WHITE & CASE

New heights: US M&A H1 2021

US M&A set a new record for value in H1 2021—and nearly surpassed the full-year figure for 2020

A year of historic highs and rapid change

US M&A surged to record levels in the face of pandemic-related challenges and potentially dramatic regulatory shifts

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We are just heading into August, but it is already safe to say that 2021 is a historic year for US M&A. Deal value rose to a new high of US$1.27 trillion in H1 2021. This was a 324 percent increase compared to H1 2020—and was virtually equivalent to the total value recorded in all of 2020.

This torrent of deals was the result of a perfect storm of activity on the part of strategic, PE and SPAC dealmakers. The pandemic drove many corporates to offload non-core divisions and acquire digital capabilities. Corporates that thrived during the pandemic used M&A to consolidate gains. PE firms strove to deploy their massive troves of dry powder. And SPACs searched for opportunities to invest the record levels of funds they raised.

The election of Joe Biden as President significantly reduced political uncertainty that may have dampened activity in 2020 and this spurred dealmaking in 2021. However, the administration's policies could also complicate dealmaking.

The Biden Administration is taking vigorous steps to reshape antitrust policies and practices in the US. In July, the President issued an Executive Order to promote competition and lower prices throughout the economy through increased antitrust enforcement. These efforts are likely to intensify during the run-up to the US midterm elections in November 2022. The effects were already visible in the recent decision by Aon and Willis Towers Watson to call off their merger, which they first announced in March 2020. The deal would have created the world's largest insurance broker, but the Department of Justice opposed the deal on the grounds that it would eliminate competition, reduce innovation and lead to higher prices.

CFIUS has shown that it will mostly continue with the more aggressive approach to evaluating deals for national security concerns that was established by the previous administration. And with the appointment of Gary Gensler as Chair of the Securities and Exchange Commission, the administration signaled it will take a more aggressive approach to securities law enforcement.

There are a number of other looming risks as well. The possibility of rising inflation and the end of government support measures related to the pandemic could shock the market. And dealmakers are concerned about potentially frothy valuations.

But perhaps the greatest variable remains the uncertain trajectory of the pandemic. Though the US was on a course of increasing optimism as vaccines were rolled out, recent concerns about the Delta variant of COVID-19 have raised questions—and exacerbated political divisions—about how quickly economies should open up.

Despite these challenges, the outlook for dealmaking remains very positive. US GDP forecasts are upbeat, stock markets are at historic highs, and interests remain low. Moreover, the Biden Administration's economic stimulus efforts and ambitious plans for energy transition and infrastructure development will inject large sums of capital into the economy. We expect US M&A to remain very active in the second half of 2021.

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US M&A hits record highs

The US enjoyed record levels of M&A activity in H1 2021, as dealmakers made up for lost time caused by pandemic-related disruptions

By John Reiss, Michael Deyong, Gregory Pryor

After a brief disruption caused by the COVID-19 pandemic, US M&A has not only returned to form—it has gone beyond previous heights. There were 3,519 US M&A transactions in H1 2021, worth US$1.27 trillion, representing a 38 percent jump in deal volume and a striking 324 percent spike in deal value compared to H1 2020. Not only was this a massive year-on-year increase in value, it represents the highest half-year total on Mergermarket record (since 2006) and matches the total value achieved in all of 2020 (US$1.27 trillion).

US $1.27 trillion

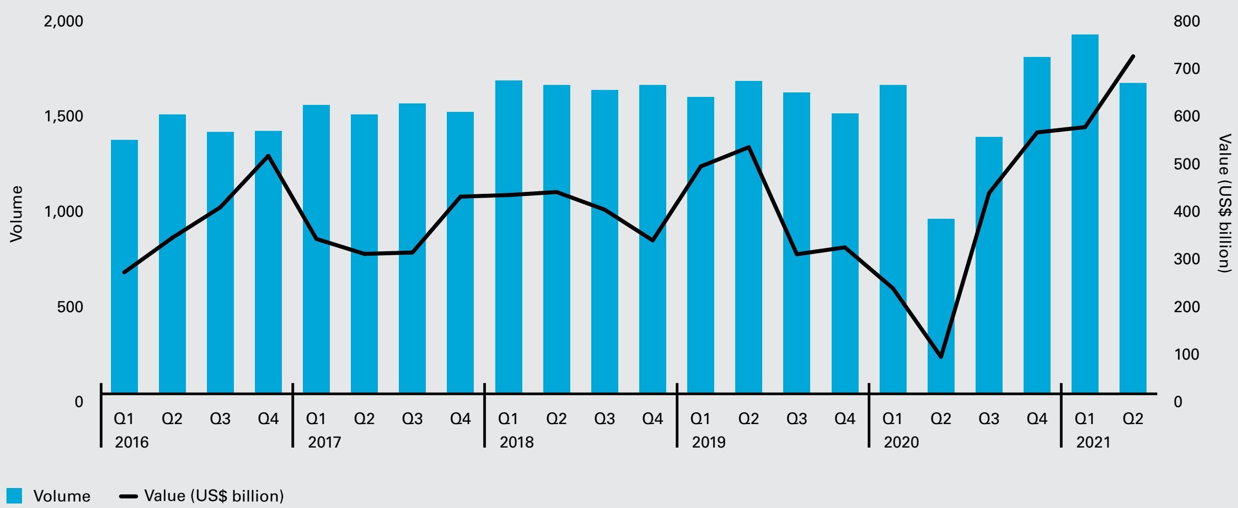
The value of US M&A deals in H1 2021—a 324 percent increase compared to the same period in 2020

US deal activity has been supported by a positive macro-economic backdrop, with a combination of factors driving M&A. According to the US Bureau of Economic Analysis (BEA), the US economy grew by 6.4 percent, while the IMF is forecasting that US GDP will see annual growth of 6.4 percent in 2021 and 3.5 percent in 2022. A successful COVID-19 vaccination roll-out and an expansive economic stimulus plan, cornerstoned by the Biden Administration's US$1.9 trillion stimulus package, have added to the economic momentum.

In a sign of confidence in the economic rebound, the Federal Reserve indicated in June that it expects to raise interest rates in 2023, after previously signaling that it expected to keep rates at near zero until at least 2024.

US stock markets have also been on an upward trajectory. After reaching record highs at the end of 2020, the Dow Jones Industrial Average and S&P 500 continued to rise. Gains were strong through H1 2021, with the Dow Jones and S&P 500 showing gains of more than 13 percent and 16 percent respectively for the year to date.

US M&A 2016 – H1 2021



Top ten US M&A deals H1 2021

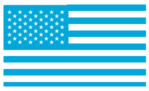
Announced date	Target company	Consolidated sectors	Bidder company	Bidder-dominant country	Deal value US$(bn)
17/05/2021	WarnerMedia, LLC.	TMT	Discovery, Inc.	USA	96.2
05/06/2021	Medline Industries, Inc.	Pharma, medical and biotech	The Carlyle Group; Hellman & Friedman LLC; Blackstone Group Inc; GIC Private Limited	USA	34.0
21/05/2021	Kansas City Southern	Transportation	Canadian National Railway Company	Canada	33.6
10/03/2021	GE Capital Aviation Services LLC	Financial services	AerCap Holdings N.V.	Ireland (Republic)	31.1
15/04/2021	PPD, Inc.	Pharma, medical and biotech	Thermo Fisher Scientific Inc.	USA	21.0
12/04/2021	Nuance Communications, Inc.	TMT	Microsoft Corporation	USA	19.3
22/02/2021	Atieva, Inc.	Industrials and chemicals	Churchill Capital Corp IV	USA	17.6
29/04/2021	VEREIT, Inc.	Real estate	Realty Income Corporation	USA	17.0
11/05/2021	Ginkgo Bioworks, Inc.	Pharma, medical and biotech	Soaring Eagle Acquisition Corp.	USA	15.0
06/01/2021	Change Healthcare Inc.	TMT	OptumInsight, Inc.	USA	13.3

Debt markets have also been strong, and alongside low interest rates, have ensured that an abundant supply of liquidity has been available to finance transactions. According to White & Case's Debt Explorer, high yield bond and leveraged loan issuance in the US rose to US$545.1 billion at the end of Q1 2021, an increase of more than 37 percent year-on-year.

Technology, media & telecoms (TMT) and pharma, medical & biotech (PMB), the two sectors that proved most resilient throughout the pandemic, have remained among the most popular industries for deals and together accounted for six of the ten largest US deals in H1 2021.

The largest US M&A deal of H1 2021, by some distance, was Discovery's proposed acquisition of WarnerMedia for more than US$96.2 billion. The deal is expected to create the second-largest media company by revenue after Disney. Scale has become increasingly important in the competitive streaming market, which benefitted from the double-digit increase in media consumption observed in the second half of 2020.

The second-largest transaction of the year was the US$34 billion sale of Medline Industries to a PE consortium comprising The Carlyle Group, Hellman & Friedman, Blackstone and Singaporean sovereign wealth fund GIC. The deal demonstrates both the attractiveness of the healthcare industry as the economy transitions out of the COVID-19 pandemic, as well as the strength of the PE industry—the deal is the largest US PE deal since the financial crisis, as well as one of the top PE buyouts ever.



2,934

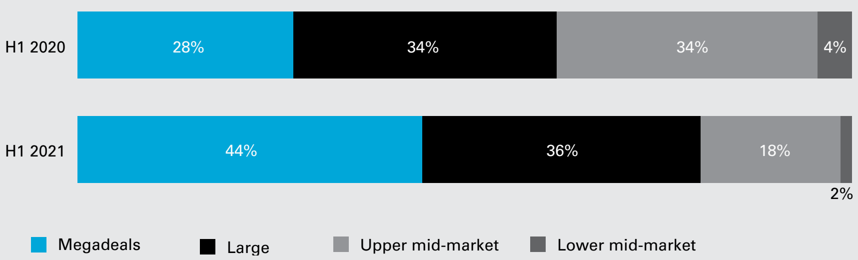
The number of US domestic deals in H1 2021—a 36 percent increase on the same period in 2020

In addition to the presence of cash-rich PE players and resilient activity in TMT and PMB, the progress of megadeals (worth US$5 billion or more) has provided another positive indicator of a recovering market. Such deals accounted for 44 percent of all US M&A deal value in H1 2021—in contrast, they made up only 28 percent of deal value in H1 2020. More jumbo deals point to a confident market where buyers have the conviction to invest large amounts in big-ticket transactions.

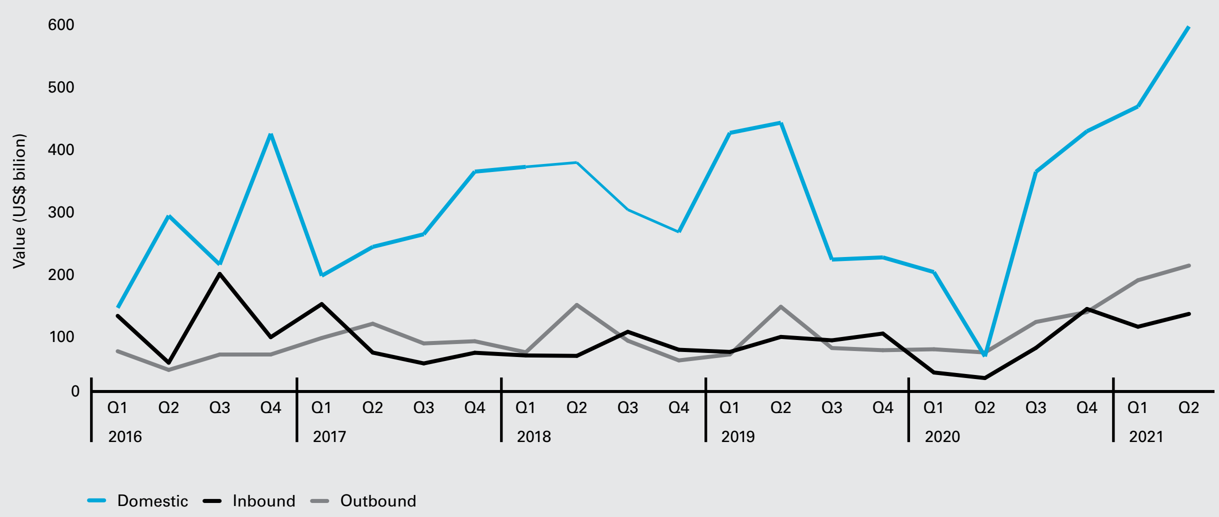
Domestic deals dominate

Outbound M&A continued to show strong signs of recovery from the COVID-19 pandemic. Total outbound cross-border deal value came to US$380 billion for the first half of 2021. This represented a 192 percent year-on-year rise and a 59 percent rise on the second half of 2020. Outbound volume for the year so far has increased

US M&A value by deal size H1 2021 vs. H1 2020



US M&A: Domestic, inbound and outbound value

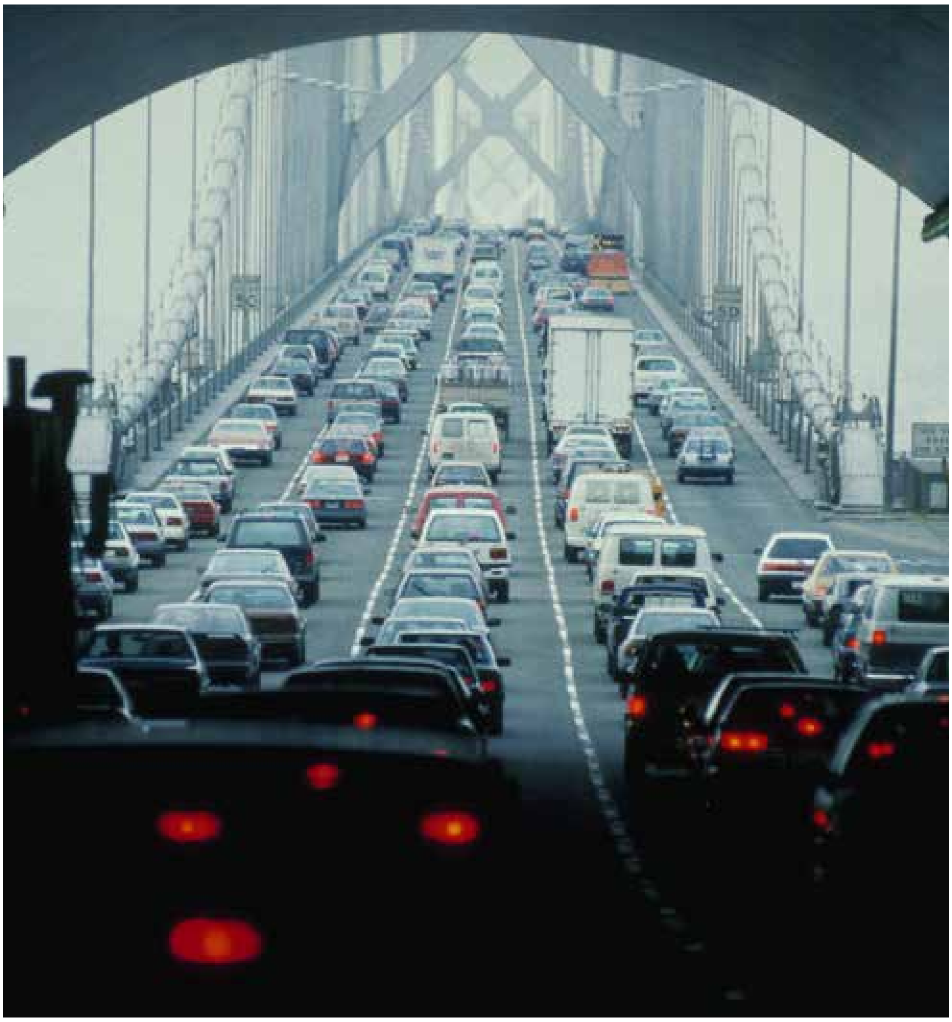


by 64 percent year-on-year to 939 deals and is 38 percent higher than in the previous six months.

The picture for inbound activity has been more nuanced, with the Biden Administration maintaining the US government's hawkish stance on inbound investments into strategically sensitive industries such as defense, utilities and technology on national security grounds.

There have been 579 inbound cross-border deals into the US so far this year, worth a total of US$228.0 billion. This is up on the 375 inbound deals worth US$51.9 billion recorded in H1 2020, as well as up on H2 2020 figures of 518 transactions worth US$202.1 billion.

Domestic M&A, however, has remained the primary engine of US deal activity. Domestic US deals worth US$1.0 trillion were announced in H1 2021. This is a 35 percent increase in value on H2 2020, and a 321 percent rise on H1 2020. Deal volume of 2,934 in H1 2021 is up on the 2,591 transactions recorded in H2 2020, and 36 percent above the 2,160 posted in H1 2020.



Regulatory woes on the horizon

Over the longer term, the tougher antitrust stance from the Biden Administration could impact M&A in the technology industry. Biden has appointed Lina Khan, one of the most vocal critics of big tech, as chairperson of the Federal Trade Commission (FTC) and Congress has put forward a package of measures that, if enacted, could significantly affect tech companies. For now, however, tech remains the most active and popular sector for dealmaking in the US.

The SPAC boom could also attract greater regulatory scrutiny. SPACs are blank check companies that raise funds on stock markets that are then earmarked for acquisitions. SPAC IPO issuance has hit record levels over the last 18 months. In 2020, SPACs raised unprecedented sums of capital on US stock exchanges, with 248 SPACs securing US$82.6 billion. Before the end of Q1 2021, that had already been surpassed, with 298 SPACs raising US$96.8 billion, according to data from Dealogic.

The increase in SPAC activity has led the Securities and Exchange Commission (SEC) to state that it could introduce additional protections for retail investors.

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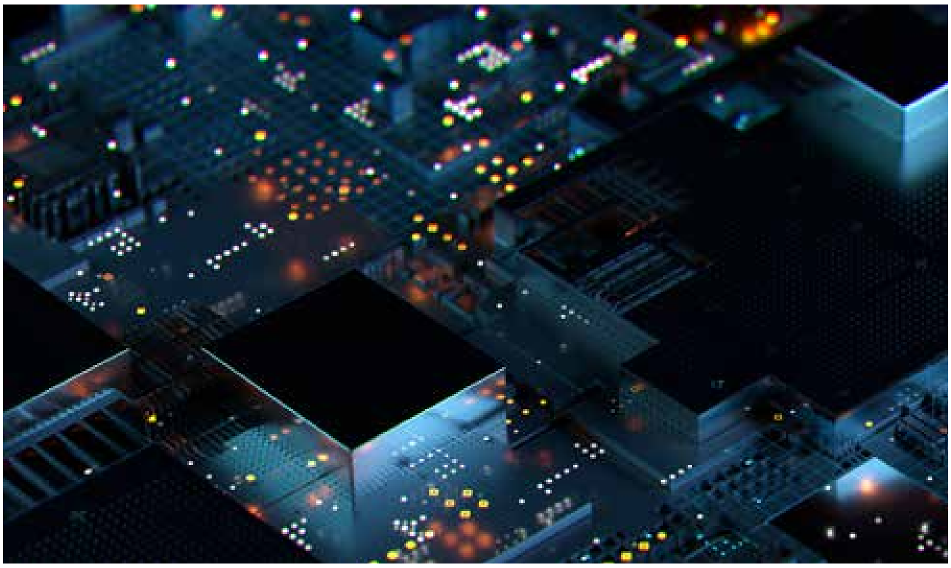


Blockchain M&A takes off

By Gary Silverman, Pratin Vallabhaneni

Pandemic uncertainty and market dislocation appear to have had minimal impact on deal activity in the blockchain space.

M&A involving blockchain technologies, which have applications ranging from cryptocurrency and personal identity security to payment processing, online gaming, sharing medical data and anti-money laundering, was red hot in 2020.

The sector may still be nascent, and valuing blockchain assets is challenging because many are developed by early-stage companies that are pre-profit and pre-revenue—which comes with high financial risk. But expectations of rapid growth in the use of blockchain-powered technology have prompted institutional investors, private markets fund managers and corporates to pay closer attention to the space and look for opportunities to acquire and fund assets that put them in a position to capitalize on blockchain's upward trajectory.

According to PwC, M&A in the crypto sub-sector alone more than doubled year-on-year to US$1.1 billion in 2020. Much of this activity was in the US, which accounted for close to US$800 million of crypto deal value. Average deal size for cryptocurrency assets, meanwhile, almost tripled from US$19.2 million to US$52.7 million. PwC forecasts show that 2021 crypto M&A is already on track to surpass the record levels of activity observed in 2020.

Emerging tech, emerging challenges

Cryptocurrency has been the primary driver of blockchain dealmaking, with the asset class moving firmly into the mainstream. Central banks are now looking at frameworks for issuing central bank digital currency, with US Federal Reserve Chair Jerome Powell sketching out plans for a potential "digital dollar." Payments platforms are also moving to facilitate crypto transactions, with PayPal acquiring Israeli crypto security start-up Curv, allowing users to trade Bitcoin and other virtual currencies across its platform.

But the sector remains volatile and unpredictable. The price of Bitcoin, for example, rose from about US$10,000 in July 2020 to more than US$60,000 by April 2021. The price then fell precipitously in May and bounced around the US$35,000 mark in June.

Regulation is a concern too, as authorities come to grips with blockchain technology generally and cryptocurrency in particular, and their impact on security, the economy and financial markets. New SEC chair Gary Gensler wants to bring the regulation of cryptocurrency in line with other financial instruments and the Treasury has put rules in place requiring cryptocurrency transfers of US$10,000 or more to be reported to tax authorities.

Blockchain dealmaking comes with a unique set of challenges, but for now, M&A investors see large enough rewards on offer in this rapidly growing industry to justify the risks.

Venture capital and growth equity

By Germaine Gurr, Tali Sealman

US venture capital and growth equity managers have taken advantage of favorable stock markets and strong investor appetite to accelerate deal and exit activity. Moreover, persistently low interest rates have led investment managers to seek returns in alternative assets, VC included.

US-based venture-backed businesses raised more than US$62 billion in Q1 2021, a 117 percent year-on-year increase and 62 percent rise on figures for Q4 2020, according to a report released by PwC and CB Insights. This represents an all-time quarterly high.

Investment volumes climbed 14 percent year-on-year and five percent on Q4 2020 figures to 1,735 transactions, the highest level seen since Q3 2019.

Venture capital managers have also displayed the confidence to back an increasing volume of mega funding rounds worth US$100 million or more. According to PwC and CB Insights, there were a record 184 mega funding rounds in the US in Q1 2021, worth an all-time high of US$39.8 billion.

Exit environment

US venture activity has been supported by a fertile environment for exits. With the Dow Jones, Nasdaq and S&P 500 all cresting record highs in February 2021, and remaining stable subsequently, managers have been able to successfully exit assets via the stock market, both through traditional IPOs, but also through direct listings and SPACs. A buoyant M&A and private equity market is also helping to create a positive landscape for VC exits.

According to the most recent National Venture Capital Association (NVCA) and PitchBook Venture Monitor report, venture capital firms secured around 447 exits in Q1 2021 with exit value reaching US$118.1 billion during the first three months of the year. This is the third-highest quarter for exit value since the beginning of 2021.

VC investors have landed a number of high-profile exits at sizable valuations. Gaming app Roblox was valued at US$38.2 billion following its direct listing on the New York Stock Exchange, and SentinelOne achieved the highest cybersecurity IPO on record with a market capitalization in excess of US$10 billion when it floated in New York.

With the US economy reopening and COVID-19 restrictions lifting, venture capital managers are expected to continue deploying capital and exiting investments in high volumes.

Private equity deal activity forges ahead

US private equity has rallied following pandemic lockdowns, thanks to adaptations to remote deal processes and record dry powder

By Raymond F. Bogenrief, Oliver Brahmst, Luke E. Laumann

US private equity activity has seen record-breaking levels of activity in the first half of 2021, fueled by rock bottom interest rates and sky-high levels of unallocated capital.

Global private equity dry powder is at an all-time high of US$1.9 trillion as of January 2021—despite the fact that fundraising slowed in 2020 as investors stepped back from committing capital to new funds to focus on their existing portfolios, according to data from Preqin. Annual US private equity fundraising in 2020 dropped 38.4 percent by value to US$203.2 billion and 36.6 percent by volume at 231 funds, according to Pitchbook. Although down from 2019 levels, fundraising results were still healthy when compared to previous years in the past decade.

US $354.2 billion

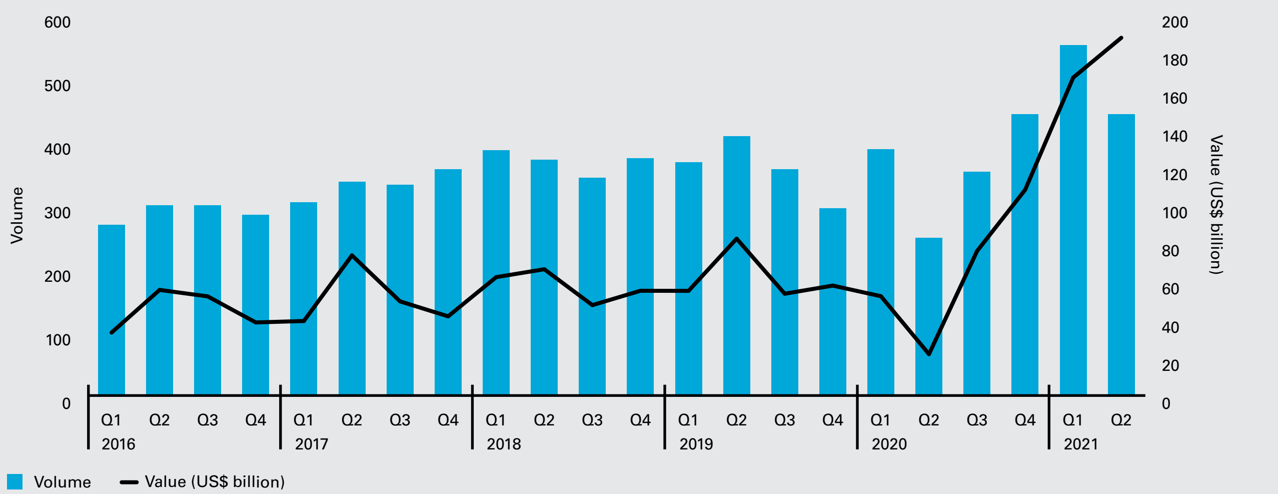
The value of US PE-related deals in H1 2021

With so much capital available to private equity managers, deal activity has surged in the back half of 2020 and into 2021. Buyout deal activity in Q1 2021 reached record quarterly highs for volume and value—only for Q2 to break the value record again. Total buyout deal value of US$354.2 billion for H1 2021 has already surpassed 2020's annual total of US$257.3 billion. Volume for H1 came to 993 deals, compared to 635 in H1 2020 and 1,429 across the whole of 2020.

Rich valuations

The amount of capital chasing deals, including from SPACs, has caused valuations to spike, with US buyout multiples averaging 11.4x EBITDA in 2020 and more than two-thirds of US deals pricing above 11x EBITDA, according to Bain & Co. This has raised some concern about the market becoming frothy, although it has been noted that buyout interest has coalesced around a handful of high-quality assets in resilient sectors such as technology, healthcare and business services. Valuations may be full, but the bar for acquisitions remains high, with firms only stretching for the most desirable targets.

US private equity buyouts 2016 – H1 2021



The largest deal of the first half—the US$34 billion buyout of medical supply manufacturer Medline by a consortium comprising Carlyle, Hellman & Friedman, Blackstone and Singaporean sovereign wealth fund GIC—is emblematic of this trend. As a manufacturer of medical masks and gowns, biohazard sanitation equipment and hand sanitizer, Medline has seen demand surge during the pandemic, and the deal is not only the largest US PE buyout since 2007, but among the largest ever.

As the economy opens, there are signs that private equity firms are seeing opportunities to invest in businesses operating in sectors hardest hit by the pandemic at attractive valuations.

A prominent example of this trend was the acquisition of car rental group Hertz by Apollo Capital, Knighthead Capital and Certares. The US$5.9 billion buyout offer came a year after Hertz filed for bankruptcy in May 2020 amidst pandemic-related disruption.

As sectors other than technology, healthcare and business services open up, private equity firms are expected to start seriously considering deals for targets across a broader mix of industries. This will help firms to manage dry powder and keep to their schedules for deploying capital.

Exit environment

High prices have enabled firms to achieve attractive valuations when selling assets. There were 356 exits worth US$117.3 billion in total in Q1 2021. This was a 41 percent rise in volume on Q1 2020, and a 139 percent increase in value.

The largest exit of the year was another example of a pandemic-related boost to valuations in the healthcare sector. Thermo Fisher, a US-based manufacturer of laboratory instruments, announced it would acquire PPD, a contract research organization (CRO) for the pharma industry. The US$21 billion deal will see investors GIC, Abu Dhabi Investment Authority, Hellman & Friedman and Carlyle exit from the company.

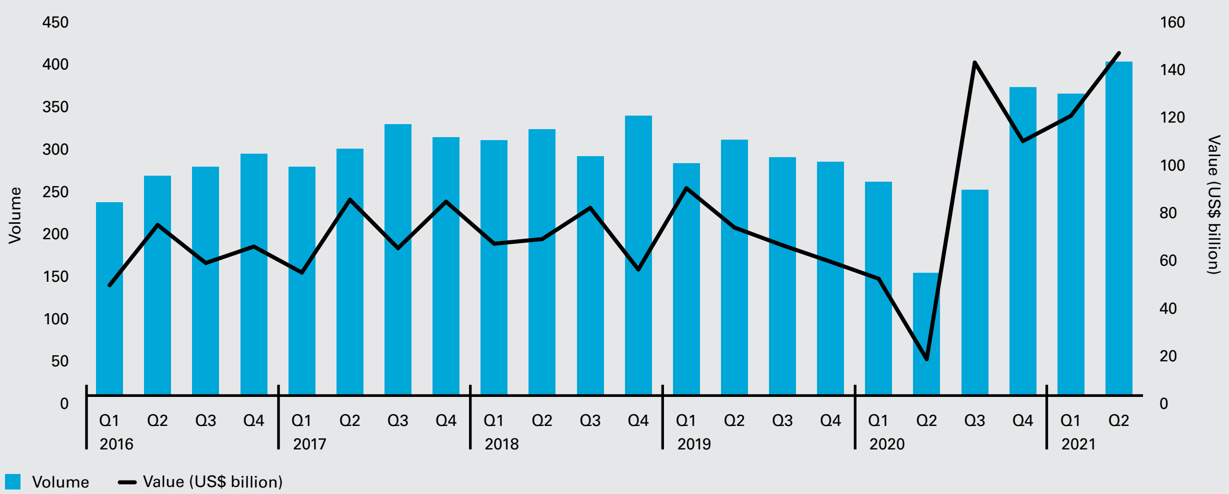
Cash-rich SPACs have further fueled the market. Although competitors to private equity firms in buyout scenarios, SPACs have provided an attractive liquidity strategy for firms when selling.

As the economy opens, there are signs that private equity firms are seeing opportunities to invest in businesses operating in sectors hardest hit by the pandemic at attractive valuations.

SPAC deals have seen buyout firms able to sell down stakes in prized assets, but also retain minority stakes in them if desired.

CVC, Leonard Green & Partners and Bain Capital, for example, rolled over a portion of their stakes in marketing agency Advantage Sales & Marketing and paid down debt after a US$5.2 billion deal with the Conyers Park II Acquisition SPAC.

US private equity exits 2016 – H1 2021



Sector overview: TMT and healthcare continue to dominate

TMT M&A tops the sector charts again

By Michael Deyong, Gregory Pryor

The TMT sector led US M&A activity through H1 2021 and was the largest by both deal value and deal volume, carrying momentum from 2020 into the first six months of this year.

The value of TMT M&A in the US totaled US$473.2 billion in the first half of the year, up more than sixfold on H1 2020 levels. Volume was up 62 percent to 1,080 transactions.

The tech industry has seen strong growth over the last 12 months, as businesses, employees, consumers and students have relied on technology to continue trading, working, shopping and studying.

PMB ranked as the next largest sector by deal value but was some distance behind TMT, with value totaling US$174 billion. The sector was the fourth largest by volume, recording 435 deals, a 24 percent rise on H1 2020 levels.

Industrials and chemicals was the second largest sector by deal count, with 523 deals recorded in H1 2021—a 29 percent rise on the same period in 2020. Value also rose, more than doubling from US$59.9 billion in H1 2020 to US$157 billion in the same period this year—making it the third biggest sector by value.

Business services was the third largest by deal volume, with the number of transactions in the sector increasing from 383 in H1 2020 to 468 over the first six months of this year. Business services was only the sixth largest sector by deal value, even as value climbed significantly from US$18.2 billion in H1 2020 to US$64.6 billion.

The leisure and consumer sectors, which were both directly impacted by lockdowns, showed encouraging signs of recovery through the course of H1 2021 as the US economy reopened and vaccine roll-outs accelerated. Leisure deal value has improved from just US$5.3 billion in H1 2020 to US$25.6 billion—and deal volume has gone up from 37 to 68. In the consumer space, deal volumes have improved from 192 transactions to 248, while value more than doubled from US$20.2 billion over the first six months of last year to US$52 billion in H1 2021.

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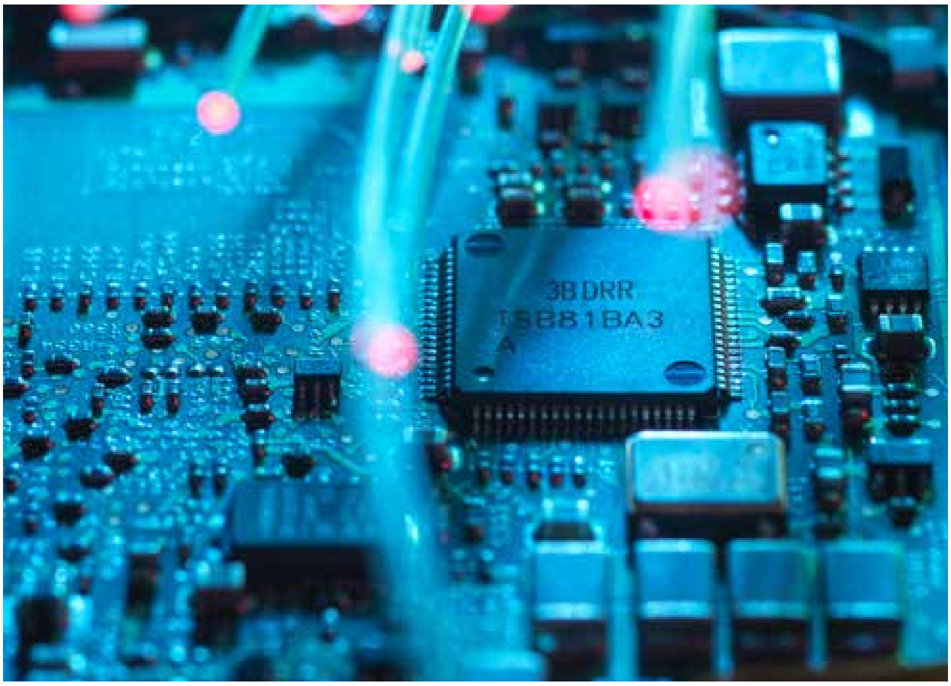
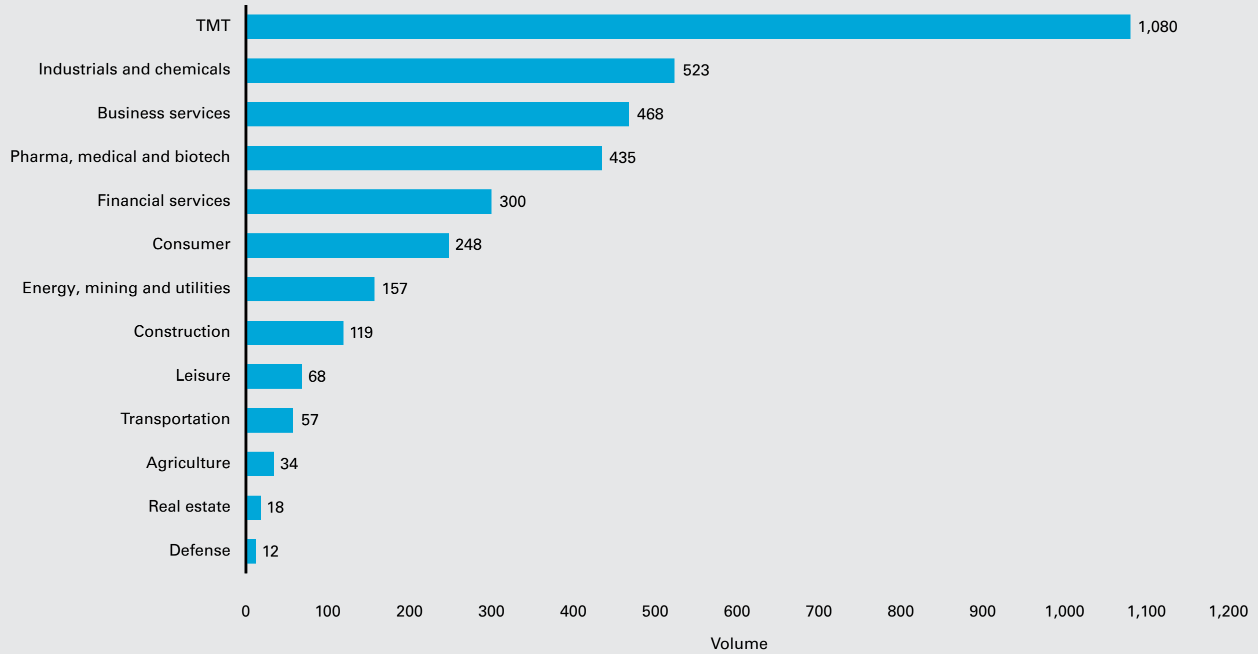
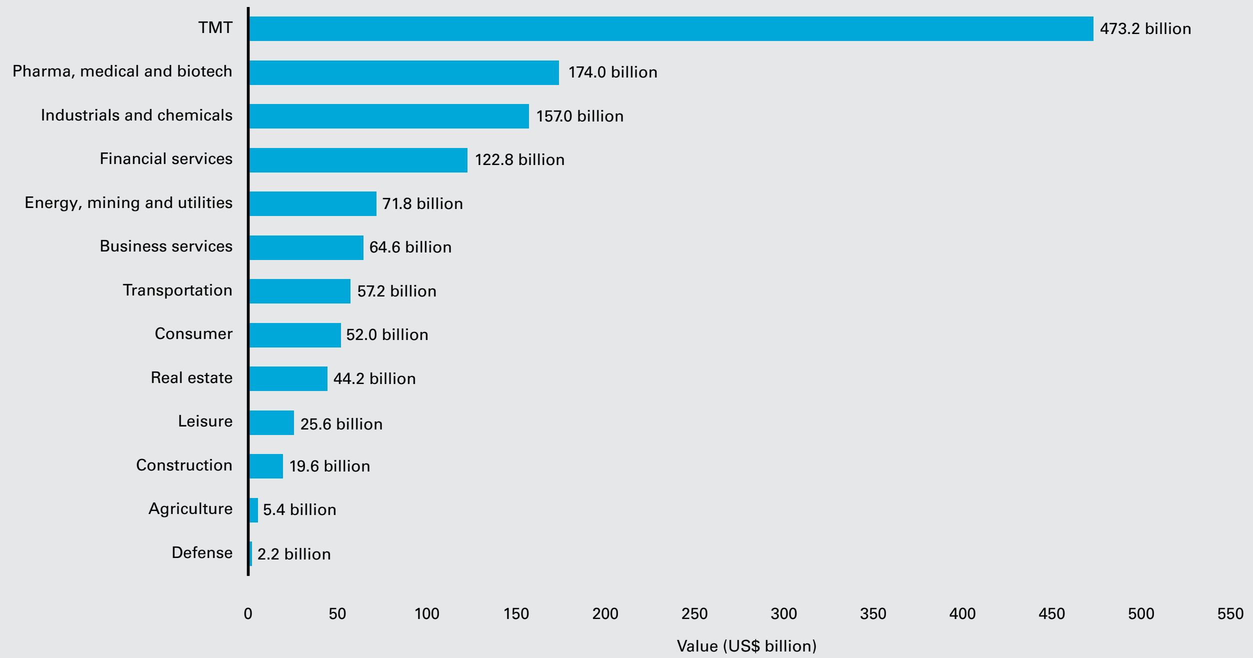
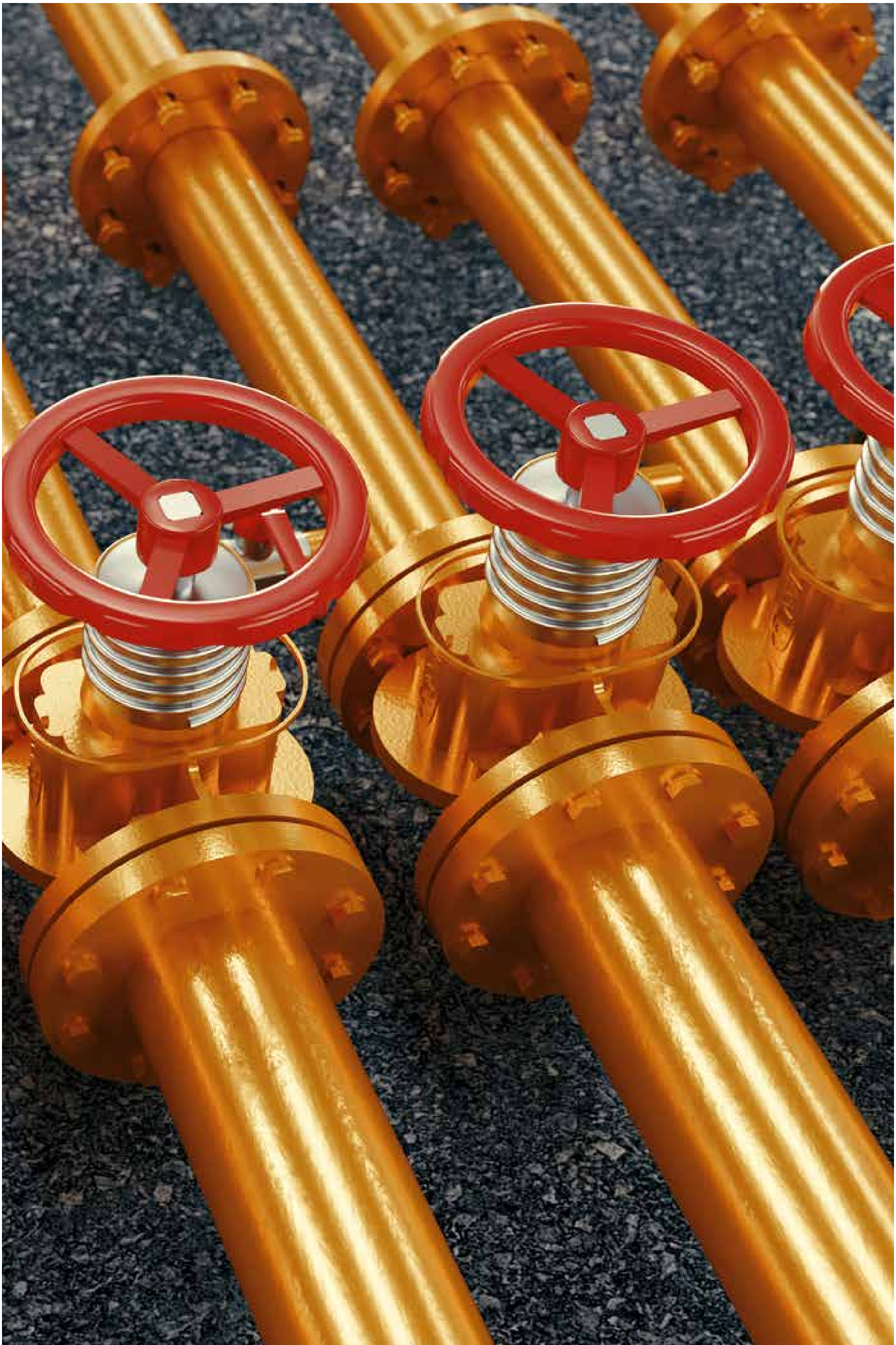


US M&A sectors by volume H1 2021



US M&A sectors by value H1 2021





Oil & gas M&A rebounds after pandemic lows

After a year of volatility, the oil & gas industry has stabilized and M&A activity has resumed

By Steven Tredennick

The oil & gas sector was hit especially hard in the first half of 2020, when oil & gas prices plummeted due to two main factors, a price war between major producers Saudi Arabia and Russia and falling demand because of COVID-19 lockdowns. The value of US oil & gas M&A approached all-time lows in H1 2020, but it spiked in Q3 2020.

Year-on-year, oil & gas M&A value increased more than eightfold to US$45 billion in H1 2021. Volume over this period rose by 73 percent to 71 deals. The positive year-on-year comparisons consolidated the gains made in the second half of 2020, when 86 oil & gas deals worth US$77 billion were agreed. A recovering oil price, which has almost doubled over the last 12 months, from US$37 per barrel in June last year to around US$70, has supported the M&A rebound and given investors the confidence to pursue deal opportunities.

US $45 billion

The value of 71 deals targeting the US oil & gas sector in H1 2021

73%

Percentage increase in volume compared to H1 2020

Building scale

The largest oil & gas deal announced so far this year was shale gas player Cabot Oil & Gas's proposed takeover of Cimarex Energy for US$9 billion. The deal will create a US$17 billion energy company with the scale to ride out future commodity cycles with resilience and deliver steady cash flows and dividends for shareholders. The acquisition will provide geographic diversity, combining Cabot's natural gas assets in Pennsylvania with Cimarex's operations in the Permian Basin and the Mid-Continent Oil Field in the American Southwest.

The transaction is part of a trend seeing independent US producers consolidate to gain scale as the industry recovers from the disruptions of last year, taking advantage of a strong current oil price while building portfolios that will be resilient in the face of potential future volatility in commodity prices.

The third-largest transaction of the sector in H1 was another example of this trend. The US$4.4 billion deal saw KKR-backed Independence Energy merge with Contango Oil & Gas. The merger will combine assets in basins ranging from Colorado to Texas and the combined entity will remain acquisitive, seeking larger targets, according to Contango Chairman John Goff.

The same theme is present in oil and gas infrastructure operators. In the second-largest deal in the sector, Energy Transfer, which owns and operates a portfolio of energy transport assets in the US, bought Enable Midstream Partners, an operator of natural gas and oil pipeline infrastructure assets, for US$6.9 billion. The deal will give Energy Transfer greater connectivity in the Mid-Continent Basin and the Gulf of Mexico Coast, according to the deal announcement.

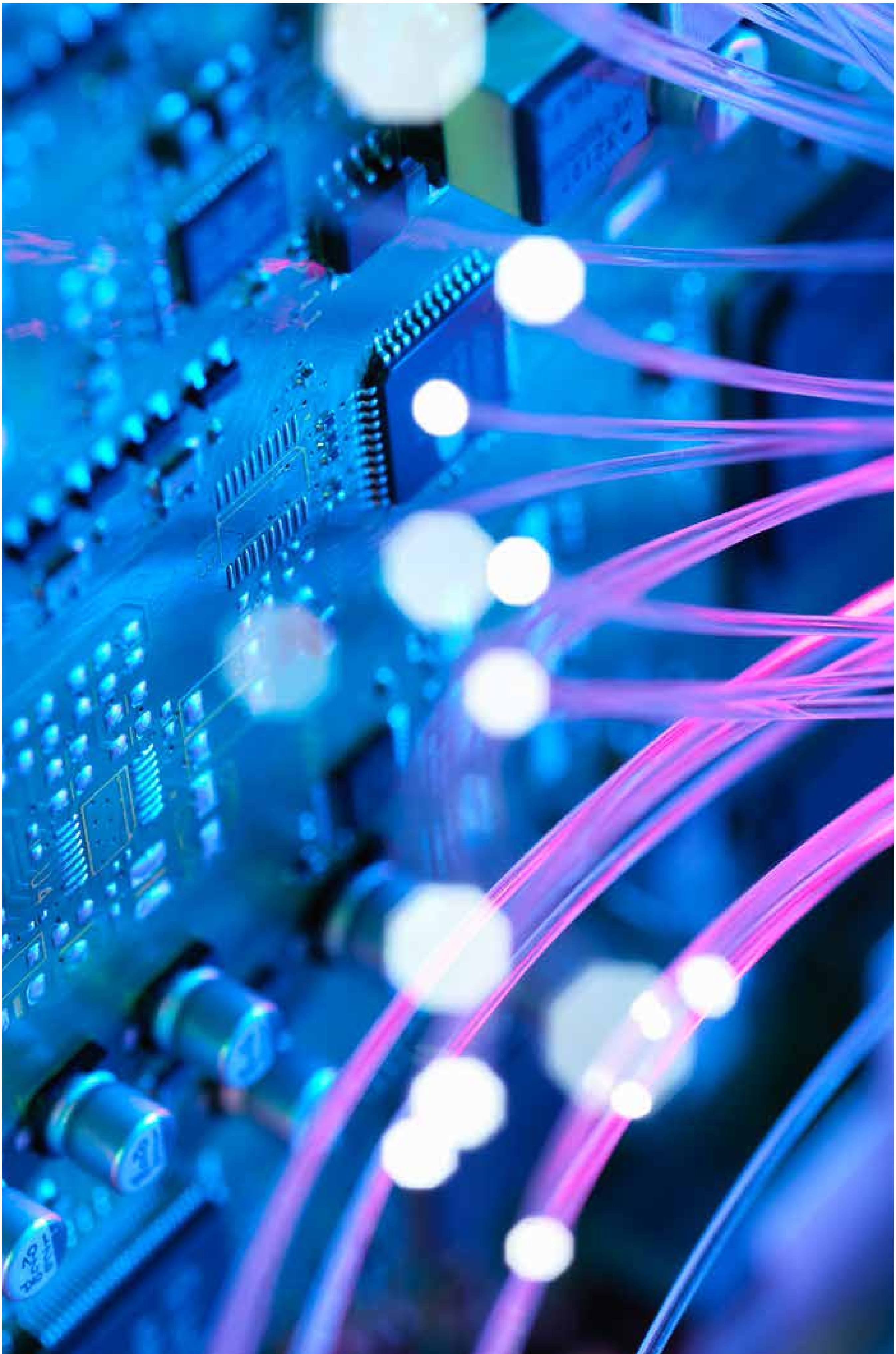
A greener future

M&A is expected to remain a theme across the US energy sector as the Biden Administration focuses on targets to achieve net zero carbon emissions by 2050.

Oil & gas companies will use M&A as a lever to either pivot their portfolios away from over-reliance on hydrocarbons or build scale as demand for fossil fuels tapers off in line with the transition to renewables.

Top oil & gas deals H1 2021

1. Cimarex Energy was acquired by Cabot Oil & Gas for **US$9 billion**
2. Energy Transfer bought Enable Midstream Partners for **US$6.9 billion**
3. Contango Oil & Gas Company acquired Independence Energy, LLC, for **US$4.4 billion**



Technology dealmaking goes from strength to strength

Technology M&A activity is thriving in 2021 as dealmakers continue to turn to the sector in search of assets with high-quality earnings and growth prospects

By Arlene Arin Hahn, Erin Hanson, James Jian Hu, Tali Sealman

Technology deal volume and value surged through the first half of 2021, with tech value climbing 387 percent year-on-year to US$324.1 billion while deal volumes increased 67 percent to 948 transactions.

The sector has been the clear winner throughout the pandemic. Sustained demand for technology products and services enabled strong growth in the sector, which in turn has encouraged higher valuations and M&A. The Dow Jones US Technology Index has climbed 48.05 percent over the last 12 months and is showing gains of more than 20 percent for the year to date. Tech companies like Amazon have posted record sales.

Valuations in the sector have soared as a result—but dealmakers appear to be reserving high prices for those tech companies of the highest quality.

Antitrust has also come onto the radar for tech deals, with the Biden Administration's appointment of Lina Khan, a prominent critic of Big Tech, as chair of the Federal Trade Commission. Any potential changes to antitrust will take time to come into effect, however, and are not expected to affect deal appetite in the short to medium term.

Digital health

The largest TMT deal in the US in H1 2021 saw software giant Microsoft pay US$19.3 billion for Nuance Communications, a developer of AI-powered speech recognition technology. The deal is the second largest in Microsoft's history and deepens a two-year partnership between the two businesses to build AI tools that help doctors with administrative tasks.

In another healthcare/technology cross-over transaction, OptumInsight, the healthcare services group owned by United Health, acquired Change Healthcare in a US$13.3 billion deal. Change Healthcare's technology integrates evidence-based criteria in clinician workflows and the deal is set to complement Optum's clinical analytics capabilities. The tie-up is expected to help expedite payments to healthcare providers and to provide patients with tools to manage their personal healthcare budgets.

Software was by far the most active subsector in tech M&A. Software deal value totaled US$248.6 billion in H1 2021, the highest half-year period on Mergermarket record, overtaking the previous record set by the US$158.5 billion achieved in H2 2020.

SPACs to stay active

Technology has also been a key sector for SPACs. There were 59 SPAC mergers in the industry in H1 2021, compared to 31 in all of 2020, according to Dealogic.

The third-largest deal in the sector saw Social Capital Hedosophia V, a NASDAQ-listed SPAC, acquire Social Finance, which does business as SoFi, in a US$12.9 billion transaction. The deal saw PIPE investment from BlackRock and Altimeter Capital, among others.

Although SPAC IPO issuance has slowed in the second quarter from the frenzied heights of Q1, SPACs will continue to play an important role in M&A in coming years as they seek attractive targets to deploy the capital they have raised. Tech start-ups—with their potential for exponential "hockey-stick" growth—are well-suited for SPACs, which often seek early-stage companies that offer higher potential reward alongside higher potential risk.

US $324.1 billion

The value of 948 deals targeting the US tech sector in H1 2021

387%

Percentage increase in tech deal value compared to H1 2020

Top technology deals H1 2021

1. Microsoft acquired Nuance Communications for **US$19.3 billion**
2. Change Healthcare was acquired by OptumInsight for **US$13.3 billion**
3. Social Finance was sold to Social Capital Hedosophia V for **US$12.9 billion**

Healthcare displays strong deal activity post-pandemic

The value of healthcare M&A in H1 surpassed pre-pandemic levels

By Dan Dufner, Morton Pierce

Healthcare M&A (including pharma, biotech and medical) saw strong growth over the first half of 2021 as investors continued to pursue deal opportunities in a sector that has played a crucial role in managing the pandemic.

Total healthcare deal value reached US$174 billion in the first half of the year, a 319 percent increase on H1 2020 and above pre-pandemic levels (H1 2018 saw US$71.3 billion in deal value; H1 2017 saw US$98.3 billion). The substantial rise in deal value comes alongside an increase in deal volumes, which increased 24 percent on H1 2020 levels to come in at 435 transactions.

Essential healthcare products and services have been in high demand through the COVID-19 dislocation period, with healthcare groups able to continue offering good visibility on future earnings as a result. The sector has also enjoyed steady growth in areas such as tech-enabled healthcare.

The strength of healthcare stocks has given corporates the confidence to push forward with M&A activity. Healthcare groups have recognized the value of scale after COVID-19 demand stretched capacity.

US $174 billion

The value of 435 deals targeting the US healthcare sector in H1 2021

319%

Percentage increase in deal value in H1 2021 compared to the same period in 2020

PE and SPACs show appetite

SPACs and private equity firms have also been active in the healthcare space, attracted to the sector's resilient earnings and long-term growth trajectory.

In a clear sign of the strong position of the private equity sector in 2021, healthcare saw the largest US buyout deal since the financial crisis in H1—the US$34 billion takeover of Medline by a group of PE investors.

The deal will see the consortium—Carlyle, Blackstone, Hellman & Friedman and GIC, the Singapore sovereign wealth fund—take over the largest privately held medical supplies manufacturer in the US.

Nor are PE funds the only ones willing to back big deals—strong public market performance has encouraged SPAC activity in the industry. Soaring Eagle Acquisition Corp., a SPAC headed by former MGM CEO Harry Sloan, acquired Boston-based biotechnology group Ginkgo Bioworks in a US$15 billion deal, in the third-biggest deal of the year in the sector. Ginkgo was founded by a team of scientists from MIT and produces DNA and microbes that customers can order and use in the development of their products.

Other notable SPAC deals include direct-to-consumer genomics firm 23andMe's US$3.6 billion merger with VG Acquisition Corp. and Fortress Value Acquisition Corp. II's US$2.4 billion merger with physical therapy clinic chain ATI Holdings.

Interest in research organizations rise

In the pharmaceuticals and biotech sub-sector, M&A has been an important tool for pharmaceutical companies to replenish their pipelines as blockbuster drugs go off patent, while the contract research organization (CRO) space has seen a wave of consolidation as providers of outsourced research services to the pharmaceuticals industry seek to build scale.

The second and fourth largest transactions of the sector were emblematic of this trend. Thermo Fisher, a producer of laboratory equipment as well as COVID-19 diagnostic test kits, acquired CRO PPD for US$21 billion, while Irish CRO ICON bought US counterpart PRA Health Services for US$12.1 billion.

Top healthcare deals H1 2021

1

The Carlyle Group, Hellman & Friedman, Blackstone Group, and GIC Private Limited acquired Medline Industries for **US$34 billion**

2

Thermo Fisher acquired PPD for **US$21 billion**

3

Ginkgo Bioworks merged with Soaring Eagle Acquisition Corp, a SPAC, for **US$15 billion**

Consumer and retail M&A picks up speed

Deals in the consumer and retail sector show signs of recovery as consumer spending rallies post-pandemic

By Raymond F. Bogenrief

The consumer and retail sector has had a turbulent year. Some sub-sectors, including non-essential and physical retail, were heavily impacted by lockdowns, while other verticals, including essential consumer goods, convenience and online-powered retailers, have thrived.

A more stable backdrop over the past six months, however, is helping most consumer verticals to thrive across the board. US consumer spending increased by 11.3 percent over the first quarter of Q1 2021, according to the Bureau of Economic Analysis, and the Dow Jones US Consumer Goods Index is up by just under 40 percent over the past 12 months, following steep declines in Q1 2020.

With clearer visibility on future company earnings and indicators pointing to stronger consumer spending, there has been greater appetite for M&A transactions in the consumer space. Volume in H1 2021 has come in at 248 deals, generating aggregate deal value of US$52 billion. This represents a 29 percent rise in volume from H1 2020, with value climbing 158 percent over the same period. H1 2021 consumer deal numbers also represent an increase on pre-pandemic levels, with deal value for the first half of the year 51 percent above total value in H1 2019.

US $52 billion

The value of 248 deals targeting the US consumer sector in H1 2021

158%

Percentage increase in deal value compared to H1 2020

PE interest

Reviving private equity interest in the consumer space has been especially prominent, with buyout firms noting the more stable consumer backdrop and opportunities to invest at attractive valuations.

The largest US consumer deal of the year saw BDT Capital Partners acquire water filtration company Culligan International from Advent International in a secondary buyout worth US$6 billion.

Water treatment and filtration providers have been popular private equity targets. Culligan generates close to two-thirds of its revenues from monthly service contracts, which reflects how private equity firms are sifting through the consumer space to find assets with stable recurring earnings and predictable cash flows.

Buyout firms have also moved to invest in assets expected to benefit from anticipated long-term shifts in consumer behavior post-COVID-19. Apollo, for example, paid US$4.4 billion to take arts and crafts retailer Michaels private. Michaels recorded double-digit sales growth through the pandemic period as consumers turned to decorating and crafts while stuck at home. Apollo expects this trend to continue. The deal is also expected to support Michaels, which has a physical store network of 1,200 sites, as it builds out its digital capability.

Consumer dealmaking has also been strong in the food, health and nutrition sub-sectors, which are also characterized by stable earnings. Food and drink multinational Nestlé acquired the vitamin and supplements brands of The Bountiful Company in a US$5.8 billion deal from private equity firm KKR. The deal builds out Nestlé's health and nutrition portfolio, which is a key growth area for the group.

Other food deals include Hormel Foods buying Kraft Heinz's nuts business and Total Produce buying the remaining 55 percent stake it did not already own in agrifood business Dole.

Top consumer deals H1 2021

1. BDT Capital Partners acquired Culligan International Company for **US$6 billion**
2. Nestlé acquired The Bountiful Company for **US$5.8 billion**
3. Michaels was acquired by Apollo Global for **US$4.4 billion**

Power & renewables M&A soars on back of green policies

The power and renewables industry is positioned for a sustained period of strong deal activity as the US focuses on hitting net zero carbon emissions by 2050

By Ipek Candan Snyder, Germaine Gurr

Within six months of coming into office, President Joe Biden has already made important policy decisions to accelerate energy transition away from hydrocarbons. Biden has re-joined the Paris climate agreement and outlined a timetable for reaching zero emissions. The Biden administration wants to cut greenhouse gas emissions to at least 50 percent of 2005 levels by 2030 and create a carbon free power sector by 2035 en route to delivering net zero carbon emissions by 2050.

According to figures from the Energy Transitions Commission, a global coalition of leaders from across the energy industry, achieving net zero 2050 will require between US$1 trillion and US$2 trillion of investment per annum. M&A into renewables and green energy will be a key factor for delivering investment at this scale.

These long-term drivers already appear to be driving M&A growth in the power and renewables industry.

There were 63 deals in the power and renewables industry in the first half of this year, worth US$16.9 billion in total. This represents a 169 percent rise in deal value on H1 2020 and an increase in volume of 15 percent over the same period. Deal value for H1 2021 has also topped pre-pandemic levels and is 30 percent above total value recorded in H1 2019.

US $16.9 billion

The value of 63 deals targeting the US power and renewables sector in H1 2021

169%

Percentage increase in deal value compared to H1 2020

Foreign buyers see opportunities

Institutional investors and sovereign wealth funds have been at the forefront of the deal push in the renewables space. The US has lagged behind Europe and Asia-Pacific in renewables development and this has attracted investment from experienced investors from those regions.

The Qatar Investment Authority and Iberdrola made investments totaling US$4 billion in Avangrid, the US-based sustainable energy company controlled by majority owner Iberdrola, a Spanish-based utility group. The proceeds from the investment have been allocated to funding a proposed merger between Avangrid and US utility PNM Resources. The merger will support investment in offshore wind energy projects and other renewable energy projects.

Singaporean sovereign wealth fund GIC, meanwhile, paid US$2.1 billion for a 19.9 percent stake in Duke Energy Indiana, a subsidiary of Duke Energy. Duke plans to use the proceeds from the deal to fund a five-year plan to accelerate Duke's clean energy transition.

Clean energy technologies developed in the US have also proven attractive for international corporates. SK Group, the third largest industrial conglomerate in South Korea, for example, paid US$1.5 billion for a 10.2 percent stake in Plug Power, a US provider of hydrogen fuel cells used for transportation and mobility. The deal will see Plug Power work with SK Group to roll out hydrogen fueling systems across South Korea and other Asian markets.

Top power & renewables deals H1 2021

1. Qatar Investment Authority and Iberdrola made investments in Avangrid, Iberdrola's majority-owned subsidiary, of **US$4 billion**
2. GIC bought a 19.9 percent stake in Duke Energy Indiana for **US$2.0 billion**
3. SK Holdings acquired a 10.2 percent stake in Plug Power for **US$1.5 billion**


MARINE & AVIATION

Real estate sees welcome revival in M&A in 2021

M&A value among real estate firms quadrupled year-on-year in H1, after a tough 2020

By Eugene Leone, David Pezza

Real estate was particularly hard hit by lockdowns, with many real estate operators carrying significant holdings of hotels, shopping malls and office space in their portfolios. With non-essential shops forced to shutter and employees instructed to work from home, many portfolios were in distress. McKinsey estimated that real estate asset values fell by an average of 25 percent immediately following lockdowns, while a number of US property funds had to limit distributions and redemptions to survive pandemic uncertainty.

But the sector has shown positive signs of recovery as the economy has stabilized, vaccines have been rolled out and shops, restaurants and hotels have been able to reopen. The Dow Jones US Real Estate Index, which lost more than 40 percent of its value within a month in Q1 2020, is back in the black and showing gains of more than 20 percent for the year to date.

As real estate stocks have recovered, confidence has returned for real estate M&A dealmakers. Real estate deal value climbed almost fourfold year-on-year, coming in at US$44.2 billion from 18 deals (up from 16 transactions in H1 2020).

A variety of drivers have supported the deal uptick. A year on from the first lockdowns, real estate dealmakers have been able to identify the most resilient real estate sub-sectors and quantify the impact on the sub-sectors most impacted by the pandemic.

US $44.2 billion

The value of 18 transactions in the US real estate sector in H1 2021

521%

Percentage increase in deal value compared to H1 2020

The largest deal of the sector is something of a turnaround story. Realty Income Corporation and VEREIT, both of which own portfolios of commercial real estate, each saw their share price crash in spring 2020 as a result of lockdown measures. Share prices have since recovered, allowing the two parties to proceed with the US$17 billion merger.

Pivot to delivery and data

Assets in industrial real estate and data centers have performed strongly, a consequence of the mass shift to online shopping and remote working.

According to real estate investor and advisory firm CBRE, developers increased warehouse capacity by 9.5 percent in 2020 to address rising demand. Asking rents for warehouses are up 8.3 percent year-on-year. The US data center market, meanwhile, is expected to expand by 13.8 percent in 2021.

A clear example is the second largest real estate deal of H1, which saw Blackstone buy QTS Realty Trust, an operator of multi-tenant data centers, for US$8 billion.

Top real estate deals H1 2021

1. VEREIT is acquired by Realty Income Corporation for **US$17 billion**
2. Blackstone Group bought QTS Realty Trust for **US$8 billion**
3. Blackstone Real Estate Income Trust acquired Home Partners of America for **US$6 billion**

Infrastructure M&A forges ahead, even before government boost

After a pause, investment in infrastructure has ballooned, even before the Biden administration's US$1 trillion-plus plan is passed

By Dolly Mirchandani

US infrastructure M&A has surged through the first half of 2021, with deal value climbing to US$126 billion in H1 2021—a fivefold increase on total deal value for H1 2020, according to data from Inframation. Deal volume has also increased year-on-year, with 191 deals recorded compared to 162 transactions over the first half of 2020.

Through much of 2020, infrastructure investors navigated the constraints around site visits and due diligence. However, as COVID-19 restrictions have been lifted and dealmakers have adapted to remote due diligence, a wave of pent-up deal demand has come to market, driving up investment.

Infrastructure dealmaking has also been driven by the growth in dry powder available to infrastructure funds, which has climbed 235 percent over the last decade according to Bain & Co, as well as ambitious plans led by President Joe Biden to accelerate infrastructure investment. The administration is pushing for legislation that would deploy up to US$1 trillion in infrastructure projects.

Infrastructure investors have started to cast a wider net as vaccines are rolled out and economies are reopening.

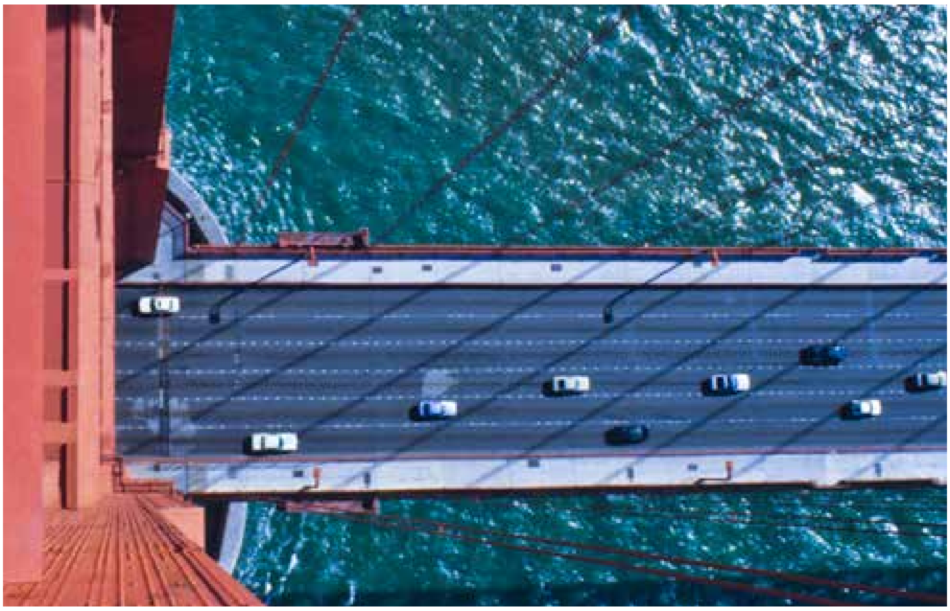
The have and have-nots

Interest remains high in resilient infrastructure verticals, such as data centers and telecoms, which have enjoyed surging demand as a result of home learning and home working. According to Comscore, US data usage increased 18 percent in 2020 compared to 2019.

But firms are also starting to see value in areas that were more negatively impacted by the pandemic and they are making investments in anticipation of a rebound in these sectors.

For example, dealmakers have also returned to the oil & gas sector as oil prices recovered. Energy Transfer acquired Enable Midstream Partners from CenterPoint Energy and OGE Energy Corp, and DoublePoint Energy sold leasehold interests and related assets in Midland Basin to Pioneer Natural Resources.

Similarly, KKR's acquisition of fixed base operator (FBO) Atlantic Aviation from Macquarie Infrastructure Corporation is a bet on the return of air travel, one of the hardest hit industries by the pandemic. The announcement of the US$4.5 billion transaction came months after the world's largest FBO network, Signature Aviation, was sold to a consortium comprised of Blackstone, Cascade and GIC. FBOs provide ground support for the aviation industry, including services such as maintenance, refueling and cargo handling.



US dealmaking braces for more challenging antitrust environment

After campaigning for the presidency on a platform that included more aggressive antitrust enforcement, Joe Biden has taken early steps to honor those pledges

By Rebecca Farrington

President Joe Biden has made antitrust enforcement a policy priority for his administration, with stricter oversight of the US's large technology companies among his policy priorities.

Biden named Lina Khan, an antitrust academic and prominent critic of Big Tech, as Federal Trade Commission (FTC) chair and appointed Tim Wu, a Columbia University law professor and also a Big Tech critic, to the National Economic Council as a special assistant to the president for technology and competition policy.

A proactive approach

These appointments signal the White House's intention to take a more proactive approach to antitrust enforcement, with a focus on the technology sector.

Tighter scrutiny of the technology industry is an issue that precedes the Biden administration, with the Department of Justice and FTC launching antitrust lawsuits against Google and Facebook during the Trump administration. These efforts are expected to continue, and may see the scope expanded, under the Biden administration.

Legislative changes

In addition to the Biden administration's appointments, Congress is considering five antitrust bills with bipartisan support that could lead to additional scrutiny of larger technology businesses.

These legislative efforts are still nascent and should be watched carefully as they develop, both for their focus on merger enforcement and on practices by businesses deemed to be dominant.

Slow but certain impact

Many of these initiatives from the White House and Congress may take time for the impact to be felt, but the scrutiny on technology transactions will likely be more immediate, adding complexities for technology companies considering transactions in this new environment of enhanced enforcement.


NOTE

CFIUS set to continue careful scrutiny under Biden administration

President Joe Biden's approach to the national security risks posed by foreign-backed M&A may differ in style from his predecessor, but not in substance

By Farhad Jalinous, Karalyn Mildorf, Keith Schomig

Under the Biden administration, the Committee on Foreign Investment in the United States (CFIUS), an interagency committee authorized to review certain transactions involving foreign investment into the US, is expected to operate in a more traditional manner, but with no less rigor.

In the lead-up to the 2020 Presidential election, CFIUS's work was highly publicized amid ongoing trade tensions, particularly with China. Under Biden, the agency has kept a lower profile but remains an essential policy tool for the White House and a key pillar of its strategy to protect US supply chains and mitigate any security risks posed by foreign ownership of critical infrastructure, technology, data and defense capability.

A wider scope

The concept of what is relevant to national security remains broad, and CFIUS's focus in recent years has included deals involving semiconductors, finance, cybersecurity, software, healthcare and social media alongside its traditional interest in defense, technology, and critical infrastructure.

CFIUS reviews are expected to be more process-driven and less politically overt under Biden, but the intensity and scrutiny of reviews are proving to be very much in line with what dealmakers have observed in recent years.

CFIUS has bipartisan support and since the enactment of the Foreign Investment Risk Review Modernization Act of 2018, CFIUS has been given additional jurisdiction to review certain non-controlling investments and real estate transactions. Some deals trigger mandatory filings, and, backed by additional resources, CFIUS has grown increasingly aggressive in identifying and reviewing non-notified transactions of interest.

CFIUS's non-notified efforts have included a notable determination to call in deals for review retrospectively, including ones that closed years ago. In some cases, CFIUS objections have led to divestments of assets post-deal on national security grounds, such as Beijing Shiji divesting US hotel software company StayNTouch and China's iCarbonX selling its majority ownership in online healthcare discussion network PatientsLikeMe.

CFIUS officials have reported that the Committee called in more non-notified deals in 2020 than in 2018 and 2019 combined, with 2021 on pace for a 50 percent increase over 2020.

Between CFIUS's increased jurisdictional authority and the aggressive pursuit of non-notified transactions, the equation for whether to voluntarily notify CFIUS ahead of a foreign-backed deal has changed, especially with the Committee deploying additional resources to examine even long-closed transactions.

Life on the fast track

Although CFIUS is looking at more deals than in the past and CFIUS scrutiny of sensitive transactions remains high, the process can be effectively navigated with the right preparation.

Unlike FDI oversight regimes in other parts of the world, CFIUS timelines are mandated by statute, which allows parties to build the required time into their timetables.

The CFIUS review process now also offers a fee-free, fast-track review process known as a declaration, which is a short-form filing assessed in 30 days. Complex deals involving countries and sectors deemed to be higher risk are unlikely to benefit from the fast-track process, but for deals less likely to pose national security concerns, the declaration process can be useful. Following a review, CFIUS can clear the transaction; issue a so-called "shrug", meaning the deal is not cleared (and therefore not granted safe harbor) but does not require a full review; or request a full notice.

The most recent figures show that full reviews happen in less than a quarter of cases, indicating parties and CFIUS are generally using the declaration process effectively.

Given mandatory filing requirements, expanded CFIUS jurisdiction and CFIUS's aggressive pursuit of non-notified transactions, CFIUS issues must be considered early in any cross-border deal involving a US business or assets to ensure they are managed properly.

Reverse break-up fees emerge in response to deal terminations

Even as economies pick up, dealmakers have maintained focus on managing the risk of broken deals

By Claudine Columbres, Tara Lee

Lockdowns in 2020 brought a large uptick in terminated deals—and although broken deal rates have slowed, there has been a renewed focus from deal parties on how to protect themselves in the event of a deal termination.

There were more than 100 deal terminations recorded globally in Q2 2020, the highest quarterly total since 2018, according to *Bloomberg Law*. High-profile deals that were called off as a result of the pandemic included Ally Financial canceling its US$2.65 billion acquisition of CardWorks after a mutual agreement and real estate mall investor Simon Property Group initially abandoning plans to buy Taubman Centers for US$3.6 billion before agreeing to go ahead after agreeing a lower valuation.

Levels have since stabilized to 70 terminated deals in Q1 2021, but dealmakers continue to monitor broken deal risk closely.

Termination protection

Parties are moving to protect themselves from deal termination risk by negotiating for clear termination fee provisions in merger agreements. The inclusion of reverse break-up fees, which were relatively rare pre-pandemic, has become more common.

Reverse break-up fees are the result of negotiations. Some buyers may be more inclined than others to agree to pay such fees if, for example, there is regulatory approval required for the merger. Payment of a break-up fee, however, depends on the facts and circumstances of each deal.

White & Case, for example, advised healthcare and insurance provider Anthem following its terminated deal with Cigna. Cigna claimed that it was automatically entitled to a US$1.85 billion reverse break-up fee if the merger failed to obtain regulatory approval, unless Cigna caused the failure. But the Delaware Chancery Court and Delaware Supreme Court determined that Anthem was not obligated to pay the reverse break-up fee because Anthem terminated based on Cigna's breaches and did not have to prove Cigna caused the merger's failure.

The pandemic did not, however, trigger the anticipated deluge of broken deal litigation over the triggering of material adverse change (MAC) and material adverse effect (MAE) clauses. Although parties did pay close attention to whether MAE and MAC clauses were triggered in the market uncertainty following the first lockdown and whether there was cause of litigation, a desire to consummate transactions fast seemed to prevail in most cases.

SPACs and private equity firms with large sums of dry powder and demanding deployment schedules have pushed for deals to close, rather than pulling out of transactions as many expected.

But there could still be an unexpected flow of lawsuits alleging sponsor or director conflicts of interest and inadequate due diligence if any of these deals fail to deliver to expectations.

“

Reverse break-up fees are the result of negotiations. Some buyers may be more inclined than others to agree to pay such fees if, for example, there is regulatory approval required for the merger. Payment of a break-up fee, however, depends on the facts and circumstances of each deal.

SEC to take tougher line on enforcement

New Securities and Exchange Commission Chair Gary Gensler has put scrutiny of SPACs and private funds at the top of his agenda

By Tami Stark

President Biden's appointment of Gary Gensler as Chair of the US Securities and Exchange Commission (SEC) in the spring indicates that the watchdog will take a more aggressive approach to securities law enforcement.

Gensler, a former investment banker and MIT professor who previously chaired the Commodity Futures Trading Commission under the Obama administration, assumed office in April 2021.

Chair Gensler's stronger enforcement strategy will not come as much of a surprise, based on the differences between the Trump and Obama administrations, his background and his statements to date.

Studies have shown the number of public companies that faced charges under Trump was 40 percent lower than under Obama.

Chair Gensler's predecessor, Chairman Jay Clayton, repeatedly stated he focused enforcement efforts on securities fraud that affected retail investors. Chair Gensler, on the other hand, is expected to revert to prioritizing prosecutions of large Wall Street financial institutions and public companies.

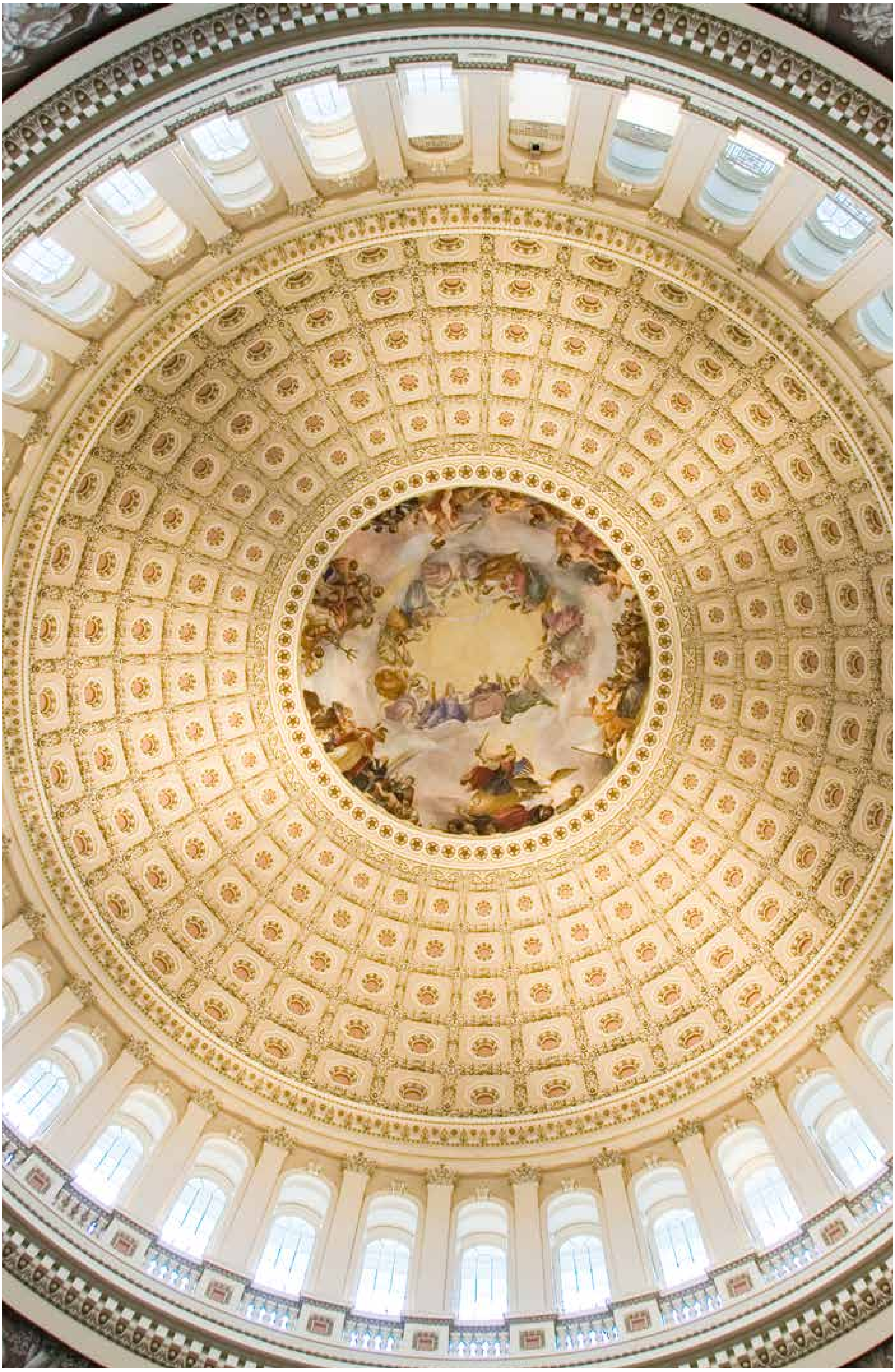
During his first testimony before Congress as the SEC Chair, he highlighted key priorities, including: SPACs; private equity and venture capital funds; and crypto assets. Further, the SEC Enforcement Division created a new ESG task force focused on climate and other ESG disclosures.

SPACs

With respect to SPACs, which have already raised more than US$100 billion this year, the SEC has identified several risks. The SEC is concerned that the interests of SPAC sponsors are not aligned with the retail investors hoping for a rise in share price after the SPAC secures a deal. The SEC is also concerned that SPACs may bring private companies into the public markets without the same level of vetting that occurs with an IPO, thereby risking the SPAC is acquiring a company with undisclosed baggage.

Private funds

In addition to SPACs, Chair Gensler has noted that over the last five years there has been a 58 percent increase in the number of private equity funds and a 110 percent increase in the number of venture capital funds. Further, as the SEC is the primary regulator of registered investment advisors to these funds and there is no self-regulatory organization like there is for broker-dealers, Chair Gensler has pointed out that it is important to hold these entities accountable when violations are found. In particular, the SEC's Enforcement Division will focus on disclosures of investment risks and conflicts of interest, fees and expenses, liquidity, valuation of assets and protecting material non-public information.



Notable decisions from Delaware courts

In the first half of 2021, Delaware courts issued several decisions affecting M&A dealmaking

By Daniel Kessler

Williams: Court of Chancery Finds Poison Pill Unenforceable
In February, the Delaware Court of Chancery held that a shareholder rights plan (a "poison pill") adopted by The Williams Companies, Inc. at the onset of the COVID-19 pandemic was unenforceable. In *The Williams Companies Stockholder Litigation*, the Court found the Williams pill to be "unprecedented in that it contained a more extreme combination of features than any pill previously evaluated by the Court—a 5 percent trigger, an expansive definition of 'acting in concert,' and a narrow definition of passive investor."

Evaluating the Williams pill under Delaware's *Unocal* standard, the Court first asked whether the Williams board had reasonable grounds for identifying a threat to the corporate enterprise and then whether the response was reasonable in relation to the threat posed. Importantly, the Court noted that, to satisfy *Unocal*, the board must do more than show good faith and reasonable investigation. Such actions must ultimately give the board "grounds for concluding that a threat to the corporate enterprise existed." However, "If the threat is not legitimate, then a reasonable investigation into the illegitimate threat, or a good faith belief that the threat warranted a response, will not be enough to save the board."

According to the Court, the Williams board identified three supposed threats: (i) the desire to prevent stockholder activism during a time of market uncertainty and a low stock price, (ii) the apprehension that hypothetical activists might pursue "short-term" agendas or distract management from guiding Williams through uncertain times, and (iii) the concern that activists might stealthily and rapidly accumulate over 5 percent of Williams' stock.

The Court characterized the three threats identified by the Williams board as "purely hypothetical," as the board was not aware of any specific activist plays afoot. The Court found that the broad category of conduct referred to as stockholder activism, without more, cannot constitute a cognizable threat under the first prong of *Unocal*. Similarly, the Court found the abstract risks of short-termism or distraction to be lacking. "When used in the hypothetical sense untethered to any concrete event, the phrases 'short-termism' and 'disruption' amount to mere euphemisms for stereotypes of stockholder activism generally and thus are not cognizable threats."

The third justification for the Williams pill was the concern that activists might rapidly accumulate over 5 percent of Williams stock and the belief that the pill could serve as an early-detection device to plug the gaps in the federal disclosure regime. While the Court assumed, for purposes of analysis, that this was a proper purpose, the Court found the pill to be extreme in its response. Of the twenty-one pills adopted between March 13 and April 6, 2020, only the Williams pill had a 5 percent triggering threshold. In addition, the Williams pill's "beneficial ownership" definition went beyond the default federal definitions to capture synthetic equity, such as options. Its definition of "acting in concert" went beyond the express-agreement default of federal law to capture "parallel conduct" and add the daisy-chain concept. Finally, the pill's "passive investor" definition went beyond the influence-control default of federal law to exclude persons who seek to direct corporate policies. According to the Court, this "combination of features created a response that was disproportionate to its stated hypothetical threat."

Williams reminds practitioners that Delaware courts will thoroughly review a board's decision to implement defensive measures such as a poison pill and that such measures must address legitimate threats in a reasonable manner.

Snow Phipps: Buyer Required to Close Transaction
In April, the Court of Chancery provided more guidance on Material Adverse Effect (MAE) provisions, as well as ordinary course of business and financing covenants in the context of a target affected by the COVID-19 pandemic. In contrast to last year's *AB Stable* decision (where the buyer was relieved of its obligation to close), in *Snow Phipps v. KCAKE Acquisition*, the Court resolved all issues in favor of the seller and ordered the buyers to close on its agreement

to acquire DecoPac, a supplier and marketer of cake decorating products. In March 2020, at the outset of the COVID-19 pandemic, entities associated with private equity firm Kohlberg & Company agreed to acquire DecoPac from Snow Phipps, another private equity firm. Approximately a month after signing, however, the buyers told the seller that they would not close because debt financing remained unavailable. They also stated that they did not believe that DecoPac would meet the bring-down or covenant-compliance conditions in the purchase agreement because DecoPac was reasonably likely to experience an MAE and failed to operate in the ordinary course of business. The seller commenced litigation seeking specific performance of the purchase agreement.

The buyers argued that the purchase agreement's MAE representation became inaccurate because DecoPac's "performance fell off a cliff" as a result of the escalating COVID-19 pandemic. The Court of Chancery disagreed, finding that DecoPac did not breach the MAE representation given the durational insignificance and corresponding immateriality of the decline in sales. According to the Court, while DecoPac's performance dropped precipitously, it rebounded in the two weeks immediately prior to buyers' termination of the purchase agreement and was projected to continue recovering through the following year. The Court compared this to the situation in *Akorn*, the only Delaware Court of Chancery case to have found an MAE to be reasonably expected, where the target's downturn had, according to the seller's management, "already persisted for a year and show[ed] no sign of abating."

The buyers also argued that the purchase agreement's ordinary course covenant was breached by DecoPac (i) drawing down US$15 million on its US$25 million revolver and (ii) implementing cost-cutting measures inconsistent with past DecoPac practice. In order for the buyers to avoid their obligation to close, the ordinary course covenant must not be complied with "in all material respects." Citing *AB Stable*, the Court held that such change in conduct "must significantly alter the total mix of information available to the buyer when viewed in the context of the parties' contract." While acknowledging that the US$15 million revolver draw was the largest since the seller acquired DecoPac, the Court noted that DecoPac had drawn on the revolver five times since late 2017. The Court also noted evidence that the drawdown was not in response to liquidity issues at DecoPac. In addition, the Court highlighted that DecoPac disclosed the draw request to the buyers within one day of making it, offered to repay it within two days of the buyers raising issue with it, and never used any of the funds. Based on this, the Court found that the revolver draw was not inconsistent with past practices and did not reflect a material departure from the ordinary course of business.

Importantly, the Court of Chancery also determined that the buyers breached their obligations under the purchase agreement to use reasonable best efforts to obtain debt financing. This permitted the seller to obtain specific performance of the purchase agreement, even though the purchase agreement expressly conditioned specific performance on the funding of the debt financing. Citing the prevention doctrine, the Court held that the buyers may not rely on the absence of debt financing to avoid specific performance. The Court explained that "the prevention doctrine provides that 'where a party's breach by nonperformance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.'" According to the Court, the buyers' failure to use reasonable best efforts to obtain debt financing contributed materially to its failure to obtain debt financing. Specifically, the Court noted that each of the lenders were willing to execute debt financing on the terms of the debt commitment letter executed at the time of the purchase agreement and that the buyers refused to move forward. The Court rejected the buyers' argument that application of the prevention doctrine requires a finding of bad faith and "in a victory for deal certainty" ordered the buyers to close on the purchase agreement.

Snow Phipps reiterates the high bar that buyers must cross in order to escape their obligations under an acquisition agreement, whether it's due to a potential MAE or breach of ordinary course covenant. It also highlights the importance of carefully drafting and complying with obligations to obtain financing.

Albertsons: Earnout Dispute Survives Motion to Dismiss

In June, the Delaware Court of Chancery failed to dismiss a breach of contract claim against Albertsons Companies, Inc. in connection with its 2017 acquisition of meal kit delivery company Plated. Former Plated stockholders sued Albertsons seeking recovery of earnout consideration. The applicable merger agreement provided for an upfront cash payment of US$175 million to be followed by up to US$125 million in earnout consideration payable over the next three years if certain targets were met. While the merger agreement provided Albertsons sole and complete discretion over the operation of Plated post-closing, it expressly prohibited Albertsons from taking any action with the intent of decreasing or avoiding the earnout.

Allowing the plaintiff former stockholders' breach of contract claim to proceed, the Court held that "to adequately plead a buyer's intent to avoid an earnout, the goal of avoiding the earnout need not be 'the buyer's sole intent'; rather, a plaintiff may well plead that the buyer's actions were 'motivated at least in part by that intention.'" The Court found that the plaintiffs had adequately alleged "a scheme whereby, from the outset of negotiations between Albertsons and Plated until the closing of the merger, Albertsons deliberately hid from Plated's negotiators that it had no interest in Plated's ecommerce business and no intent to support it, much less grow it."

In addition, the Court found that the plaintiffs adequately alleged that Albertsons knew that pivoting from subscriptions to in-store sales would be unsuccessful in the short term such that Plated would miss the earnout milestones. According to the Court, "the reasonable inference allowed by these allegations is not that Albertsons sabotaged a company it just paid US$175 million

for, but rather that Albertsons intended to avoid short-term Earnout targets in favor of long term gains. Even if Albertsons took these actions only in part with the purpose of causing Plated to miss the Earnout milestones, this is enough at the pleading stage to support Plaintiff's breach of contract claim." On this basis, the Court allowed the breach of contract claim to proceed.

Interestingly, the Court did dismiss fraudulent inducement claims against Albertsons based on the merger agreement's integration clause, which did not include anti-reliance language. The Court acknowledged that Delaware law is now settled that "[t]he presence of a standard integration clause alone, which does not contain explicit anti-reliance representations and which is not accompanied by other contractual provisions demonstrating with clarity that the plaintiff had agreed that it was not relying on facts outside the contract, will not suffice to bar fraud claims." However, the Court found that the plaintiff's fraudulent inducement claim was based on allegations that Albertsons lied about its "future intent" with respect to the operation of the business. "While anti-reliance language is needed to stand as a contractual bar to an extra-contractual fraud claim based on factual misrepresentations, an integration clause alone is sufficient to bar a fraud claim based on expressions of future intent or future promises."

Albertsons serves as a reminder that transactions that include earnouts can often result in post-closing disputes, even when buyers negotiate broad discretion for themselves.

Snow Phipps reiterates the high bar that buyers must cross in order to escape their obligations under an acquisition agreement, whether it's due to a potential MAE or breach of ordinary course covenant.

Six trends to look out for in the second half of 2021

After a turbulent 18 months which saw M&A crash before an impressive return to form, H2 2021 is set for continued strong deal activity, as well as new challenges

By John Reiss, Michael Deyong, Gregory Pryor

US M&A progressed steadily through the first half of 2021. The COVID-19 vaccination roll-out has allowed the economy to begin reopening, stock markets have remained strong, and dealmakers have moved to accelerate deployment and put deal schedules back on track after lockdown disruption.

The outlook for M&A remains very positive for the second half of the year. Below we consider some key themes that are likely to be at the top of dealmakers' agendas.

1

Regulation could complicate dealmaking

The Biden administration has made antitrust a key focus of its policy agenda, with the technology sector a priority area. The White House remains focused on the impact of M&A on national security and CFIUS has been allocated additional resources and the SEC, under its new chair Gary Gensler, is expected to take a more aggressive approach to securities law enforcement.

This does not mean deals will not progress. Effective bidders will have to adapt and demonstrate understanding of how to prepare transactions in advance to secure regulatory clearance.

2

Energy transition will fuel M&A

The Biden administration's ambitious targets to achieve net zero carbon emissions will drive a surge of M&A activity in the energy and infrastructure sectors as corporates pivot their portfolios away from hydrocarbons and move to retrofit and build infrastructure for renewables. There will also be follow-on effects in other sectors, with consumers already showing preference for 'green' brands and suppliers, while financial institutions see opportunity to create ESG-focused financial products and finance energy transition projects.

3

SPACs continue to be an important factor

There are signs that the red-hot capital market for SPACs is cooling off. Shares in some SPACs have fallen after completing a deal this year, in contrast to the rising share prices that greeted SPAC purchases in 2020. Retail investors and institutions have opted to sell their shares when deals don't meet expectations.

So much capital has been raised by SPACs, however, that even at the current frenetic pace of dealmaking, SPAC acquisitions are still lagging the pace of new SPAC IPOs. With SPACs given two years to deploy their funds, these dealmakers will remain active and influential for the next 24 months, even if the pace of new listings does not reach the same heights as its peak in Q1 2021.

4

The sector lens is widening

The pandemic saw dealmakers narrow their investment focus to a select group of high-quality companies in a small group of industries that did well throughout the pandemic. Resilient technology and healthcare assets were the most prized, with consumer, leisure and aviation deemed too risky.

Dealmakers will continue to invest heavily in tech and healthcare, but industries hardest hit by lockdowns are starting to draw dealmaker attention to a broader range of targets. The gradual reopening of hospitality, travel and entertainment and clearer visibility of future earnings, will help to direct more capital into these industries.

5

Liquidity remains high, but watch out for inflation

Extensive government stimulus and dovish monetary policy are expected to continue supporting the provision of abundant liquidity. There are early signs of inflation increasing, however, and the Federal Reserve has indicated that it plans to raise interest rates in 2023—sooner than it previously suggested. Over the medium to long term, this could ease M&A valuations and balance out what has been a market slanted in favor of vendors.

6

Stock markets could pull back

Stock markets plunged early in the pandemic, sharply rebounded, and then surged to new highs in the second half of 2020 and the first half of 2021. Rising market caps fueled dealmaking throughout the last 12 months. Similarly, a significant pullback in the next year could put a significant damper on M&A activity.

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Other M&A resources

WHITE & CASE
M&A Explorer

M&A Explorer is a platform that combines an interactive tool with a regular flow of short articles from White & Case partners. The tool enables users to create charts to explore trends in M&A in every country and sector, drawing on more than a decade of data from Mergermarket.

mergers.whitecase.com

WHITE & CASE
Debt Explorer

Debt Explorer combines an interactive research tool with exclusive commentary from White & Case partners. The tool, which uses Debtwire Par's primary issuance data from 2015 onwards, can be used to compare data and create custom charts about the value and volume of global leveraged loan and high-yield bond activity across all sectors.

debtexplorer.whitecase.com

CFIUS
PILOT PROGRAM

The CFIUS Pilot Program Covered Transaction Analysis Tool enables users to conduct a quick, online analysis to determine whether a transaction could be subject to the CFIUS pilot program that implements parts of the Foreign Investment Risk Review Modernization Act (FIRRMA).

whitecase.com/cfius-firrma-tool


FEDERAL RESERVE NOTE

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