WHITE & CASE

Record breaker: US M&A 2021

US M&A had an extraordinary year in 2021, with total deal value reaching US$2.6 trillion—surpassing US$2 trillion for the first time


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M&A roars into 2022 on momentum of a record-shattering year

Challenges loom—including the possibilities of tighter regulations, rising inflation and a stock market correction—but markets show little sign of slowing down

John Reiss
Global Head of M&A
White & Case

The value of US M&A blew past the US$2 trillion mark in 2021, ending the year more than 30 percent above the previous record set in 2015. US deal value reached US$2.6 trillion, twice the value of 2020, and volume set a new record at 7,896 transactions.

Confidence reigned among dealmakers as stock markets continued to rise; increasing numbers of SPACs sought merger targets; and private equity houses set new records, deploying some of the sector's historic levels of dry powder. All of which was underwritten by flexible and cheap debt financing.

Technology was a major driver of M&A, fueled by pandemic-related trends that continued to accelerate deployment of digital technologies across all sectors. The tech sector itself led the sector charts. Companies with product mixes boosted by the pandemic, including those in the pharma and healthcare sector, turned to M&A to complement and add to their existing business portfolios.

Despite a continuing positive outlook, dealmakers will need to keep potential risks in mind in 2022. Under the Biden administration, CFIUS went on a recruitment drive, and it will clearly continue to take a more aggressive stance across sectors, particularly when deals involve technology.

Indeed, regulatory scrutiny is tightening from a number of angles. The Securities and Exchange Commission under chair Gary Gensler is taking a tougher stance on enforcement and has its sights set on SPACs, cryptocurrencies and ESG. And the Federal Trade Commission has announced far-reaching antitrust policy changes that may require companies that reach settlements to observe a ten-year mandatory clearance period on new acquisitions and disposals—the new rules would even apply to buyers of affected assets.

This increasingly tough approach to regulating M&A has so far had little impact on dealmakers' appetites for transactions—although new rules may eventually render some deals less attractive.

In response to recent inflation, the Fed will increase interest rates, which could pose another challenge for dealmakers. But given that rates are so low by historical standards, increases are unlikely to have any direct significant effect on M&A for most of 2022.

One of the biggest questions is whether stock markets will continue to hold up. A correction seems inevitable at some point, but it's unclear what might trigger one in the foreseeable future. For example, markets seem to have shrugged off concerns related to the emergence of the Omicron variant of COVID-19—at least at the time of writing. And private equity still has a mountain of capital to deploy. Recent events, however, suggest that markets will be volatile.

As a result, although regulatory hurdles continue to multiply, we expect 2022 will be another strong year for US M&A, with robust activity through the first half and possibly well beyond.

Contents

Surging M&A surpasses expectations

All the stars aligned in 2021, creating a confident and exceptionally busy M&A market

By Michael Deyong and Gregory Pryor

M&A markets appeared to defy gravity through 2021. Globally, dealmakers were highly active, with values exceeding US$5 trillion for the first time ever. Total deal value rose by 81 percent on 2020 totals to US$5.75 trillion, with volumes rising 37 percent year-on-year to reach 26,060 deals.

And nowhere was busier than the US market. Surpassing all records, US dealmaking exceeded the US$2 trillion milestone for the first time, climbing to US$2.6 trillion—a massive 99 percent increase on 2020 total values. By volume, the US M&A market also smashed records, with 7,891 deals (versus the previous high of 6,497 transactions in 2018).

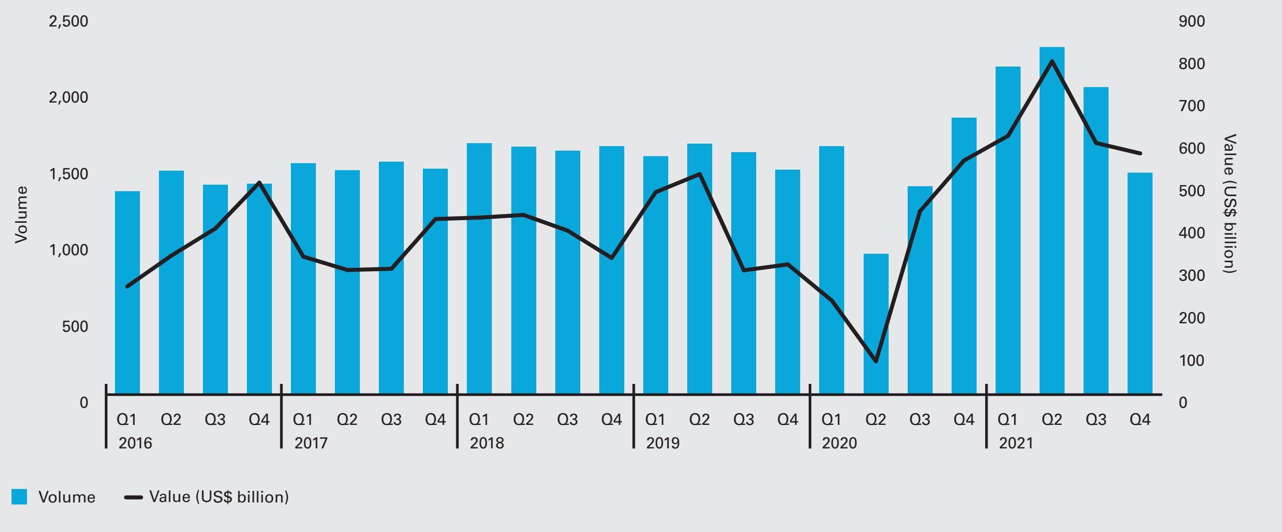
US $2.6 trillion

The value of US M&A deals in 2021—a 99% increase compared to 2020

With stock markets trending higher through much of the year—the S&P 500 was up more than 26 percent for the year—public company financial firepower increased and dealmaker confidence ran high. Businesses seeking rapid growth and strategic shifts at a time of technological and societal change went on the hunt for large and potentially transformative deals to achieve these aims. Megadeals of US$5 billion or more accounted for nearly half of all US M&A.

And it wasn't just the public markets pushing up M&A numbers. Private equity activity was highly active in 2021, with deal value reaching US$987.8 billion—more than double the previous year's total of US$474.5 billion. Volume over this period rose by 59 percent to 3,460 transactions. With strong fundraising totals in 2020—even despite a brief COVID-induced lull—and a continuation of that trend through 2021, dry powder extended its climb, reaching US$2.3 trillion in August 2021, according to S&P Global. Combined with the ready availability of low-cost debt

US M&A 2016 – 2021



Top-ten US M&A deals 2021

Announced date	Target company	Consolidated sectors	Bidder company	Bidder-dominant country	Deal value US$(bn)
05/17/2021	WarnerMedia, LLC.	TMT	Discovery, Inc.	USA	96.2
04/14/2021	VMware, Inc. (80.65% stake)	TMT	Dell Technologies Inc. (shareholders)	USA	60.8
07/12/2021	MSP Recovery, LLC	TMT	Lionheart Acquisition Corporation II	USA	44.3
10/20/2021	Pinterest, Inc. (100% stake)	TMT	PayPal Holdings, Inc.	USA	38.9
06/05/2021	Medline Industries, Inc.	Pharma, medical and biotech	The Carlyle Group; Hellman & Friedman LLC; Blackstone Group Inc.; Abu Dhabi Investment Authority; GIC Private Limited	USA	34.0
06/22/2021	Universal Music Group BV	TMT	Vivendi SA (shareholders)	France	32.5
03/21/2021	Kansas City Southern	Transportation	Canadian Pacific Railway Ltd	Canada	31.1
03/10/2021	GE Capital Aviation Services LLC	Financial services	AerCap Holdings N.V.	Ireland (Republic)	31.1
12/16/2021	Cerner Corporation (100% stake)	TMT	Oracle Corporation	USA	29.2
02/22/2021	Atieva, Inc.	Industrials and chemicals	Lucid Group, Inc.	USA	28.5

Tax reforms remain unclear

By Scott Fryman

In a bid to finance certain spending on social, infrastructure and other initiatives, President Joe Biden has been trying to reform the US tax code, including initial proposals that would raise the corporate income tax rate and change capital gains and individual tax rates.

The proposed tax reforms were subject to significant changes throughout 2021. Proposals have included increasing the corporate tax rate to 28 percent from its current level of 21 percent and increasing the highest marginal capital gains tax rate to 25 percent. In addition, a proposal was put forth to charge corporations with average financial statement income in excess of US$1 billion with an alternative minimum tax of 15 percent.

Some of the proposals may have impacted the timing of M&A activity, as dealmakers attempted to get deals over the line before the end of the year to lock in their tax liability at the current rates, particularly since the proposals include the possibility of retroactive application of new tax rates. Some dealmakers have taken out tax insurance to cover this risk.

There had also been some discussion of whether the reforms would cover the preferential tax treatment for carried interest payments, which would primarily affect private equity sponsors. The current rules, enacted as part of the Tax Cuts and Jobs Act of 2017, generally require that investments be held for at least three years for the related carried interest to qualify for favorable tax rates. At one point, there was a proposal to increase the holding period to five years, although this proposal was removed from the latest version of the bill.

Structural changes

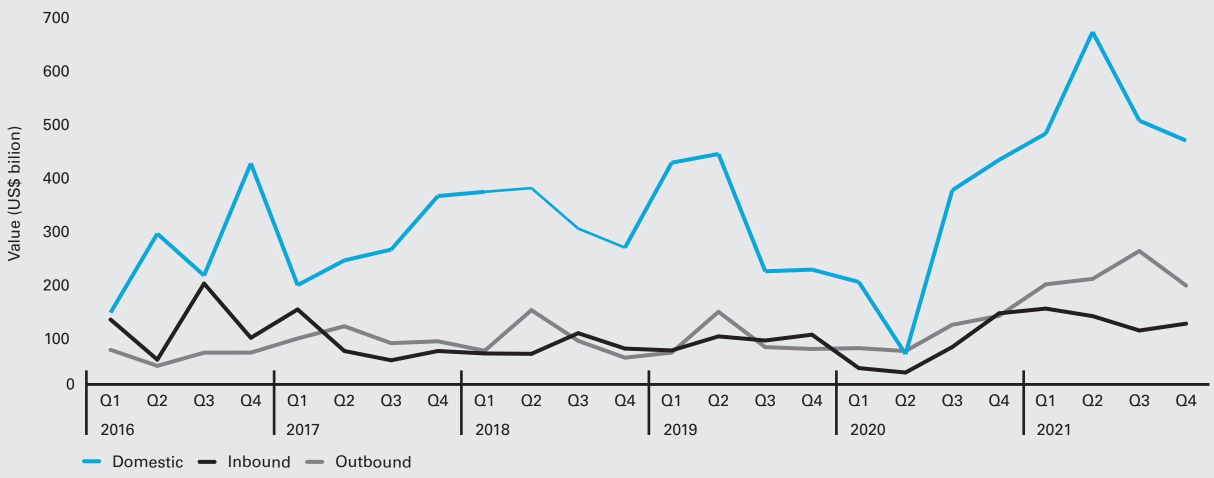
Tax reforms would be most likely to affect deal structuring, share buybacks and cross-border investments. The decrease in the corporate tax rate as part of the tax cuts under the Trump administration made corporate holding structures more attractive. Conversely, increasing the corporate tax rate could cause a shift to pass-through investments and holding structures.

The latest version of the bill also included proposals to levy a 1 percent tax on the value of share buybacks to encourage company investment rather than distributing excess cash to shareholders. Should this be included in future versions of the bill, it could reduce the level of buybacks seen in the aftermath of the 2017 tax cuts.

And finally, a key aim of the proposed reforms is to increase taxes on profits earned by US companies overseas. If enacted, these may well have an impact on decisions as to where to locate certain assets, acquisition holding structures, and the amount and timing of repatriations of cash to the US, among other things.

The M&A market is exceptionally buoyant, with activity driven by the combination of high levels of private equity cash, strong stock markets, significant numbers of SPACs looking for deals and a healthy debt market. Tax changes—whatever shape they may take—are unlikely to dampen dealmaking appetite to any great degree, although they may have a marginal effect on deal timings and on structures employed in M&A transactions.

US M&A: Domestic, inbound and outbound value



financing, private equity firms had significant capital at their disposal to close deals. The fifth-largest deal of the year, valued at US$34 billion, was a private equity consortium that saw The Carlyle Group, Hellman & Friedman, Blackstone Group, Abu Dhabi Investment Authority and GIC acquire Medline.

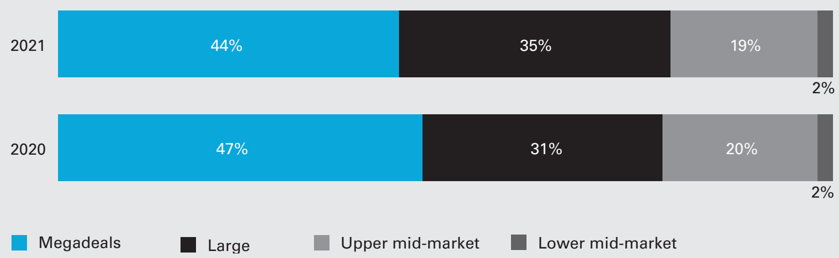
Domestic, inbound and outbound deals surge

Domestic transactions were particularly buoyant and accounted for much of the spectacular rise in activity. Totaling US$2.1 trillion, US-to-US transactions rose by 102 percent in 2021 versus the previous year.

The surge in domestic activity is partly the result of supply chain issues and the increased regulatory scrutiny of cross-border transactions. Since COVID-19 disrupted the production and flow of goods around the world, companies have begun to bring supply sources closer to home, boosting M&A in the process.

Rising concerns about the national security implications of deals involving data and other sensitive assets have also placed some roadblocks in the way of overseas investments. With the US taking a stronger stance on deals involving certain jurisdictions, getting some deals over the line has been challenging. At the same time, other countries in Europe and Asia-Pacific are also looking much more closely at overseas investments, potentially stemming the flow of cross-border deals overall.

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



However, even with a more cautious approach to cross-border deals, 2021 saw both inbound and outbound M&A increase. The value of US transactions involving overseas buyers rose by 90 percent over 2020 figures to US$483 billion, and those involving US buyers of foreign assets increased to US$817.8 billion—a 121 percent increase on the previous year.

Tech trends push up deal activity

Technology was by far the most active sector by value, chalking up US$790 billion worth of transactions, an increase of 133 percent on an already busy 2020, while volumes also rose, by 69 percent, to 2,194 deals.

> **Domestic transactions were particularly buoyant and accounted for much of the spectacular rise in activity. Totaling US$2.1 trillion, US-to-US transactions rose by 102 percent in 2021 versus the previous year**

The surge in US tech M&A is partly due to the strong technology base in the US. Technology assets are hotter than ever, as businesses rapidly digitalize their operations and deploy technologies such as machine learning and artificial intelligence, particularly since the pandemic.

Appetite for media and entertainment assets also surged due to the pandemic. Indeed, the biggest deal of the year hailed from the sector: the US$96.2 billion WarnerMedia and Discovery tie-up. This megadeal helped media M&A surge by 744 percent to US$182.9 billion compared to the previous year. Volume in the sector ticked up by 35 percent over the same period.

As we move into 2022, the signs are that many of the factors underpinning strong M&A markets are set to endure. The emergence of the highly transmissible Omicron variant of COVID-19 may cause some stock market volatility in the short term, while rising inflation and the prospect of interest rate rises are also potential risks. However, should these risks materialize, their effects will take some time to filter through to M&A activity. Absent a major shock, we anticipate continued robust M&A activity, at least through the first half of 2022.

744%

The year-on-year rise in M&A deal value for the media sector in 2021

A remote possibility?

The pandemic forced dealmakers to run M&A processes differently. How much of this will stick? And how will this affect M&A infrastructure?

The pandemic has shown just how resilient dealmaking infrastructure really is. While there was clearly a lull in M&A activity in the first half of 2020, as businesses got their staff working remotely and stabilized finances where necessary, deal numbers and values have been on a roll since.

New COVID-19 variants could trigger restrictions once more, but even without this, the M&A process seems to have changed forever. Indeed, some of the work practices put in place when people were ordered to stay home turned out to be far more efficient versus the status quo. Management and bidder meetings no longer have to be face-to-face every time. At least part of the roadshow can be done online via video meetings, and staff working on deals can collaborate with colleagues and clients remotely.

It seems likely that at least some remote working will continue to feature in the market, including among the advisory and investment banking community. This may mean less office space is needed, which would reduce overheads. It may also mean advisors can hire globally, at least for some jobs, attracting talent without necessarily requiring relocations. And deal teams may often be able to close deals from home, cutting down the number of late nights in the office. There are plenty of positives to the new working environment.

Meeting people in the flesh, however, is still important, given that M&A is built on trust and relationships. But as the past two years have demonstrated, in-person interaction is not always essential. It turns out that dealmaking infrastructure is more flexible than anyone imagined just a few years ago.

Record year for private equity dealmaking

Transaction values more than doubled year-on-year, as firms deployed ever-larger amounts of dry powder

By Ray Bogenrief, Oliver Brahmst and Luke Laumann

In line with the broader M&A market, private equity firms had an exceptionally busy 2021. Deal value soared to US$987.6 billion in the year, more than doubling what was an already high total of US$474.5 billion in 2020. This is now the highest value recorded for any year on Mergermarket record (since 2006). Volumes were also up significantly, rising 59 percent to 3,460 deals—again, a new annual record.

Buyouts drove much of this increase, as aggregate deal value jumped 157 percent on 2020 totals to US$665.5 billion, with volumes rising 64 percent to 2,385 deals.

US $987.6 billion

The value of US PE-related deals in 2021—more than double the same period in 2020

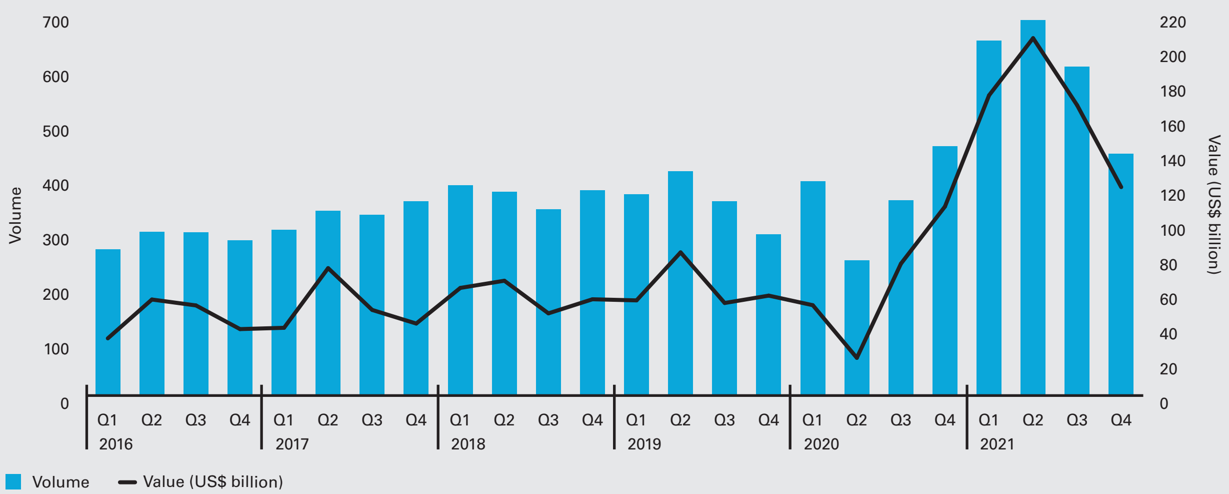
This high level of activity reflects the significant stores of dry powder at private equity firms' disposal. Globally, this stood at US$2.3 trillion in August 2021, according to Preqin, with US firms holding approximately 50 percent of the total. In addition, thanks to the trend for co-investment by private equity fund investors—the limited partners—the industry's firepower is significantly larger than these figures suggest.

Technology and club deals push volumes higher

Technology and healthcare continued to be among the more popular sectors for US-based private equity deals, accounting for more than half of the industry's total deal value. Indeed, the largest US private equity deal of the year was in healthcare. Medline Industries, a medical supplies manufacturer, was acquired for US$34 billion by a consortium that included The Carlyle Group, Hellman & Friedman, Blackstone Group, Abu Dhabi Investment Authority and GIC.

This transaction also demonstrates the recurring popularity of club deals. The profileration of club deals clearly reflects a step-up in the deal size some firms are targeting—an unsurprising trend given the fact

US private equity buyouts 2016 – 2021



that investor commitments are concentrating among larger firms—the top-25 firms between them are sitting on half a trillion dollars of dry powder.

Given higher valuations, it's unsurprising that exit activity also rose in 2021, up 49 percent by value to US$482.2 billion and up 50 percent by volume, totaling 1,511 deals. Private equity houses are also clearly taking advantage of a seller's market to crystallize returns for their investors.

Among popular exit types is merging portfolio companies with a SPAC. Blackstone did just that to exit benefits provider Alight in a deal that valued the company at US$7.3 billion. With so many SPACs raised looking for targets, this trend may be only just beginning.

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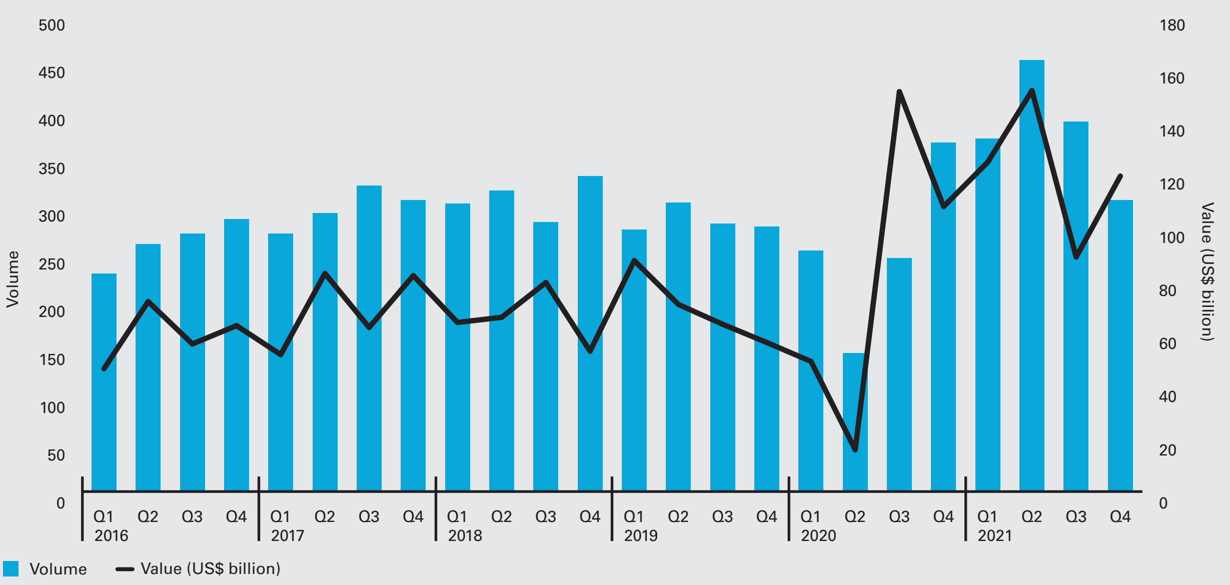
US private equity exits 2016 – 2021



What’s next for SPACs?

Dynamics may be changing as the focus shifts to de-SPACs and regulatory scrutiny intensifies

By James Hu and Matthew Kautz

New SPAC listings went on a rollercoaster ride through 2021. The first quarter saw 278 SPAC IPOs in the US, raising US$92.8 billion. This fell significantly to 51 listings, raising US$11.8 billion in Q2 as the SEC indicated it would take a tougher approach to regulating SPACs. New SPAC IPOs then rose again in Q3, with 77 listings worth US$15.7 billion and then in Q4, with 144 listings worth US$29.2 billion.

While the signs are that the IPO pace may pick up a little in 2022, the main story of the year will be what happens with de-SPAC mergers. These declined over the second half of 2021, from 122 mergers worth US$253.4 billion in H1 to just 86 valued at US$162.3 billion in H2.

With so much capital seeking deals and the requirement to complete transactions within the usual two-year timeframe, competition will be strong for high-quality companies. It is likely that those with some experience and track record with SPACs will be most successful in finding the strongest deals and generating interest from PIPE investors.

Although the technology and life sciences sectors will continue to be the primary picking grounds for SPACs, there is now some interest in more traditional industries. Among the largest transactions of the year was the US$9.2 billion merger of Luxembourg-based industrial firm Ardagh’s metal packaging business with Gores Holding IV, a SPAC backed by PE firm Gores Group.

SPACs have also been looking for targets beyond US borders, including in Western Europe and Israel, as sponsors and investors have become more comfortable with cross-border transaction structures. India is also becoming an interesting market for mergers, given the scale of its market, the growth of the technology sector and the increasing amount of private equity investment there looking for an exit. De-SPAC deals targeting assets outside of the US jumped from 31 transactions in 2020 to 94 in 2021, while value leaped by an astounding 589 percent year-on-year to US$207.2 billion.

Given recent statements by the SEC, it seems likely that regulatory changes to SPACs will emerge over the next year or two, with potential reform to forward-looking statements and transparency requirements. The overall thrust of any changes would be to bring de-SPAC mergers more in line with traditional IPOs. On the state law front, in *In re Multiplan Corp. Stockholders Litigation*, Delaware Court of Chancery applied the entire fairness standard of review to breach of fiduciary duty claims brought against the SPAC’s directors, officers and its controlling stockholder, due to alleged conflicts between the SPAC’s fiduciaries and public stockholders in the context of a value-decreasing transaction. The uncertainty introduced by this decision to the standard of review applicable to a de-SPAC transaction is expected to result in additional litigations.

We’re also seeing some creativity emerge in SPAC PIPE fundraising processes. Many investors already have exposure to these investments and so sponsors are looking to make PIPEs more attractive by, for example, offering common shares at a discount to the US$10 price, having some form of warrant attached, or deploying preferred or convertible preferred structures.

Overall, it will continue to be an active market subject to continued evolution through 2022 and beyond.

> **“While the signs are that the IPO pace may pick up a little in 2022, the main story of the year will be what happens with de-SPAC mergers**

Sector overview: Strong M&A activity pervades nearly every sector

In what was a stand-out year, M&A picked up the pace in almost every sector

By Michael Deyong and Gregory Pryor

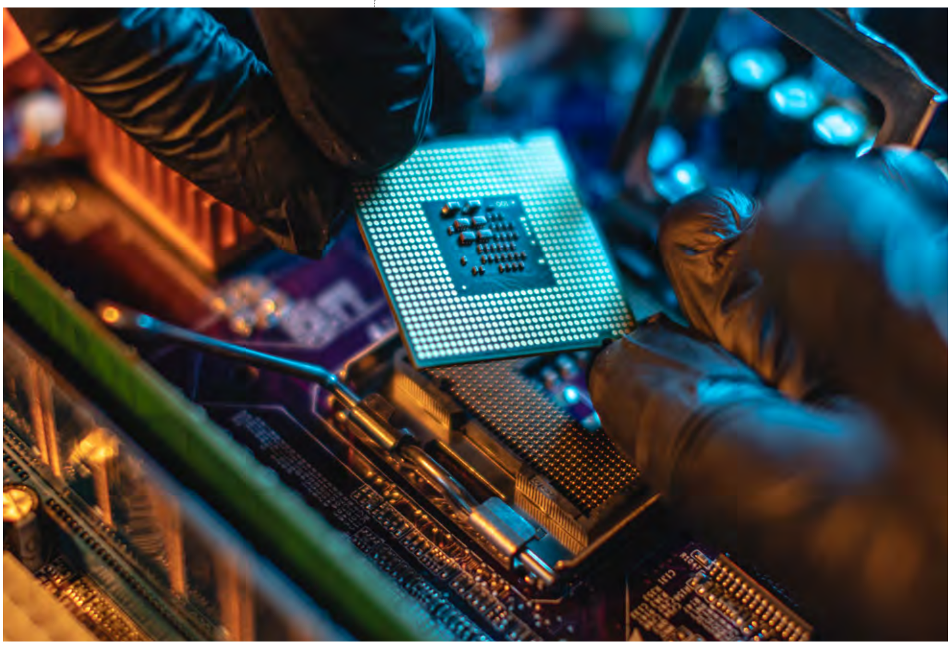
Dealmakers in almost every industry had an outstandingly busy 2021. With just a few exceptions, the M&A boom swept across the US economy with deal values, in particular, up significantly on 2020 totals.

Nevertheless, technology clearly dominated with records set for value and volume. There were 2,193 technology deals in 2021, a 69 percent increase on 2020 numbers, while value rose 133 percent to reach US$790 billion.

The second-largest sector by value and by volume was industrials and chemicals, which saw US$299 billion worth of deals in 2021, a massive increase of 111 percent over the previous year. Deal numbers rose by 31 percent to 1,127. This is a significant rebound for an industry that was heavily affected by the stay-at-home orders in 2020, when manufacturing plants had to shut down for a time. Increased M&A here may reflect a desire by companies to bring at least part of their supply chain closer in light of pandemic-related disruptions, which have continued throughout 2021.

Pharma, medical and biotechnology came in third by value, up 38 percent on 2020 to reach US$289 billion, while volume was up to 976 deals, a rise of 25 percent.

Perhaps understandably, given changing consumer behaviors and increased consumption of home-based entertainment through the pandemic, the biggest increase in total deal value for 2021 was in

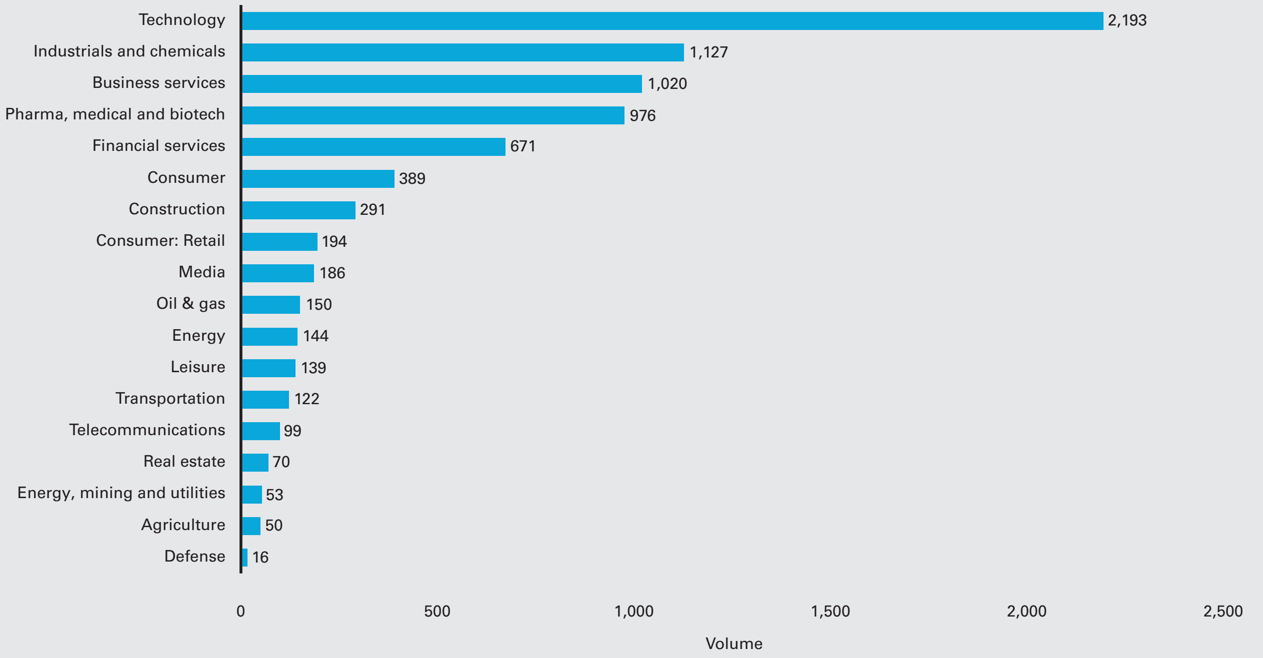


the media sector—aggregate value rose by a staggering 744 percent to US$182.9 billion. The sector was responsible for the largest deal of 2021—AT&T's US$96 billion spin-off of WarnerMedia, and merger with Discovery. It also had another top-ten deal with Vivendi's US$32.5 billion acquisition of Universal Music Group. Financial services and real estate also saw significant increases in deal values in 2021.

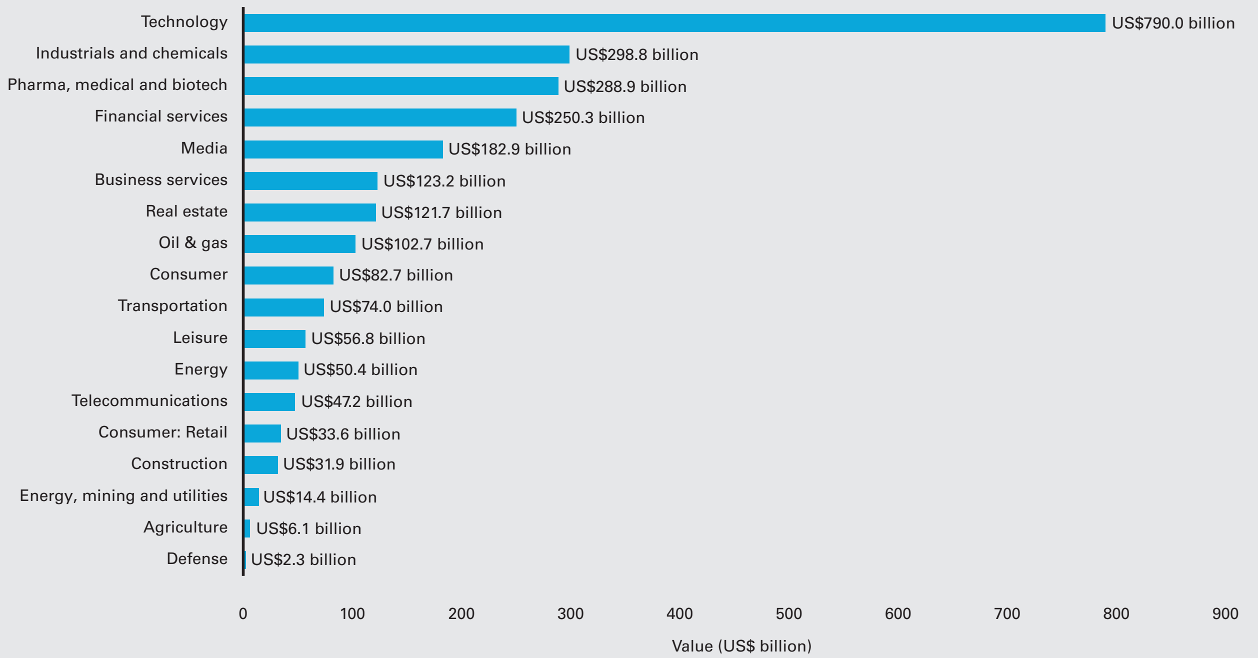
There were, however, a few sectors that recorded lower transaction value in 2021 compared with the previous year. Retail fell from US$35 billion to US$33.6 billion, reflecting the challenging environment that brick-and-mortar stores face as shoppers migrate online. Telecoms fell marginally, as did energy, mining and utilities, and defense M&A values.

As we move through 2022, however, we may well see some of these sectors pick up the pace on M&A. Retailers are likely to need to consolidate further and there may be scope for some turnaround or distressed deals. Energy, mining and utilities deals could be set for further M&A activity—many of the materials needed for technological devices, for example, come from the ground, while energy transition could boost dealmaking significantly.

US M&A sectors by volume 2021



US M&A sectors by value 2021



Oil & gas M&A trends up due to recovery in demand and the pressing need for clean energy

Dealmaking may continue to rise, as price volatility abates and companies embrace energy transition

By Morgan Hollins and Mingda Zhao

Increased energy demand as economies moved out of COVID-19 restrictions through 2021 helped oil & gas M&A continue its recovery in H2. Deal values jumped by 24 percent year-on-year to US$102.7 billion in 2021, while the number of deals increased by 16 percent to 150 deals.

Rising demand drove the surge in energy commodity prices through 2021, although some volatility remained—the price of the benchmark West Texas Intermediate (WTI) crude took a sharp dip in November on the news of the emergence of the Omicron COVID-19 variant.

While there will be some volatility over the coming period—in particular as COVID-19 is not yet fully under control—prices are expected to be more stable in 2022, absent a major shock. This should unlock the M&A market further, given that volatility is a bigger dampener on activity than actual price levels because it brings uncertainty that makes forecasting and investment planning more difficult.

Some private equity investors have been holding on to their investments in the last couple of years, and there may be increased incentive and pressure for them to exit in the current commodity price environment. This will in turn increase the pace of oil & gas M&A in 2022.

Clean energy fuels deals

Overall, we expect dealmaking to continue in the sector at a reasonable pace. Energy transition will be a significant driver, as oil & gas majors reposition their portfolios toward clean energy. The largest deal in the sector in 2021 exemplifies the trend: Royal Dutch Shell's US$9.5 billion sale of its Permian Basin assets to ConocoPhillips is part of a move by Shell to reduce its hydrocarbon assets and move to clean energy.

Societal and regulatory pressure for energy transition will underpin M&A in the sector over the next few years. Although tax advantages (such as the intangible drilling tax deduction and inventory depreciation allowances) remain in place in the US for now, there is some uncertainty about how long this will be the case. If they change, the economics of traditional energy exploration and production will change dramatically.

Government support

Tax reform will be necessary, however, to encourage decarbonization. Traditional integrated companies are looking at repurposing their infrastructure for carbon sequestration, although this is currently expensive and will require tax credits to make it a viable path to carbon neutrality. The same is true for downstream assets, where feedstock for natural gas can, in theory, produce hydrogen using existing petrochemical infrastructure. Yet this is also costly, and tax incentives will be needed.

With the prospect of more stable pricing, and as the overall tax and regulatory regime becomes clearer over time, we expect energy transition to generate significant M&A activity, as traditional players dispose of older assets and acquire businesses that promote clean energy.

US $102.7 billion

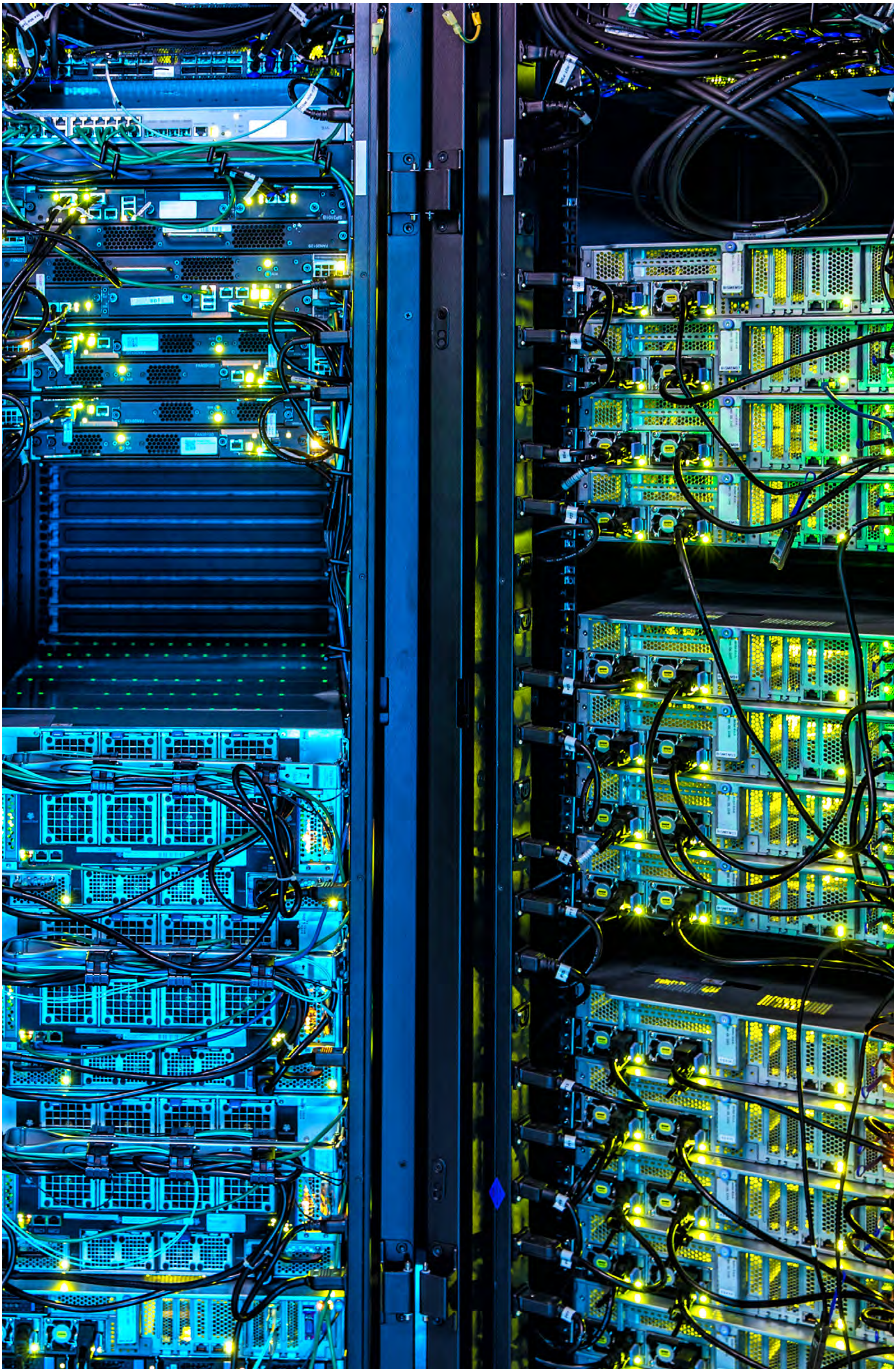
The value of 150 deals targeting the US oil & gas sector in 2021

24%

Percentage increase in value compared to 2020

Top oil & gas deals 2021

1. Royal Dutch Shell sold its Permian Basin assets to ConocoPhillips Company for **US$9.5 billion**
2. Cabot Oil & Gas bought Cimarex Energy for **US$9 billion**
3. Southwest Gas Corporation was acquired by Icahn Enterprises for **US$7.5 billion**



Technology M&A continues record run

The pervasiveness of technology, particularly since the pandemic, continues to drive deals to all-time highs

By Arlene Hahn, Erin Hanson and Tali Sealman

The technology sector continued its record-breaking path through 2021 as digitalization picked up pace. M&A value in 2020 was already strong—it reached US$339 billion, the highest-ever annual value for the sector at that point. However, 2021 blew that total out of the water, more than doubling to US$790 billion. Volumes also hit an all-time high, with 2,194 transactions in 2021, a 69 percent rise on 2020.

Technology assets have been highly prized for some time, although the pandemic has only added to their allure, as businesses accelerated their adoption of digital tools. This is evident in the largest deal of the year—Dell's spin-off of VMware. The business is focused on digital solutions, including digital workspaces, cloud, networking and app modernization. The persistent trend toward digitization means that investors will continue to focus on cybersecurity, networks and data storage in the coming years.

Green energy provides a boost

The Biden administration's US$1 trillion infrastructure bill is also helping to boost totals, given its emphasis on energy transition and the development of clean energy technology, including US$7 billion for investment in batteries and US$1.5 billion to develop clean hydrogen. A recent partnership between Amazon and TotalEnergies shows the direction of travel—the collaboration will apparently see TotalEnergies provide 474MWs of renewable energy to Amazon, while the energy company will be able to accelerate its move to the cloud through Amazon's Web Services.

Energy transition will continue to be a theme for technology M&A for some years to come. We anticipate the move to electric vehicles, for example, to boost activity in battery storage technology and vehicle software.

The second-largest deal of 2021 illustrates another big trend in technology: de-SPAC mergers. Lionheart Acquisition Corporation, a SPAC, acquired medical claims reclamation business MSP Recovery, which has developed a proprietary algorithm to find suitable litigation cases, in a US$44.3 billion transaction. The technology sector has been a fertile hunting ground for SPACs, whose numbers swelled significantly in early 2021. These vehicles are now on the hunt for businesses to merge with—and early-stage pre-revenue technology companies are strong candidates for these deals.

Potential challenges: Valuations, antitrust and FDI

Given demand for tech assets, it's no surprise that valuations have soared—and there is little reason to believe multiples will fall off in the foreseeable future.

Under the leadership of Lina Khan, the Federal Trade Commission has signaled it will take a tougher stance on antitrust in the US, especially on technology deals. As a result, we are increasingly seeing dealmakers make antitrust filings before signing merger agreements and, in some cases, even before announcing a deal.

CFIUS is also increasingly scrutinizing technology deals involving overseas investors and has demonstrated that it is prepared to examine even non-notified transactions. While neither of these is likely to significantly stem the tide of technology M&A for the foreseeable future, they are adding to the preparation work needed to get deals over the line.

US $790 billion

The value of deals targeting the US tech sector in 2021

69%

Percentage increase in deal volume compared to 2020

Top technology deals 2021

1

Dell spun off an 80.65 percent stake in VMware, Inc. for **US$60.8 billion**

2

MSP Recovery was acquired by Lionheart Acquisition Corporation for **US$44.3 billion**

3

PayPal acquired Pinterest for **US$38.9 billion**

Pharma and healthcare deliver strong results

Despite the absence of megadeals, M&A in the sector climbed from 2020 levels thanks in part to strong PE and SPAC activity

By Arlene Hahn and Andres Liivak

Healthcare and pharmaceutical deals continued at a robust pace through 2021, registering the third-highest value of any sector, behind technology and industrials, and with values and volumes both increasing year-on-year. In 2021, deal value rose to US$288.9 billion, a 38 percent increase on 2020; the number of deals rose to 976, a 25 percent rise year-on-year.

The kinds of blockbuster deals seen in 2018-2019, such as Takeda's US$78.2 billion acquisition of Shire, were largely absent, as large corporates steered clear of a more aggressive antitrust environment under the Biden administration and continued to hone their portfolios to take advantage of what was undoubtedly a seller's market.

Cash to spend

Flush with dry powder and eyeing countercyclical opportunities, private equity continues to play a strong role in the market—the largest deal in the sector in 2021 was struck by a Carlyle-led consortium for Medline in a US$34 billion transaction.

Healthcare SPAC mergers have also remained in focus, as earlier stage, technology-focused businesses boosted by pandemic-related trends, such as telemedicine and data-driven diagnostic devices and discovery tools, begin to disrupt more traditional healthcare models. With the surge in SPAC IPOs over the past 18 months, these pre-revenue companies will attract further sponsor attention as technology convergence in the healthcare sector continues apace. We also expect these merger transactions to accelerate over the coming months, as sponsors and companies seek to get ahead of any potential change in regulation, given signals emanating from the SEC around SPACs.

38%

Percentage increase in the value of deals targeting the US healthcare sector in 2021 compared to 2020

US $288.9 billion

The value of 976 deals targeting the US healthcare sector in 2021

Greater data, greater scrutiny

While incumbents will remain keen to ensure they stay up-to-speed with digitalization, big data and the application of machine learning and artificial intelligence across the healthcare and pharma spectrum, cross-border transactions in this space could face increased scrutiny. CFIUS in the US, the Data Security and Personal Information Protection Laws in China and similar legislation in some key European markets, such as Germany, are raising regulatory hurdles for dealmakers looking at digital healthcare M&A beyond domestic borders.

However, we expect there to be good M&A appetite among companies that have generated strong cash flows from product mixes that benefit from the pandemic. While these deals will likely retain a focus on core business lines, we see potential for these businesses to broaden and fill their portfolios. Pfizer's announcement in late 2021 of its US$6.7 billion deal to acquire Arena Pharmaceuticals could be the shape of things to come, as the COVID-19 vaccine and antiviral pill manufacturer seeks to deploy cash from what it forecasts to be record revenues for the year.

Top healthcare deals 2021

1. Medline was acquired by a consortium led by The Carlyle Group for **US$34 billion**
2. PPD was acquired by Thermo Fisher for **US$21 billion**
3. Soaring Eagle Acquisition Corp., a SPAC, merged with Ginkgo Bioworks for **US$20 billion**

Real estate deals come back to life

After dropping in 2020, real estate M&A ramped up significantly in 2021

By Elena Baca, Eugene Leone and David Pezza

In a significant rebound, M&A values in real estate rose sharply in 2021. Deal value rose to US$121.7 billion, a sharp increase of 229 percent compared to 2020. Deal volume rose by 79 percent to 70 transactions.

Consolidation in the real estate investment trust (REIT) space was a major driver of activity throughout the year. This trend was already evident pre-pandemic but has accelerated since. The biggest deal of the year was one such transaction: Realty Income's acquisition of VEREIT for US$17 billion. The deal brought together two net lease-focused businesses and allowed them to spin off all their office property assets into a new REIT.

Tech takes over

As in other sectors of the economy, the real estate sector is seeing the immense value of telecommunications and technology assets. Three of the top-five largest real estate transactions of the year involved investments in technology.

KKR and Global Infrastructure Partners' US$15.3 billion acquisition of CyrusOne, American Tower's US$9.5 billion tie-up with CoreSite and the US$8 billion investment by Blackstone in QTS Realty are the most prominent examples of this trend in 2021. All three targets were REITs holding data center properties—an area of intense interest among investors, as demand for data storage and connectivity has risen with accelerating digitalization and the use of big data across industries.

US $121.7 billion

The value of 70 transactions in the US real estate sector in 2020

79%

Percentage increase in deal volume compared to 2020

It seems likely that appetite for assets that support accelerating digital adoption, such as data centers, will continue through 2022.

Return to retail and leisure

As the economy continued to re-open through 2021, consumers returned to leisure activities that were less available or largely off-limits in 2020. Indeed, the second-largest deal of the year demonstrated renewed interest in leisure assets. The US$16.6 billion deal saw hospitality and entertainment-focused REIT VICI Properties buy MGM Growth Properties, which owns large-scale casino and hotel assets, including the MGM Grand and The Mirage.

As the COVID-19 pandemic enters its third year, some retail businesses are seeing a way forward toward growth in spite of persistent headwinds. Indiana-based Kite Realty's US$4.5 billion acquisition of Illinois-based Retail Properties of America is an example of this. Both parties to the transaction operate open-air shopping centers, which according to Kite have performed well during the pandemic. The company also cited the rise in curbside pickup for online orders as a growth area when announcing the deal.

Top real estate deals 2021

1

Realty Income acquired VEREIT for **US$17 billion**

2

MGM Growth Properties was acquired by VICI Properties for **US$16.6 billion**

3

CyrusOne was bought by KKR and Global Infrastructure Partners for **US$15.3 billion**

Cross-border deals face increased CFIUS scrutiny

Increased sector scope and concerns around a more aggressive approach to identifying non-notified transactions is leading to rising numbers of filings

By Farhad Jalinous, Karalyn Mildorf and Keith Schomig

The signing of the Foreign Investment Risk Review Modernization Act (FIRRMA) into law in 2018 was the most significant update to CFIUS in more than a decade. For years leading up to the new legislation, there had been a rising vigilance around foreign investments into the US, but FIRRMA significantly expanded the committee's scope, enabling it to focus on more sectors and examine non-controlling investments.

The result has been that more cross-border transactions now fall under the US national security umbrella than ever before. Thirty years ago, CFIUS concerns mainly applied to energy, telecommunications and defense deals; today businesses across a variety of sectors need to file for review. This is in part driven by digitalization—a side effect of which is the ever-growing amount of personal data held by businesses. Indeed, deals involving data, as well as critical technologies or infrastructure, are among the most scrutinized, although companies in most sectors are increasingly filing—sometimes due to concerns raised by their supply chains.

More and more, parties to transactions or investments involving US businesses with even remote ties to US national security are opting to file voluntarily in a bid to reduce uncertainty. This applies across a variety of dealmaker types, including strategics and financial investors such as private equity and sovereign wealth funds.

A tougher stance on non-notified transactions

Some of this voluntary filing is being driven by the Committee's tougher stance on examining non-notified transactions. These have stepped up since 2018, as CFIUS increased its oversight and enforcement resources. Although these enforcement measures have mainly focused on live transactions, CFIUS has also taken action against many completed deals—including ones that had closed several years previous. Those with a connection to Russia or China are a particular target, reflecting rising geopolitical tensions and security concerns between these states and the US in recent years.

Foreign jurisdictions tighten scrutiny

Added to this is the fact that other governments are taking a similarly stringent approach to foreign investment in their own countries. In Germany, the Foreign Trade and Payments Act was updated in 2020 as was the Foreign Trade and Payments Ordinance in 2021. These changes have extended rules on overseas investment and now include health-related businesses in the country's list of sensitive sectors. There have also been similar moves in the UK, Italy, Spain, Australia and New Zealand, and China has enacted new foreign investment security review measures in the past year. And while the US regime has a specific focus on national security, some other states have broadened their objectives to include areas such as economic security, and public order and safety.

The effect of reforms in the US and elsewhere is to make cross-border transactions more complex, especially where they involve multiple jurisdictions. Dealmakers need to be increasingly aware of any requirements to file transactions for review—and potentially consider voluntary notifications—and prepare accordingly.

> **"More and more, parties to transactions or investments involving US businesses with even remote ties to US national security are opting to file voluntarily in a bid to reduce uncertainty.**

Antitrust: Extended timelines and broader scope

The Federal Trade Commission is taking an increasingly stringent approach to antitrust investigations

By Rebecca Farrington and Anna Kertesz

The Federal Trade Commission (FTC) was busy in its first year under the Biden administration. Over the past year, the FTC announced several important policy and process changes that may have significant implications for US M&A, and dealmakers should be prepared for far more scrutiny around antitrust issues—and longer review periods as well.

The first shift began in February 2021 when the FTC announced a temporary suspension of the early termination process under the HSR (Hart-Scott-Rodino Antitrust Act) waiting period. While early termination was never guaranteed on any particular deal, that process allowed deals without competitive concerns to be cleared within approximately ten to 15 days. Now, all deals are subject to the initial 30-day waiting period. There is little evidence that this temporary suspension will be removed any time soon, and the practical result is that dealmakers are making their HSR filings at an earlier stage—sometimes based on letters of intent or term sheets—to kick-start the waiting period.

Warning! Warning letters

Faced with a significant rise in filings (see chart, "US merger notifications spiked to new record high in 2021"), the FTC also announced that it may send "warning letters" to companies when the FTC is unable to complete investigations within the 30-day HSR period, or even at the end of an investigation following substantial compliance with a second request.

These co-called "pre-consummation warning letters" advise merging parties that, while they can legally proceed with the transaction, they do so "at their own risk" because the FTC's investigation is ongoing. The FTC also announced that these warning letters could be sent on the basis of not just competition or consumer welfare concerns, but rather on an extended scope of issues, including where it perceives that a merger may harm workers or "honest business."

It is unclear at this stage how much risk these warning letters actually pose to closed transactions, but we are watching closely to see how substantive they prove to be and the extent to which the FTC or DOJ challenge completed mergers.

These letters have so far had little effect on deal closings, although it is possible that more cautious buyers may reconsider their involvement in a deal if it triggers a warning letter with a plausible risk of a meaningful investigation (and subject to agreement covenants).

Longer clearance periods, greater uncertainty

The FTC has also reinvigorated a policy requiring companies that have entered into a consent agreement to obtain the FTC's prior approval before pursuing a future transaction in a directly or indirectly affected market. This reverses a policy change made in 1995 and could have far-reaching implications for a company's future acquisitions. Yet the biggest impact is likely to be on divestitures because, not only would the FTC need to approve the deal, but the buyer of the business would also become subject to the 10-year prior notice and approval period. This could narrow the universe of buyers for a business, since a divestiture buyer must be willing to commit to a prior approval process for unknown, future transactions.

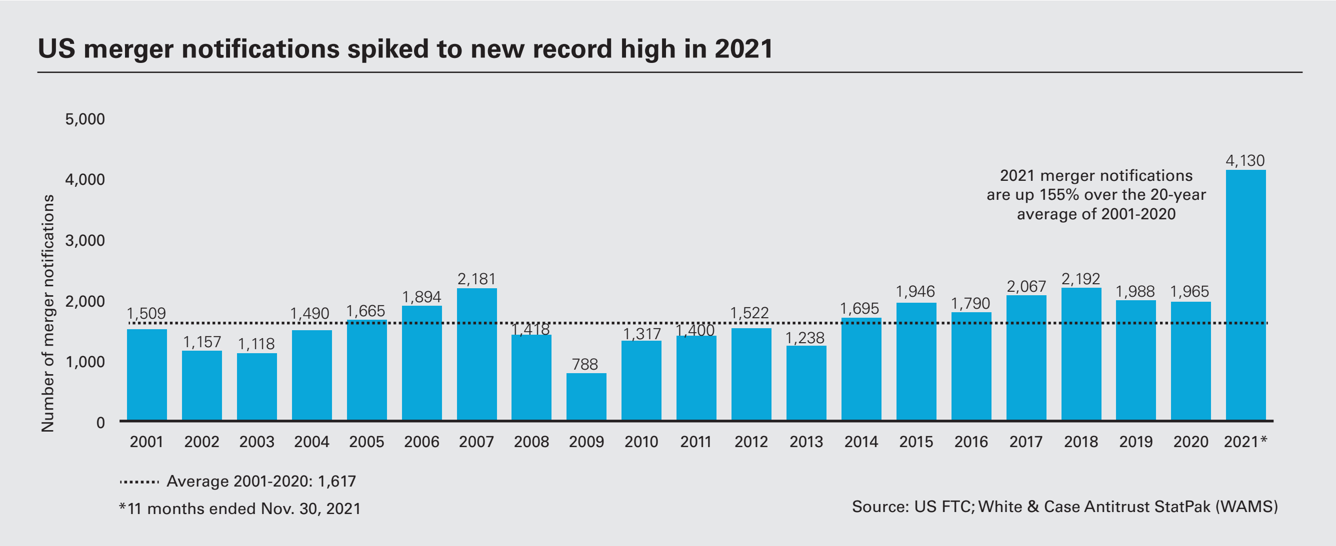
Private equity buyers in the spotlight

While a PE buyer often presents no directly competitive issues in any particular transaction, in January 2022, PE was highlighted in a joint agency public inquiry. As part of the FTC and DOJ's planned revamping of their Merger Guidelines, the internal standards by which they review the competitive effects of transactions, the agencies are polling the public to see if stronger enforcement measures against PE firms should be taken.

Underlying this inquiry, the FTC Chair has expressed a focus on "rollup plays" by PE buyers, i.e., when a firm acquires several small players to combine them later, but the initial investments are not HSR reportable, thus potentially flying under the government's radar.

DOJ signals a preference for litigation over remedies

The FTC is not the only agency signalling an aggressive enforcement stance. On January 24, 2022, the DOJ Assistant Attorney General



remarked that in most situations, the agency should seek an injunction to block the transaction, rather than negotiating a remedy with the parties to fix the issue. The Assistant AG also criticized the use of "partial divestitures" (i.e., buying less than what the agency considers a full-functioning business unit) as effective at maintaining competition.

Conclusion

Overall, the agencies' more aggressive stance on antitrust means that dealmakers will need to factor in longer timelines and the potential for agency involvement or investigations post-transaction. As recently as January 24, 2022, the FTC Chair asked Congress to consider an increase in funding, an increase in HSR filing fees, and additional time beyond the 30-day window to review deals. Further, the agency's policy changes have not so far had a major impact— if any—on M&A activity, though they may change the structure and scope of some deals. One potential future development, as a result of the 10-year prior notice and approval period, may be that parties consider a "fix-it first" option with assets carved out of a business before a transaction is filed, to limit the FTC's oversight of the transaction in its entirety. It also remains to be seen whether parties in front of the DOJ will have less success in negotiating remedies, and instead should prepare for an increased possibility of litigation.

SEC enforcement ramps up

Dealmakers should be braced for a more aggressive stance under Chair Gary Gensler

By Susan Grace, Tara Lee and Tami Stark

The appointment of Gary Gensler to Chair of the Securities and Exchange Commission (SEC) signaled a break from the Trump administration, when enforcement actions reduced overall. Since taking office, his speeches have outlined his priorities and his intention to take a tougher stance on enforcement. The fact that full-year figures published by the SEC in November show a 7 percent rise on 2020 demonstrates a more aggressive approach.

Based on his recent pronouncements, Gensler is making his mark on enforcement processes in a number of ways. One is a pivoting back toward admissions of misconduct. During the Trump years, settlements with the SEC on a "neither admit nor deny" basis were prevalent, offering defendants some protection in areas such as private litigation. However, the SEC looks likely to seek more admissions of misconduct to increase accountability, where there is a public interest for this to happen.

Another is pursuing novel or high-impact cases, with Gensler indicating he will not shy away from accusations of regulation through enforcement. An insider trading case brought in the summer of 2021, for example, expanded the misappropriation theory in a way not seen before. Under Gensler, the SEC is also seeking to shorten investigations by cutting back on Wells meetings (in which defendants can discuss their case with SEC staff) and instead focus on bringing enforcement actions. This may mean a reduction in the number of settlements reached or that defendants will need to settle on more onerous terms.

And finally, indications are that the SEC will seek much more detailed information for entities to qualify for co-operation credit. The result could be that entities and, potentially, C-suite executives shoulder responsibility for misconduct as well as the individuals investigated.

New frontiers

Gensler has also recently reiterated particular areas of focus for the SEC. One of these is SPACs, where he has outlined concerns around lower disclosure requirements than in IPOs and a lack of gatekeepers looking out for investor interests. He has also expressed concerns about the conflict of interest between, on one side, investors that do not redeem before the de-SPAC merger, and on the other, sponsors and investors who cash out or invest through the PIPE transaction. The SEC is clearly looking at the potential for misleading statements in the market as well. Those involved in SPACs will therefore need to focus heavily on disclosures and ensure that any potential conflicts of interest are transparent to investors.

ESG has also moved up on the SEC's agenda. The creation of an ESG taskforce and the announcement that the SEC will deploy data analytics to identify material gaps or misleading statements, in particular around climate disclosures, clearly illustrate the direction of travel. This will raise the due diligence bar for dealmakers looking at M&A involving a company with potential climate risks or social risks.

Crytocurrencies are also high on the SEC enforcement agenda, with concerns raised around the decentralized and anonymous nature of these digital assets. The SEC is taking the view that these fall under securities laws and it has announced a number of cases involving lending platforms and cryptocurrency exchanges in addition to those already recently investigated. Dealmakers will need to consider carefully during due diligence whether any of the target's digital assets could be deemed securities.

Lastly, while there has been a lot of press around SEC enforcement targeting private equity, the signs are that there is no significant shift away from the approach of the past few years, with potential conflicts of interest the main area for investigations.

Financing likely to continue largely as is, despite inflationary worries

Borrower-friendly terms over the past few years have helped boost M&A totals—and a number of factors suggest the financing will not change dramatically in 2022

By Brenda Dieck, Brad Laken and Jacob Schtevie

Flexible and attractively priced financing has been a driving force of the M&A market for a number of years now, a trend that even the pandemic did not reverse. Persistently low interest rates have helped keep borrowing costs low, but rising inflation has prompted concerns that the US Federal Reserve may undertake measures to tighten monetary policy on a faster basis than previously projected.

The US consumer price index rose by 7.0 percent in 2021—the largest annual increase since 1982—with many sectors, including gas, food and shelter, registering substantial jumps. Even before the release of these figures, the Fed had already indicated that it would accelerate the tapering process for its quantitative easing program and that interest rates may rise sooner than it had anticipated earlier in the year.

Despite those headwinds, we see a number of factors that should underpin a continued robust finance market for M&A dealmaking. Although consumer price inflation is at a four-decade high, there remain reasons to believe it is unlikely to continue at this pace through 2022. For one, US savings rates are trending down (they were 7.3 percent in October 2021, substantially lower than the 10.6 percent seen in July 2021), which suggests that wage inflation should stem as people feel pressure to return to the labor market.

There are also significant structural factors that will continue to drive strong deal lending volumes. Globally, private debt funds were sitting on US$364 billion of dry powder as of July 2021, according to Preqin figures, and the number of funds continues to increase—there were more than 651 funds in the market, targeting US$295 billion, more than double the totals seen in January 2017. Coupled with the firepower of private equity, this will lead to enduring high levels of competition for deals, which should keep pricing and terms competitive. Additionally, private equity sponsors' continued focus on buy-and-build transactions to generate value will likely translate into a continuation of strong demand for incremental debt to finance the growth of existing platforms.

While higher inflation and burgeoning labor costs may yet put pressure on borrowers' balance sheets, sponsor-backed businesses have generally thus far been successful in passing these costs on to customers. Another mitigating factor is that we are now seeing longer maturities on financing arrangements, as borrowers seek to lock in attractive terms and pricing—three- to five-year tenors are now being pushed to up to six or even seven years.

Overall, we are cautiously optimistic that—absent a major shock—the financing market will continue to be highly active, at least through H1 2022 and possibly beyond.

Good security practices for data and networks are essential to M&A success

With data privacy laws tightening and cyberattacks on the rise, due diligence of technology networks and data processes should be a top priority for dealmakers

By F. Paul Pittman and Mark Williams

May 2021 saw one of the most high-profile cyberattacks in US history, as ransomware infected the technology systems supporting the southeastern Colonial Pipeline, which primarily carries gasoline and jet fuel. The pipeline was shut down, disrupting supplies, as the attackers demanded US$4 million in ransom. Among the many organizations that have fallen prey to cyberattacks is the Washington, DC Metropolitan Police Department. Cyberattacks like these are increasing in frequency as companies and governments further digitalize their operations.

The prevalence of cyberattacks clearly has a knock-on effect for dealmakers. Regulators are increasingly requiring companies to disclose cybersecurity risks. The SEC has released guidance that identifies processes companies should have in place and disclosures they should make regarding data, cybersecurity and security breaches. US lawmakers are taking steps to vest consumers with rights relating to their personal data, similar to those provided by Europe's GDPR, by passing new data privacy laws.

Regulatory and compliance risks associated with cybersecurity and data has clearly increased. In response, insurers are paying more attention to this area in deals, both from a regulatory and an operational perspective. In some instances, insurers have denied representations and warranties coverage in situations where they believe that a company's systems and procedures are not robust enough or where they perceive insufficient due diligence on a company's data and cybersecurity risks.

Assessing resilience and compliance

All these factors mean that, for every target, dealmakers are increasingly having to conduct in-depth analyses of resilience and readiness for a cyberattack, including across the supply chain. This requires reviewing the target's privacy and cybersecurity processes to understand where its data lies, and how such data is accessed, used and shared—as well as examining the company's networks to identify potential vulnerabilities or even whether an attacker is already there.

Dealmakers must also conduct analysis to ensure targets are in compliance with regulatory requirements on data privacy. This is becoming increasingly complex. US data privacy regulation remains highly fragmented, with separate laws encompassing a number of verticals at the federal level, such as on healthcare, financial services and consumer protection—plus laws coming into force in 2023 in a number of states, including in California, Virginia and Colorado.

Many other states have new laws pending. Those conducting M&A transactions or entering the capital markets will therefore need to start conducting compliance reviews on a state-by-state basis where applicable.

To help mitigate some of these risks, buyers are increasingly seeking representations from sellers that they have implemented adequate data privacy and cybersecurity processes and assessed technology networks, or building into the documentation a full review and implementation post-deal within a specified time. Buyers should also start to consider the risks posed by data privacy considerations and cyberattacks as material because breaches can occur at any time. We are even seeing cyberattacks happen during live deals, the effect of which can significantly delay or even completely derail transactions.

> "
> **For every target, dealmakers are increasingly having to conduct in-depth analyses of resilience and readiness for a cyberattack, including across the supply chain**

Notable decisions from Delaware courts

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

By James Hu and Dan Kessler

***Bardy Diagnostics*: Chancery confirms high bar for material adverse effect**

The Delaware Court of Chancery was once again required to determine whether a potential buyer should be relieved of its obligation to acquire a target business due to the alleged occurrence of a "Material Adverse Effect." In *Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*, the Court found that, despite the approximately 86 percent decline in the reimbursement rate for the sole product manufactured and marketed by Bardy Diagnostics, an MAE had not occurred and ordered Hill-Rom to close on its acquisition of Bardy.

While acknowledging the magnitude of the rate change (comparing it to a Mike Tyson uppercut), the Court found that Hill-Rom failed to prove the "durational significance" of the rate change—a critical element in establishing an MAE. The Court found that Hill-Rom failed to prove that the lower rate would endure for a commercially reasonable period and failed to prove that the lower rate would not be meaningfully revised upwards. In particular, the Court noted that it was insufficient to show that the lower rate might be durationally significant, as "a mere risk of an MAE cannot be enough (citing *Akorn*)."

While the Court's analysis could have ended there, it went on to determine whether carve-outs to the MAE definition applied. The Court found that the MAE carve-out for changes in law, which expressly included any healthcare law as well as any regulation or rule, "squarely encompasses" changes in Medicare reimbursement rates. Therefore, even if the rate change had been found to be an MAE, the carve-out would have excluded it. Finally, the Court determined that the exception to the MAE carve-out for matters with "materially disproportionate impact" did not apply. The Court focused on the precise wording of the disproportionate impact exception, which required comparison to "similarly situated companies operating in the same industries or locations." Describing this as a "narrower, more target-friendly exclusion to the MAE carve-outs," the Court found only one other similarly situated company, and determined that Bardy was not disproportionately impacted.

Bardy Diagnostics confirms the difficult task buyers face when attempting to avoid closing due to an alleged MAE. It also highlights the importance of carefully attempting to negotiate carve-outs to the MAE definition to ensure that they allocate risks as the parties intend.

***Online Healthnow*: Fraud claims survive despite contractual limitations**

The Delaware Court of Chancery failed to dismiss fraud claims made by Bertelsmann, Inc. in connection with its 2018 acquisition of continuing education company OnCourse Learning. Bertelsmann alleged fraud with respect to representations and warranties in the SPA regarding OnCourse Learning's sales and use tax liability. The defendants argued that the SPA's survival clause (which expressly provided that the representations and warranties terminated upon closing) extinguished all claims (including fraud claims) when the deal closed. In addition, defendants argued that the seller's parent entity was protected by the SPA's non-recourse provision, which provided that claims under the SPA may be asserted only against parties to the SPA.

The Court of Chancery disagreed, citing *Abry Partners* for the notion that "fraud vitiates everything it touches." The Court held that when "an agreement purports to limit liability for a lie made within the contract itself, and parties know of the lie, such parties cannot skirt liability through contractual limits within the very contract they procured by fraud." The Court found that the plaintiffs affirmatively pled that tax information was actively withheld from Bertelsmann's data room, and then false representations were purposefully inserted into the SPA regarding these same tax liabilities. The Court questioned a prior Chancery Court decision (*Sterling*) which defendants argued stood for the proposition that parties may agree contractually to shorten the limitations period for fraud claims without violating Delaware public policy, provided there is a reasonable opportunity to discover the potential misrepresentations. In any event, the Court found that such reasonableness determination was not appropriate

for resolution on the pleadings. On this basis, the Court held that, at this motion to dismiss phase, the SPA's survival clause does not defeat the plaintiffs' fraud claims. As for the non-recourse provision, the Court found that the plaintiffs pled that the seller's parent entity did, in fact, know of and facilitate the fraudulent misrepresentations in the SPA, and therefore could not invoke the non-recourse provision to avoid liability.

Online Healthnow is an example of the balancing act Delaware courts must undertake when express contractual limitations of liability are confronted with viable allegations of fraud within the same contract and stands for the Delaware courts' view that a contractual disclaimer (in the form of a non-recourse provision) does not vitiate a fraud claim against a non-party if a fraudulent statement is made within the four corners of the purchase agreement.

Manti Holdings: Supreme Court upholds contractual waiver of appraisal rights

The Delaware Supreme Court affirmed a prior Chancery Court decision upholding a contractual waiver of appraisal rights. The case involved the 2017 acquisition of Authentix Acquisition Company, Inc. Cash from the transaction, which was structured as a merger, was distributed to stockholders pursuant to a waterfall provision. A group of common stockholders filed a petition for appraisal in the Court of Chancery under Section 262 of the Delaware General Corporation Law. Authentix moved to dismiss the petition, arguing that the petitioners had waived their appraisal rights under a stockholders' agreement that bound the corporation and all of its stockholders. The Court of Chancery granted the motion to dismiss, holding that the petitioners had agreed to a clear provision requiring that they "refrain" from exercising their appraisal rights with respect to the merger.

The Supreme Court affirmed the Chancery Court's decision. The Supreme Court first affirmed that petitioners had agreed to a clear waiver of their appraisal rights. In particular, while the stockholders' agreement's termination provision did not contain a savings clause expressly providing for the refrain obligations to survive a company sale, the Supreme Court agreed with the Chancery Court's finding that the refrain obligation imposed a clear post-termination duty on the petitioners to refrain from exercising their appraisal rights. However, the fact that this was even in dispute serves as a reminder to ensure that any obligations expected to be enforced following a sale should be specifically addressed in the termination provision.

The Supreme Court went on to address what it called the "real crux" of the petitioners' argument—that appraisal rights are core characteristics of the corporate entity that provide basic protections to investors and as such they cannot be waived—at least ex ante ("before the event")—under a bilateral agreement. While the Supreme Court acknowledged that the availability of appraisal rights might theoretically discourage attempts to pay minority stockholders less than fair value, it was "unconvinced that appraisal claims play a sufficiently important role in regulating the balance of power between corporate constituencies to forbid sophisticated and informed stockholders from freely agreeing to an ex ante waiver of their appraisal rights under a stockholders' agreement in exchange for consideration". The Supreme Court also noted that Section 262(g) provides a de minimis exception from appraisal rights for stockholders of publicly traded corporations. According to the Supreme Court, "[i]f appraisal rights are sacrosanct to the corporate form, it would make little sense for the General Assembly to adopt this exception. The Supreme Court also noted that the petitioners' position would also cast doubt on whether drag-along rights are enforceable, as they often require stockholders to vote in favor of a merger, which would result in a forfeiture of an appraisal claim. Importantly, the Supreme Court emphasized the particular facts of this case, noting that "this case is about whether 'sophisticated and informed parties, represented by counsel and with the benefit of bargaining power', can freely agree to alienate their appraisal rights ex ante in exchange for valuable consideration. The answer to that question is yes."

Of note, Justice Karen L. Valihura dissented from the Supreme Court's ruling, finding that the waiver was not sufficiently unambiguous and unequivocal. And even if it was, she would hold that such a term goes to the heart of corporate governance and can only be contained in a corporate charter, not a bylaw or stockholders' agreement. And even if it had been contained in a charter amendment, she would hold that such an amendment contravenes the DGCL and cannot be valid without authorization from the General Assembly.

While *Manti Holdings* provides comfort that contractual waivers of appraisal right will generally be respected, practitioners are wise to evaluate the circumstances under which such waivers are obtained, particularly with respect to less sophisticated and informed parties.

AB Stable: Supreme Court highlights importance of ordinary course covenants

The Delaware Supreme Court upheld the 2020 Delaware Court of Chancery decision to allow MAPS Hotels and Resorts One LLC ("MAPS"), a subsidiary of Mirae Asset Financial Group, to terminate its September 2019 agreement to purchase Strategic Hotels & Resorts LLC ("Strategic") from AB Stable, a subsidiary of Anbang Insurance Group ("AB Stable"). While the Court of Chancery found that the business of Strategic and its subsidiaries did not suffer a "Material Adverse Effect" as defined in the sale agreement, it concluded that MAPS could terminate the sale agreement because AB Stable breached a covenant and a condition in the sale agreement.

First, according to the Court of Chancery, AB Stable violated the ordinary course covenant by failing to operate in the ordinary course of its business (closing hotels, laying off or furloughing thousands of employees, and implementing other drastic changes to its business) without MAPS' consent. Second, a condition requiring title insurance for the hotel properties failed because the title insurers' commitment letters had a broad exception covering fraudulent deeds, and MAPS did not cause the failure.

On appeal, AB Stable argued that it satisfied the ordinary course covenant because the covenant did not preclude it from taking reasonable, industry-standard steps in response to the pandemic. In addition, AB Stable argued that the Court of Chancery's ruling negated the parties' allocation of pandemic risk to the buyer through the Material Adverse Effect provision and its breach of the notice requirement in the covenant was immaterial. AB Stable also claimed that the Court of Chancery gave too expansive a reading to the exception in the title insurance condition, or, alternatively, that the court incorrectly found that MAPS did not contribute materially to its breach.

The Supreme Court affirmed the Court of Chancery's 2020 decision, finding that the Court of Chancery concluded correctly that AB Stable's drastic changes to its hotel operations in response to the COVID-19 pandemic without first obtaining MAPS consent breached the ordinary course covenant and excused MAPS from closing. The Supreme Court noted that the parties "did not choose the actions of industry participants as the yardstick" and the Court of Chancery therefore correctly ruled that compliance is measured by AB Stable's operational history. The Supreme Court also noted that the ordinary course covenant did not contain a reasonableness qualifier, while the parties included such qualifiers elsewhere in the agreement. Because the failure to comply with the ordinary course covenant was dispositive of the appeal, the Supreme Court did not reach whether the title insurance condition was breached.

AB Stable serves as a reminder that parties must carefully consider what can happen between signing and closing of an acquisition agreement and, to the extent appropriate, build flexibility into the agreement to both maintain the target business and maintain the bargain between the parties.

What's in store for 2022?

Five factors that will shape dealmaking over the coming 12 months

By Michael Deyong, Germaine Nicole Gurr, Luke E. Laumann and Gregory Pryor

Last year will be a very tough act to follow. M&A values and volumes soared on the back of confident public markets, strong deal financing options and a private equity industry flush with cash.

What follows are five key trends that will shape the direction of 2022.

1

Regulation lengthens deal processes

Regulatory scrutiny has so far failed to dampen M&A appetite, and we expect that to continue to be the case. However, it may slow down the progress of some deals. The M&A process has become more complex over the past year, as antitrust policy changes have extended the FTC's scope and timelines, the SEC has focused increasingly on enforcement actions and CFIUS has brought in additional resources to scrutinize deals involving overseas parties.

A more aggressive regulatory regime requires dealmakers to understand early on where there may be regulatory hurdles to clear. Dealmakers may need to potentially pre-empt these with filings at the terms sheet stage—and in the case of cross-border deals, consider the appropriateness of voluntary filings.

2

Interest rates start creeping up

Unprecedented stimulus packages put in place to counter the economic effects of the pandemic, plus a strong rebound in demand and supply chain issues, have all resulted in steep price increases, with inflation hitting levels not seen for decades. While this could be a temporary phenomenon caused by the release of pent-up demand accumulated during lockdowns, the pace of increase has caught some by surprise. Indeed, the Federal Reserve has already indicated that it is sharply reducing its monthly bond purchases. Its next move is likely to be on interest rates, with as many as three rises forecasted for 2022.

This clearly has an impact on the cost of deal financing and, depending on the pace and scale of interest rate rises, it may decelerate the M&A market somewhat. However, with interest rates very low by historical standards and significant dry powder among private equity funds, we expect the impact on deal flow to be relatively small, at least through 2022.

3

Energy transition drives deals

In the same way that digitalization has boosted technology M&A, the increased urgency around energy transition will create ever more opportunities for dealmakers in 2022. President Biden's US$1 trillion-plus infrastructure package prioritizes clean energy investment, and societal shifts are encouraging businesses to consider their role in mitigating or preventing climate change.

As a result, M&A involving liquefied natural gas assets and electric vehicle-related companies has already picked up. We anticipate that this will happen across the broader energy and infrastructure sectors, and we expect to see interest in clean tech increase significantly among investors and acquirers.

4

De-SPAC mergers will continue

After a record-breaking run for SPAC IPOs in 2021 (albeit at a more moderate pace from Q2 onwards), the race is on for sponsors to find attractive public-ready targets.

With a typical two-year period within which to find deals, competition for the best companies will be fierce, and we may see more sectors targeted beyond the white-hot technology and healthcare spaces.

De-SPACs could also provide a strong exit route for private equity and venture capital firms, and we may start to see triple-track sales processes that run the IPO, de-SPAC and M&A options alongside each other.

Yet, given the competition for deals, as we move toward the end of 2022, it is also likely that we will start to see some liquidations of SPACs that raised funds in H2 2020. That could usher in a welcome flight to quality in the SPAC market, with investors backing only experienced and high-quality sponsors. Increased regulatory scrutiny is also likely to raise the quality bar.

5

The possibility of a stock market correction looms large

It's a near certainty that the markets will correct at some point, but it's impossible to know when. New record highs were set in 2021, continuing a long-term upward trajectory that was interrupted relatively briefly by the precipitous fall and dramatic recovery following the global outbreak of COVID-19 in 2020. There was some volatility in the third quarter of the year, but 2021 closed well above 2020, even as COVID-19 figures ticked upwards through December. Dealmakers will be watching closely for signs of a change in direction. Some might be particularly eager to act before markets turn, while others may be more wary of pursuing deals if they expect a significant change in the short term. But every dealmaker knows that what goes up must come down, at some point and to some extent—and the maxim's urgency will only intensify the longer markets maintain their highs.

There are clearly some risks on the horizon—inflation, interest rate rises and the potential for a stock market correction. There is also the possibility of further lockdowns as new COVID-19 variants emerge, with the rapid spread of the Omicron variant at the end of 2021 a sign of how new strains can sow chaos even in highly vaccinated countries. However, these risks are baked into many deals and the market has shown that stay-at-home orders have had little effect on dealmaking appetite. There is also increasing optimism that the Omicron variant may signal the beginning of the end of the pandemic. As a result, we believe that conditions remain in place for continued high dealmaking activity, at least for the first half of the year and potentially well beyond.

> **Every dealmaker knows that what goes up must come down, at some point and to some extent**

Global

John M. Reiss
Partner, New York
T +1 212 819 8247
E jreiss@whitecase.com

Americas

Michael Deyong
Partner, New York
T +1 212 819 2577
E michael.deyong@whitecase.com

Chang-Do Gong
Partner, New York
T +1 212 819 7808
E cgong@whitecase.com

Germaine Gurr
Partner, New York
T +1 212 819 7611
E ggurr@whitecase.com

Arlene Hahn
Partner, New York
T +1 212 819 8506
E ahahn@whitecase.com

Luke E. Laumann
Partner, New York
T +1 212 819 8451
E llaumann@whitecase.com

Gregory Pryor
Partner, New York
T +1 212 819 8389
E gpryor@whitecase.com

Tali Sealman
Partner, Silicon Valley
T +1 650 213 0315
E tali.sealman@whitecase.com

EMEA

Thierry Bosly
Partner, Brussels
T +32 2 239 25 09
E tbosly@whitecase.com

Philip Broke
Partner, London
T +44 20 7532 2110
E pbroke@whitecase.com

Darragh Byrne
Partner, Frankfurt, Stockholm
T +49 69 29994 1433
E dbyrne@whitecase.com

James Dodsworth
Partner, London
T +44 20 7532 2101
E jdodsworth@whitecase.com

Nathalie Nègre-Eveillard
Partner, Paris
T +33 1 55 04 15 63
E nnegre@whitecase.com

Asia-Pacific

Jonathan Olier
Partner, Singapore
T +65 6347 1317
E jolier@whitecase.com

Vivian Tsoi
Partner, Shanghai
T +86 21 6132 5930
E vtsoi@whitecase.com

Jun Usami
Partner, Tokyo
T +81 3 6384 3272
E jusami@whitecase.com

Daniel Yeh
Partner, Hong Kong
T +852 2822 8786
E dyeh@whitecase.com

Other M&A resources

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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

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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
FIRRMA TOOL

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

whitecase.com/cfius-firrma-tool

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Published in association with Mergermarket

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For more information, please contact:

Nadine Warsop
Publisher, Acuris Studios, an Acuris company

Tel: +44 20 3741 1370