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USA

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Overview

The year 2022 started strong but proved to be a mixed year for M&A in what could be described as a return to earth after the record-setting year that was 2021. The U.S. M&A market alone exceeded $2 trillion in 2021 – a staggering figure that crushed (by nearly 30%) the then-existing record established in 2015. And while 2021's M&A volume was spectacular, its exponentially increasing valuations, rising stock prices, low interest rates, and post-pandemic economic recovery turned into rising interest rates, war in Ukraine, inflation, tax law changes, equity market volatility, and regulatory scrutiny in 2022, combining to slow the M&A market in the same year, particularly the second half, with the U.S. being no exception.

Taking stock, 8,468 M&A deals were announced in the U.S. in 2022, worth approximately $1.6 trillion in the aggregate. Those totals represent close to a 10% decline in aggregate deal volume and a 38% decline in aggregate deal value compared to 2021's blockbuster year. But perhaps it is not fair to compare 2022 solely to the record year that was 2021. If 2021 figures were removed, 2022 would have been a record year for U.S. deal volume; however, the global market produced its fourth-lowest deal volume since 2010.

Domestic M&A market volume was, as has been the trend in recent years, aided by a large number of "mega-deals" early in the first half of 2022, particularly in the technology sector, including two deals valued in excess of $65 billion each: Microsoft Corporation's $69 billion bid to merge with leading videogame developer Activision Blizzard, Inc., announced in January 2022 (we note that this transaction has not closed as of the date of publication of this chapter, as regulators in both the U.S. and U.K are seeking to block the deal; this development is further discussed below); and Broadcom Inc.'s $71.6 billion offer for renowned cloud-computing and virtualisation technology company VMWare, Inc., announced in May 2022. Megadeals continued after May 2022, but not at the same pace or volume: Johnson & Johnson's nearly $17 billion offer for medtech company Abiomed; Amgen, Inc.'s purchase of Horizon Pharma plc for approximately $27.8 billion; and General Electric's purchase of a majority of GE HealthCare Technologies, Inc. for approximately $22 billion. Large-cap deals, such as the above, accounted for approximately 40% of the overall value of M&A activity in 2022 – a figure largely in line with 2021. However, the average U.S. deal size in 2022 decreased by 29% from 2021, and from $122.4 million in 2021 to $86.4 million in 2022. The number of transactions in excess of $1 billion involving U.S. companies fell by 52% in 2022, from 594 such deals in 2021 to 288 in 2022, and total deal value decreased by 43%. Further, M&A levels continued to fall throughout 2022, each quarter showing a decline in deal volume and value from the prior quarter. Small and mid-sized transactions made up for some of the decrease, but not all.

The number of cross-border deals in North America in 2022 was down by 21.3% from 2021, the greatest decrease of all global regions. Overall, inbound investment in the United States witnessed a 38% decline in total deal value compared to 2021. Macroeconomic deceleration and geopolitical tension both played a role.

Many have described 2022 M&A activity as a tale of two halves. It is not a stretch to say the halving began on June 16, 2022, when the U.S. Federal Reserve Bank began increasing interest rates. Alarming inflation figures across global markets driven largely by ongoing supply chain issues, coupled with increased demand and labour shortages, led other central banks around the world to aggressively raise interest rates. These rate changes, combined with the uncertainty of a potentially looming U.S. and global recession, put a chill on deal activity. Between the first and second halves of 2022, deal volume fell approximately 40%, and the number of deals declined by almost 34%. Deal multiples declined as the Federal Reserve's higher discount rates caused targets to prioritise near-term cash flow over long-term growth and sustainability. The result went from record high M&A multiples in 2021 to 10-year record lows in 2022. To be precise, the median deal multiple for enterprise value to earnings before interest, taxes, depreciation, and amortisation (EBIDTA) for announced strategic deals (including corporate M&A and private equity portfolio add-ons) was 15.4 in 2021 and fell to 11.9 in 2022. Data showed that high-growth industries, such as energy, software, healthcare, and life sciences, experienced the brunt of the decline, with each having fallen by more than five turns. These drops corresponded with drops in public company market capitalisations generally. For instance, the S&P 500 was down approximately 20% in 2022, and the Nasdaq 100, which is concentrated in technology, was down 32% for the year.

In 2022, the U.S. regulatory environment reflected the global trend of increased scrutiny on antitrust and national security grounds. The Biden administration adopted a more expansive definition of "anticompetitive" and became more likely to challenge consolidation deals in court. A prime example was the October 2022 decision by the U.S. District Court for the District of Columbia, siding with the Department of Justice (DOJ) in its civil antitrust lawsuit that blocked Penguin Random House's $2 billion plus acquisition of Simon & Schuster. Another regulatory roadblock to M&A activity was the U.S. Federal Trade Commission's (FTC) move toward more aggressive enforcement policies. In 2022, the FTC issued a new policy statement concerning unfair methods of competition, setting out a new framework that adopted a broader view of its authority under the federal statute that establishes the FTC. In a move that would align the FTC more with the stance toward restrictive covenants seen in some of the more progressive U.S. states, the FTC proposed a general ban on non-competition agreements for employees as an unfair method of competition. While not yet in place, the proposed rulemaking exemplifies the FTC's recent impact on M&A. The FTC was active in merger challenges in 2022, with a heavy focus on vertical and nascent competition theories in the digital platforms and life sciences spaces. This comes with the backdrop that dealmakers are currently waiting for an update on the proposed new merger guidelines being developed jointly by the DOJ and the FTC, affecting market confidence negatively.

Industry sector focus

The industry sector mix in 2022 was not unlike 2021, with the top five sectors in deal value and volume remaining largely unchanged, although the underlying values and volumes saw a steady decrease. In 2022, healthcare and life sciences led the charge on large deals, but technology remained the top sector by deal value and volume metrics, with $612.6 billion

of aggregate value across 2,589 deals; however, those figures represented a 40% and 11% decline, respectively, from technology deals in 2022. Second in both deal value and volume metrics were pharmaceutical, medical, and biotech deals, with $254.7 billion of aggregate value across 1,187 deals, a drop in aggregate deal value of 20% from 2021; deal volume, however, only dropped 2% from 2021, highlighting the trend to lower value deals in 2022. The third leading sector for U.S. deal volume was business services, with 1,116 transactions. The third leading sector for U.S. deal value, however, was industrials and chemicals, with $146.3 billion in aggregate deal value across a total of 1,060 deals – a 50% decline in deal value and 20% decline in deal volume compared to 2021.

Secondaries trends

A depressed M&A and capital markets environment, as well as the "denominator effect", has led to increased interest in alternative exit structures, particularly in secondaries transactions.

Historically, the private secondaries market has been dominated by limited partner secondaries transactions, where a limited partner in a private, closed-end investment fund sells its interest in the fund to a third party. In these transactions, limited partners were able to obtain liquidity in one or more of their fund investments before the end of the fund term, with the buyer of the interests taking over the limited partner's remaining capital commitment obligations. The buyers found these transactions attractive because they gave the buyers indirect access to a known set of portfolio companies of a fund before the technical end of the fund life, and since the positions were private and non-controlled, the interests traded at a relative discount.

Attention to the secondaries market has increased significantly in recent years. Fundraising for these transactions reached 33 funds, totalling $20 billion in commitments, in 2006. While fundraising peaked in 2020 at 85 vehicles raising over $100 billion, fundraising remains at solid historical levels, with $54 billion raised across 92 funds in 2021, and approximately $45 billion raised by 88 funds in 2022. Despite the drop in fundraising, aggregate secondaries transaction value significantly increased from $60 billion in 2020 to $134 billion in 2021 and $111 billion in 2022. In 2022, secondaries investors continued to prioritise investments in the United States, with transaction volume originating from domestic funds accounting for almost two-thirds of general partner transaction volume, as well as parties anticipating a record level of secondaries transactions in 2023.

Traditionally, the buyer of the limited partner's interest in a secondary transaction fell into two camps – another limited partner of the same fund or a private fund dedicated to secondaries. In the great financial crisis, however, a shift occurred. Funds nearing the end of their term had a decision to make – sell in the face of difficult market dynamics or seek structures that provided more time to shore up a company or wait for market multiples to return to more favourable levels. Extension of fund terms often requires the consent of the limited partners or limited partner committees, which could alienate relationships between the manager and the limited partners.

One structure that fund managers implemented in order to address these concerns was the sale of one or more assets in a manager's older vintage fund to the manager's current fund. That structure, however, presented similar and additional issues to the extension of a fund's life – it presented significant conflict of interest concerns, which again required the consent of limited partners or their committees.

As a result, a more recent structure that arose out of this dilemma was the general partner-led secondaries fund, commonly known as a continuation fund. In this transaction, the

buyer group may consist of some combination of new investors and existing limited partners, led by the general partner itself. That group then forms the continuation fund, which acquires one or more assets of the fund in which the selling limited partners are investors. Participation in the sale is optional in that it allows the limited partners to either sell outright, continue their interest into the new fund, or continue and increase their interest in the new fund. The optionality helps reduce the acuteness of conflict issues and increases the ease of obtaining limited partner consent to the transaction. It also allows the general partner to offer liquidity to its limited partners with respect to high-performing portfolio companies, and since the structure is typically positioned on a concentrated set of portfolio companies with a shorter hold period, limited partners with great conviction can continue to hold their investment for a reasonably manageable period. In response to this growing trend, in February 2022, the Securities and Exchange Commission (SEC) proposed new rules under the Investment Advisors Act that would require advisors to obtain fairness opinions in transactions where fund investors have the option to either sell their interests or exchange them for interests in a continuation fund.

The benefits of the continuation fund model brought about its increasing use over the last 10 years. In 2012, general partner-led secondaries sales represented a mere 7% of all secondaries transactions by volume. In contrast, by 2020, they measured 58% of all secondaries transactions – the first time that general partner-led transactions overtook the volume of limited partner-led transactions. That number dipped to 43% in 2022, but the figure is still viewed as an upward trend since the decline has been attributed to market-specific conditions of the measurement year, such as differing price expectations between buyers and sellers and the substantial deployment of capital in 2021.

As a result, continuation funds have become firmly planted as one of the private equity industry's main methods of providing liquidity, alongside M&A and initial public offerings (IPOs). Single asset continuation funds comprised approximately 40% of alternative exit transactions deployed in 2022, while multiple asset continuation funds accounted for 34% of that capital, with the remaining alternative exit transactions – *e.g.*, tender offers, strip sales, and preferred equity investments – taking up the balance.

Shareholder activism

A volatile stock market, tighter credit markets, reduced M&A volume, and overall economic uncertainty contributed to a busy 2022 for shareholder activism. The year 2022 saw 235 activist campaigns launched – a 36% increase over 2021 – representing the highest number of campaigns since 2018, while targeting companies of all sizes across a variety of industries.

A record 55 first-time activists initiated campaigns in 2022, besting the 48 new activists in 2018. Given significant drops in valuations, the technology, media, and telecom sectors were the most heavily targeted, with 21% of all activity, followed by industrials, financial institutions, retail and consumer, energy, and healthcare. Continuing a trend developing over several years, large-cap companies accounted for 18% of activist targets in 2022 – a new record. Large companies that attracted activist activity included Huntsman, Kohl's, News Corp, Alphabet, Meta, and Salesforce.

Activists continued to focus on environmental, social, and governance (ESG) campaigns, as well as campaigns seeking divestitures and spin-offs. However, the holy grail for activists continued to be board seats. Activists won 108 board seats in 2022, a 21% increase over 2021. The impact of the SEC's universal proxy rules was muted in 2022, as the new rules only took effect for meetings held after August 31, 2022. The rules required the use of

universal proxy cards in contested director elections, other than for business development companies and investment companies to level the playing field for shareholders by making proxy contests easier and more affordable, while allowing shareholders to mix and match between company and activist nominees. Settlement, however, remained the preferred approach to obtaining board seats. Of the 108 board seats won by activists in 2022, the vast majority were reached on a consensual basis, indicating that most companies preferred to concede board seats to activist investors rather than engaging in costly and protracted battles that occur in the public spotlight. Settlements also spared companies from potentially losing proxy contests, which could indicate a loss in confidence by shareholders in management and/or the board.

SPACs

The robust level of M&A activity involving special purpose acquisition companies (SPACs) in 2021 contributed to significant overall deal flow. However, the volume of M&A activity by SPACs dropped precipitously in 2022, both in terms of number of transactions (187 in 2022 compared to 265 in 2021) and deal value ($8.9 billion in 2022 compared to $39.2 billion in 2021). Similarly, the pipeline for new SPACs declined (86 SPAC IPOs in 2022, raising $13.4 billion compared to 610 SPAC IPOs in 2021, raising $160.8 billion). These drops resulted from various factors, including enhanced scrutiny by lawmakers and regulators and new March 2022 SEC-proposed rules designed to bolster investor protections. Although the new rules did not go into effect in 2022, they created a chill in the markets, causing several investment banks, including Goldman Sachs, JPMorgan, Citigroup, and Bank of America, to withdraw or curtail work on transactions involving SPACs. The proposed rules would, among other things: (1) require new disclosures in de-SPAC transactions, including whether the SPAC reasonably believes that the de-SPAC transaction and any related financing are fair or unfair to investors and whether the SPAC has obtained any outside opinion relating to the fairness of the transaction; (2) subject a target company in a de-SPAC transaction to liability under Section 11 of the U.S. Securities Act of 1933; and (3) deem underwriters of securities in a SPAC IPO, which also take steps to facilitate, finance, or otherwise participate in a de-SPAC transaction, to be underwriters in such subsequent de-SPAC transaction, subjecting the underwriters to liability under Section 11 of the Securities Act of 1933.

Case law developments

There have been significant decisions in 2022 originating out of the Delaware courts that are of particular interest to the M&A legal community. The cases discussed below address: the ability of parties in M&A transactions to "sandbag"; liquidity needs resulting in unique benefits to a controlling stockholder; *de facto* managers of limited liability companies; and the scope of restrictive covenants. There may be developments relating to these cases arising after the time of writing on May 31, 2023.

Delaware Chancery Court endorses sandbagging

In March 2022, the Delaware Chancery Court explicitly stated that Delaware is a pro-sandbagging jurisdiction. In *Arwood v. AW Site Services*, AW Services (AWS), the buyer of Arwood's waste management business, claimed breach of certain of Arwood's representations and warranties relating to Arwood's financial condition, even though AWS had virtually full access to Arwood's books and records. As is fairly common in acquisition agreements, the contract was silent about the parties' ability to sandbag, meaning the ability to bring a claim for breach despite having knowledge of the breach prior to closing.

After establishing that Delaware permits sandbagging in a situation where a contract is silent on the issue, the court stated that a sandbagging defence to a breach of contract claim would only be viable where a buyer knew a seller's representation to be false, as opposed to where a buyer should have known it was false. The court attributed this view to the fact that Delaware allows parties the right to allocate risk, enter into good and bad contracts, and the court's propensity to enforce those contracts.

It is important to note that the Delaware Supreme Court has not yet ruled on this issue, thus creating some uncertainty if a sandbagging case were to be heard by the Delaware Supreme Court. It is also important to note that other jurisdictions, most notably New York, do not allow sandbagging if a party discloses a breach to the other party prior to closing, and the contract is silent on the issue. Parties therefore need to be cognizant of the governing law of contracts when deciding whether to explicitly address the ability to sandbag or to stay silent on the issue.

Controlling stockholder may derive unique benefit based on liquidity need

Delaware courts have generally found that a controlling shareholder receiving the same consideration in a transaction as other shareholders is not deriving a unique benefit, thus providing for business judgment as the judicial standard of review. In *Manti Holdings, LLC v. The Carlyle Group Inc.*, however, the Delaware Chancery Court applied the entire fairness standard of review and found that Carlyle, as a controlling stockholder, may have derived a unique benefit by obtaining a timely opportunity to return funds to its investors.

The transaction involved the sale of Authentix Acquisition Company, Inc., which was controlled by Carlyle, to Blue Water Energy. Carlyle was in the process of closing an associated fund and sought to return funds to its investors. The plaintiff stockholders sued Carlyle for breach of fiduciary duties, which Carlyle attempted to dismiss. The court denied the motion to dismiss by determining that Carlyle derived a unique benefit because it held preferred stock in Authentix and thus received priority in payment and that the sale would allow Carlyle to satisfy its liquidity needs.

Although the case only involved a ruling on a motion to dismiss, controlling stockholders should focus not only on the consideration being received in a transaction, but also whether the circumstances of the controlling stockholder warrant some type of unique benefit, thus resulting in entire fairness as the judicial standard of review.

Managers of Delaware limited liability companies need not be named as such

Section 18-109(a) of the Delaware Limited Liability Company Act provides that, for purposes of service of process, a manager of a limited liability company is a person who is named a manager in a company's governing operating agreement, as well as a person who participates materially in the management of a limited liability company. In *In re P3 Health Group Holdings, LLC*, the Delaware Chancery Court held that a principal of a private equity fund was subject to jurisdiction in Delaware for alleged actions taken on behalf of a portfolio company, despite the principal not being named an officer or designated manager of the company.

P3 Health Group Holdings LLC, a Delaware limited liability company, was a portfolio company of a private equity firm. Hudson Vegas Investment SPV LLC was a minority investor in P3. Over Hudson's objections, P3 entered into a transaction to merge with a SPAC. In connection with the de-SPAC, the principal of the private equity fund, who never held any role with P3, negotiated between P3 and the SPAC and directed P3's financial and

legal advisors to perform specific tasks. When Hudson objected to the new deal structure, P3 and the private equity fund excluded Hudson from the process and moved forward with the transaction. A majority of the board then approved the merger, with the Hudson managers abstaining. After the merger closed, Hudson filed a complaint, challenging the transaction and asserting that the principal's role as part of the private equity fund team that engineered the de-SPAC merger "tortiously interfered with the contractual rights that Hudson enjoyed under the company's limited liability company agreement". The principal moved to dismiss Hudson's claim on the merits and moved for dismissal under Rule 12(b)(2) for lack of personal jurisdiction.

The court found that the plaintiff alleged specific facts supported by accompanying documentation, demonstrating that the principal had acted as a manager of P3 in connection with the merger and thus could be served with process for purposes of claims that arose out of his actions and decisions.

Overbroad restrictive covenant deemed unenforceable

Delaware courts have historically "blue penciled" or modified restrictive covenants to the extent they were deemed overly broad. In *Kodiak Building Partners, LLC v. Adams*, however, the Delaware Chancery Court struck down in its entirety a non-compete provision that was entered into in connection with an acquisition that it found to be broader than necessary to protect the buyer's legitimate business interest.

Kodiak Building Partners LLC entered into a stock purchase agreement to acquire Northwest and Mandere Construction, Inc. In connection with the purchase, certain of Northwest's management stockholders signed non-compete agreements with Kodiak. One manager's non-compete had a duration of 30 months and prohibited him from competing with any of Kodiak's portfolio company businesses in Washington, Idaho, or within a 100-mile radius of another Kodiak company location. Following the closing, the manager took a job with a competitor of Northwest within the 100-mile radius. In the ensuing litigation, the court ruled that the non-compete was unenforceable in its entirety.

While acknowledging that Kodiak had a legitimate business interest in protecting the business it acquired, the court found that the covenant went beyond the business of the target company and extended to all of Kodiak's business lines both in terms of scope and geography.

In light of this decision, buyers that continue to utilise overly broad restrictive covenants in connection with acquisitions risk having them struck down in their entirely rather than being able to rely on the courts to blue-pencil or modify such covenants.

Antitrust developments

CFIUS Review Trends

The 2018-adopted U.S. Foreign Investment Risk Review Modernization Act (FIRRMA) significantly expanded the authority of the Committee of Foreign Investment in the United States (CFIUS) to review control acquisitions or non-control investments by foreign persons in certain U.S. businesses from a national security perspective. The 2022 legislative and regulatory developments continued CFIUS's trend of increased scrutiny of foreign investments in U.S. businesses, in particular the ones dealing in technology and infrastructure critical to national security or the collection and maintenance of sensitive personal data. Particularly scrutinised were business operations and relationships of transaction parties in China and Russia. CFIUS continued to process in a timely manner transactions that did not raise complex

national security considerations, but resolving complex cases became more challenging due to multiple factors, including increased caseload and a policy push on enforcement, which, in turn, required more thorough and early planning by transaction parties.

Executive Order 14083

On September 15, 2022, U.S. President Joe Biden issued Executive Order 14083, directing CFIUS to robustly consider covered transactions': (1) effect on resilience and security of U.S. supply chains fundamental to national security (including those outside of the defence industrial base); (2) effect on U.S. technological leadership in industries and sectors critical to national security, including but not limited to "microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy, and climate adaptation technologies"; (3) effect on cybersecurity risks that threaten to impair national security; and (4) use of and effect on the sensitive data of U.S. persons in a manner detrimental to national security. The executive order also directed CFIUS to look beyond the four corners of a specific transaction and to broadly consider the impact of incremental investments over time in a sector or technology, as well as the impact of multiple investments in a single sector or multiple related sectors where a foreign person may take actions that would impair national security. The areas of focus outlined in the executive order did not materially change the factors CFIUS regularly considered since the adoption of FIRRMA, but the articulation of these specific areas of concern in the executive order had a marginal effect on the committee's reviews in 2022 and reinforced CFIUS's extraordinary discretion to define and mitigate national security risks as it sees fit.

CFIUS Enforcement and Penalty Guidelines

On October 20, 2022, the U.S. Treasury Department issued the first-ever CFIUS Enforcement and Penalty Guidelines, identifying categories of conduct that may constitute a violation under the relevant CFIUS regulations: (1) failure to timely submit a mandatory declaration or notice; (2) any non-compliance with a CFIUS mitigation agreement, condition, or order; and (3) a material misstatement or omission from information filed with CFIUS or any false or materially incomplete certification filed in connection with CFIUS review. To investigate a potential violation, CFIUS may issue requests for information, solicit tips from the general public, or use its subpoena authority. CFIUS also strongly encouraged timely self-disclosure of any violation. The release of the guidelines signalled that CFIUS will take a more aggressive and coordinated approach to enforcement of mitigation agreements and non-notified transactions in 2023.

Omnibus Bill 2023

On December 29, 2022, U.S. President Joe Biden signed the Consolidated Appropriations Act, 2023 (Omnibus Bill) into law. The Merger Filing Fee Modernization Act (Filing Fee Act), adopted within the Omnibus Bill, increased the U.S. merger filing fees for the largest transactions (with a total value of $5 billion and up) nearly ten-fold to $2.25 million, while some smaller transactions saw a drop in U.S. filing fees. The Foreign Merger Subsidy Disclosure Act (Subsidy Disclosure Act) included in the Omnibus Bill required parties filing merger notifications to disclose subsidies from certain "foreign entities of concern", including China, Russia, Iran, North Korea, foreign terrorist organisations, and those designated on Office of Foreign Assets Control lists of the U.S. Department of Treasury, among others. "Subsidies" can take the form of "direct subsidies, grants, loans, loan guarantees, tax concessions, preferential government procurement policies, or government ownership of control". The Subsidy Disclosure Act specifically highlighted the role of Chinese foreign subsidies made pursuant to its "Made in China 2025" plan. The Omnibus Bill further

created premises for establishment of a new outbound review process and required the Departments of Commerce and Treasury to consider their role in the establishment of a new programme to address the national security threats emanating from outbound investments in certain sectors critical for U.S. national security and to prepare a report setting out the details of a new outbound investment review regime.

Recent transactions

Transactions in the healthcare and technology sectors continued to attract heightened antitrust scrutiny by the FTC and the DOJ. At the end of 2022, the FTC issued a complaint to block Microsoft from acquiring video game developer Activision Blizzard, alleging that the $69 billion transaction would harm competitors to its Xbox consoles and its subscription content and cloud-gaming business. The FTC's challenge remains pending before an administrative law judge, but the proposed transaction, which would be the largest deal in the gaming industry, was also blocked by the U.K. antitrust regulator, thus making a closing of this transaction in the near future doubtful. In contrast, the European Commission approved the Activision acquisition, conditioned upon compliance with certain commitments offered by Microsoft.

In September 2022, an administrative law judge dismissed the FTC's complaint against DNA sequencing provider Illumina's $7.1 billion acquisition of Grail. However, in April 2023, the FTC issued an opinion and order, reversing the judge's decision and requiring Illumina to divest Grail, which makes a multicancer early detection test, finding that the deal would stifle competition and innovation in the U.S. market for lifesaving cancer tests.

Many of the 2022 FTC and DOJ objections were successfully overcome in courts. In August 2022, the FTC sued to block Meta Platforms' acquisition of Within, a virtual reality studio, alleging that the deal could lessen competition in a market for virtual reality-dedicated fitness apps. Meta Platforms won the lawsuit and completed its acquisition of Within in February 2023. The DOJ's challenge to UnitedHealth's bid to buy Change Healthcare was also dismissed by a judge, and the deal ultimately closed in October 2022. Other losses included the DOJ's challenges to U.S. Sugar's acquisition of Imperial Sugar, where the court disagreed with the DOJ's market definition and allegations of anticompetitive effects, and Booz Allen Hamilton's acquisition of EverWatch, again finding fault with the DOJ's market definition.

The year ahead

Deal volume through the first half of 2023 continued to lag, but there are factors that support cautious optimism that M&A activity may rebound as the year progresses. Indeed, some large deals announced by April 2023 signal a better start of the second quarter, including Pfizer's acquisition of Seagen, Inc. valued at $42.8 billion, Endeavor Group Holdings, Inc.'s acquisition of World Wrestling Entertainment, Inc. for over $8 billion, and private equity firm Silver Lake Technology Management LLC and Canada Pension Plan Investment Board's acquisition of software firm Qualtrics International, Inc. for over $10 billion.

While still far from the Fed's target of 2%, there are encouraging signs that inflation may recede. After having peaked at 9.1% in June 2022, the 12-month U.S. inflation rate dipped to 6.5% by December. Further stabilisation of inflation should create a more stable market situation, allowing for greater certainty. This, in turn, may lead to an increase in M&A activity, notably in the private equity sector, with its heavy reliance on debt financing. Until inflation stabilises at a level closer to 2%, portfolio optimisation will be a key tool to help businesses adjust, bolster growth, and stay on track for long-term success.

Private equity firms have an unprecedented amount of uncommitted capital for acquisitions, which they will look to deploy as valuations become more attractive. In the meantime,

sponsors will focus on smaller deals and continue to turn to private credit, which is predicted to become part of the established landscape in 2023.

We expect the differing views between buyers and sellers as to valuation to remain for the duration of 2023. In an attempt to bridge the gap between the bid/ask spread, the use of earn-outs, contingent value rights, and other means by which parties could mitigate pricing risks will continue to be common. Indeed, non-market deals may become more normal in the short run.

On the regulatory front, we expect that U.S. antitrust agencies will continue to take a more interventionist approach to covered transactions during the year ahead. Wide-ranging U.S. antitrust legislation remains pending, causing dealmakers to be cautious and to plan ahead and structure their transactions to consider the anticipated higher regulatory scrutiny. The Inflation Reduction Act and related incentives propelled M&A deals in the clean energy space. This trend can be expected to continue.

With the widespread adoption of artificial intelligence, another area of expected growth is domestic semiconductor manufacturing and chips research and production, supported by the 2022 U.S. CHIPS and Science Act with roughly $280 billion in funding to be available in the next decade. In addition, opportunistic acquisition activity is expected to increase, especially in the tech space, as acquirers take advantage of lower valuations and expand into highly innovative areas.

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Dan concentrates his practice in the areas of M&A, venture capital, private equity, securities, technology law (including distributed ledger technology), and general corporate matters. Dan regularly represents public and private companies and equity funds in stock and asset acquisitions and dispositions, mergers, joint venture, and strategic alliances. He also represents venture capitalists, emerging companies and entrepreneurs in private placements, venture capital, and other capital-raising transactions. In addition to his transaction-based practice, Dan has served as outside general counsel to emerging companies in the life sciences, software and technology spaces, regularly providing advice on early-stage formation and strategy, corporate governance matters, federal and state securities law compliance, fiduciary obligations of directors and officers, and various day-to-day challenges and opportunities.

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