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Market Intelligence

M&A 2023

Global interview panel led by Simpson Thacher & Bartlett LLP

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Simpson Thacher & Bartlett LLP, this *M&A* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

- Keynote Deals
- Sector Focus
- M&A Activity Levels
- 2024 Outlook

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United States

Eric Swedenburg is a partner at Simpson Thacher & Bartlett LLP, where he is the global head of the firm's mergers and acquisitions practice and a member of the executive committee. Eric focuses on representing companies in a wide range of mergers, acquisitions and divestitures, spin-offs, joint ventures and other significant corporate transactions. He also regularly counsels clients on shareholder activism, corporate governance and general corporate and securities law matters. In addition to his work with public companies and special committees of boards of directors, Eric has extensive experience in advising non-public corporations, private equity firms and financial advisers in both US domestic and cross-border M&A transactions across a number of industry verticals. Some of his recent transactions have included representing SiriusXM in its US\$3.5 billion acquisition of Pandora, Mars in its strategic partnership with KIND, Dover in the spin-off of Apergy, Genesee & Wyoming in its US\$8.4 billion sale to affiliates of Brookfield Infrastructure and GIC, and The Mosaic Company in its US\$2.5 billion acquisition of Vale Fertilizantes. Other clients of his have included Ingersoll Rand, La Quinta, McKesson and Vodafone Group. Among other recognitions of his work, in 2009, *The American Lawyer* named him 'Dealmaker of the Year.' He is a frequent commentator on M&A issues.



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INSIDE TRACK



1 What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

In the first half of 2023, M&A deal volume in the US came at just over US\$560 billion. This reflected a 40 per cent decline from the first half of 2022 (US\$950 billion). It was also lower than the record setting first half of 2021 (US\$1.3 trillion) as well as the pre-pandemic levels of the first halves of 2018 and 2019 where US M&A deal volume was approximately US\$900 billion and US\$1.1 trillion, respectively. Whether the US M&A market rebounds in the second half of 2023 and into 2024 remains to be seen, as a number of the headwinds that first appeared in the fourth quarter of 2021 persist.

As the world recovered from the global pandemic, US M&A activity hit record levels in 2021, largely driven by the low cost of capital, the loosening and conclusion of many covid-19 restrictions, surging private equity activity and the completion of a backlog of deals created by the pause in M&A activity at the start of 2020. However, in the fourth quarter of 2021 and continuing into 2023, the following headwinds tempered activity: inflationary pressures that have been absent in the US for decades, increasing interest rates, rising global geopolitical tensions, volatile equity markets that saw major indexes fall by over 20 per cent and supply chain issues. Moreover, the regulatory climate in the US (and globally) began taking a decidedly more aggressive approach to challenging deals on antitrust grounds, which has also complicated what had been a red hot 2021 deal market. As a result, US M&A activity softened notably from its 2021 highs.



Eric Swedenburg

2 Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

The sectors that have been particularly active in the US so far in 2023 have been healthcare, energy and power and technology. Healthcare deals were a notable contributor to US M&A activity in the first half of 2023, up 78 per cent from the first half of 2022. Energy and power deals also increased, up 3 per cent from the first half of 2022. Tech deals, long a large share of US M&A activity, saw a dramatic decline in the first half of 2023, down 76 per cent from the first half of 2022. This decline, driven in part by increased conservatism at tech companies coming out of the pandemic, is also due to an absence of large tech deals that punctuated the first half of 2022 (the acquisition of



Activision by Microsoft (US\$69 billion), Broadcom by VMware (US\$68 billion) and Twitter by Elon Musk (US\$40 billion).

3 What were the recent keynote deals? What made them so significant?

In the US, no announced deal in the first half of 2023 exceeded US\$50 billion, compared to the prior year where there were two such deals. The largest is the pending acquisition of Seagen by Pfizer for US\$43 billion. Pfizer's proposed acquisition of Seagen is the largest M&A deal in biopharma since AbbVie acquired Allergan for US\$63 billion in June of 2019. The second largest is in the energy infrastructure sector: Magellan Midstream Partners pending acquisition of ONEOK for US\$19 billion. The third largest deal was Extra Space Storage's acquisition of Life Storage for US\$16 billion, which closed on 20 July 2023.

4 In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

In the United States, consideration can be composed of stock, cash or a combination of both, and which form of consideration shareholders prefer is very much dependent on the circumstances. For a target's shareholders, receiving cash has the benefit of locking in a value certain, often at a premium price to current value. Obtaining shares as a portion of the consideration, however, allows the target's shareholders to benefit from the synergies resulting

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from the transaction. Additionally, if a majority of the consideration is composed of shares, then the receipt of shares may be free of taxes.

Acquisitions by non-US buyers of US public companies are generally entirely for cash. In situations where the non-US buyer is truly under non-US control, US shareholders may be reluctant or even not permitted by their investment guidelines to hold shares of non-US entities. Furthermore, under the US federal securities laws, public company shareholders in the United States may only receive shares as consideration if the shares are issued by a company registered with the Securities and Exchange Commission (SEC) and that are publicly tradable. This means that a non-US company that is not already a SEC-registrant must become registered in the US prior to the closing of a purchase of a US public company if shares are used as part of its consideration. The time and expense of this process is a limitation on the ability and desire of non-US purchasers to use shares as consideration for purchasing a US public company.



5 How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

Key legal and regulatory developments in the United States in the past few years include:

- the increase in scrutiny of non-US buyers by the Committee on Foreign Investment in the United States (CFIUS) as to whether a potential purchase of a US company by a non-US company creates any concerns from a US national security perspective, with the full expansion of the scope of CFIUS now being implemented following a pilot programme during 2019;
- a noticeably heightened level of scrutiny by US antitrust authorities' of transactions across a number of sectors, together with an increased willingness of US regulators to challenge transactions in court, with 10 mergers challenged in court in 2022, up from six in 2021 and eight in 2020;
- the increase of US Securities and Exchange Commission focus on special purpose acquisition companies include new proposals related to disclosure, standards for marketing practices, and gatekeeper and issuer obligations; and
- changes to US corporate tax law, which make it far more acceptable for a US corporation to be the corporate parent of a global enterprise, which introduces greater flexibility into structuring cross-border transactions.

6 Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

Buyers from outside the United States have typically been an important part of the US M&A market. The amount of inbound activity in the first



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half of 2023 was approximately US\$75 billion, lower than the activity in the first half of 2022 (approximately US\$115 billion), but consistent with the overall decline in US M&A activity.

Chinese buyers, who by 2015 had become an important participant in the US M&A market, have stepped back almost entirely from the US market, with little activity in the first half of 2023: approximately US\$200 million, down from US\$3.1 billion in the first half of 2022. This is due to increasing restrictions imposed by the Chinese government on acquisitions by Chinese companies and due to the increasing level of scrutiny by US regulators of Chinese buyers. It is safe to assume that there is a tension on the part of potential non-US buyers coming into the United States seeking to balance the general uncertainty around the political and regulatory climate in the United States, on the one hand, against a relatively attractive American economy, on the other hand. The significant uncertainty around US trade and foreign investment policy and the increase in scrutiny of non-US buyers by CFIUS, among other things, has no doubt deterred some degree of M&A activity in the United States and inbound cross-border M&A in particular.



7 Are shareholder activists part of the corporate scene? How have they influenced M&A?

Shareholder activism in 2023 continues to be a regular part of the corporate landscape in the United States, with 29 campaigns initiated in the first quarter of the year by activists at US companies that have a market capitalisation over US\$500 million, around the average of 27 campaigns for the past four years in Q1.

Activism in the US takes a variety of forms, as is the case in other geographies, and the activist campaigns typically include one or more of the following themes: M&A actions, board representation, strategy and operations reviews and capital allocation. With respect to M&A actions, one regular aspect of the activist playbook in the US is the urging of companies to put themselves up for sale or to put up for sale portions of their business. In addition to the transactions directly stimulated by activists, many companies have engaged in transactions even before an activist has acquired a stake in that company to forestall such an appearance by an activist. Regardless of your view as to the tactics and merits of shareholder activists, they have certainly contributed to M&A activity over the years, and that is expected to continue in the US market.

Also of note regarding activism in the US is that shareholder activists have become increasingly sophisticated in their approach to board composition, with many proposing high-quality nominees to their slate of board directors. Further, as institutional investors continue to adopt explicit qualifications for diversity in board representation, whether through skill, ethnic or gender diversity, shareholder activists are provided with an opportunity to enhance the quality of a board's composition through diverse nominee selections using networks not accessible or otherwise not efficiently utilised by companies.

8 Take us through the typical stages of a transaction in your jurisdiction.

First contact regarding a possible transaction can either take place between intermediaries or from CEO to CEO. Who makes the initial approach really depends on the particular situation, the nature of the industry and whether there is a pre-existing relationship between executives of the two companies involved.

Diligence of non-public information is permissible if a confidentiality agreement is entered into between the parties. Typically under US law, no disclosure of discussions regarding a possible transaction needs to be made until a definitive agreement with respect to a transaction is executed by the parties, so long as the parties have maintained a position of not making any public comment about a possible transaction while negotiations were taking place.

One issue that often arises at the state of entering into a confidentiality agreement is whether the potential seller will agree to grant to a prospective buyer the exclusive rights to negotiate for a period of time. US sellers have the right to grant a period of exclusive negotiations. However, the boards of directors of most US public companies being sold have a fiduciary duty to show that they engaged in an appropriate process intended to obtain the highest price reasonably available for that company. Some kind of check of the market by the prospective seller is a common way to fulfil that duty. Thus, there is a tension between granting an exclusive right of negotiation and being able to fully assess the market for potential purchasers.

Any potential purchaser of a US public company needs to be aware that lawsuits are frequently filed in connection with acquisitions of US public companies. These lawsuits can be filed in the court of the state where the company is incorporated to allege either that the target



company's directors have violated their fiduciary duties in connection with agreeing to a sale of the company or, in the case of cash transactions, to initiate an appraisal action in which a shareholder seeks a judicially determined fair value for its shares. Alternatively, a lawsuit can be filed in a US federal court alleging inadequate or misleading disclosure in the documents concerning transactions that have been filed with the SEC. The majority of US companies are incorporated in the state of Delaware, and the Delaware courts have sought to severely limit the number of lawsuits filed making specious claims that directors have violated their fiduciary duties, as historically the overwhelming number of these suits were simply nuisance suits. Appraisal claims had risen sharply a few years ago, but recent Delaware court decisions have similarly curbed such suits.

9 Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

The regulatory climate in the US, particularly with respect to competition regulation (known in the US as 'antitrust' regulation), has become decidedly more hostile to deal-making in recent years. In a 2021 executive order, US President Biden articulated a broad view of antitrust regulation that, among other things, instructed the US antitrust agencies to increase enforcement to prevent a rise in consumer prices and competitive harm in labour markets and to seek to preserve nascent competition. In what the order calls a 'whole-of-government competition policy', it charged more than a dozen agencies, in addition to the US antitrust enforcement agencies, to protect competition using their authority under a range of US laws.

The Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ), as the principal US antitrust regulatory bodies, have responded as expected and have been taking a notably

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more aggressive approach to reviewing and challenging deals on antitrust grounds. For example, historically, vertical combinations between suppliers and customers were not given much scrutiny. Now, however, the antitrust agencies have been applying increasing scrutiny of vertical mergers, considering, in particular, potential harms in the context of 'modern firms', as well as harms to labour markets. The FTC also adopted other policies making it more challenging on merging parties, including modifications to second-request requirements (the process whereby the FTC can request additional information with respect to the merger) that make the antitrust review process lengthier and give the FTC more time and leverage to challenge deals. Although recent high profile FTC legal defeats, including Microsoft's acquisition of Activision and Meta's acquisition of a virtual reality start up, suggest that courts are not persuaded by these new policies and theories of harm, the overall pro-enforcement approach to antitrust has dampened US M&A activity.



With respect to regulation in the area of foreign investment, the US continues to take a close look at many deals involving a foreign acquirer. The CFIUS pilot programme installed in 2019 remains in place and is focused on what it refers to as the protection of national security from existing and emerging risks through the expansion and strengthening of CFIUS. Among other things, this programme expanded the overall scope of foreign investment review, including with respect to non-controlling investments in 27 critical technologies, ranging from semiconductors to aircraft engines, all of which are now subject to national security evaluations provided certain benchmarks are satisfied.

10 What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

With the current uncertainty in the US around geopolitical tensions and the high interest rate environment, it is challenging, at this time, to predict how activity levels will look for the next 12–24 months. Facing the current headwinds, US M&A activity has fallen, but there are reasons to think that it may rebound later this year and into the next as parties adjust to the new normal. Many corporate buyers are continuing to execute on their M&A objectives, as M&A remains a vital component of staying competitive and growing, and there remains a significant amount of dry powder that private equity has accumulated and will continue to look to deploy. Some of the sectors that are most likely to remain relatively active in the US M&A market include:

- technology, continuing the constant series of combinations of older and newer businesses in the range of fields comprising the sector;

- healthcare, including hospitals, outpatient facilities, medical device manufacturers and pharmaceutical companies all continuing the ongoing consolidation and convergence in those fields; and
- energy, mining and utilities, continuing this sector's current run of activity.

Making a prognostication as to potential geopolitical or macroeconomic developments could have an effect on M&A activity in the coming year is obviously highly speculative. The potential list of developments range from the impact of higher interest rates and inflation on the economy, how the increased regulatory scrutiny being applied to deal-making evolves, the impact of Russia's war in Ukraine and whether other current geopolitical tensions escalate dramatically. Finally, China seems to be reorienting its economy towards one with greater government control of areas such as technology, banking and real estate, and the global consequences of this internal activity by the Chinese government remains to be seen. In many ways, the crystal ball as to future events and their impact on the US M&A market in the coming year or two is more cloudy than it has been for a while.

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The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

The size and complexity of many transactions in the US market, together with the highly developed corporate law governing change-in-control transactions of US companies, make the M&A market here unique. Helping boards of directors properly fulfil their fiduciary obligations in connection with a sale of a company is challenging in the litigious environment of the United States. In addition, the depth, experience and creativity of the private equity deal market in the United States remains a dynamic and distinctive factor in US M&A.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

First, does the counsel listen and communicate well with the client? Second, is there a complete team of specialist and colleagues who work together seamlessly to help the client achieve its goals? Third, does the counsel have deep expertise with the kind of transaction under discussion? Successfully guiding complex multinational transactions is not for a novice.

What is the most interesting or unusual matter you have recently worked on, and why?

Representing Change Healthcare in its proposed sale to UnitedHealth for approximately US\$14 billion (including assumption of debt) has proven to be an enormously interesting transaction that has now spanned three calendar years. In addition to many of the unique elements associated with representing a US public company in a sale process, the Change Healthcare deal became a sort of bellwether of the US government's more aggressive antitrust enforcement posture. Following the production of millions of documents by the merging parties, the US DOJ filed a lawsuit to block the transaction in February 2022. After negotiating and agreeing to an extension of the merger agreement, which was originally executed and announced in January 2021, the DOJ trial took place in August 2022. In a recent period that saw an enormous number of highly interesting deals, the potential sale of Change Healthcare stands out.





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