact that the board members were fully exculpated from financial damages under Del Monte's certificate of incorporation did not limit the liability of the financial advisor.

In 2014, the Delaware Court of Chancery decided the *Rural Metro* case,[3] holding Rural Metro's financial advisor liable for aiding and abetting a breach of duty by the company's board. As in Del Monte, the financial advisor misled or withheld information from the board, resulting in the board's breach of its fiduciary duty. Among numerous faults, the financial advisor prodded the company into running its process at the same time a major competitor (EMS) was running its own sale process. The financial advisor sought to participate in the buyer financing in the EMS transaction and believed that its chances would be enhanced if the buyer thought it had an inside track on the acquisition of Rural Metro as well. None of this was disclosed to the board, nor did the advisor explain the downsides of running a process in parallel with that of a competitor. Nevertheless, Rural Metro's process was faulty, resulting in a breach by the board of its fiduciary duty, which in turn was aided and abetted by the financial advisor.

In 2021, the Delaware Court of Chancery held a financial advisor liable for aiding and abetting a breach of fiduciary duty in the *Presidio* case.[4] Again, the financial advisor was the only party facing liability in light of the exculpation of the directors. It appears that the financial advisor on several occasions knowingly downplayed or misstated to the board the interest of a certain bidder, and during a post-signing go-shop period the same bidder sought to top the winning bidder's (BC Partners) (BCP) price, the financial advisor "tipped" BCP to the other bidder's strategy

2. *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. 2011).
3. *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d. 54 (Del. Ch. 2014).
4. *Firefighters' Pension System v. Presidio, Inc.*, 251 A.3d 212 (Del. Ch. 2021).

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and bid, allowing BCP to overbid and win the company. The court found this resulted in a breach by the directors of their duty to provide "active and direct oversight" over the financial advisor, which breach was aided and abetted by the advisor. In his opinion, Vice Chancellor Laster raised the possibility the financial advisor might alternatively have been held liable under a "fraud-on-the-board" theory, which would not require the plaintiffs to plead any underlying tortious conduct. Financial advisors should be aware that the recent development of this application of the theory could make it that much easier for plaintiffs and courts to assert liability on the part of advisors in the future.

One recent case that did not involve an aiding and abetting claim against the financial advisor is the *Mindbody* case,[5] which we discuss here. It is worth noting briefly, because one could imagine that the financial advisor might have been found liable for aiding and abetting. The case involved disabling conflicts that drove the Mindbody CEO to tilt the playing field in favor of his favorite buyer by providing that buyer with informational and timing advantages. We do not know all the conduct of the financial advisor in this case, but allegedly the advisor did provide tips to the favored buyers, and it is not hard to imagine the financial advisor following the CEO's lead, perhaps rushing the process to advantage the preferred buyer or failing to pull in the reins and insist that the board's Revlon duties were satisfied. The plaintiffs did not, however, name the financial advisor as a defendant in the lawsuit.

Most cases holding financial advisors liable for aiding and abetting look to the board's breach of its fiduciary duties as the underlying misconduct. The *Phage* decision is different only in that the underlying misconduct there was fraudulent misrepresentation. But the message is the same: financial advisors play an important and influential role in the context of M&A transactions. Bankers are sophisticated and experts in their field, and both regulators[6] and courts[7] have sought to incentivize financial advisors to serve as "gatekeepers," helping their clients avoid some of the behavior described in these cases. Though financial advisors do not owe fiduciary-type duties to their clients, their conduct must be particularly untainted by personal interest, and they must resist pressure from their clients to do the wrong thing. "Caesar's wife must be above suspicion." If not, courts will continue finding legal theories to hold financial advisors liable.

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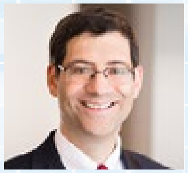
5. *In re Mindbody, Inc.*, S'holder Litig., C.A. No. 2019-04420KSJM (Del. Ch. 2023).
6. See, e.g., *Statement from the Securities & Exchange Commission in connection with its proposed SPAC rules available here*.
7. See, e.g., *In re Rural Metro*, 88 A.3d at 78.

Author



Andrew L. Bab
Partner

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Selected Recent SEC Comments Relating to Financial Advisors: Take-Private Transactions

Transaction Details	SEC Comment Letter	Company Response
Cadeler A/S (Cadeler) merger with Eneti, Inc. (Eneti) **Signing Date:** June 16, 2023 **Eneti Financial Advisor:** Perella Weinberg **Nature of Transaction:** Take-Private Transaction of Eneti	Given that Perella Weinberg relied upon synergies in issuing its fairness opinion, Cadeler should discuss the synergies or explain why this information is not necessary for stockholders to understand the fairness opinion.	Cadeler informed the SEC that the potential transaction synergies are discussed in the Risk Factors section and briefly discussed in the Opinion of Eneti's Financial Advisor section. Cadeler noted that Perella Weinberg reviewed, but did not rely upon, the potential synergies for purposes of rendering its fairness opinion. The financial analyses that Perella Weinberg performed and relied upon for purposes of issuing its fairness opinion are already summarized in the disclosure.
Pardes Biosciences, Inc. (Pardes) merger with MediPacific, Inc. **Signing Date:** July 17, 2023 **Pardes Financial Advisor:** Leerink Partners **Nature of Transaction:** Take-Private Transaction of Pardes	Pardes should explain how Leerink Partners analyzed the value of the contingent value right (CVR) included in the offer price, or explain why it did not do so.	Pardes revised the disclosure to indicate that Leerink Partners, at Pardes' direction, ascribed no value to the CVR amount. Given the CVR structure and the market opportunity surrounding the assets being acquired (COVID-19 related assets), Pardes believes that no amounts will be payable under the CVRs.
Startek, Inc. (Startek or the Company) merger with Stockholm Parent, LLC (Parent), Stockholm Merger Sub, Inc. and Capital Square Partners (Sponsor) **Signing Date:** October 10, 2023 **Startek Financial Advisor:** Houlihan Lokey **Nature of Transaction:** Take-Private Transaction of Startek	In the disclosure, Startek notes that Houlihan's fairness opinion addresses the fairness of the transaction for the holders of Company common stock other than Parent and its affiliates (including Sponsor). This universe of individuals includes affiliates of the Company, such as Company officers or directors, who may not be affiliates of the Parent or Sponsor. Thus, Startek must address how persons relying on the Houlihan opinion are able to reach the fairness determination as to unaffiliated security holders given that the fairness opinion addresses fairness with respect to unaffiliated and certain Company affiliated security holders together, rather than just solely unaffiliated security holders.	Startek informed the SEC that the Houlihan fairness opinion addresses fairness to "unaffiliated security holders", as defined under Rule 13e-3 of the Exchange Act, which includes any security holder of an equity security who is not an affiliate of the issuer of such security. Thus, the universe of security holders that the fairness opinion addresses fully encompasses all unaffiliated security holders. As a result, each filing person relying on Houlihan's opinion can reach the fairness determination as to unaffiliated stockholders of the company, even though certain affiliated Company security holders are included in this universe. In addition, the Special Committee considered that holders of Company common stock that are affiliates of the Company are situated substantially similarly (*continued next page*)

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Selected Recent SEC Comments Relating to Financial Advisors: Take-Private Transactions (continued)

Transaction Details	SEC Comment Letter	Company Response
Startek, Inc. (*continued from previous page*)		to the security holders unaffiliated with the Company generally, since they will receive the same per share merger consideration as the security holders unaffiliated with the Company. Therefore, the Special Committee believed there was no material distinction between the fairness of the merger to holders of Company common stock that are affiliates of the Company and the fairness of the merger to security holders unaffiliated with the Company generally.
Hostess Brands, Inc. (Hostess) merger with J.M. Smucker Co. (Smucker) **Signing Date:** September 11, 2023 **Hostess Financial Advisor:** Morgan Stanley **Nature of Transaction:** Take-Private Transaction of Hostess	Since some of the consideration offered consists of Smucker common stock, clarify what dollar value Morgan Stanley ascribed to the share consideration component of the offer in making its fairness determination.	Hostess revised the disclosure to state that for purposes of Morgan Stanley's opinion, "Morgan Stanley assumed that the merger consideration is $34.25 per share consisting of cash consideration of $30.00 per share and assumed stock consideration of $4.25 per share, based on a merger exchange ratio equal to 0.03002 of a Smucker Common Share multiplied by the closing price of Smucker Common Shares as of September 8, 2023 of $141.58."
Focus Financial Partners Inc. (Focus) merger with Clayton, Dubilier & Rice **Signing Date:** February 27, 2023 **Special Committee Financial Advisor:** Jefferies LLC **Nature of Transaction:** Take-Private Transaction of Focus	Disclosure in the Jefferies opinion indicates that the "opinion may not be used or referred to by the Special Committee or the Company, or quoted or disclosed to any person in any manner", without Jefferies' prior written consent. Focus should disclose, if true, that Jefferies has consented to use of its materials in the Schedule 13E-3 filing.	Focus revised the disclosure to indicate that Jefferies has consented to the use of its materials in the Schedule 13E-3 filing.

Author

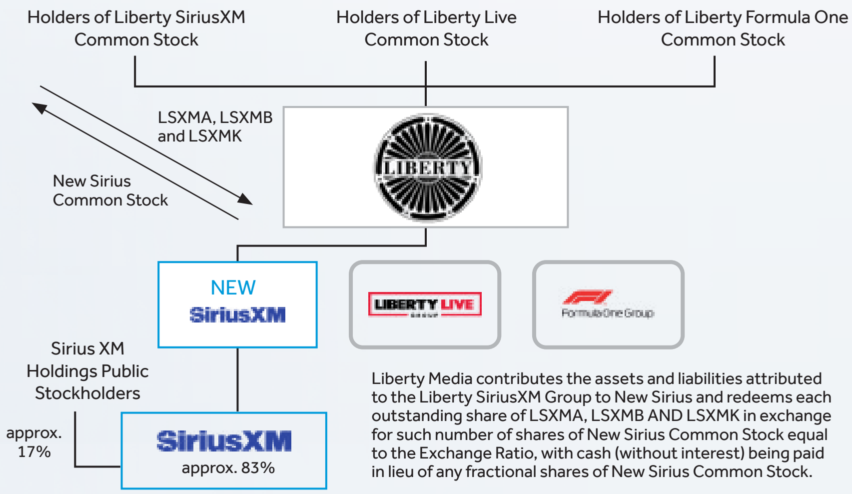
Micah A. Rubin
Associatet

Deal Nook

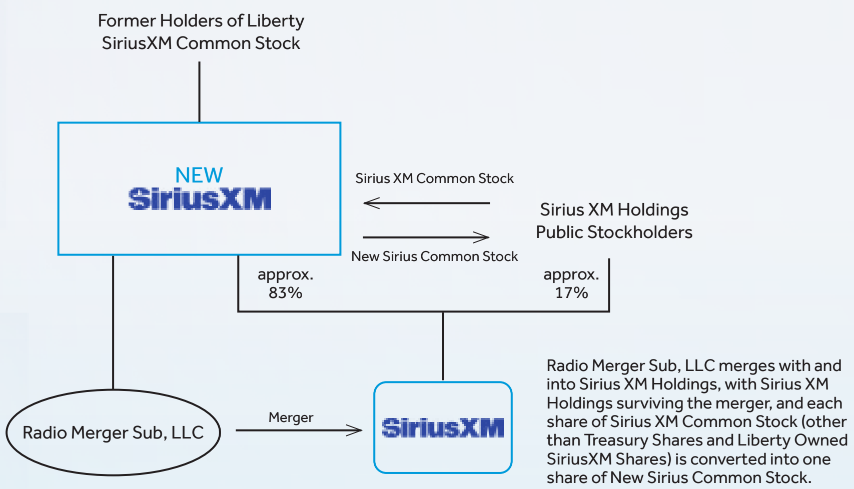
On December 12, 2023, Liberty Media Corporation and SiriusXM Holdings Inc. announced that they entered into agreements to combine Liberty's SiriusXM tracking stock group (LSXM) with SiriusXM to create a new public company under the SiriusXM brand. The transaction will be effected through a split-off of New Sirius, the new public company that will own the assets and liabilities attributed to LSXM, followed by a merger of a New Sirius merger subsidiary with SiriusXM, with SiriusXM surviving as a wholly owned subsidiary of New Sirius. Once consummated, the transaction will streamline SiriusXM's governance by creating a non-controlled public company with one class of common stock.

The deal agreements address unique risk allocation complexities stemming from Liberty's tracking stock structure, through which Liberty stockholders separately invest in Liberty's SiriusXM, Formula One and Live Nation businesses. Because of the need for LSXM liabilities to remain with LSXM, rather than be reallocated to Liberty's Formula One or Live Nation tracking stock groups, the agreements carefully seek to ensure the existing SiriusXM public minority stockholders are compensated for the LSXM liabilities assumed by New Sirius in the transaction. This is achieved through a net liabilities adjustment to the exchange ratio that governs the split-off and other bespoke mechanics in the agreements.

The Split-Off



The Merger (following the Split-Off)



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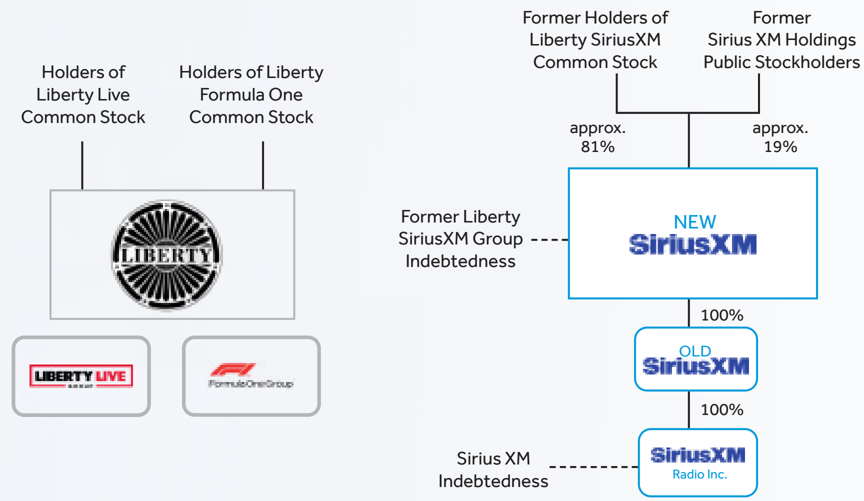
The transaction highlights the importance special committees can play in controller transactions, particularly where, as here, protecting the SiriusXM public minority stockholders necessitated the negotiation of unique arrangements due to Liberty's tracking stock structure.

Note: Debevoise represents the special committee of SiriusXM's board in this transaction.

Author

Katherine Durnan Taylor
Partner

After the Transactions

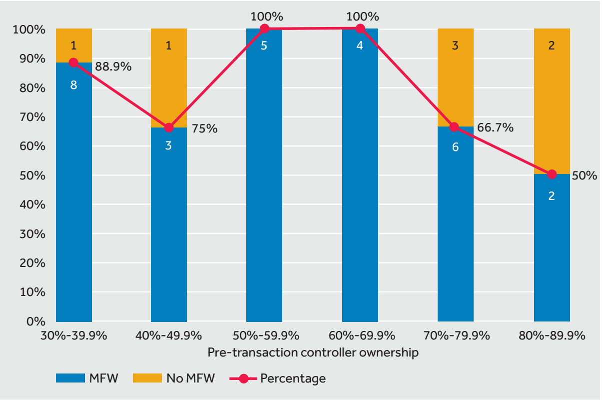


The Charts

In the most recent issue of our [Special Committee Report](), we surveyed controller take-privates announced between March 15, 2014—the day after the Delaware Supreme Court's *MFW* decision—and December 31, 2023. The survey was intended to examine the correlation between compliance with *MFW* and the size of the controller's ownership interest, measured both in terms of percentage ownership and the dollar value of the non-controlled interest and was limited to transactions involving U.S. corporate targets (i) with a deal value of at least $100 million, (ii) in which a Schedule 13E-3 was filed, and (iii) where the acquiring party had a pre-transaction ownership of at least 30% of the target shares. We identified a total of 33 transactions meeting these criteria, of which 26 involved targets incorporated in Delaware.[1] Since the Special Committee Report's publication date, we identified two additional transactions meeting these criteria (for a total of 35 transactions), of which 28 involved targets incorporated in Delaware. Accordingly, the charts set forth at right differ slightly from those presented in our Special Committee Report.

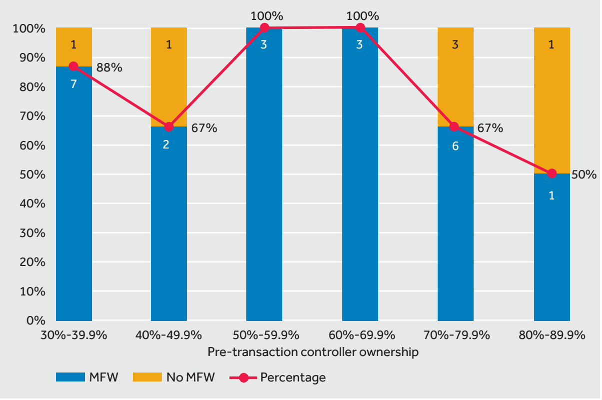
The following chart shows all surveyed take-private transactions and the correlation between compliance with *MFW* and the size of the controller's pre-transaction ownership interest, measured in 10% bands from 30% to 90%:

All Transactions



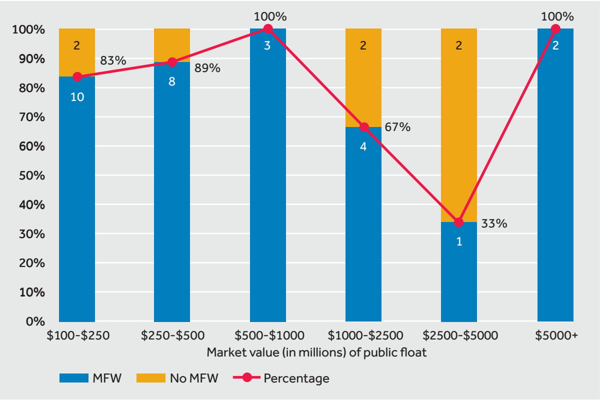
The following chart shows the same data but limited to targets incorporated in Delaware:

Delaware Transactions



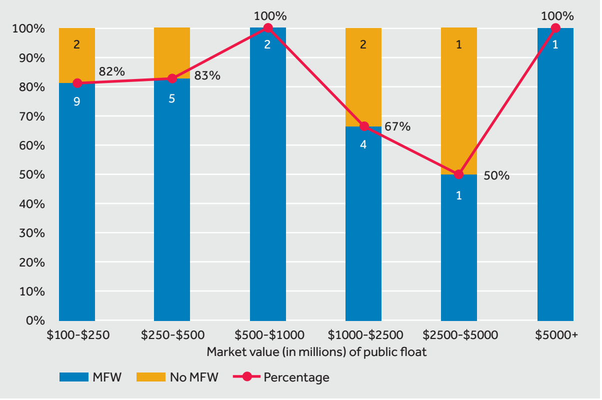
We also looked at the correlation between utilization of *MFW* and the size of the public float. The following chart shows all surveyed take-private transactions:

All Transactions



The following chart shows the same data but limited to targets incorporated in Delaware:

Delaware Transactions



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1. The non-Delaware transactions included in the survey involved target companies incorporated in jurisdictions where the corporate law relating to controller and director liability appears largely similar to Delaware. However, we excluded from the survey two transactions involving target companies incorporated in Nevada given that the underlying corporate law is sufficiently different from Delaware's to make compliance with the *MFW* procedures less relevant to a fiduciary duty claim.

The Charts (continued from page 34)

Bylaw Amendments

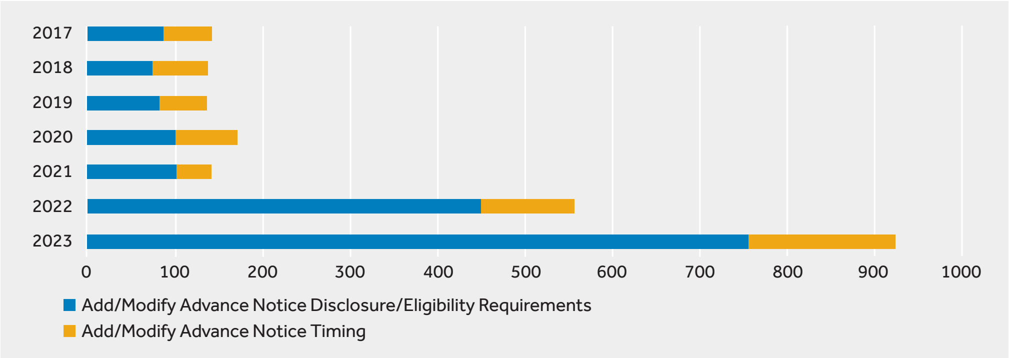
In January of last year, we discussed potential bylaw amendments in light of the universal proxy rules that were adopted by the SEC for the 2023 proxy season. As the chart below reflects, 2023 was a record-setting year for companies adopting bylaw amendments, most likely fueled—at least in part—by the newly-adopted universal proxy rules.

Year	Bylaw Amendments	
	# Filings	# Companies
2017	802	693
2018	764	643
2019	730	627
2020	966	821
2021	761	663
2022	968	841
2023	1,135	1,038

Based on filing date. Excludes bylaw and charter refilings and restatements without changes. Companies in the S&P 1,500 or Russell 3000 during the year of the filing. Source: DealPointData.com

Advance Notice Provision Changes

In addition to being a record-setting year for bylaw amendment adoption, 2023 also represented a significant uptick in the adoption of bylaw amendments requiring advance notice of stockholder nominations for a contested election of directors. For more information on Delaware's view of the legality of such amendments, refer to this Debevoise Update.



Source: DealPointData.com

Debevoise Quarter

Below are links to articles and publications of interest.

Delaware Supreme Court Holds Entire Fairness Applicable to All Conflicted Controller Transactions

Special Committee Report, August 2022, Issue 4

Special Committee Report, January 2023, Issue 5

Special Committee Report, July 2023, Issue 6

Special Committee Report, January 2024, Issue 7

Insurance Industry Corporate Governance Newsletter, April 2, 2024

100 Days of Cybersecurity Incident Reporting on Form 8-K: Lessons Learned, March 28, 2024

The FDIC's Proposed Bank Merger Guidance: Proposing a Perilous Path for Large Bank (and Nonbank) Merger Transactions, March 27, 2024

New York State LLC Transparency Act Amendments Signed Into Law, March 11, 2024

Debevoise National Security Update: Supply Chain Security in 2024

Corporate Transparency Act Ruled Unconstitutional, but Scope of Judgment Is Limited, March 5, 2024

FCPA Update March 2024

Key Considerations for the 2024 Proxy Season, December 20, 2023

Crossword Puzzle

Across

1 Key non-GAAP metric

4 Classic video game; defensive strategy used in hostile takeover

7 Characteristic of a special committee

8 Private tech company with valuation in excess of $1 billion

Down

2 Host of annual M&A conference

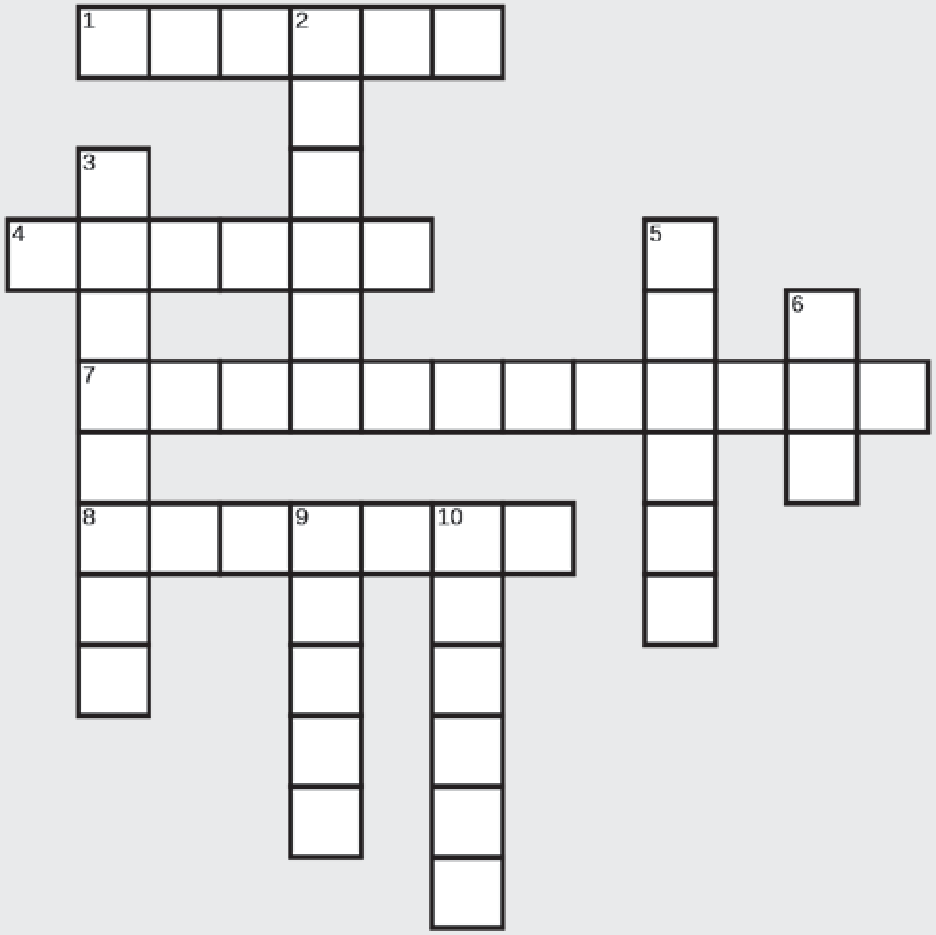
3 Justice Karen of the Delaware Supremes

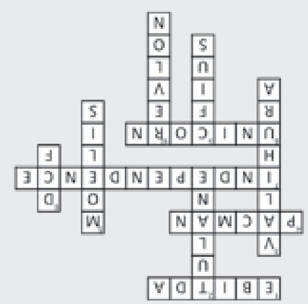
5 Recent Delaware case addressing stockholder agreements

6 Valuation method estimating future cash flows (abbrev.)

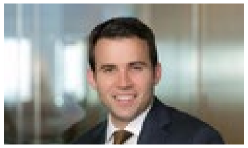
9 U.S. regulator for foreign investments

10 Standard of enhanced scrutiny in sale of control of a Delaware company

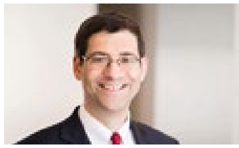




M&A Partners



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

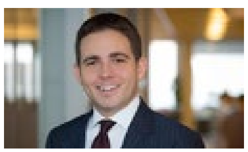
Spencer K. Gilbert
New York
skgilbert@debevoise.com
+1 212 909 6265

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

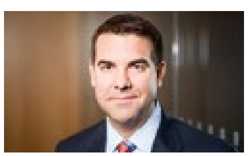
Alan Kartashkin
London
akartashkin@debevoise.com
+44 20 7786 9096
+44 20 7786 9000

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

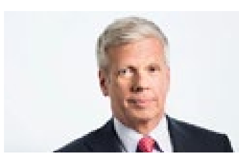
Jonathan E. Levitsky
New York
jelevitsky@debevoise.com
+1 212 909 6423

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

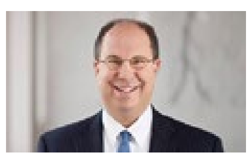
William D. Regner
New York
wdregner@debevoise.com
+1 212 909 6698



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