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Seventh Edition

Editors:
Michael E. Hatchard & Scott V. Simpson

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USA

Eric L. Cochran & Robert Banerjea
Skadden, Arps, Slate, Meagher & Flom LLP

Overview

M&A activity in numbers

On the heels of the two years with the strongest M&A activity on record, 2017 saw a year-over-year decline of 16% in the dollar volume of announced deals with a U.S. target, from $1.7 trillion to $1.4 trillion, according to Thomson Reuters. This represents a decrease of 29% from the record amount set in 2015, and of 6% from the 2007 pre-financial crisis high. In comparison, worldwide M&A activity was essentially unchanged from 2016, at $3.6 trillion.

When measured by number of announced deals, however, U.S. M&A activity increased by 14% to an all-time high of 13,069 transactions, following a 7% increase in 2016. Thus, 2017 continued the prior year's pattern of fewer mega-deals but strong mid-market activity. The decline in large transactions becomes apparent when comparing the number of deals with an equity value of at least $5 billion announced in the last three years: it dropped from a record 52 in 2015, to 32 in 2016, to 21 in 2017.

In another parallel to 2016, the largest deals were announced in the fourth quarter of the year, including Broadcom Limited's $105 billion offer to acquire QUALCOMM Incorporated (which was subsequently increased to $121 billion, then cut to $117 billion, before being withdrawn in March 2018); CVS Health Corporation's $69 billion offer to acquire Aetna Inc.; and The Walt Disney Company's $66 billion offer to acquire Twenty-First Century Fox, Inc. (following a pre-merger spin-off of certain news, sports and broadcast businesses). In the first three quarters, dealmakers had mostly been in wait-and-see mode, given uncertainties regarding the U.S. tax reform, trade regulation and antitrust enforcement.

Another indication of the strength of the M&A market is the increase in deal multiples registered in 2017, which, according to Thomson Reuters, climbed from an average of 14.6 times EBITDA in 2016 to 16.2 times EBITDA in 2017, barely missing 2015's 16.3 average multiple. The average bid premium over the four-week stock price preceding announcement declined from 35.6% to 29.4% – not a surprise, given the general advance of stock prices in the past year, as exemplified by the 22% gain in the Standard & Poor's 500 index.

Withdrawn offers

The deal value of withdrawn acquisition offers for public U.S. targets dropped by just over 50% from $279 billion to $137 billion, according to data provided by Deal Point Data. The big percentage drop was primarily attributable to the fact that the 2016 number had been inflated by the large size of Honeywell International Inc.'s $90 billion offer to acquire United Technologies Corporation, which was withdrawn in March 2016.

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The three largest transactions withdrawn in 2017 were Anthem, Inc.'s proposed acquisition of Cigna Corporation; Aetna Inc.'s proposed acquisition of Humana Inc.; and Emerson Electric Co.'s offer to purchase Rockwell Automation, Inc., with equity values of $47 billion, $35 billion and $29 billion respectively. The Anthem/Cigna deal, announced in June 2015 and highlighted by us in the 5th edition of *Global Legal Insights*, was terminated by Cigna in February 2017, following an order by the U.S. District Court for the District of Columbia, enjoining the merger on antitrust grounds. Cigna has filed suit in the Delaware Court of Chancery seeking a $1.85 billion reverse termination fee from Anthem and damages for wilful breach of the merger agreement exceeding $13 billion, including the lost premium value to Cigna's shareholders. The Aetna/Humana deal, announced in July 2015 and also highlighted in the 5th edition of *Global Legal Insights*, was mutually terminated in February 2017, again following an order of the U.S. District Court for the District of Columbia enjoining the transaction on antitrust grounds. Aetna has paid a $1 billion termination fee to Humana. As noted above, less than 10 months after calling off the Humana deal, Aetna announced its merger with CVS Health, perhaps evidence of how an unsuccessful bid can put the bidder into play. Emerson Electric's hostile approach of Rockwell Automation found its end much more quickly than the Cigna and Humana offers: Emerson withdrew its offer after less than a month in light of the unwillingness of Rockwell's board to engage in discussions.

Unsolicited activity

The dollar volume of openly unsolicited or hostile transactions declined by 34% from $266 billion to $174 billion, according to data provided by Deal Point Data. These numbers do not tell the whole story, however, as there continues to be a large and, according to market spectators, increasing number of transactions commencing on an unsolicited basis that are not reported as such.

After a number of big unsolicited offers failed in 2016 (including, most notably, Honeywell International Inc.'s above-mentioned $90 billion offer to acquire United Technologies Corporation and Mondelez International, Inc.'s $23 billion offer to acquire The Hershey Company), 2017 saw only three openly unsolicited offers above the $10 billion mark: Brookfield Property Partners L.P.'s $14 billion offer to acquire GGP Inc., and the above-mentioned withdrawn offers by Broadcom Limited to acquire QUALCOMM Incorporated, and by Emerson Electric Co. to acquire Rockwell Automation, Inc. Broadcom was forced to withdraw its offer to acquire QUALCOMM after the President of the United States issued an executive order prohibiting the transaction. Rockwell's successful defence focused primarily on the long-term prospects of Rockwell and the inadequacy of Emerson's bid. It serves as a good example of how, in an age where traditional, structural defence mechanisms, such as "poison pills" or staggered boards, have fallen out of favour, the target's communication strategy and ability to demonstrate its stand-alone value is key to fending off hostile suitors.

Private equity

Private equity deals closed in 2017 dropped in dollar volume by 8.9% to $538 billion, according to Pitchbook. The average holding period of PE funds went up, with 34% of private equity-backed companies having been acquired more than five years ago. Exit volume decreased by 11% year-over-year, to $184 billion. $77 billion worth of private equity exits took the form of secondary buyouts.

Fundraising continued to be very active, with 75% of follow-on funds being larger than their predecessors and the median time between funds dropping from a high of 4.3 years in

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2012 to 2.8 years in 2017. Apollo, CVC Capital Partners, Silver Lake Partners, KKR and Vista Equity Partners raised the largest funds, each of them exceeding the $10 billion mark. Commitments for Apollo Investment Fund IX reached $24.7 billion, the largest private equity vehicle of all time.

As in prior years, private equity funds continued to exercise discipline in the face of elevated equity prices, often foregoing larger deals and focusing on smaller add-on acquisitions instead. Consequently, not one buyout reached the $10 billion mark.

Shareholder activism

The number of activist campaigns against U.S. based targets was essentially flat in 2017, at 461 campaigns compared to 456 in 2016, according to Activist Insight. While we had noted a trend in 2016 away from large cap and towards mid and small cap campaigns, 2017 proved that a large market capitalisation does not inoculate against activists, as Trian Fund Managements waged a proxy fight against Procter & Gamble Co., the largest target of a proxy fight ever, and Greenlight Capital, Inc. took on General Motors Company. After a shareholder vote that was too close to call and a disputed recount of votes, Procter & Gamble offered a board seat to Trian's Nelson Peltz, acknowledging his broad shareholder support. Proxy advisory firms Institutional Shareholder Services and Glass Lewis had recommended voting for Peltz. Trian is said to have spent approximately $25 million on the proxy fight, and Procter & Gamble four times as much. Greenlight's campaign against General Motors was less successful, as its proposal to split GM's shares into two classes, one receiving dividends, the other being entitled to all remaining earnings and buybacks, was overwhelmingly voted down by shareholders.

As in prior years, activists continued to shape M&A activity. Globally, 21% of activist demands were M&A-related, according to Activist Insight. Notable examples include Amazon.com Inc.'s $14 billion acquisition of Whole Foods Market Inc. following pressure for a sale by activist investor Jana Partners, reportedly netting Jana Partners a $300 million profit, and a successful campaign by Corvex Management LP and 40 North derailing Huntsman Corporation's $20 billion merger with Swiss specialty chemicals company Clariant AG.

Significant deals and highlights

Broadcom Limited / QUALCOMM Incorporated

The largest transaction announced in 2017 was Broadcom Limited's above-mentioned unsuccessful offer to acquire chipmaker QUALCOMM Incorporated. Had it succeeded, it would have constituted the largest tech deal ever. Twelve financial institutions had committed to provide up to $100 billion in debt financing and Silver Lake Partners, KKR and CVC Capital Partners had committed to provide $6 billion in convertible notes financing. The offer was made during the pendency of QUALCOMM's offer to acquire Dutch chipmaker NXP Semiconductors N.V., but not conditioned upon the success of the NXP offer.

Initially, Broadcom went out with a $105 billion offer, consisting of $60 in cash and $10 in Broadcom stock per QUALCOMM share. When QUALCOMM's board rejected the offer as inadequate, Broadcom commenced a proxy fight and increased its offer to $60 in cash and $22 in stock, or an aggregate consideration of $121 billion. Two weeks later, QUALCOMM raised the price of its offer to acquire NXP. To compensate for what Broadcom called a "value transfer", Broadcom lowered the cash component of its offer to $57 per share, thereby reducing the aggregate offer value to $117 billion. QUALCOMM responded by issuing a statement that "Broadcom's reduced proposal has made an inadequate offer even worse."

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At the time Broadcom increased its offer to $121 billion, it announced that it would withdraw this "best and final" offer following determination of the results of QUALCOMM's 2018 annual meeting, unless the parties had entered into a definitive agreement or Broadcom's six board nominees (down from an initial nomination of 11 nominees) had been elected. It also conditioned its offer on QUALCOMM not delaying or adjourning its annual meeting beyond March 6, 2018. On March 4, 2018, the Committee on Foreign Investment in the United States (CFIUS) ordered QUALCOMM to postpone its annual meeting by 30 days to allow CFIUS to fully investigate the proposed acquisition by Broadcom, which is based in Singapore.

Broadcom, which had previously announced that it would redomicile to the United States at a future date, announced it would move to do so by April 3, 2018, two days before the new date for QUALCOMM's annual meeting. Before it could do so, the President of the United States issued an executive order on March 12, 2018, prohibiting the transaction and disqualifying all of Broadcom's board nominees from standing for election as directors of QUALCOMM. The executive order cited "credible evidence" leading the President to believe that Broadcom "might take action that threatens to impair the national security of the United States". On March 14, 2018, Broadcom announced the withdrawal and termination of its offer, and the withdrawal of its slate of director nominees.

While it is not uncommon for targets of unsolicited offers to employ regulatory defences based on antitrust grounds, this deal highlights that national security concerns may present another option for those seeking a defence. This episode shows that foreign companies interested in acquiring U.S. businesses should pay particular attention to CFIUS issues.

CVS Health Corporation / Aetna Inc.

The second-largest transaction announced in 2017 was the above-mentioned $69 billion merger between CVS Health Corporation and Aetna Inc. The consideration consisted of 70% of cash and 30% of CVS stock. While mixed consideration is relatively rare among public deals in general (with only 11% of deals announced in 2017 providing for a stock/cash mix and another 6% for a right to elect between stock and cash), it is in fact very common among larger transactions. Thus, from the 11 deals exceeding $10 billion in equity value announced in 2017, five deals provided for a mix of stock and cash (including the aforementioned QUALCOMM offer), and two for a right to elect between stock and cash.

The Aetna offer is emblematic of consolidation pressures in the health care industry. We already noted above Aetna's failed 2015 bid to acquire Humana Inc., a transaction reportedly prompted by the passage of the Affordable Care Act. Also in 2015, CVS had swallowed Omnicare, Inc. in a $13 billion transaction designed to broaden its distribution channels.

But in 2017, a new threat to CVS and other drugstore operators emerged, as Amazon.com, Inc. applied for and received wholesale pharmacy licences in 12 U.S. states. Market commentators believe this to have been a driving factor behind CVS's Aetna bid. As we enter 2018, pressure by Amazon continues to be an M&A stimulant. For example, merger pressures in the retail industry have been ascribed to competition from Amazon and other online retailers.

The Walt Disney Company / Twenty-First Century Fox, Inc.

With a transaction value of $66 billion, The Disney Company's pending acquisition of Twenty-First Century Fox was the third-largest deal announced in 2017. Immediately prior to the closing of the transaction, Twenty-First Century Fox will separate certain news, sports and broadcasting businesses into a newly listed company that will be spun off to its shareholders. Fox shareholders will receive shares in Disney representing, in the aggregate,

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an estimated 25% stake in Disney. The per share consideration is subject to adjustment for certain tax liabilities arising from the spinoff and other transactions related to the acquisition. Apart from its size and complexity, this transaction is notable as being last year's only transaction with a value above $10 billion in which the consideration consisted entirely of the acquirer's stock.

Brookfield Property Partners L.P. / GGP Inc.

Also among the top five deals by size was the pending unsolicited offer by Brookfield Property Partners, L.P., a commercial real estate company with dual listings on the NYSE and the Toronto Stock Exchange, to acquire the remaining 66% of retail property owner and operator GGP Inc. that it did not already own. The offer valued the entire company at an enterprise value of $35 billion. Under the terms of the offer, GGP shareholders are entitled to elect between stock and cash consideration, subject to proration based on a 50/50 split between stock and cash. The transaction would create one of the largest listed property companies in the world, with almost $100 billion in real estate assets globally. GGP has formed a special committee to review the offer.

The GGP offer is reminiscent of 2016's successful hostile offer by British American Tobacco plc to acquire the remaining 57.8% it did not already own in Reynolds American Inc. As we noted in last year's edition, unsolicited bids for companies in which the bidder already holds a substantial foothold stake may be difficult to resist.

Key developments

Case law developments

In last year's edition, we reported on the Delaware Chancery Court's landmark decision *In re Trulia, Inc. Stockholder Litigation*, in which the Chancery Court announced its increasing vigilance against disclosure-based settlements. We also reported on the resulting decline of merger challenges brought in Delaware, and the corresponding increase of claims brought outside Delaware. This trend continued in 2018. Particularly remarkable was the number of M&A-related claims brought in federal courts, which, according to Cornerstone Research, went up to a record 198 cases, more than double the number seen in 2016.

Notwithstanding this development, both the Delaware Chancery Court and the Delaware Supreme Court continued to issue decisions of great relevance to M&A practitioners. In the following paragraphs, we would like to highlight the most important developments with respect to appraisal rights, merger challenges under the so-called *Corwin* doctrine, and purchase price adjustment disputes.

Appraisal rights

2017 saw important developments on the appraisal front, as the Delaware Supreme Court reversed two Chancery Court cases highlighted in last year's *Global Legal Insights* edition, *DFC Global Corporation v. Muirfield Value Partners, L.P.* and *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*

In *DFC Global*, the Delaware Supreme Court refused to create a presumption, as had been requested by the defendants, that the deal price is the best evidence of fair value when the transaction giving rise to appraisal results from an open market check, and when certain other conditions indicative of an arm's length transaction process pertain. Reaffirming its 2010 *Golden Telecom, Inc. v. Global GT LP* decision, the Court pointed out that Section 262 of the Delaware General Corporation Law requires the court to "take into account all relevant factors". However, the Court rejected the Chancery Court's methodology of

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assigning one-third weight to each of the deal price, the discounted cash flow valuation and the comparable companies valuation. The Supreme Court stated that it could not discern the basis for this allocation, in light of the Chancery Court's findings about the robustness of the market check and substantial public information available. The Supreme Court also rejected the Chancery Court's concept of a "private equity carve-out", *i.e.,* the Chancery Court's argument that the deal price was not dispositive in a private equity transaction given the buyer's "attention on achieving a certain internal rate of return".

In the same vein, in *Dell* the Delaware Supreme Court held that the Chancery Court's decision to give the stock and deal price no weight and exclusively rely on a discounted cash flow valuation (thereby arriving at a fair value 28% above the deal price) did not follow from the Chancery Court's key factual findings and from relevant, accepted financial principles. It found that the Chancery Court's had erroneously relied on a conclusion that several features of management buyouts render the resulting deal prices unreliable, given that these features were largely absent in the Dell transaction. While the Supreme Court conceded that there was no requirement to assign some mathematical weight to the deal price, it held that, in this case: "[T]he record as distilled by the trial court suggests that the deal price deserved heavy, if not dispositive, weight." The Supreme Court also rejected the Chancery Court's notion of "investor myopia" creating a "valuation gap" between market and fundamental prices, and reaffirmed *DFC's* rejection of a "private equity carve-out". In support of its finding that the deal price deserved heavy weight, the Supreme Court cited the competitive auction process (including the canvassing of 67 parties), a 45-day go-shop designed to raise "fewer structural barriers than the norm", and Michael Dell's involvement in the due diligence by competing bidders.

While not going so far as assigning the deal price dispositive weight, the *DFC* and *Dell* decisions give dealmakers significant reassurance with respect to the indicative value of the deal price in appraisal proceedings. In addition, *Dell* serves as a reminder of the importance of a well-run process in avoiding surprises at the appraisal stage.

Evolution of the Corwin Doctrine

In the 5th edition of *Global Legal Insights*, we had highlighted the case *Corwin v. KKR Financial Holding, LLC*, in which the Delaware Supreme Court held that an uncoerced, fully informed vote of disinterested stockholders in favour of a challenged transaction provides an independent basis to invoke the business judgment rule, insulating the transaction from all attacks other than on the grounds of waste. Last year, the Delaware Chancery Court issued a string of decisions further refining the *Corwin* doctrine.

In *In re Solera Holdings, Inc. Stockholder Litigation*, the Chancery Court had occasion to expound on the burden of proof with respect to disclosure deficiencies potentially invalidating a *Corwin* defence. The Court held that the plaintiff challenging the stockholder approval of the transaction bears the burden of identifying a deficiency in the operative disclosure document.

In *In re Merge Healthcare Inc. Stockholders Litigation,* the Court reaffirmed its 2016 *Larkin v. Shah* decision, holding that coercion is assumed (with the result of the entire fairness standard, rather than *Corwin*, applying) when the disputed transaction involves a controlling stockholder and the controlling stockholder engages in a conflicted transaction, *i.e.,* sits on both sides of the transaction. It further reaffirmed the 2012 decision *In re Synthes, Inc. Shareholder Litigation* in its holding that the mere liquidity interest of the controlling stockholder does not create a conflict. Rather, the controlling stockholder must seek liquidity under circumstances akin to a "crisis" or "fire sale" to satisfy an exigent need.

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In re Saba Software, Inc. Stockholder Litigation is an example of a case in which the defendants attempted in vain to invoke *Corwin*, the Court concluding that the stockholders' approval of the transaction was neither fully informed nor uncoerced. Noting that the Court was typically not receptive to "why" or "tell me more" disclosure claims (and rejecting certain of the plaintiffs' claims on that basis), the Court drew a distinction between claims relating to board decisions (in the context of which "why" claims are usually not considered meritorious), and claims relating to factual developments not constituting purposeful decisions of the board; in this case, Saba's repeated failure to restate its financials. The Court held that absent full information with respect to such failure, the stockholders would have no means to evaluate the choice between selling the company and awaiting the company's restatement of its financials, which was necessary to avert the deregistration of its stock. Furthermore, the Court found that the parties' failure to include in their proxy statement information on Saba's post-deregistration options, and to recite the investment bankers' advice that the company was selling itself at a discount to market price and that a transaction would eliminate upside from standalone value creation, constituted material omissions undermining the cleansing effect of the stockholder vote under *Corwin*. In addition to finding it not fully informed, the Court also determined that the vote was coerced, as the company placed stockholders into a situation where they had to choose between a non-premium sale of the company and holding potentially worthless stock of a deregistered company.

In Re Massey Energy Company Derivative and *Class Action Litigation* contained an important (if self-evident) clarification that the *Corwin* doctrine only applies to challenges of the economic merits of the transaction itself, and "was never intended as a massive eraser, exonerating corporate fiduciaries for any and all of their actions or inactions preceding their decision to undertake a transaction for which stockholder approval is obtained". The Court was "mystified" by the argument that *Corwin* could apply to the defendants' conduct over multiple years prior to the transaction and its resulting harm on the company.

Just before the end of the year, the Chancery Court issued its decision *Lavin v. West Corporation*. Here, the defendant had invoked *Corwin* as a defence against the plaintiff's request to inspect the defendant's books and records pursuant to Section 220 of the Delaware General Corporation Law, after the company had been sold. Under applicable case law, Section 220 demands require demonstration by the stockholder, by a preponderance of the evidence, of a credible basis from which the court can infer that mismanagement, waste or wrongdoing may have occurred. The defendant argued that, following the sale of the company, any Section 220 claim would have to overcome the *Corwin* defence. The Court held that *Corwin* was not suitable to bar inspection in a Section 220 proceeding, consistent with the Chancery Court's rejection of "similar attempts to invoke merits-based defences that turn on doctrinal burden shifting as a basis to defend otherwise properly supported demands for inspection". The Court went on to note that the decision was not intended to suggest that the defendant would not prevail with a *Corwin* defence in a subsequent challenge by the plaintiff of the stockholder approval of the merger. However, the information the plaintiff would receive under Section 220 would help him prepare a better complaint. Among the categories of documents whose production the Court approved were banker presentations, deal documents exchanged with bidders, board minutes, communications about the sale of business segments, including emails, memoranda and notes, and director independence questionnaires. Following Carl Icahn's filing of a Section 220 demand with SandRidge Energy Inc. in January of this year, the legal press has speculated that Section 220 demands may become a more frequently used tool in challenging M&A deals.

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In re Paramount Gold and Silver Corp. Stockholders Litigation raised the interesting question of the interplay between *Corwin* and the *Unocal* standard for reviewing deal protection devices. However, the Court did not have to resolve this issue, finding that the measures in question did not constitute deal-protection devices. Similarly, *Van Der Fluit v. Yates et al.* touched upon the interplay between *Corwin* and the *Revlon* standard for reviewing change-of-control transactions. But again, the Court did not have to resolve the issue, given that under the facts of the case (which included disclosure deficiencies), the defendants could not rely on *Corwin*.

<u>Purchase price disputes</u>

In its widely discussed *Chicago Bridge & Iron Company N.V. v. Westinghouse Electric Company LLC and WSW Acquisition Co., LLC* decision, the Delaware Supreme Court overturned the Chancery Court's finding that the dispute process the parties had agreed upon for purposes of resolving purchase price adjustment or "true up" disputes constituted the appropriate mechanism for resolving a near-$2 billion claim relating to the GAAP compliance of the target's net working capital calculation. The Supreme Court argued that the purchase price adjustment process was a "cabined remedy available to address any developments affecting [...] working capital that occurred in the period between signing and closing". In reaching its decision, the Supreme Court also relied on the fact that the parties had agreed to exclude all indemnification claims with respect to breaches of representations, and that the dispute primarily revolved around the company's historic accounting practices. This argument has created some confusion among commentators as to whether the decision would also apply to purchase agreements permitting indemnification claims. The Supreme Court also considered as relevant the fact that the parties had designated the independent accounting firm to act as an expert, not an arbitrator.

While not all of these arguments may necessarily withstand critical examination – in particular, the notion that purchase price adjustments are limited to the post-signing period is at odds with the fact that parties typically use an average or desired target working capital, rather than the working capital as of signing – they demonstrate the importance of avoiding ambiguity in crafting purchase price adjustment provisions. This applies to: (i) clarifying the purpose of the purchase price adjustment process; (ii) specifying what takes preference between historic or agreed accounting principles, on the one hand, and GAAP, on the other hand; (iii) defining the scope of review by the independent accounting firm; (iv) specifying whether the accounting firm acts as expert or arbitrator; and (v) separating true-up claims from indemnification claims. Buyers will generally favour provisions allowing them to challenge historical accounting practices as part of the true-up process, as this will result in speedier resolution and avoid caps, baskets and other applicable indemnification limitations. Sellers can be expected to resist this, or, at a minimum, to require an exclusive remedy provision that would prevent buyers from getting a second bite at the apple via indemnification claims. In negotiating exclusive remedy provisions, buyers should be aware that claims that are subject to exclusive review in the purchase price adjustment dispute will not benefit from the longer survival terms typically applying to financial statement representations and related indemnification claims.

Following issuance of the *Chicago Bridge* decision, we have noticed increased focus on the scope of purchase price adjustment provisions and related indemnification provisions. For example, a (small) number of publicly filed agreements expressly states that the purpose of the purchase price adjustment is to capture fluctuations of working capital, and not to introduce new accounting methodologies.

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Legislative developments

Tax Cuts and Jobs Act

First and foremost among legislative developments in 2017 impacting the M&A landscape is the Tax Cuts and Jobs Act, signed into law on December 22, 2017. Of particular interest to dealmakers will be: (i) the reduction of the corporate tax rate to 21%; (ii) limitations on the use of net operating losses (which, under the new regime, can only offset up to 80% of taxable income and cannot be carried back); (iii) the availability of 100% "bonus" depreciation (allowing 100% of the purchase price for qualified tangible property to be immediately deductible); (iv) the limitation of interest deductibility to business interest income plus 30% of adjusted taxable income; and (v) a dividend exemption system permitting repatriation of cash held by foreign subsidiaries at a lower U.S. tax cost than previously permitted (which effect is, however, expected to be offset to a significant degree by the new "global intangible low-tax income" tax).

Market spectators expect the Tax Cuts and Jobs Act to fuel M&A activity, as companies put to work the additional cash available to them as a result of the reduced corporate tax rate and the lower cost of accessing cash in foreign subsidiaries. In addition, the reduction of the corporate tax rate may make U.S. domiciled companies more attractive targets for inbound M&A activity. The new tax law may also impact the structuring of transactions, as the introduction of 100% "bonus" depreciation may increase the attractiveness of asset sales, or of stock sales that are subject to a Section 338(h)(10) election (*i.e.*, that, for tax purposes, are deemed to be an asset sale followed by a liquidation).

The imposed limits on deducting interest expense will be disadvantageous to companies with large debt burdens. In addition, they may impact private equity activity, as buyouts employing a high degree of leverage will become less attractive.

The cash freed up as a result of the lower corporate tax rate and from foreign subsidiaries could also attract activist investors, prompting demands on companies to increase their dividends or share buybacks, or to otherwise apply such cash for the benefit of their shareholders.

CFIUS reform

On November 8, 2017, the U.S. House of Representatives and the U.S. Senate each introduced a bill that would dramatically reform national security reviews performed by CFIUS. The proposed Foreign Investment Risk Review Modernization Act of 2017 (FIRRMA) would, among other things: (i) expand the scope of transactions within CFIUS' purview to include joint ventures, strategic partnerships, certain licensing agreements, non-controlling investments in U.S. critical technology and infrastructure companies, and purchases and leases of real estate near sensitive U.S. government properties; (ii) introduce short-form and mandatory notification procedures; (iii) permit CFIUS to analyse transactions with respect to their nexus to "countries of special concern"; (iv) expand the initial review period from 30 to 45 days (with an additional 30 days available in extraordinary circumstances); and (v) broaden the President's authority to take any action the President considers appropriate to address risks to national security.

While still a long way from becoming law, if passed, FIRRMA would have a significant impact on the feasibility, structure and timeline of many cross-border transactions.

Antitrust enforcement

Speculation that antitrust enforcement would become more lenient under a Republican administration has, thus far, not been proven true. While this may change as more Department

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of Justice and Federal Trade Commission appointments are made, and as recently appointed officials settle in, for now antitrust enforcement has largely continued along the path taken under the previous administration and, if anything, has become more aggressive. Indications of a more aggressive stance include the complaint filed in November of 2017 by the DOJ challenging AT&T Inc.'s acquisition of Time Warner Inc., prompting speculation that the U.S. may become more wary of vertical combinations (here between content and content distribution). In the past, vertical combinations had largely been off the radar of antitrust enforcement. Another example of a more vigorous enforcement policy is the DOJ's suit, filed in September of 2017, challenging Parker Hannifin Corp.'s $4.3 billion acquisition of Clarcor Inc., about eight months after expiration of the waiting period under the Hart-Scott-Rodino Act, and seven months after the transaction closed.

Shareholder activism

A notable recent development attributable to shareholder activism is the adoption, by a growing number of companies, of bylaws intended to prevent circumvention of advance notice bylaws (*i.e.,* bylaws requiring advance notice by shareholders intending to nominate directors). This trend was initiated by a 2016 campaign of activist hedge fund Corvex Management LP against The Williams Companies, Inc., in which Corvex attempted to oust all of Williams' board members. As Corvex did not have sufficient time to identify suitable candidates prior to the advance notice deadline, it nominated 10 of its employees to stand for election at the annual meeting, with the intention that these "placeholder directors" would, immediately following their election, appoint other nominees that Corvex hoped to identify by then. Ultimately, Corvex abandoned this strategy, following a number of Williams appointments that it deemed satisfactory.

In response to Corvex's tactics, as of September 2017, more than 50 publicly traded companies, including 19 S&P 500 companies, had adopted bylaws requiring director nominees to provide a written representation to the company as to his or her intention to serve as a director for the full term appointed. We note that these bylaws have not yet been tested in court, nor have proxy advisory firms expressed a view on them.

Industry sector focus

In 2017, Technology and Energy & Power continued to rank among the top three sectors with the most M&A activity, according to Thomson Reuters. Healthcare re-entered the top three, swapping its place with Media, which dropped from third to fourth place.

Technology

Technology deal volume equalled $240 billion, accounting for a 17% market share, according to Thomson Reuters. Transactions were driven by the need to acquire new technologies and technology platforms, as well as access to digital distribution channels. Much of the activity crossed industry sectors, as non-technology companies scooped up technology businesses. At times, we also saw examples of the reverse, *i.e.,* of technology companies acquiring brick-and-mortar businesses, most notably Amazon.com Inc.'s above-mentioned $14 billion acquisition of Whole Foods Market Inc. Sector-crossing activity was not limited to tech transactions, however. According to Dealogic, $961 billion worth of transactions crossed industry sectors.

Notable technology transactions included the above-mentioned unsuccessful Broadcom/QUALCOMM offer; Marvell Technology Group Ltd.'s $6 billion acquisition of semiconductor company Cavium, Inc.; and KKR & Co. L.P.'s $2.8 billion acquisition of health information provider WebMD Health Corp.

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Energy & Power

With a deal volume of $229 billion, Energy & Power deals grabbed a 16% market share. Many deals were motivated by a desire to optimise or reorganise corporate structures and joint ventures. An example is the largest energy transaction seen in 2017, ONEOK Inc.'s $24 billion (based on 100% of the enterprise value of the target) acquisition of the 60% limited partnership interests in ONEOK Partners LP, one of the largest publicly traded master limited partnerships, that it did not already own. We also saw consolidation among natural gas players as, in the year's second-largest energy deal, EQT Corporation's $8.8 billion acquisition of Rice Energy Inc. Jana Partners attempted, in vain, to derail this deal. The sector's third-largest deal was AtlasGas Ltd.'s $6 billion acquisition of clean energy provider, WGL Holdings, Inc.

Healthcare

$211 billion worth of transactions secured Healthcare a 15% market share. Activity abounded across all subsectors, with managed care and long-term care emerging as leaders, according to a PwC study. A third of the deal volume can be ascribed to the above-mentioned CVS/Aetna merger. The second-largest deal was Becton, Dickinson and Company's $24 billion acquisition of medical technology company, C. R. Bard, Inc. Private equity sponsors exhibited particular appetite for healthcare targets, due to their perceived stability resulting from favourable demographics. An example is Pamplona Capital Management's $5 billion buyout of PAREXEL International Corporation, a life science consulting and contract research firm.

The year ahead

2018 is off to a good start. The view espoused by both dealmakers and market spectators is that we should continue to see robust M&A activity, as the factors driving last year's activity continue to be in place. These include boardroom confidence, buoyant equity markets, strong balance sheets, and pressure on businesses to make acquisitions as a means to access new technologies and supplement limited opportunities for organic growth. As noted above, the U.S. tax reform is expected to further stimulate M&A activity.

These favourable conditions are to a certain extent offset by a return of volatility to U.S. equity markets after a period of unusual stability (February saw the greatest point-decline of the Dow Jones Index in history), the prospect of four interest rate hikes in 2018 under new Federal Reserve Bank leadership (and their impact on equity valuations and the cost of debt financing), uncertainty over the future of the North American Free Trade Agreement, and a potentially challenging regulatory environment (depending on the further development of antitrust enforcement and the CFIUS reform).

In light of this mix of M&A drivers and constraints, we expect to see continued healthy deal-flow, more likely than not fuelled by a significant number of strategic transactions and only a limited number of "bet the company" type mega-deals.

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Eric L. Cochran
Tel: +1 212 735 2596 / Email: eric.cochran@skadden.com
Eric L. Cochran is a corporate attorney, concentrating on mergers and acquisitions, securities law and general corporate law.
Mr. Cochran has been listed in numerous editions of *Chambers USA* and *Chambers Global* as a leading lawyer for business. In addition, he has been repeatedly selected for inclusion in *The Best Lawyers in America.*
Mr. Cochran is also actively involved in the firm's management and administration, including the administration of the Mergers and Acquisitions Group and the firm's efforts to promote a diverse and inclusive workplace.

Robert Banerjea
Tel: +1 212 735 3748 / Email: robert.banerjea@skadden.com
Dr. Robert Banerjea focuses his practice on mergers and acquisitions, securities law, and corporate governance. He has advised public and private clients on a variety of domestic and cross-border transactions, including negotiated and contested acquisitions, dispositions, auctions and joint ventures. In addition, he has represented *pro bono* clients in death penalty, clemency and asylum cases. Dr. Banerjea has authored and co-authored numerous publications on M&A and corporate law issues, including a treatise on derivative actions.

Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square, New York, New York 10036, USA
Tel: +1 212 735 3000 / Fax: +1 212 735 2000 / URL: www.skadden.com

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