

# Summary of New Developments in the M&A Marketplace as of December 31, 2023, with Comments on 2024 Developments through September 30, 2024

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## INTRODUCTORY NOTE

This Article is based on the “Recent Data” sections of the book entitled *Mergers, Acquisitions and Tender Offers: Law and Strategies — Corporate, Securities, Taxation, Antitrust, Cross-Border* (Second Edition) (“MATO”) by Penn State Law Professor Samuel C. Thompson, Jr. The book is published by the Practising Law Institute (PLI), and this Article is published with the permission of PLI.

MATO has six volumes and focuses on a range of M&A issues, including corporate, securities, antitrust, federal and state taxation, cross-border, regulatory, and valuation. The book is updated twice annually, and this Article is based on the sections of chapter 1 that focus on an analysis of the developments in the M&A marketplace through December 2023. The last section of this Article, which is not included in the book, provides some preliminary observations on 2024 developments through September of 2024.

The numbering system in this Article is based on the numbering system of the New Developments section of the MATO book, with section 1:7.4 providing an introduction to sections 1:7.5 through 1:7.43, which address different substantive concepts in M&A.<sup>1</sup>

## Table of Contents

I. RECENT DATA: MACRO VIEW OF THE RECENT ECONOMIC AND FINANCIAL IMPACT OF M&A.....	55
§ 1:7.5 Review of 2018-2024 Trend in U.S. M&A Activity.....	55

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1. I want to thank my Research Assistant at Penn State Law, Bailey Keenan, a third-year student for her excellent work on this Recent Developments section of this chapter.

§ 1:7.6 Recent Trends in U.S. and Worldwide M&A Activity .....	61
§ 1:7.7, Recent U.S. M&A Volume (1) Related to Aggregate U.S. Gross Domestic Product, GDP, and (2) as a Percentage of Aggregate GDP .....	65
§ 1:7.8 Recent U.S. M&A Volume Related to Investment Component of GDP.....	67
§ 1:7.9 Recent U.S. M&A Volume Related to the S&P 500 Stock Index .....	69
§ 1:7.10 FactSet and Wachtell’s Overall Assessment of M&A Activity in 2023 and 2024.....	71
<b>II. RECENT DATA: STRUCTURAL ISSUES IN RECENT M&amp;A DEALS, SECTION 1:7.11 THROUGH 1:7.19.....</b>	<b>74</b>
§ 1:7.11 Recent U.S. M&A Activity by Type of Transaction.....	74
§ 1:7.12 Recent (1) P:E Ratios. (2) Premiums Paid, and (3) Revenue Metrics in U.S. Public Deals .....	75
§ 1:7.13 Recent U.S. Payment Trends: Cash, Stock, Mixed, and Other .....	78
§ 1:7.14 Recent Data on Acquisitions of Domestic and Foreign Publicly Traded Companies and the Returns to the Target’s and the Acquirer’s Shareholders .....	80
§ 1:7.15 Recent Data on Acquisitions of Privately Owned Companies.....	83
§ 1:7.16 Recent (1) Private Equity Capital Raising, (2) Leveraged Buy-Out Activity, and (2) Related Issues .....	84
§ 1:7.17 Recent Data on U.S. M&A Deal Size .....	94
§ 1:7.18 Recent Data on U.S. Regional Acquirer Activity .....	95
§ 1:7.19 Recent Data on U.S. Regional Target Activity .....	96
<b>III. RECENT DATA: TAKEOVER DEFENSES, TENDER OFFERS AND RELATED ISSUES, SECTIONS 1:7.20 THROUGH 1:7.31.....</b>	<b>97</b>
§ 1:7.20 Recent Data on the Shareholder Rights Plan, i.e., the Poison Pill .....	97
§ 1:7.21 Recent Data on the Percentage of S&P 500 Companies with Various Types of Defensive Measures.....	104
§ 1:7.22 Recent Data on U.S. Tender Offers, Contested and Uncontested.....	107
§ 1:7.23 Recent Data on the Rise of Two-Step Transactions and the Top-Up Option.....	109
§ 1:7.24 Recent Data on U.S. Termination Fees: Direct and Reverse.....	111
§ 1:7.25 Recent Data on “No-Shop” and “Go Shop” Provisions of Acquisition Agreements in Negotiated Deals .....	114
§ 1:7.26 Wachtell’s Assessment of Hostile M&A Activity in 2022 and 2023.....	117
§ 1:7.27 Recent Information on Bankruptcies.....	118
§ 1:7.28 Recent ABA Deal Point Studies .....	123
§ 1:7.29 Recent Information on the Top Ten M&A Investment Banks and Law Firms Ranked by U.S. Deal Size.....	125

§ 1:7.30 Recent Information on Proxy Contests .....	127
§ 1:7.31 The Role of Activist Shareholders Specifically .....	129
IV. RECENT DATA: CROSS BORDER M&A, SECTIONS 1:7.32 TO 1:7.36 ..	133
§ 1:7.32 Recent Data on Cross-Border M&A Activity .....	133
§ 1:7.33 Recent Data on the Top Ten Foreign Buyer Countries:	
Inbound Acquisitions .....	141
§ 1:7.34 Recent Data on the Top Ten Foreign Seller Countries:	
Outbound Acquisitions .....	141
§ 1:7.35 Resolution of the Trapped Foreign Income Problem by the 2017 Tax Cuts and Jobs Act (TCJA).....	143
§ 1:7.36 The Inversion Problem Before and After the TCJA and the Section 385 Regs.....	144
V. RECENT DATA: OTHER M&A ISSUES, SECTIONS 1:7.37 TO 1:7.43.....	145
§ 1:7.37 Brief Introduction to Special Purpose Acquisition Companies (SPACs) .....	145
§ 1:7.38 Brief Introduction to Blockchain and Cryptocurrency M&A .....	148
§ 1:7.39 The Impact of Environmental, Social and Governance (ESG) on M&A.....	154
§ 1:7.40 The Impact of ChatGPT and Other Artificial Intelligence (AI) Firms on M&A.....	155
§ 1:7.41 The Impact of Monetary Policy on the Level of M&A Activity .....	162
§ 1:7.42 Preliminary Report on M&A Activity in 2024 .....	165
§ 1:7.43 A Deal Lawyer’s “Takes” on the Impact on M&A of the Biden Administration’s Laws and Regulations.....	167
§ 1:7.44 A Guide to Some of the Literature Addressing Current Developments in M&A.....	172

*§ 1:7.4 Introduction to Recent Data on the M&A Marketplace  
Contained in Sections 1:7.5 through 1:7.44*

[A] The Purpose of these Sections

Sections 1:7.5 through 1:7.44 present recent data and information on the state of the M&A marketplace, in most cases, as of the end of 2023,<sup>2</sup> with a brief look at this activity during the first five months of 2024. This section 1:7.4 provides:

(1) a guide to the *Principal of Sources of Information* employed in this chapter (section 1:7.4[B]);

(2) a guide to the manner in which the data and information in this chapter are organized (section 1:7.4[C] to 1:7.4[G]);

(3) an introduction to the B2B and B2C manner of thinking about the organization of business activity for M&A and other purposes (section 1:7.4[H]).

(4) a list of the Parts I through Part V in which these Recent Developments sections (i.e., sections 1:7.5 through 1:7.44) are organized (section 1:7.4[I]);

(5) an introduction in section to Appendix 1B, which is a guide to these Recent Developments (section 1:7.4[J]); and

(6) “*A Guide to Some of the Literature Addressing Current Developments in M&A*” (section 1:7.44).

In addition to addressing the topics generally, some of the sections focus specifically on the impact of the COVID-19 crisis.

[B] A Brief Introduction Principal Sources of Information

[1] In General and 2024 FactSet Review

The principal source of data in this part of chapter 1 is the *2024 FactSet Review*,<sup>3</sup> which is published by Business Valuation Resources (BVR). It contains a significant amount of data and other information on M&A and related transactions occurring in 2023 and before. There are many other sources, including those mentioned below in this section.

[2] An Introduction to Wachtell Lipton’s<sup>4</sup> May 2024  
Takeover Law and Practice Book and to Its January

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2. Some of the data are presented as of years prior to 2022. Of course, in assessing any particular situation, it is important to get the most recent information available.

3. Business Valuation Resources, *2024 FactSet Review* (2024) [hereinafter *2024 FactSet Review*].

4. Wachtell, Lipton, Rosen & Katz is a leading law firm in New York City. It specializes in the legal aspects of M&A activity and is one of the best-known law firms in the world working in the M&A area. The firm periodically publishes articles, available on the firm’s website, dealing with various M&A and related issues.

### 2024 M&A Update

Yearly, Wachtell Lipton publishes a book, which is free on Wachtell's website, entitled *Takeover Law and Practice*.<sup>5</sup> The 2024 version of this excellent book, which was issued in April 2024, is 237 pages in length and is divided into the following Chapters:

- I. Current Developments;
- II. Board Considerations in M&A;
- III. Preliminary Considerations in the Deal Making Process;
- IV. Structural Considerations;
- V. Deal Protection and Deal Certainty; and
- VI. Hostile M&A and Advanced Takeover Preparation.

The following sections 1:7.4 through section 1:7.44 refer in many places to Chapter I, the *Current Developments* chapter of *Wachtell, 2024 Takeover Law and Practice*. Also, in many cases, references are made to other chapters in this book in which the particular topic is addressed.

In addition to *Takeover Law and Practice*, the article *Mergers and Acquisitions—2024*, authored by several Wachtell lawyers, is helpful in addressing current M&A developments.<sup>6</sup>

### [3] The Different Legal Styles for Implementing M&A

As indicated in the following report on a presentation given at the *Berkeley 2024 Spring Forum on M&A*,<sup>7</sup> law firms in different geographical areas of the U.S and the world sometimes have different approaches to implementing M&A transactions:

The large migration to the US capital markets of companies organized under non-US laws or with principal operations or HQs outside the US has led to tensions about whether to structure transactions US-style (and if we are doing US-style, is it the Silicon Valley-way or the NY-way?), UK-style, or European-style. These types of tensions can get in the way of process and standardization . . . [T]here are two trends that are resolving this tension:

- Convergence – the differences between the approaches of different jurisdictions to transactions are getting smaller faster; and
- Indifference – the core group of global dealmaking professionals is increasingly familiar with, tolerant of, and agile in implementing

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5. Wachtell, Lipton, Rosen & Katz, *Takeover Law and Practice* (Apr. 4, 2024), [hereinafter *Wachtell, 2024 Takeover Law and Practice*], <https://perma.cc/753W-L32B>.

6. Victor Goldfeld et al., *Mergers and Acquisitions—2024*, HARV. L. SCH. F. CORP. GOVERNANCE (Jan. 9, 2024), <https://perma.cc/3QCU-BWJS>.

7. Ethan Klingsberg, *Takeaways from the [Berkeley] 20th Annual Spring Forum on M&A and the Boardroom* (May 31, 2024), [hereinafter Klingsberg, *Berkeley 2024 Spring Forum on M&A*], available at <https://perma.cc/YW6H-NCZA>.

any of the different approaches associated with different geographies, including hybrid approaches.<sup>8</sup>

#### [4] Other Sources

Other sources for both this update, and some past updates, to this chapter 1 are included in section § 1:7.44.

#### [C] Macro View of the Recent Economic and Financial Impact of M&A, Sections 1:7.5 Through-1:7.10

The following sections look at the macro impact of the M&A activity:

§ 1:7.5, Recent Trends in U.S. M&A Activity;

§ 1:7.6, Recent Trends in U.S. and Worldwide M&A Activity;

§ 1:7.7, Recent U.S. M&A Volume (1) Related to Aggregate U.S. Gross Domestic Product, GDP, and (2) as a Percentage of Aggregate GDP;

§ 1:7.8, Recent U.S. M&A Volume Related to Investment Component of GDP; and

§ 1:7.9, Recent U.S. M&A Volume Related to the Performance of the S&P 500 Stock Index; and

§ 1:7.10 Wachtell's Overall Assessment of M&A Activity in 2023.

It will be seen from the information contained in the sections referenced above that notwithstanding the presence of the COVID-19 Crisis, M&A was very strong in 2021, and notwithstanding the reduced adverse impact of COVID-19 during 2022 and 2023, M&A activity significantly decreased from the level in 2021.

#### [D] Structural Issues in Recent M&A Deals, Section 1:7.11 through 1:7.19

The following sections provide data on structural issues in acquisitions, such as (1) type of consideration paid; (2) premiums offered in public deals, that is, the amount by which the deal price for the Target exceeds the pre-announcement trading price of the Target; (3) capital raising by Private Equity (PE) firms, like KKR, and (4) deal size:

§ 1:7.11, Recent U.S. M&A Activity by Type of Transaction;

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8. *Id.*

§ 1:7.12, Recent (1) P:E Ratios,<sup>9</sup> (2) Premiums Paid, and (3) Revenue Metrics in U.S. Public Deals;

§ 1:7.13, Recent U.S. Payment Trends: Cash, Stock, Mixed, and Other;

§ 1:7.14, Recent Data on Acquisitions of Domestic and Foreign Publicly Traded Companies and the Returns to the Target's and Acquirer's Shareholders;

§ 1:7.15 Recent Data on Acquisitions of Privately Owned Companies;

§ 1:7.16 Recent (1) Private Equity (PE) Capital Raising, (2) Leveraged Buy-Out Activity, and (2) Related Issues;

§ 1:7.17, Recent Data on U.S. M&A Deal Size;

§ 1:7.18, Recent Data on U.S. Regional Buyer Activity; and

§ 1:7.19, Recent Data on U.S. Regional Seller Activity.

[E] Takeover Defenses, Tender Offers, and Miscellaneous M&A Issues, Sections 1:7.20 through 1:7.31

The following sections provide information on takeover defenses, tender offers, and provisions of acquisition agreements:

§ 1:7.20, Recent Data on the Shareholder Rights Plan, i.e., the Poison Pill;

§ 1:7.21, Recent Data on the Percentage of S&P 500 Companies with Various Types of Defensive Measures;

§ 1:7.22, Recent Data on U.S. Tender Offers, Contested and Uncontested;

§ 1:7.23, Recent Data on the Rise of Two-Step Transactions (that is, negotiated tender offer followed by a merger) and the Top-Up Option;

§ 1:7.24, Recent Data on U.S. Termination Fees: Direct and Reverse;

§ 1:7.25, Recent Data on "No-Shop" and "Go-Shop" Provisions in Negotiated Deals;

§ 1:7.26 Wachtell's Assessment of Hostile M&A Activity in 2023;

§ 1:7.27, Recent Information on Bankruptcies;

§ 1:7.28, Recent ABA Deal Point Studies;

§ 1:7.29 Recent Information on the Top Ten M&A Investment Banks and Law Firms Ranked by U.S. Deal Size;

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9. The P:E ratio is the relationship of (1) the price per share of a stock, to (2) the earnings per share of such stock.

§ 1:7.30 Recent Information on Proxy Contests Generally; and

§ 1:7.31 The Role of Activist Shareholders Specifically.

[F] Cross-Border M&A, Sections 1:7.32 to 1:7.36

The following sections look at various aspects of cross-border M&A transactions:

§ 1:7.32, Recent Data on Cross-Border M&A Activity;

§ 1:7.33, Recent Data on the Top Ten Foreign Buyer Countries, that is, countries home to acquirers;

§ 1:7.34, Recent Data on the Top Ten Foreign Seller Countries, that is, countries home to Targets;

§ 1:7.35, Resolution of the Trapped Foreign Income Problem by the 2017 Tax Cuts and Jobs Act (TCAJA); and

§ 1:7.36 The Inversion Problem Before and After the TCAJA and the Section 385 Regs.

[G] Other Recent Development M&A Issues, Sections 1:7-37 through 1:7.44

Finally, in focusing on recent developments, this chapter covers the following topics that do not fall clearly into any of the above topics:

§ 1:7.37 presents a brief introduction to Special Purpose Acquisition Companies (SPACs), which, as discussed in greater detail in chapter 6, have become a more active part of the M&A scene;

§ 1:7.38 provides a brief introduction to Blockchain and Cryptocurrency M&A;

§ 1:7.39 takes a brief look at the impact of Environmental, Social and Governance (ESG) on M&A;

§ 1:7.40 briefly introduces the impact of ChatGPT and other artificial intelligence (AI) concepts on M&A;

§ 1:7.41 considers the Impact of Monetary Policy on the Level of M&A Activity;

§ 1:7.42 presents a Preliminary Report on M&A Activity in 2024;

§ 1:7.43 because the policies of the current president and his or her administration can have a significant impact on M&A activity, section 1:7.43 presents a “First (2021), Second (2022), Third (2023), and Fourth (2024) Take” on the impact on M&A of the Biden Administration’s policies, including tax, antitrust, and healthcare policies; and



§ 1:7.44 A Guide to Some of the Literature Addressing Current Developments in M&A

[H] B2B and B2C Concepts

In conducting an M&A analysis, it may be helpful to keep in mind the B2B and B2C concepts. A B2B business, like, for example, a steel manufacturer acquires its input from a business (e.g., a producer of iron ore) and sells to another business (e.g., a car manufacturer). On the other hand, a B2C business sells to the ultimate consumer.<sup>10</sup>

[I] A List of the Parts I through Part V in Which the Following Recent Developments Sections (i.e., Sections 1:7.5 through 1:7.43) are Organized

The following sections 1:7.5 through 1:7.43 address the Recent Economic and Financial Impact of M&A in the following Parts I through Part V of this recent developments section of chapter 1.

Part I of recent data: macro view of the recent economic and financial impact of M&A, sections 1:7.5 through-1:7.10

Part II of recent data: structural issues in recent M&A deals, sections 1:7.11 through 1:7.19

Part III of recent data: takeover defenses, tender offers and related issues, sections 1:7.20 through 1:7.31

Part IV of recent data: cross border M&A, sections 1:7.32 to 1:7.36

Part V of recent data: other M&A issues, sections 1:7.37 to 1:7.43

[J] An Appendix Guide to the Economic and Related Factors Discussed in Sections 1:7.5 to 1:7.44

A significant amount of economic and financial information is provided in these “Recent Developments” sections of this book, that is, sections 1:7.5 through section 1:7.44. To assist in an understanding of the organization of these sections, a *Guide* to these sections is set out in Appendix 1A, *Guide to the Economic and Financial M&A Related Factors Addressed in Sections 1:7.5 through 1:7.44*.

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10. See Tim Clarke, PitchBook Data, Inc., *B2B*, in GLOBAL M&A REPORT 10–11 (2022); see also Kyle Walters, PitchBook Data, Inc., *B2C*, in GLOBAL M&A REPORT 12–13 (2022) [hereinafter Pitchbook, 2022 Global M&A Report].

## I. RECENT DATA: MACRO VIEW OF THE RECENT ECONOMIC AND FINANCIAL IMPACT OF M&A

### *§ 1:7.5 Review of 2018-2024 Trend in U.S. M&A Activity*

#### [A] The General Performance of Equity Markets

Before looking at M&A, it is helpful to have a general understanding of the recent general performance of stock markets around the world. Of course, stock markets go up and down, but on balance over the long term they have to go up because otherwise no one would invest in stocks.

In this connection, it is helpful in looking at the trend in M&A activity to keep in mind the general performance of the broader stock market. A March 2024 report by Pitchbook paints the following picture of the performance of domestic and foreign equity markets through the first quarter of 2024:

Strong out of the gate: As Q1 2024 ended, the US market sustained its growth, with the S & P 500 increasing by 3.2% in March to 10.6% YTD and the Nasdaq 100 growing 1.2% in March to 8.7% YTD. US inflation matched expectations, with the Personal Consumption Expenditure price index rising 0.3% monthly and 2.8% YoY. Federal Reserve Chair Jerome Powell highlighted the potential for a bumpy journey to the 2.0% inflation target, underscoring the need for further data before adjusting rates.

Internationally, March's markets outperformed February's, with strong Q1 outcomes. The Nikkei 225 [a stock market index for the Tokyo Stock Exchange rose 3.8% month over month (MoM) and 21.5% YTD, the FTSE 100 [Financial Times Stock Exchange 100 Index] increased 4.9% MoM and 4.0% YTD, and the Morningstar Global Markets ex-US grew 3.0% MoM and 4.3% YTD. Japan's central bank notably increased interest rates, ending eight years of negative rates.<sup>11</sup>

As of 10:30 A.M. on May 29, 2024, the S&P 500 has the following performance record over the indicated time-periods, i.e., 5-Days to 1-Year:

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11. Miles Ostroff and Zane Carmean, PitchBook Data Inc., *Global Markets Snapshot 2* (March 2024) [hereinafter PitchBook, March 2024 Global Markets Snapshot], <https://perma.cc/6T5F-DTQ4>.

**Figure 1-1A**  
**Returns on the S&P 500, for Various Recent Periods, as of**  
**May 29, 2024**

<b>TIME PERIOD</b>	<b>RETURNS</b>
5-DAYS	-0.54%
1-MONTH	5.05%
3-MONTHS	3.98%
YEAR TO DATE (YTD)	10.52%
1-YEAR	26.32%

Source: MarketWatch, MSNBC, <https://www.marketwatch.com/investing/index/spx>, (last visited May 29, 2024).

[B] The Trend in M&A as of Early 2024

A PitchBook discussion of trends in M&A as of the first quarter of 2024 explains:

Closing out 2023, global M&A had declined for two years straight. M&A has almost always bounded back from consecutive annual declines, and we do not think this year will be any exception. The prior two episodes of 2007-2008 and 2001-2002 registered total peak-to-trough declines of approximately 60% to 70%, whereas the present decline has measured 34.4% from 2021's peak. We think we will look back on Q3 2023 as the trough in the current cycle, and Q1 2024 provided some support to that outlook. Against a relatively easy comparison a year ago, global M&A activity has risen by approximately 5% to 10% versus Q1 2023. This was not gangbuster volume by any means—and a deceleration from Q4 2023—but an improvement, nonetheless.

We see the better tone of the last two quarters as a sign that M&A dealmaking is slowly on the mend. It would be faster if not for lagging activity among PE buyers. [Chapter 14 addresses PE and LBOs.] Large LBO dealmaking has been stunted by high borrowing costs. Banks are lending again, but mostly to refinance old PE loans as opposed to new loans backing new PE deals.<sup>12</sup>

Along the lines of this PitchBook observation, the McKinsey & Company, *Top M&A Trends in 2024* makes the following observation:

While the value of M&A activity fell for all of 2023, a jump in the fourth quarter—up 41 percent from the third quarter and 37 percent from a year earlier—points to increasing optimism returning to the market,

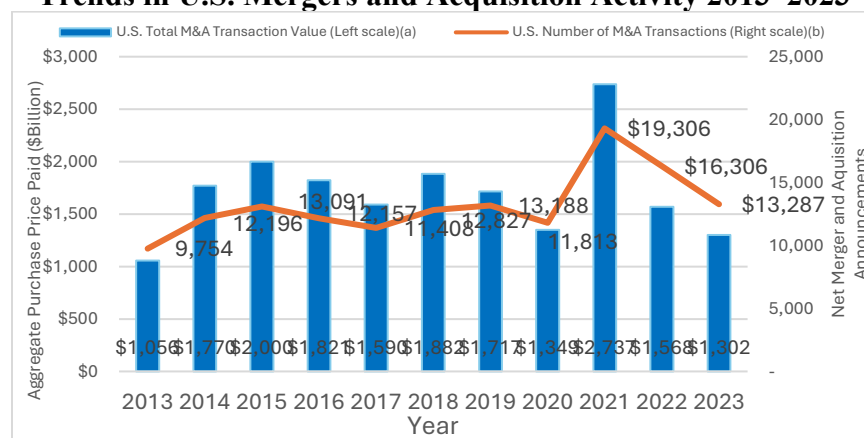
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12. Tim Clarke, PitchBook Data, Inc., *Q1 2024 Global M&A Report 4* (Apr. 2024), <https://perma.cc/D6EG-SWQL>.

along with a growing appetite to consider M&A as a means to advance strategy.<sup>13</sup>

Figure 1-1B, *Trends in U.S. Mergers and Acquisition Activity 2013–2024*, shows both the dollar value of U.S. deals and the number of such deals for each year during this period.

**Figure 1-1B**  
**Trends in U.S. Mergers and Acquisition Activity 2013–2023**



Source: (a) Net M&A Announcements 2004–2023, Right Scale, Line, *2024 FactSet Review*, pg. 20

(b) Purchase Price 2004–2023, Left Scale, Bar, *2024 FactSet Review*, pg. 29

Figure 1-1 demonstrates that both value of deals and number of deals:

- (1) grew fairly steadily from 2013 through 2015;
- (2) held up fairly well from 2015 to 2019;
- (3) experienced a fairly significant drop in 2020, during the COVID-19 crisis;
- (4) had a significant increase in 2021, a “post-real bad” COVID-19 year, and
- (5) had a significant fall from 2021 to 2022 and from 2022 to 2023 in both number and dollar value of deals.

As discussed below, this fall from 2021 to 2022 and from 2022 to 2023 was caused, at least in part, by higher interest rates, which resulted from the Federal Reserve Board’s fight against inflation.

Several factors drove the high level of M&A activity from 2015 through 2019, including (1) low interest rates and better functioning debt markets, (2) significant cash on corporate balance sheets and held by

13. Jake Henry and Mieke Van Oostende, McKinsey & Company, *Top M&A Trends in 2024: Blueprint for Success in the Next Wave of Deals 1* (2024) [hereinafter McKinsey & Company, *Top M&A Trends in 2024*], <https://perma.cc/3A7C-2F7U>.

private equity firms (see chapter 14), and (3) a rising stock market. Obviously, COVID-19 took its toll on M&A in the latter part of 2019 and in 2020, but M&A came roaring back in 2021, before falling back significantly in 2022 and 2023.

As indicated in Figure 1-10, *Recent U.S. M&A Volume Related to S&P 500 Index 2013–2023*, M&A activity is generally correlated with increases and decreases in the stock market. And, as discussed below, as inflation increases, interest rates will generally increase, and stock prices will generally fall. Note that as demonstrated in Figure 1-10, M&A activity was low in both 2022 and 2023, even though the stock market did very well from 2022 to 2023.

As indicated in Figure 1-13, *U.S. Payment Trends 2018–2023*, most M&A transactions are all-cash deals, and this is true in all years. As discussed in chapter 9, which addresses tax aspects of M&A, transactions in which the consideration is all cash are virtually always taxable at the Target shareholder level and possibly at the Target level. On the other hand, deals in which the consideration is all voting stock of the acquirer are almost always tax free to the Target's shareholders and the Target. Mixed consideration deals, that is, any combination of acquirer stock, cash, or acquirer debt, present particularly difficult tax issues, and may be partially taxable and partially tax free to the Target's shareholders.

Notice below in Figure 1-1C, *U.S. Mergers and Acquisition Activity 2020, 2021, 2022, and 2023*, both (1) the spike up in *Announced Deals* and *Value of Announced Deals* from 2020 to 2021, followed by (2) the dramatic fall in both *Announced Deals* and *Value of Announced Deals* from 2021 to 2022 and from 2022 to 2023. This shows the volatility in the overall M&A marketplace, caused, in significant part, here by (as will be seen below) higher inflation and the correlative increase in interest rates orchestrated by the Federal Reserve Board in its fight against inflation.

**Figure 1-1C**  
**U.S. Mergers and Acquisition Activity 2020 - 2023**

<b>YEAR</b>	<b>ANNOUNCED DEALS</b>	<b>VALUE OF ANNOUNCED DEALS</b>
2020	13,696	\$1.5 Trillion
2021	19,099	\$2.7 Trillion
2022	15,734	\$1.5 Trillion
2023	13,287	\$1.3 Trillion

Source: (a) Net M&A Announcements 2004-2023, Right Scale, Line, *2024 FactSet Review*, pg. 20

(b) Purchase Price 2004–2023, *2024 FactSet Review*, pg. 29

Note the “rollercoaster ride:” A dramatic climb in both the number of deals and the value from 2020 to 2021 and dramatic fall in both from 2021 to 2022. Notwithstanding this dramatic fall, a graph prepared by the Moelis investment banking firm shows:

History instructs that steep declines in M&A activity are often followed by robust periods of activity –and the bounce back can be dramatic.<sup>14</sup>

Figure 1-2, *Percent Change in U.S. Deals Volume and Percent Change in U.S. Number of Deals 2018–2023*, shows, in addition to the percentage changes, the number of deals during the 2018–2023 period (1) in the \$100 million to \$500 million range, (2) above \$1 billion, and (3) above \$10 billion.

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14. Moelis & Co., Presentation at the American Bar Association M&A Subcommittee Meeting: Current M&A Environment 11 (Apr. 2023) (presentation on file with author).

**Figure 1-2**  
**Percent Change in U.S. Deals Volume and Percent Change in**  
**U.S. Number of Deals 2018–2023**

<b>Year</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>	<b>2023</b>
Percentage change in the US Deals Volume	19%	-5%	-13%	73%	-50%	-18%
Percentage Change in US No. of Deals	12.4 %	2.4%	-6.3%	48.8%	-17.6%	-19%
US \$100 Million + Deals	803	684	623	954	669	505
US \$1 Billion + Deals	336	280	290	590	285	235
US \$10 Billion + Deals	36	22	13	?	?	?

Note the “rollercoaster ride” in Figure 1-2, the number of deals is (1) up dramatically from 2020 to 2021; and (2) down dramatically from 2021 to 2022 and from 2022 to 2023, with respect to:

- Percentage change in the US Deals Volume;
- Percentage change in US No. of Deals;
- US \$100 Million to \$500 Million Deals; and
- US \$1 Billion + Deals.

Figures 1-3, *Top Five Seller Industries Ranked by Number of Announcements 2023*, and Figure 1-4, *Top Five Seller Industries Ranked by Dollar Value of Offers 2023*, provide information for 2023 from 2024 *FactSet Review*, on the industries with the most M&A activity from the perspective of the Target’s industry.

**Figure 1-3**  
**Top Five Seller Industries Ranked by Number of**  
**Announcements 2023**

<b>Rank</b>	<b>Industry</b>	<b>Total</b>	<b>Value (\$ in Millions)</b>
1	Technology services	2,426	\$212,506.5
2	Commercial services	1,962	\$39,280.0
3	Finance	1,679	\$131,920.8
4	Consumer services	1,061	\$98,379.5
5	Industrial services	861	\$59,115.7

Source: Sector Activity: Number of Transactions 2018–2023, 2024 FactSet Review, pgs. 90 and 92

**Figure 1-4**  
**Top Five Seller Industries Ranked by Dollar Value of Offers**  
**2023**

<b>Rank</b>	<b>Industry</b>	<b>Total announcements</b>	<b>Value (\$ in Millions)</b>
1	Technology services	3,107	\$212,506.5
2	Energy minerals	2,026	\$188,292.4
3	Health technology	467	\$170,365.8
4	Finance	851	\$131,920.8
5	Consumer services	548	\$98,378.6

Source: Sector Activity: Dollar Value Offered 2023, 2024 FactSet Review, pgs. 90 and 92

The following industries are listed in both figures (i.e., *Number of Announcements* and *Dollar Value of Offers*): Technology Services, Finance, and Consumer Services. This was also the case for 2022.

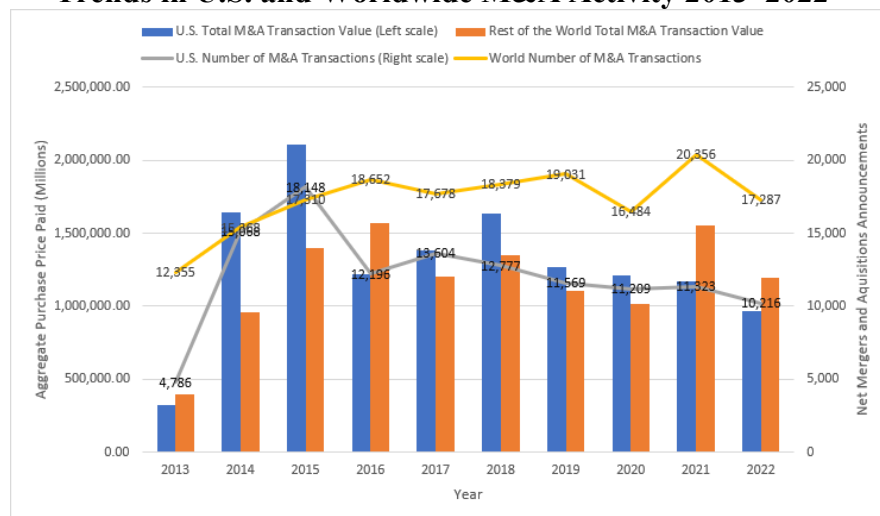
*§ 1:7.6 Recent Trends in U.S. and Worldwide M&A Activity*

[A] In General

Figure 1-5, *Trends in U.S. & Worldwide M&A Activity 2013–2022*, displays the M&A deal value and number of deals for both the United States and the “Rest of World” for the period from 2013 through 2022.



**Figure 1-5**  
**Trends in U.S. and Worldwide M&A Activity 2013–2022**



Source: FactSet IdeaScreening M&A Database, as of June 2023

Figure 1-5 demonstrates that generally when domestic M&A activity is robust, foreign M&A activity also tends to be robust, and when domestic activity declines, as was the case in 2022, foreign activity also declines. This may mean that M&A activity, whether domestic or foreign, is driven by the same factors.

As shown on the above figure, both domestic M&A and foreign M&A, in terms of both number of transactions and value of transactions, declined significantly in 2019 and 2020, in large part because of COVID-19. However, there was a large rebound in M&A activity in 2021, motivated in large part by the “catch-up” resulting from the effects of COVID-19. But this “catch-up” was followed by a big decline in 2022, largely attributable, as discussed more completely below, to high inflation and the resulting high interest rates engineered by the Federal Reserve Board to fight the inflation, which was in large part a response to the Fed’s and Congress’s aggressive measures in fighting COVID-19.

As shown above in Figure 1-2, *Percent Change in U.S. Deals Volume and Percent Change in U.S. Number of Deals 2018–2023*, from 2022 to 2023, there were significant drops in both US Deals Volume, and US No. of Deals.

Although in Figure 1-5, in many years the value of U.S. deals exceeded the value of foreign deals, in all but one year (2015), the number of foreign deals exceeded, by a wide margin, the number of U.S. deals. This indicates that the average value of foreign deals is substantially less than the average value of U.S. deals.

[B] McKinsey’s View on the “M&A Market Durability”

In its 2024 report on M&A,<sup>15</sup> McKinsey expressed the following view on “M&A Market Durability:”

A variety of factors supports the global M&A market’s durability. First, with the business landscape experiencing seismic shifts—ranging from the rise of AI to the growing importance of sustainability and the emergence of a more demanding, tech-enabled consumer class—CEOs across industries tell us that M&A is a more vital strategic lever than ever. Organic growth—which never compared well with the most effective M&A strategy—pales further when significant strategic shifts are called for. This is especially true when companies need to adapt quickly.

For example, our latest analysis of the “Global 2,000”—the world’s largest global public companies—found that those making more than two small to midsized deals annually over ten years through 2022 delivered a median excess total shareholder return (TSR) of 2.3 percent. This programmatic approach outperformed all other M&A strategies, including organic growth, which actually destroyed value in the same period. Part of this success stems from actively managing portfolios. Programmatic acquirers are not just acquisitive; they also actively divest nonstrategic assets . . . .

Strikingly, programmatic dealmakers with the most deals earned the highest returns. Seventy percent outperformed programmatic peers who made fewer deals. And the performance gap between programmatic acquirers and companies pursuing organic growth only widened during the COVID-19 years. Programmatic acquirers achieved 3.9 percent excess TSR in the past decade, up from 2.9 percent in the 2010s. Even with some of the lowest M&A volumes in recent years, our latest research shows that the case for programmatic M&A is stronger than ever.<sup>16</sup>

The McKinsey report also explains as follows that the macroeconomic conditions support a renewed growth in M&A:

Higher interest rates have tempered the inflationary trends so worrying to central bankers; inflation now hovers just above 3 percent across the US, Europe, and Asia. Job growth has remained healthy, with US unemployment under 4 percent late last year, while the Eurozone hit historic lows of around 6.5 percent. Consumer spending has also remained robust globally, with US retail sales rising at an annual rate of about 4 percent from a year earlier. This improving picture has buoyed economists’ hopes of a soft landing for the US economy—a sentiment

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15. McKinsey & Company, Top M&A Trends in 2024, *supra* note 13.

16. *Id.* at 2-3.

shared by many investors who boosted stock market returns at the end of the year.<sup>17</sup>

Note, however, while the stock market went up dramatically, the level of M&A activity retreated.

[C] Assessment by Paul Weiss of M&A Activity as of June 2024

The following are the “Key Takeaways” in the Paul Weiss, *June 2024 M&A at a Glance*:<sup>18</sup>

► M&A was generally down in May compared to April, except for global sponsor M&A, which saw modest increases in total deal value and deal count. Year over year, deal counts and total deal values were also generally down in May, with only sponsor total deal values increasing in the United States and globally.

► Computers & Electronics was the most active U.S. industry by total deal value and number of deals in May and over the last 12 months (LTM). Nine of the 21 \$1 billion+ U.S. deals announced in May were in that industry.

► Both inbound and outbound U.S. crossborder activity fell in May compared to April. Canada and the United Kingdom were our most active crossborder deal partners in May.

► Among definitive \$100 million+ U.S. public deals, some interesting observations are that there were no go-shop provisions compared to 8% announced LTM, unaffected premiums in May (25%) were well below the LTM average (43%) and there were also no tender offers in May.<sup>19</sup>

The *June 2024 M&A at a Glance* report also explains that “Strategic” acquisitions (i.e., an acquisition by an acquirer of a target for purposes such as expanding into a new geographic area or product line) were down significantly both in the U.S. and Globally.<sup>20</sup> On the other hand, “Sponsor” acquisitions (i.e., private equity transactions, see chapter 14) were down significantly in the U.S., but up Globally.<sup>21</sup>

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17. *Id.*

18. Paul Weiss, *M&A at a Glance 1* (June 10, 2024) [hereinafter *Paul Weiss, June 2024 M&A at a Glance*], <https://perma.cc/5X2F-BX69>.

19. *See id.*

20. *See id.*

21. *See id.*

§ 1:7.7, *Recent U.S. M&A Volume (1) Related to Aggregate U.S. Gross Domestic Product, GDP, and (2) as a Percentage of Aggregate GDP*

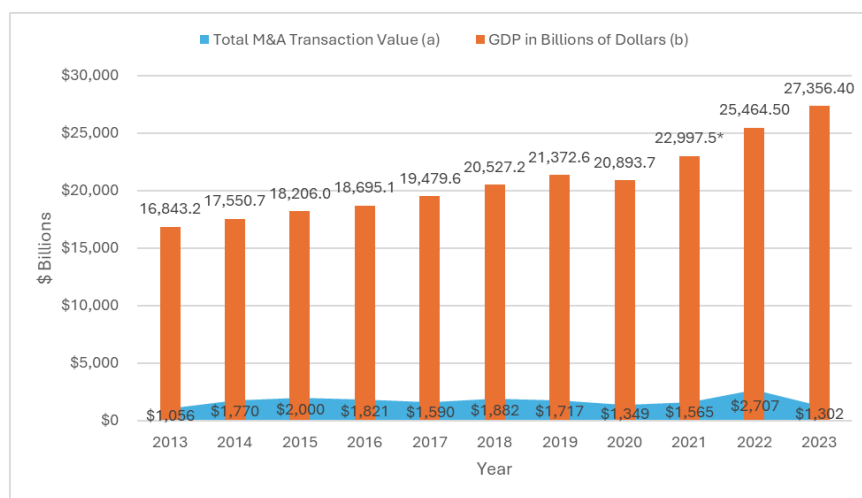
[A] What is GDP and What Does it Have to Do with M&A

Many readers will ask: “What is GDP?” The initials stand for the economic concept of Gross Domestic Product, which is the dollar value of aggregate purchases of new US products and services by (1) consumers, (2) firms, (3) the federal, state, and local governments, and (4) foreign persons (netted against foreign purchases by U.S. persons).

[B] Relationship between Aggregate GDP and M&A Activity

Figure 1-6, *U.S. M&A Volume Related to Aggregate GDP 2013–2023*, shows the relationship between (1) aggregate GDP for the period from 2013 through 2023, and (2) the dollar value of M&A activity for each of those years.

**Figure 1-6**  
**U.S. M&A Volume Related to Aggregate GDP 2013-2023**



Source: (a) Transaction Value 2014-2023, Left Bar, 2024 FactSet Review, pg. 29

(b) *Economic Report of the President*, March 2024; Table B-3 Gross Domestic Product; GDP in billions of dollars; pg. 412, <https://perma.cc/A876-JZV2>.

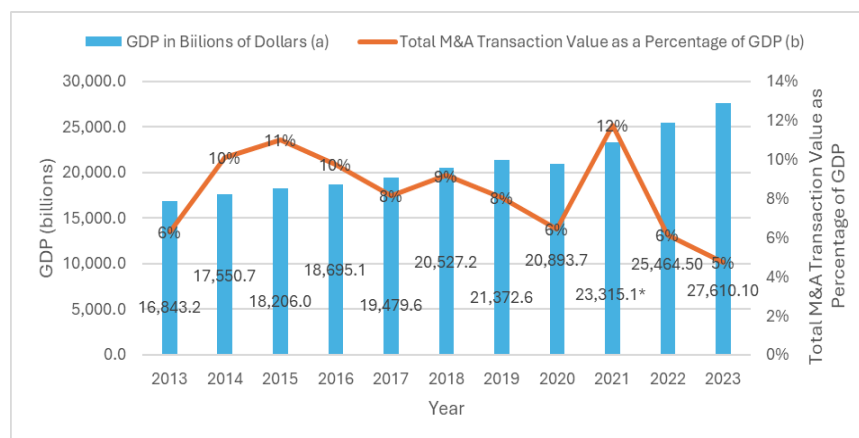
Figure 1-6 shows that M&A deal volume tends to move in lockstep with the growth or decline in GDP. Note that during 2020, the heart of the COVID-19 crisis, both GDP and M&A deal volume declined. But from

2021 to 2022, dealmakers and the market adjusted to COVID-19, with both GDP and M&A deal volume increasing again well beyond pre-pandemic levels. However, from 2022 to 2023, although GDP continued to grow, deal volume declined, largely as a result of the Fed's increase in interest rates.

[C] Recent U.S. M&A Volume as a Percentage of Aggregate GDP

Figure 1-7, *U.S. M&A Volume as a Percentage of Aggregate GDP 2013–2023*, is another way of expressing the relationship between GDP and M&A deal value.

**Figure 1-7**  
**U.S. M&A Volume as a Percentage of Aggregate GDP 2013–2023**



- Source:
- (a) *Economic Report of the President*, March 2024; Table B-3 Gross Domestic Product; GDP in billions of dollars; pg. 412, <https://perma.cc/A876-JZV2>.
  - (b) Transaction Value 2013-2023, *2024 FactSet Review*, pg. 29.
  - (c) The transaction value percentages are calculated by dividing “Total M&A Transaction Value” by “GDP in Billions of Dollars.”

As seen in Figure 1-7, measured as a percentage of GDP, deal value (1) significantly increased from 2020 to 2021, and (2) significantly decreased from 2021 to 2022 and further to 2023. Clearly, the significant increase in interest rates is one of big reasons for the significant decline in M&A activity.

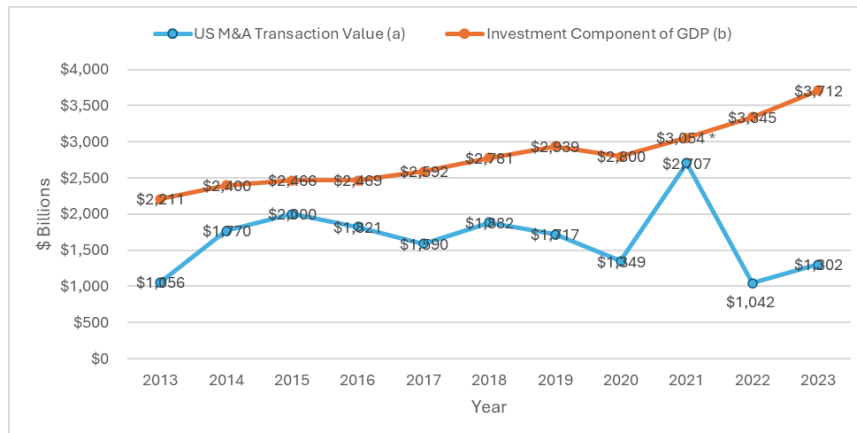
One might ask, “Why does GDP keep growing from 2021 through 2023, while M&A activity keeps falling during this period?” One possible

explanation is that although the Federal Reserve Board was able to fight inflation with its high interest rates beginning in 2021 without putting the economy into a recession, in which GDP would fall, the high interest rates had a significant depressing effect on the level of M&A transactions. As will be seen below, the most common consideration in acquisitions is cash, and much of the cash is raised by the issuance of debt, so if the cost of debt goes up, it is natural to expect that there would be fewer acquisitions and the average purchase prices would tend to fall.

*§ 1:7.8 Recent U.S. M&A Volume Related to Investment Component of GDP*

Figure 1-8, *Recent U.S. M&A Volume Related to the Nonresidential Investment Component of GDP 2013–2023*, presents the relationship between (1) the volume of M&A announcements, and (2) the “Nonresidential Investment” component of GDP, which reflects the spending businesses make on equipment, software, and structures. Generally, this spending increases with a growing economy. Spending on Nonresidential Investment is a reflection of the decision of companies to build capacity. So, this graph shows that from 2020 through 2023, firms were building capacity by investing in plant and equipment, while at the same time there was a decrease in M&A activity.

**Figure 1-8**  
**Recent U.S. M&A Volume Related to the Nonresidential**  
**Investment Component of GDP 2013–2023**



Source: (a) Purchase Price 2002-2023, *2024 FactSet Review*, pg. 29.

(b) *Economic Report of the President*, March 2024; Table B-3  
 Gross Domestic Product; GDP in billions of dollars; pg. 412,  
<https://perma.cc/A876-JZV2>.

Also, Figure 1-9, *Recent U.S. M&A Percent Change in Deal Volume Related to Investment Component of GDP 2017–2023*, presents the percentage changes in these two metrics for the period 2017 through 2023.

**Figure 1-9**  
**Recent U.S. M&A Percent Change in U.S. Deal Volume**  
**Related to Nonresidential Investment Component of GDP**  
**2017–2023**

Year	2017	2018	2019	2020	2021	2022	2023
Percentage change in US Deals Volume (a)	-13%	19%	-5%	-13%	73%	-50%	24% (But Still Much Lower than in 2021)
Percentage Change in Investment Component of GDP (b)	5.01%	7.40%	4.88%	-4.21%	8.11%	10.58%	10.98%

Source: (a) Purchase Price 2002-2023, *2024 FactSet Review*, pg. 29

(b) *Economic Report of the President*, March 2024; Table B-3 Gross Domestic Product; GDP in billions of dollars; pg. 412, <https://perma.cc/A876-JZV2>.

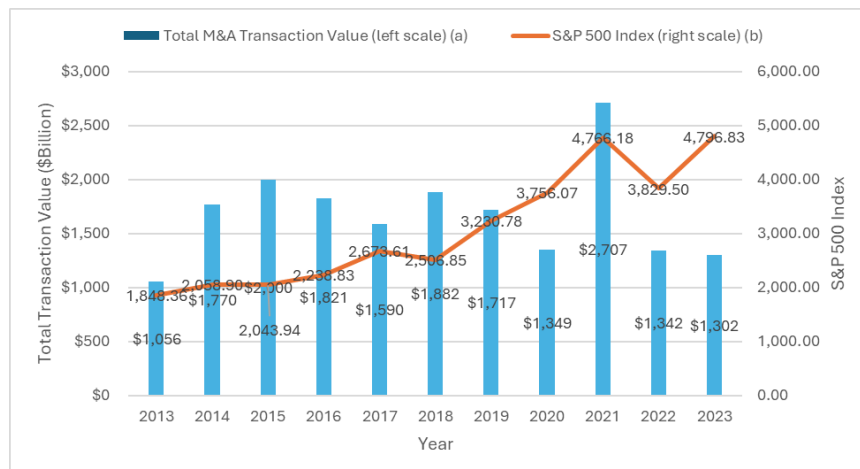
Figures 1-8 and 1-9 show that spending on M&A is much more volatile, on both the upside and the downside, than spending on Nonresidential Investment. This is another indication that, as a general matter, a strong economy means an even stronger M&A marketplace, and a weak economy means an even weaker M&A marketplace. However, the above analysis also shows that even though the economy may be growing, there can be a significant fall in M&A activity. It appears that this could be one of those situations where there is: “On the one hand this; and on the other hand, that.”

*§ 1:7.9 Recent U.S. M&A Volume Related to the S&P 500 Stock Index*

Figure 1-10, *U.S. M&A Volume Related to S&P 500 Stock Index 2013–2023*, shows the aggregate value of U.S. M&A over this period as compared with movements in the S&P 500.



**Figure 1-10**  
**Recent U.S. M&A Volume Related to S&P 500 Index 2013–2023**



Source: (a) Purchase Price 2001-2023, *2024 FactSet Review*, pg. 29

(b) *Economic Report of the President*, March 2023; Table B-56 Common stock prices and yields, 2000-2022; pg. 501, <https://perma.cc/77A4-X52D>.

Figure 1-10 shows that from 2013 through 2018, the S&P 500 and the total M&A transaction value were generally in lockstep, with both moving up. However, from 2019 to 2020, the stock market went up rather dramatically, while M&A volume dropped significantly. This is an indication that the stock market is forward looking, whereas the growth in GDP from year to year is a function of the then current economic performance.

A 2021 Vox article entitled “*Why Stocks Soared While America Struggled*”<sup>22</sup> describes this “Stock Market Up, Notwithstanding GDP Down Effect” as follows:

The market was temporarily shaken in March 2020, as stocks plunged for about a month at the outset of the Covid-19 outbreak, but then something strange happened. Even as hundreds of thousands of lives were lost, millions of people were laid off and businesses shuttered, protests against police violence erupted across the nation in the wake of George Floyd’s murder, and the outgoing president refused to accept the outcome of the 2020 election — supposedly the market’s nightmare scenario — for weeks, the stock market soared.

22. Emily Stewart, *Why Stocks Soared While America Struggled*, VOX (May 10, 2021), <https://perma.cc/37X4-7BHS>.

After the jobs report from April 2021 revealed a much shakier labor recovery might be on the horizon, major indexes hit new highs.<sup>23</sup>

Thus, after a brief fall at the beginning of the COVID-19 crisis, the stock market went up dramatically, skyrocketing in 2021. M&A volume had dropped significantly as a result of the crisis, before also booming in 2021, resulting largely in both figures starting to move in lockstep with one another in 2021.

However, then came 2022 and 2023. From 2021 to 2022, there were significant decreases in both (1) *Total M&A Transaction Value*, and (2) the *S&P 500 Index*. See Figure 1-10. As illustrated below in the discussion of developments in 2022, and the first part of 2023, the stock market was significantly down, and M&A activity was trending down. This brings us to the next section, which discusses both FactSet's and Wachtel's *Assessment of M&A Activity in 2023-2024*.

§ 1:7.10 *FactSet and Wachtel's Overall Assessment of M&A Activity in 2023 and 2024*

[A] In General

As indicated previously, FactSet provides significant information on M&A, and the Wachtel Lipton law firm is one of the most active law firms specializing in M&A. Wachtel also issues many firm memos addressing various areas of business law.

[B] 2024 FactSet Review of M&A Activity

The *2024 FactSet Review* makes the following point about the path of M&A over the past 20 years:

Over the past 20 years, M&A activity has seen four periods of downturns. In the period following the burst of the dot-com bubble, activity trended downward and remained at low levels until the recovery in 2004. From 2004 to 2007, the pace of acquisitions increased until the downturn caused by the financial crises of 2008.

Following the recovery, from 2014 to 2019, M&A activity returned to levels last seen during the dot-com heyday. The most recent downturn occurred as a result of the coronavirus pandemic, which affected markets worldwide. M&A activity exceeded that of any of the prior 20 years in 2021, but fell dramatically in 2022 before declining further in 2023, likely due to interest rate hikes by the U.S. Federal Reserve, which resulted in increased costs for financing M&A activity.<sup>24</sup>

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23. *Id.*

24. *2024 FactSet Review*, *supra* note 3, at 19.

[C] Wachtell's 2024 General Assessment of M&A Activity

In April 2024 Wachtell issued its annual *Wachtell, 2024 Takeover Law and Practice*.<sup>25</sup> The discussion of recent “Deal Activity” reported, in part:

Amid rising interest rates, ongoing fears of a global recession, inflation concerns, stock market volatility, financing market dislocations, geopolitical conflicts and other adverse developments, deal value in the first quarter of 2023 was the lowest for any first quarter in 20 years. The full year saw a 17% decline in global M&A activity compared to 2022. It marked the first year since 2013 that global M&A volume failed to cross the \$3 trillion threshold and represented only 50% of peak 2021 deal value of \$5.8 trillion. Transactions involving U.S. targets and acquirors continued to represent a substantial percentage of overall deal volume, with U.S. M&A exceeding \$1.26 trillion in 2023 (approximately 44% of global M&A volume), as compared to about \$1.5 trillion in 2022 (roughly 43% of global volume).<sup>26</sup>

With respect to specific deals, the Wachtell book goes on to report:

Despite the overall slowdown in M&A markets, a number of transformative transactions—including several megadeals—were struck. The energy sector saw the two largest deals of the year: Exxon Mobil's \$59 billion agreement to acquire Pioneer Natural Resources and Chevron's \$53 billion agreement to acquire Hess, both announced in the fourth quarter. Only two other deals crossed the \$25 billion threshold: Pfizer's purchase of Seagen for \$43 billion and Cisco's agreement to acquire Splunk for \$28 billion. These four \$25 billion-plus deals compare to six such deals announced in 2022 and 10 in 2021; . . . As in 2022, a significant number of companies turned to separations, divestitures, carve-outs and spin-offs in 2023, with nearly 200 \$1 billion-plus divestitures and spin-offs announced.<sup>27</sup>

As a general matter a “separation” generally involves, for example, one corporation separating into separate entities with different shareholders. In a divestiture a parent corporation generally transfers all or a part of the stock or assets of an unwanted sub or division to an acquiring corporation. In a carveout, new shareholders are brought into the ownership of a part of a corporation's assets. In a spinoff, which is generally implemented on a tax-free basis (see chapter 9), a parent corporation transfers the stock of one of its subs to its shareholders on a proportionate or non-proportionate basis. The transaction must satisfy all

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25. Wachtell, *2024 Takeover Law and Practice*, *supra* note 5.

26. *Id.* at 2.

27. *Id.*

of the conditions of section 355 of the Internal Revenue Code, which is explored in chapters 9 and 15.

[B] Wachtell’s Assessment of Technology M&A Activity in 2023, Including IBM’s Investment in OpenAI, Inventor of ChatGPT

While this section addresses Tech M&A generally, section 1:7.40 addresses *The Impact of ChatGPT and Other Artificial Intelligence (AI) Firms on M&A*. Wachtell summarized as follows, the April 2024 picture of tech M&A:

While the number of M&A deals in the technology sector in 2023 remained roughly consistent with 2022, the lack of blockbuster transactions brought the overall value of technology transactions down 46% year-over-year to about \$371 billion, the lowest in six years. Increased regulatory scrutiny in antitrust and foreign direct divestment is one factor for the decline in technology transactions, even though a number of the FTC’s high-profile challenges have been unsuccessful, as discussed below. Nonetheless, technology M&A still played a meaningful role in overall 2023 M&A, accounting for 13% and 15% of global and U.S. deal volume, respectively.<sup>28</sup>

With regard to artificial intelligence, which as indicated, is discussed in greater detail in section 1:7.40, Wachtell provides the following general observation:

In 2023, artificial intelligence continued to be one of the most important current areas of technological development and investor focus, as highlighted by, among many other things, the meteoric rise of NVIDIA and OpenAI’s noteworthy governance developments. Artificial intelligence has driven a number of significant M&A transactions, as companies look to either enhance existing artificial intelligence capabilities or acquire artificial intelligence capabilities to transform existing businesses.<sup>29</sup>

[C] Wachtell’s Picture of M&A in the First Months of 2024

In addressing some of the factors impacting the M&A marketplace in the first months of 2024, the Wachtell book explains:

At the start of 2024, there have been a number of macroeconomic, political and geopolitical factors affecting the M&A landscape—global conflicts, the upcoming U.S. elections and expectations of further interest rate reductions by the Federal Reserve in light of continuing uncertainty regarding both a “soft landing” for the U.S.

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28. *Id.* at 3.

29. *Id.* at 4.

economy and inflationary trends. There is reason to believe that M&A activity will increase in 2024, especially given the uptick in M&A volume in the last quarter of 2023 and a strong start to 2024, though it remains to be seen how the abovementioned factors will develop throughout the rest of 2024.<sup>30</sup>

## II. RECENT DATA: STRUCTURAL ISSUES IN RECENT M&A DEALS, SECTION 1:7.11 THROUGH 1:7.19

### *§ 1:7.11 Recent U.S. M&A Activity by Type of Transaction*

Figure 1-11, *Breakdown of U.S. M&A Activity by Type of Transaction: Number of Deals and Deal Value 2018–2024*, provides a breakdown on the type of M&A deals for the years 2018 through 2024. The deals are divided into the following four categories:

- Public Domestic Targets, that is, publicly held Targets,
- U.S. Acquirers' Acquisitions of Foreign Targets,
- Domestic Divestitures, and
- Privately Held Domestic Targets.

**Figure 1-11**  
**Breakdown of U.S. M&A Activity by Type of Transaction:**  
**Number of Deals and Deal Value 2018–2023**

Year	Public Domestic Targets		U.S. Acquirers' Acquisition of Foreign Targets		Domestic Divestitures		Privately Held Domestic Targets	
	No. of Deals	Deal Value (\$ In Billions)	No. of Deals	Deal Value (\$ In Billions)	No. of Deals	Deal Value (\$ In Billions)	No. of Deals	Deal Value (\$ In Billions)
2018	319	720.7	2,223	359.3	2,603	378.9	8,221	424.1
2019	249	781.4	2,329	421.6	2,412	313.4	8,706	277.2
2020	169	504.0	2,024	274.7	2,303	287.8	8,332	499.6
2021	264	570.1	3,019	714.2	2,707	474.9	13,109	948.8
2022	216	653.4	2,519	238.4	2,099	198.0	10,900	252.3
2023	234	603.8	2094	?	2070	217.9	8,873	?

Source: (a) Composition of Net Merger and Acquisition Announcements, *2024 FactSet Review*, pg. 31

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30. *Id.* at 2.

Note that from 2021 to 2023, in all categories, there were significant drops in the Number of Deals.

Interestingly, in the case of Public Domestic Targets, even though from 2021 to 2022 there was a significant decline in the number of deals, there was a significant increase in Deal Value. This could be attributable to a few large public deals. Note that in all categories there were significant increases from 2020 to 2021, likely due to pent-up demand from pauses in activity at the outset of COVID-19.

Figure 1-11 shows that while the number of public deals is significantly less than the number of private deals, the aggregate deal value of public deals is significantly more than the aggregated deal value of private deals. For example, for 2019, there were 249 acquisitions of publicly held U.S. Targets for a total of \$782 billion, while, on the other hand, in the same year, there were 8,706 acquisitions of privately held Targets for a total consideration of \$277 billion.

*§ 1:7.12 Recent (1) P:E Ratios.<sup>31</sup> (2) Premiums Paid, and (3) Revenue Metrics in U.S. Public Deals*

[A] In General

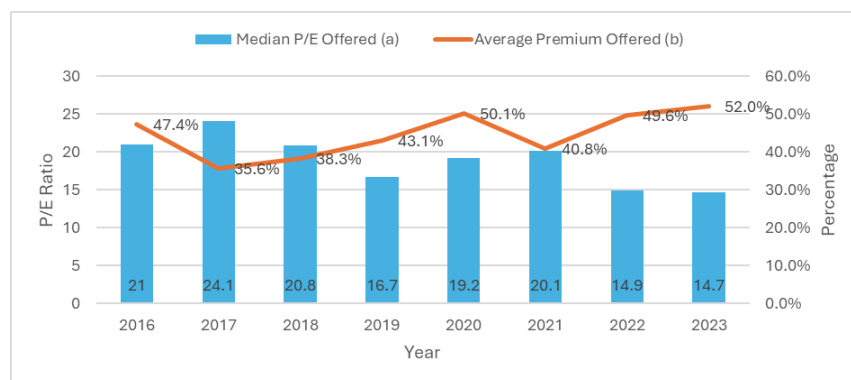
Figure 1-12, *U.S. P:E Ratio, (2) Premiums Paid, and (3) Revenue Metrics in U.S. Public Deals 2016–2023*, shows that for acquisitions of publicly held Targets during that period the following information:

- (1) the ratio of the price offered by the acquirer to the Target's earnings, that is, the "Price to Earnings" (P:E) Ratio, and
- (2) the amount by which the price offered by the acquirer exceeded the pre-offer trading price of the Target, that is, the "Premium Offered."

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31. The Price to Earnings (P:E) ratio is different from a Private Equity (PE) investment firm, which sponsors leveraged buyouts (LBOs) and similar transactions

**Figure 1-12**  
**U.S. P:E Ratio and Premiums Paid 2016-2023**



Source: (a) Distribution of P/E Ratios Offered 2017–2023, 2024 *FactSet Review*, pg. 39

(b) Percentage Premium Offered, 2017–2022, 2024 *FactSet Review*, pgs. 45, 271

Figure 1-12 shows that the Median P:E Offered has remained fairly steady throughout this period. Although the Average Premium Offered during this period has been more volatile, it has been within a range of 35.6% and 52%. The range of Median P:E Offered was from 14% to 24%

Note that both the Median P:E Offered and the Average Premium Offered increased dramatically from 2019 through 2020 during the COVID-19 crisis. One would have expected that as a result of the COVID-19 crisis both the Median P:E Offered and Average Premium Offered would have declined; but the reverse is true. This pattern is consistent with what generally was happening with the prices of homes during this period, which saw some dramatic increases.

It should be noted that the average premium dropped significantly from 2020 to 2021 and came back to a significant extent from 2021 to 2023.

#### [B] The EBITDA Metric

As discussed in chapter 11, which deals with valuation, another common deal metric is the comparison of (1) the firm's earnings before interest, taxes, depreciation, and amortization (EBITDA), which is examined in depth in chapter 11, with (2) the firm's total invested capital (TIC) or enterprise value (EV). Both TIC and EV mean the value of the firm's total (1) debt (net of cash held), and (2) equity. From 1997 through 2008, the average multiple of EV to EBITDA was 9.7 to 1.<sup>32</sup> This means

32. Houlihan Lokey, Presentation on M&A Market Overview 14 (Jan. 2009).

that in the average deal during this period, the price paid plus the Target's debt (net of cash held) was 9.7 times the Target's EBITDA.

In addressing the EV/EBITDA ratio as of the beginning of 2023, the Litera, *2023 M&A Report* explains:

Perhaps the biggest finding in this report is around EV/EBITDA valuations, which appear to be coming down at long last. Since 2016, the median M&A multiple has hovered around 10x, briefly wading into 11x territory in the buying frenzy of late 2021. For the first time in six years, however, the median EV/EBITDA multiple fell below 10x in Q3 2022, and the fourth quarter is following the same trajectory.<sup>33</sup>

It can be expected that as interest rates rise, thereby increasing the cost of financing acquisitions, the price purchasers will be willing to pay will fall. Notwithstanding this disadvantage that Private Equity (PE) firms face, as indicated as follows in the Litera, *2023 M&A Report*, PE firms continue to be able of compete vigorously with strategic acquirers:

Compared with strategic buyers, PE investors are a growing force in global M&A. A decade ago, PE acquisitions made up 23.4% of all M&A activity by count. Fast-forward to today, and PE acquisitions make up 36.6% of global M&A. As that percentage has gradually gone up, it has subliminally increased the competition for assets around the world. For the biggest assets, strategic acquirers still have the upper hand. The ability to add stock payments to their offers, in addition to the synergy assumptions strategics can make, diminishes the likelihood of financial sponsors winning those battles. But PE's willingness to pay high multiples—in some cases upward of 20x EBITDA—has made them more serious competitors in the broader M&A market.<sup>34</sup>

As an illustration of the ability of PE firms to compete, this Litera report goes on to explain:

Between 2021 and 2022, PE firms have acquired 208 public companies to the tune of \$452.7 billion altogether. Those transactions have happened even as the public markets have been historically rich.<sup>35</sup>

The Litera article has an interesting table that shows the number of deals that have been completed over the years by several PE firms,

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33. Litera Corp., *Return to Normal: Resilience and Resetting* 12 (Dec. 1, 2022) [hereinafter Litera, *2023 M&A Report*], <https://perma.cc/QS5E-BVKA>.

34. *Id.*

35. *Id.* at 13.



including (1) Shore Capital Partners at 586; (2) The Carlyle Group at 485, and (3) KKR at 438.<sup>36</sup>

[C] Revenue Metric

Consistent with the information provided on multiples above, Pitchbook has a graph relating to multiples that compares (1) the M&A Enterprise Value (EV) to Revenue multiple, with (2) the S&P 500 EV to Revenue.<sup>37</sup> The graph shows, inter alia, that for this EV to Revenue multiple (1) for 2021, the multiple was 3.1 for M&A to 2.0 for the S&P 500, and (2) for 2022, the multiple shrank on both ends to 2.4 for M&A to 1.7 for the S&P 500.<sup>38</sup>

Note that in both cases the M&A multiple was higher than the S&P 500 multiple, which will be true virtually in every case because acquirers have to pay a price that is higher than the going market price in order to get a sufficient number of a Target's shareholders to accept the transaction.

*§ 1:7.13 Recent U.S. Payment Trends: Cash, Stock, Mixed, and Other*

Figure 1-13, *U.S. Payment Trends 2016–2023*, sets out for the applicable years the percentage of transactions funded with the following types of consideration: cash, stock, mixed, and other.

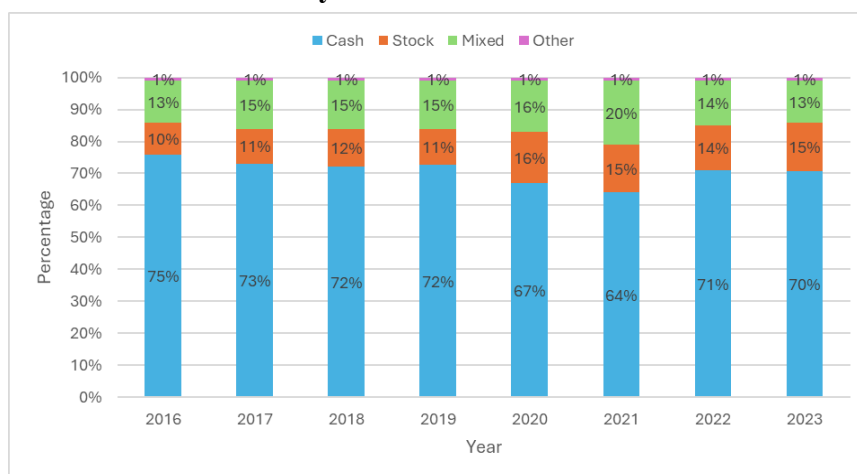
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36. *Id.* at 14.

37. PitchBook, *2022 Global M&A Report*, *supra* note 10, at 7.

38. *Id.*

**Figure 1-13**  
**U.S. Payment Trends 2016–2023**



Source: Payment Trends 2013–2023, 2024 FactSet Review, pg. 35

Figure 1-13 shows that, in each of the years covered, cash was the sole consideration offered in between 64% and 75% of the transactions, and stock was the sole consideration in between 10% and 16% of the transactions.

The predominance of cash is attributable, at least in part, to the activity of private equity firms in the M&A marketplace. As discussed in chapter 14, most acquisitions by private equity firms are either leveraged buyouts or management buyouts in which cash is the sole or primary consideration. Stock consideration is in many cases offered by a publicly held acquirer that is making a strategic acquisition. And, as shown in Figure 1-11, between 2018 and 2023, the maximum number of publicly held Targets in one year was 264, whereas the maximum number of private deals was 13,109, both in 2021. Only in a subset of these transactions was the consideration paid principally in the stock of the acquirer. As a practical matter, if the shareholders of a Target are going to accept stock of the acquirer, they generally are going to want the stock to be listed on an exchange rather than stock in a closely held firm.

As discussed in chapter 9, which deals with the tax aspects of M&A, where cash is the consideration, the transaction is taxable to the Target's shareholders and possibly at the corporate level on the Target itself. On the other hand, if stock is the sole consideration, the transaction will generally qualify as a "reorganization" under section 368 under the Internal Revenue Code, which results in tax-deferred treatment for all shareholders of the Target who receive solely stock in the "reorganization." Where the consideration is a mixture, for example, of cash and stock, the transaction may also qualify as a "reorganization;"

however, the Target's shareholders generally will be taxed on the cash (but not on the stock) received.

*§ 1:7.14 Recent Data on Acquisitions of Domestic and Foreign Publicly Traded Companies and the Returns to the Target's and the Acquirer's Shareholders*

[A] In General

Figure 1-14, *Acquisitions of Domestic and Foreign Publicly Traded Companies 2018–2023*, provides the following information on acquisitions of publicly held Targets in each of the years 2018 through 2023:

- Total Number of Transactions,
- Dollar Value Offered,
- Method of Payment: Cash, Stock, Combination, or Other, and
- Percentage of the Transactions That Are “Going Private” Deals.

As indicated in footnote (c) to Figure 1-14, a “going private” transaction “refers to an acquisition of a publicly traded company by a private investment group, individual, or a private company.” Thus, these transactions include acquisitions of publicly held Targets by private equity firms in leveraged buyouts and management buyouts, which are examined in chapter 14.

**Figure 1-14**  
**Acquisitions of Domestic and Foreign Publicly Traded**  
**Companies 2018–2023**

Year	Total transactions (a)	Dollar Value offered (in billions) (a)	Method of payment (b)				Going private as a % of Public Take Over (c)
			cash	stock	combination	other	
2018	410	\$856	57%	27%	14%	0%	28%
2019	344	\$958	58%	26%	14%	0%	33%
2020	260	\$613	56%	34%	9%	0%	30%
2021	376	\$788	58%	26%	15%	0%	33%
2022	294	\$746	70%	22%	7%	0%	44%
2023	335	\$698	67%	24%	8%	0%	44%

Source: (a) Acquisitions of Publicly Traded Companies 2018–2023, *2024 FactSet Review*, pg. 57  
(b) Acquisitions of Publicly Traded Companies by Method of Payment 2018–2023, *2024 FactSet Review*, pg. 58  
(c) Going Private 2012–2023, *2024 FactSet Review*, pg. 63 (“‘going private’ refers to an acquisition of a publicly traded company by a private investment group, individual, or a private company.”)

Figure 1-14 demonstrates that from 2018 through 2023, the number of worldwide acquisitions of public companies ranged from a high of 410 in 2018 to a low of 260 in 2020. In all years, cash was the principal form of consideration, with stock consideration constituting 34% of deals in 2020 and 22% of deals in 2022. Note that the percentage of stock paid in these public company acquisitions (i.e., 22% to 34%) is, on average, much higher than the percentage of stock issued in acquisitions generally (i.e., 10% to 15%), which is set out above in Figure 1-13, *U.S. Payment Trends 2018–2023*.

#### [B] The Tendency for Acquirers in Public Deals to Overpay

Section 1:5.2 discusses the evidence regarding the returns of publicly held Target and publicly held acquirer shareholders in M&A. As noted there, the Target shareholders generally experience significant gains in all types of M&A transactions, but the results for the shareholders of publicly held acquirers are ambiguous. Section 1:5.2 reports that:

(1) the Pre-2008 Evidence indicated that acquirer shareholders generally have not benefited from M&A,

(2) the 2008–2018 Evidence indicated that these shareholders benefited from M&A, and

(3) the 2020 Evidence indicated that, at least in many cases involving large acquisitions, acquirer shareholders are not benefiting from the acquisition on the date of the acquisition.

An example of a 2020 transaction in which the acquirer's shareholders have seen a significant fall in the price of the acquirer's stock after the announcement of the deal is the Salesforce-Slack transaction. The acquisition by Salesforce of Slack, both publicly held firms, was announced in November 2020. One report on this transaction explains:

[S]ince the Salesforce-Slack deal reached the ears of the public, shares of the [Salesforce, the acquirer] giant have fallen, while shares of the enterprise social upstart [Slack] have risen sharply.

That Slack did well since news of the deal broke is not a surprise. Salesforce is paying more for the company than it had been worth, the premium to its prior value constituting its argument that Slack's investors should approve the deal. This is standard in corporate takeovers.

But what to make of Salesforce's value declines? Let's first calculate how much ground the company has lost on the stock market.

Here's what's happened to Salesforce's stock from November 25th, when the deal initially leaked during the day, to today [December 2nd]. We're calculating the daily change between the preceding day's close and the listed day's final price:

November 25: -5.4% (deal leaks midday)

November 27: +0.33%

November 30: -0.74%

December 1: -1.8% (deal is announced after-hours)

December 2: -8.52%

Salesforce saw its share price fall from around \$264 before the deal became known to \$220.78 at the end of regular trading today. The loss in value works out to 16.5%. From a different perspective, Salesforce lost around \$18.7 billion in value today alone.

Those swings constitute a summary rejection of the deal by investors . . . Salesforce has lost more value than the transaction is worth, which feels notable.

My gut says that investors are worried that Salesforce is overpaying for Slack, and that potential synergies between the two won't amount to as much as the two companies' CEOs imagine.<sup>39</sup>

§ 1:7.15 Recent Data on Acquisitions of Privately Owned Companies

[A] In General

Figure 1-15, *Acquisitions of Privately Owned Companies 2018–2023*, provides for privately held Targets the same information provided in Figure 1-14 for publicly held Targets, except for information on going private, which is not applicable in acquisitions of closely held Targets.

**Figure 1-15**  
**Acquisitions of Privately Owned Companies 2018–2023**

Year	Total transactions (a)	Total Dollar Value offered (in billions) (a)	Method of payment (b)			
			Cash	stock	combination	other
2018	9,600	\$540	66%	14%	17%	1%
2019	10,094	\$380	67%	12%	18%	1%
2020	9,611	\$588	60%	18%	20%	1%
2021	15,255	\$1,248	56%	18%	24%	0%
2022	12,764	\$345	63%	18%	16%	0%
2023	10,306	\$337	61%	20%	16%	0%

Source: (a) Acquisitions of Privately Owned Companies 2018–2023, *2024 FactSet Review*, pg. 66

(b) Acquisitions of Privately Owned Companies by Method of Payment 2018–2023, *2024 FactSet Review*, pg. 67

Perhaps the first thing to notice about Figure 1-15 is that the number of these transactions jumped from 9,611 in 2020, to 15,255 in 2021, and fell back to 12,764 in 2022. And, during this period the Total Dollar Value jumped from \$588 billion to \$1,248 billion and fell way back to \$345 billion, the lowest level in this five-year period.

Figure 1-15 also shows that the number of all-cash deals for closely held Targets fell from 67% in 2019, to 56% in 2021, and climbed back to 63% in 2022. On the other hand, the number of all-stock deals for such firms held steady at 18% in the years 2020, 2021, and 2022.

39. Alex Wilhelm & Ron Miller, *Salesforce Slumps 8.5% As Its Post-Slack Selloff Continues*, TECHCRUNCH (Dec. 2, 2020), <https://perma.cc/7N8L-PLWY>.

### [B] The Tax Reason for Stock-for-Stock Deals

Clearly, one of the most significant reasons for the use of stock in the acquisition of a privately owned Target is that, properly structured, the transaction can qualify as a tax-free reorganization under section 354 of the Internal Revenue Code (IRC), which will defer the tax the Target's shareholders would otherwise incur on the transaction from the swap of their stock of the Target for stock of the Acquirer. Further, the deferral may become permanent, because, for example, elderly shareholders of the Target may hold the acquirer stock received in the acquisition until death, at which time there would be a step-up in basis of the stock in the hands of the beneficiaries under section 1014 of the IRC. This and other tax-planning opportunities are addressed in chapter 9.

The Biden Administration has proposed to eliminate the "step-up in basis at death" rule in certain cases involving large estates, but with a Republican controlled House of Representatives, there is zero chance of this proposal becoming law.

### *§ 1:7.16 Recent (1) Private Equity Capital Raising, (2) Leveraged Buy-Out Activity, and (2) Related Issues*

#### [A] Introduction

##### [1] In General

Private equity (PE) firms generally (1) raise equity capital from a small number of individuals and institutions in private offerings under the federal securities laws (see chapter 6), and (2) invests the funds by taking public firms private in leveraged buyout (LBO) transactions. Private Targets may also be acquired in such transactions.

In LBO transactions, which are addressed generally in chapter 14, a significant amount of the purchase price is raised through debt.

PWC has provided the following assessment of PE fund raising from 2020 through the second half of 2022:

Following a period of unprecedented activity from late 2020 through mid-2022, private equity (PE) activity slowed markedly in the second half of 2022, reflecting uncertainty and disruption driven by inflation, rising interest rates, shuttered debt markets and geopolitical turmoil. Over this period, PE deal volume declined by 22% versus 12 months earlier and has now broadly returned to pre-COVID levels.

With record levels of dry powder (US PE holds \$1.1 trillion), we expect more creative approaches to deploy capital (minority investments, all-equity deals, private placement of debt) and a broader

recovery in activity either as inflation is tamed or asset valuations are sufficiently depressed.<sup>40</sup>

## [2] Wachtell's April 2024 Take on PE Activity

In an assessment of PE activity in 2023, Wachtell reports the following with respect to the acquisition activity of PE firms in 2023:

Some of the 2023 decline in M&A activity can be explained by the continued slowdown in private equity dealmaking, which faced many of the same headwinds as the broader M&A market. Global private equity deal volume extended its decline from its pandemic heights, notching \$1.3 trillion in 2023, compared to \$1.7 trillion in 2022 and a record \$2.2 trillion in 2021, as sponsors facing choppy financing markets increasingly focused on smaller deals and minority investments. Larger transactions generally required sponsors to write proportionally larger equity checks; the average equity contribution for large corporate LBOs reached 52% in 2023, an all-time high, while average leverage levels declined to 5.9x, from 7.1x the prior year. Beyond interest rate and financing market challenges, valuation fundamentals and the “expectations gap” between sellers and buyers also deserve recognition for the slowdown.<sup>41</sup>

Turning to exit strategies by PE firms, the Wachtell report says:

Sponsors [i.e., PE firms] fared little better on the sell side. Global private equity exits shrank in value from approximately \$783 billion in 2022 to approximately \$574 billion in 2023, down more than 25%.<sup>42</sup>

The Wachtell report also gives the following picture of “club deals” in which PE firms join forces in making an acquisition:

Private equity “club deals,” which made a comeback during the pandemic, continued to feature prominently in 2023. Financial sponsors joined forces in a number of notable transactions, most significantly in the \$13 billion bid for eBay-backed Adevinta by a consortium of investors led by Permira and Blackstone.<sup>43</sup>

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40. PwC, *Private equity: US Deals 2023 Outlook*, <https://perma.cc/63GZ-PF62> (last visited June 13, 2023).

41. Victor Goldfeld et al., *Mergers and Acquisitions—2024*, HARV. L. SCH. F. CORP. GOVERNANCE (Jan. 9, 2024), <https://perma.cc/3QCU-BWJS>.

42. *Id.*

43. *Id.*



[3] PitchBook, April 2024 *U.S. PE Breakdown*

The PitchBook, April 2024 *U.S. PE Breakdown*<sup>44</sup> presents the following picture of the US PE marketplace as of April 2024:

[L]ast year was the first year that PE lost share of the global M&A market both in terms of deal value and deal count. This followed eight straight years of buyouts gaining share of total M&A, rising from 21.8% to 36.1% of deal count and an even higher share of deal value. This all reversed in 2023, with the setback in deal value especially pronounced, falling to 39.9% from a share of 44.0% the year prior. This sets up a scenario in which PE is left out of a cyclical rebound in M&A activity due to a declining participation rate.

As noted in previous reports, breaking the exits logjam holds the key to a sustained PE recovery. Without meaningful distributions flowing back to LPs [Limited Partners] by way of realizations, we are concerned that a lack of recycled capital will cause fundraising to stall, dry powder to fall, and capital deployment to decline at the margin. GPs are mindful of what is at stake and have been working ahead of this issue for several years in order to develop more exit routes and liquidity solutions.<sup>45</sup>

[4] PE Firms are “on the Clock”

An interesting feature of PE investing is that because of the need to “invest the cash or return the cash,” PE firms are always “on the clock.” Strategic buyers can wait for the right time and circumstance to move; however, since PE firms do not have permanent capital, they do not have an unlimited time to make acquisitions. However, even in the midst of the COVID crisis, PE firms were able to raise money that would be invested as the crisis abated. Indeed, this may be one of the reasons for the spike in M&A activity during 2021.

[5] McKinsey’s View on PE Investing in 2024

McKinsey’s *Top M&A Trends in 2024*<sup>46</sup> presents the following picture of PE investing in 2024:

But private equity (PE) investors may not be so rare in the times ahead. Although they accounted for only 18 percent of deal activity in 2023, they are not likely to linger on the sidelines for long. Some funds will need to consider exit strategies and redeployments in the near term, and others, along with corporate dealmakers, may be aroused by the

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44. PitchBook Data, Inc., *Q1 2024 U.S. PE Breakdown* 1, 19 (Apr. 9, 2024) [hereinafter PitchBook, *April 2024 U.S. PE Breakdown*], <https://perma.cc/SA32-BJV6>.

45. *Id.* at 4.

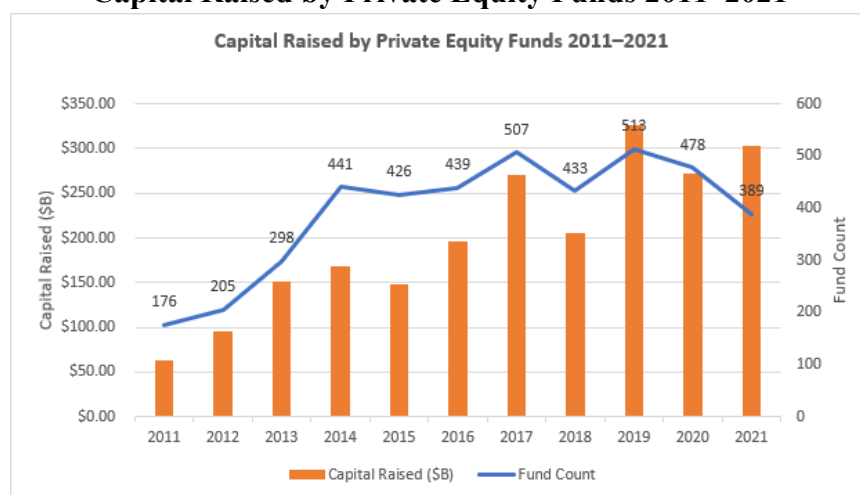
46. McKinsey & Company, *Top M&A Trends in 2024*, *supra* note 13.

more than \$2 trillion in undeployed capital as of the end of 2023. Although macroeconomic and geopolitical challenges could continue to temper PE interest, that mountain of dry powder nonetheless beckons—a temptation that will grow for PE investors and other dealmakers as they sense a return to greater market stability.<sup>47</sup>

#### [B] Capital Raised by PE Funds

Figure 1-16, *Capital Raised by Private Equity Funds 2011–2021*, shows for each of these years the capital raised by private equity firms and the number of private equity funds closed.

**Figure 1-16**  
**Capital Raised by Private Equity Funds 2011–2021**



Source: PitchBook 2021 US PE Breakdown, PE Fundraising Activity by Year, at p. 43 (As of Dec. 31, 2021), <https://perma.cc/M7CL-CMMH>.

With respect to 2022 and 2023, the PitchBook, *May 2023 PE Breakdown* shows that both the Fund Count and Capital Raised were down in 2022 and in the first part of 2023.<sup>48</sup>

Notwithstanding the pull back in 2022 and the first part of 2023, Figure 1-16 shows that the capital invested in private equity funds has greatly increased since a low of \$59 billion in 2011 to a high of \$513 billion in 2019, with only relatively small decreases since 2019.

In its analysis of recent PE fundraising in the first Quarter of 2024, PitchBook<sup>49</sup> says, inter alia:

47. *Id.* at 3

48. PitchBook Data, Inc., Q1 2023 U.S. PE Breakdown 1, 37 (Apr. 11, 2023) [hereinafter PitchBook, *May 2023 PE Breakdown*], <https://perma.cc/T67U-MGHH>.

49. PitchBook April 2024 U.S. PE Breakdown, *supra* note 44.

The overall PE fundraising environment has remained resilient in the face of headwinds that were expected to limit capital raised by sponsors, such as the denominator effect ballooning allocations to private markets and limited distributions to fuel new fundraises. To start the year, US PE closed 63 funds on \$76.8 billion in Q1 2024. In comparison with the first quarter of last year, when \$80.2 billion was raised, the total amount raised by closed funds remains relatively steady. This is noteworthy, especially when juxtaposed with the fact that US-based PE funds amassed just above \$370 billion in 2023.<sup>50</sup>

This is a lot of money. One may ask: who is investing all of this money? The answer is: institutions, including pension funds of large corporations, and wealthy individual investors or “family offices,” i.e., the investment arms of wealthy families.

Pitchbook also addresses as follows the time it takes to raise the funds for a PE fund:

A trend that has continued has been the increased time it takes to close a fund. In 2022, the median time to close a fund sat at 11 months; this pushed higher to 14.5 months in 2023 and reached 16.8 months through the first three months of 2024. The median time between funds has also edged higher, starting at 2.7 years in 2022 and now sitting at 2.9 years through Q1 2024. Although fundraising has taken longer on average, GPs continue to achieve higher step-ups from their predecessors. Through the end of March, a record 82.4% of PE funds closed at larger sizes, surpassing the five-year average.<sup>51</sup>

### [C] Relationship Between LBOs and PE Activity

#### [1] In General

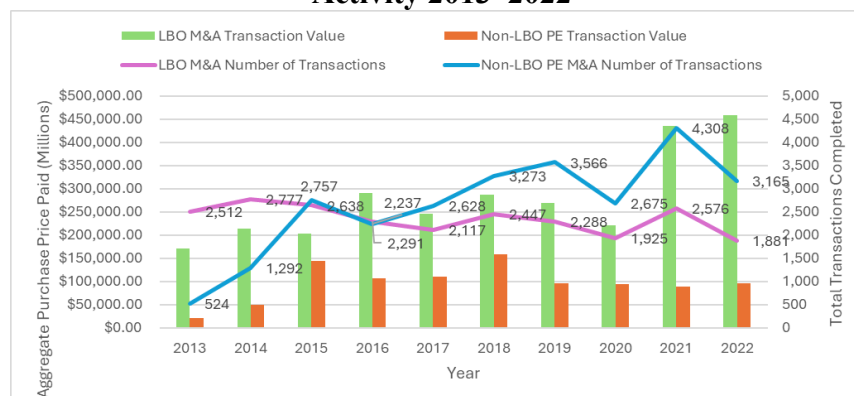
Figure 1-17, addresses as follows: Leveraged Buy-Out Activity in Relation to Private Equity Activity 2013–2022:

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50. *Id.* at 28.

51. *Id.*

**Figure 1-17**  
**Leveraged Buy-Out Activity in Relation to Private Equity**  
**Activity 2013–2022**



Source: FactSet IdeaScreening M&A Database, as of June 2023

In the above Figure 1-17, an LBO is any M&A transaction in which the acquirer borrows a significant portion of the funds required to finance the acquisition. It is not clear how a private equity transaction differs from an LBO, as many, if not most, private equity transactions involve an acquisition of a Target with a significant amount of the consideration coming from debt financing, which is an essential element in an LBO.

Perhaps the most important information displayed in this Figure is that LBO Transaction Value grew from 2020 to 2021 and then again from 2021 to 2022. So, notwithstanding the Federal Reserve Board's increase in interest rates from 2021 to 2022, the value of LBO transactions increased during this period, while the number of these transactions dropped significantly. This may be attributable to a few large transactions.

#### [2] PE Activity and the Percentage of Debt Used in LBO Transactions in 2024

With respect to an analysis of PE activity as of April 2024, PitchBook<sup>52</sup> explains, inter alia:

US PE dealmaking finished last year down 41.2% from the all-time peak of \$1.2 trillion set in 2021. While that record deal activity is unlikely to be reached again any time soon, deal flow has shown some signs of stabilizing in the past several quarters. We have revised our estimate of Q4 2023 deal activity upward, and it is now on par with Q3 and Q2 activity. In Q1 2024, deal activity continued to move

52. PitchBook April 2024 U.S. PE Breakdown, *supra* note 44, at 6.

mostly sideways with estimated deal count slightly elevated relative to the past four quarters and deal value moderately lower.<sup>53</sup>

PitchBook reported as follows on “Platform LBO deals,” which are deals in which a principal Target is acquired with the intent of adding “bolt on” acquisitions of additional Targets: “Platform LBO deals continue to be scarce due to their greater dependency on leverage, and their share of all PE deals declined . . . in Q1 2024.”<sup>54</sup>

With respect to the level of debt (i.e., leverage) used in 2023 PE transactions, PitchBook explains:

Leverage ratios [i.e., the debt-to-equity ratios] continue to reflect tight conditions, and this is choking the ability to pull off larger LBOs, which platform deals tend to be. Debt/EV deteriorated slightly to 45.1% in Q1 from 45.7% for all of 2023 and a 10-year average of 55.0%.<sup>55</sup>

This means that in the average LBO transaction in Q1 2024, 45.1% of the purchase price came from debt and 54.9% came from equity. On the other hand, the article says that the 10-Year average debt to equity ratio is 55% debt to 45% equity. The article also reports: “Debt/EBITDA ratios are also below normal at 5.1x in Q1 versus a 10-year average of 5.6x.”<sup>56</sup>

As discussed in chapter 14, as a general matter the equity owners in an LBO transaction want as much debt as possible because the profit potential for the equity increases as the amount of debt increases. Obviously, the purchasers of debt in LBO transactions will be concerned about getting paid and they will be skeptical about making loans to an overly leveraged company. As indicated in chapter 14, in the 1980s when LBOs flourished, the debt in certain transactions was 90% or more of the purchase price.

As indicated in chapter 17, as a general matter, the banking regulators limit the amount of debt that can be used in an LBO.

#### [D] Cov-Lite Bonds

“Cov-Lite” bonds are corporate bonds that do not contain significant covenants saying that the borrower (1) must do this (an affirmative or maintenance covenant), and (2) cannot do that (a negative covenant). For example, a maintenance covenant could provide that a Target must “maintain” a debt to EBITDA<sup>57</sup> ratio of less than 5 times EBITDA. Thus, if the Target has EBITDA of \$100M, its debt cannot exceed \$500M.

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53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. EBITDA is Earnings before Interest, Taxes, Depreciation and Amortization.

A LexisNexis article focusing on the “Trends in Covenant-Lite Loans”<sup>58</sup> during the fourth quarter of 2022 provides the following basic description of these Cov-Lite loans:

Covenant-lite features have become very common in leveraged lending, both in cash flow financings and asset-based lending. While the terms and structures of covenant-lite loans vary, aside from the lack of maintenance [a form of affirmative] covenants, covenant-lite loans often have loosened negative covenant restrictions on the borrower. Sometimes, one or more incurrence-based financial covenants permit the borrower to avail itself of certain negative covenant exception baskets. Some covenant-lite loans also permit borrower-friendly add-backs to the borrower’s EBITDA for calculation of financial covenant.<sup>59</sup>

As indicated in the following excerpt from a *Forbes* 2021 article, Cov-Lite loans,<sup>60</sup> continued to be available during the COVID-19 crisis:

The low interest rate environment in the United States and significant competition amongst banks and other lenders continues to feed into the leveraged loan approval frenzy. \$308 billion gross institutional loans were issued the first quarter of this year; this is nearly triple the issuance the last quarter of 2020, \$116 billion and significantly above the previous high of \$202 billion the first quarter of 2020. It makes sense that so many companies want to take advantage of cheap funding. The inaugural “Fitch U.S. Leveraged Finance Market Insight Report,” shows that repricing and refinancing transactions made up 74% of first-quarter total issuance; mergers and acquisition (M&A) and dividend recapitalizations represented the remainder.

Presently, the institutional leveraged loan market stands at \$1.5 trillion. Almost 40% of leveraged loans are in the healthcare/pharmaceutical, technology, and services/miscellaneous sectors. . . . [W]ith over 80% of total leveraged loans being covenant-lite, should any of these borrowers were to default, lenders will have little in protection to sustain financial losses.<sup>61</sup>

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58. Trends in Covenant-Lite Loans: Q4 2022 Update, LEXISNEXIS: LEGAL INSIGHTS (March 7, 2023) [hereinafter *Q4 2022 Update*], <https://perma.cc/2TTP-L36W>.

59. *Id.*

60. Leveraged loans are defined as “a commercial loan provided by a group of lenders. It is first structured, arranged, and administered by one or several commercial or investment banks, known as arrangers. It is then sold (or syndicated) to other banks or institutional investors. Leveraged loans can also be referred to as senior secured credits.” Leveraged Loan Primer, <https://perma.cc/Z7RF-2PC8> (visited May 27, 2021).

61. Mayra Rodriguez Valladares, *Institutional Leveraged Loan Issuance Tripled First Quarter 2021*, FORBES (Apr. 14, 2021), <https://perma.cc/9JNW-NPPS>.

The March 2023 LexisNexis article focusing on the “Trends in Covenant-Lite Loans” reports that “out of 1,093 credit agreements that closed during the fourth quarter of 2021 through the third quarter of 2022, 18.48% of transactions (202 deals) were covenant-lite loans.”<sup>62</sup> On the other hand, as would be expected with the increase in interest rates in 2022, the article points out that the “percentage of covenant-lite deals fell during Q4 2022.”<sup>63</sup>

[E] The Greater the Risk, the Greater the Potential Reward with LBOs

As discussed in chapter 14, private equity firms that focus on leveraged buyouts put their capital to work as equity investments in Targets acquired in leveraged transactions. Higher contributions of equity by the investors both (1) reduce the risk of bankruptcy, and (2) reduce the potential return on equity; that is, with less risk comes less potential reward.

For example, assume that a PE firm acquires a Target for \$100M. Assume further that the required equity contribution is in the alternative \$30M and \$50M. In the case of the \$30M of equity, the debt is \$70M, and in the case of the \$50M of equity, the debt is \$50M. Also, assume that after five years the debt is still outstanding (only interest is required to be paid on the debt), and the Target is sold for \$110M. If the equity were \$30M and the debt were \$70M, the PE firm receives \$40M after paying the debt, which is a 33% return on its \$30M investment. On the other hand, if the equity were \$50M and the debt were \$50M, the PE firm receives \$60M after paying the \$50M of debt, a 20% return on its \$50M equity investment.

[F] Wachtell’s Assessment of Acquisition Financing in 2023

As indicated, many acquisitions, including Leveraged Buyouts (LBOs), which are examined in chapter 14, are financed in part, or substantial part, with debt. Obviously as interest rates rise, which in the Fed’s fight against inflation, occurred in 2022 and through May of 2024 (when this section was going to press), acquisition debt financing becomes more costly and challenging. Wachtell Lipton discusses as follows some of the background and current, as of May 2024, status of acquisition financing:

Widely held concerns about inflation, rising interest rates and a possible recession combined to slow debt financing and deal activity in the first half of 2023. Borrowers deferred new debt deals, delayed

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62. *Id.*

63. *Id.*

planned refinancings and paused major corporate transactions while waiting for interest rates to top out. Financial sponsors, in particular, held back on debt-financed leveraged buyouts while watching to see whether interest rates (or business valuations) would fall. Direct lending remained hot, continuing to fill in market gaps, but it was by no means a borrower's market, whether in terms of pricing, terms or leverage multiples.

The story changed somewhat in the second half of the year. Inflation slowed and deal activity picked up. Major deal financings in the second half of the year included: a \$28.4 billion term loan for Broadcom's purchase of VMware; . . . ; and an \$8 billion bridge loan for Tapestry's acquisition of Capri Holdings.<sup>64</sup>

In its *2023 Current Developments*, Wachtell makes the following interesting observation about the relationship between antitrust enforcement and acquisition financing:

[The Biden] antitrust regulators' aggressive attitudes led to less predictable (and much longer) timelines between signing and closing of acquisitions. These two factors— a volatile and weakening credit market, and the need for longer-duration acquisition financing commitments—had a compounding effect, squeezing availability for commitments of the requisite duration, and making those that were available more expensive.<sup>65</sup>

#### [G] Wachtell's Assessment of "Private Equity Trends" in 2023

Wachtell paints the following picture of "Private Equity Trends" on the buy side (i.e., PE firms purchasing Targets) in 2023:

Some of the 2023 decline in M&A activity can be explained by the continued slowdown in private equity dealmaking, which faced many of the same headwinds as the broader M&A market. Global private equity deal volume extended its decline from its pandemic heights, notching \$1.3 trillion in 2023, compared to \$1.7 trillion in 2022 and a record \$2.2 trillion in 2021, as sponsors facing choppy financing markets increasingly focused on smaller deals and minority investments. Larger transactions generally required sponsors to write proportionally larger equity checks; the average equity contribution for large corporate LBOs reached 52% in 2023, an all-time high, while average leverage levels declined to 5.9x, [i.e., 5.9 times earnings or Free Cash Flow] from 7.1x [i.e., 7.1 times earnings or Free Cash Flow]

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64. *Wachtell, 2024 Takeover Law and Practice*, *supra* note 5, at 6.

65. Igor Kirman, Victor Goldfeld, Elina Tetelbaum, Wachtell Lipton Rosen & Katz, *Takeover Law and Practice: Current Developments*, HARV. L. SCH. F. CORP. GOVERNANCE (May 3, 2023) [hereinafter *Wachtell, 2023 Current Developments*], <https://perma.cc/95JP-2CD3>.



the prior year. Beyond interest rate and financing market challenges, valuation fundamentals and the “expectations gap” between sellers and buyers also deserve recognition for the slowdown.<sup>66</sup>

And, with respect to the sell side (i.e., a PE firm selling a Target it acquired in an LBO), Wachtell reports:

Sponsors fared little better on the sell side. Global private equity exits shrank in value from approximately \$783 billion in 2022 to approximately \$574 billion in 2023, down more than 25%.<sup>67</sup>

*§ 1:7.17 Recent Data on U.S. M&A Deal Size*

Figure 1-18, *Number of Deals by U.S. Deal Size 2018–2023*, presents the U.S. deal size for years 2018 through 2023, with transactions divided into the following categories:

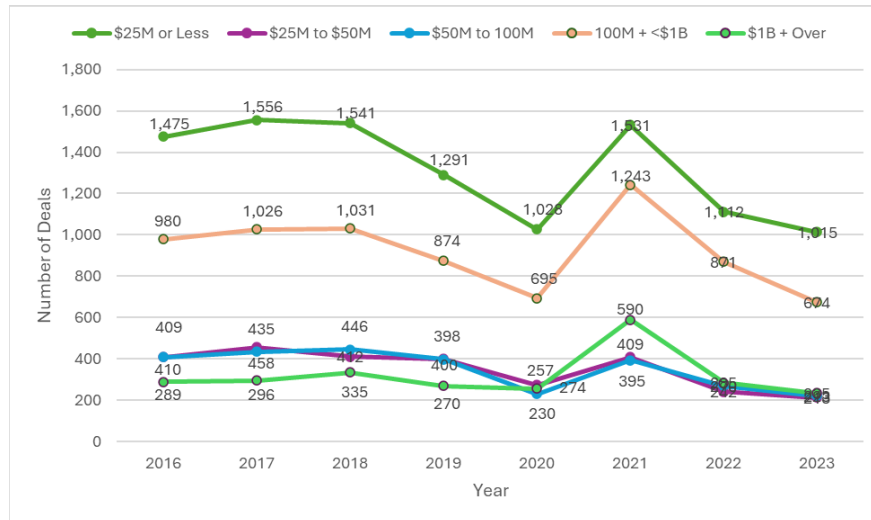
- Under \$25 million,
- \$25 million to less than \$50 million,
- \$50 million to less than \$100 million,
- \$100 million to less than \$1 billion, and
- \$1 billion and over.

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66. Wachtell, *2024 Takeover Law and Practice*, *supra* note 5, at 5.

67. *Id.*

**Figure 1-18**  
**Number of Deals by U.S. Deal Size 2016–2023**



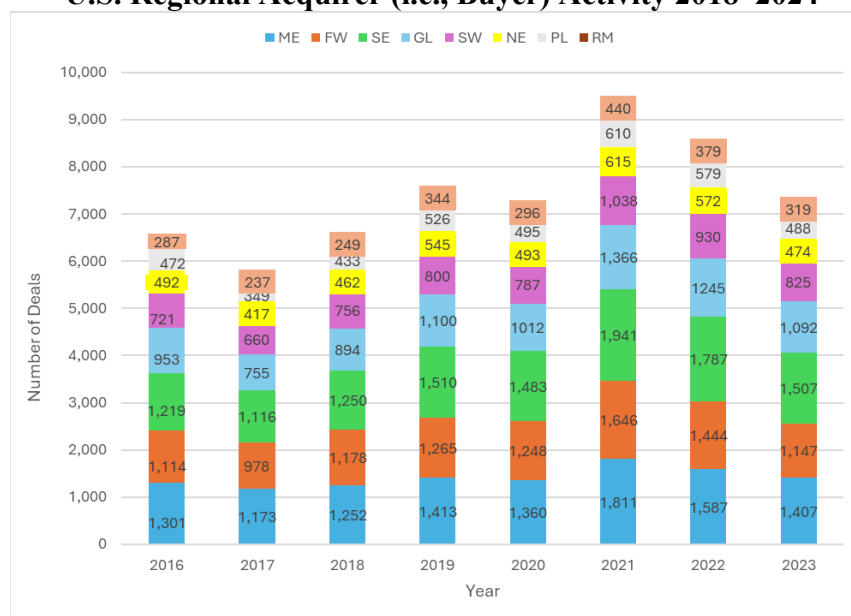
Source: Comparison by Value of Deals 2019–2023, *2024 FactSet Review*, pg. 37

Note that for all of these categories, there was a rise from 2020 to 2021 and a fall from 2021 to 2023. In all the years depicted in Figure 1-18, the most frequent deal size was under \$25 million.

*§ 1:7.18 Recent Data on U.S. Regional Acquirer Activity*

Figure 1-19, *U.S. Regional Acquirer Activity 2018–2023*, depicts the geographic base of U.S. acquirers for the years 2018 through 2023.

**Figure 1-19**  
**U.S. Regional Acquirer (i.e., Buyer) Activity 2018–2024**



Source: Regional Ranking 2019-2023, 2024 FactSet Review, pg. 136

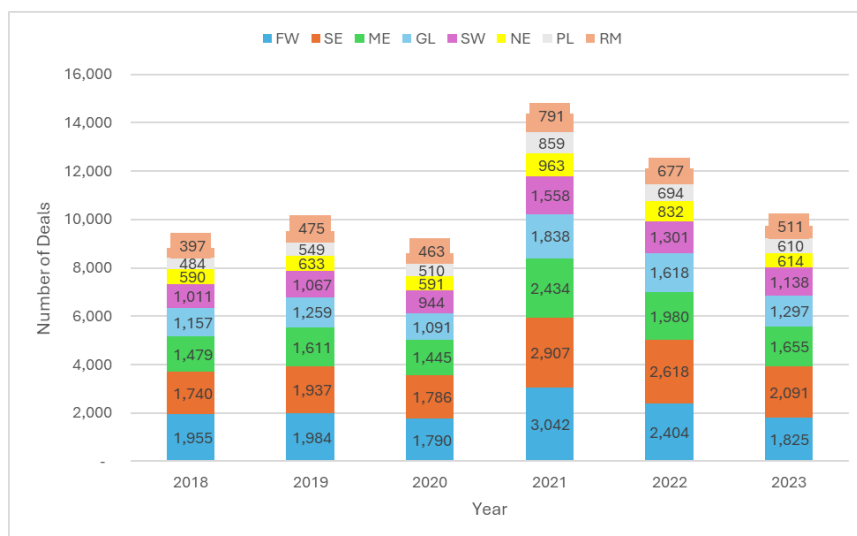
Key: ME= Mideast, FW=Far West, SE=Southeast, GL=Great Lakes, SW=Southwest, NE=New England, PL=Plains, & RM=Rocky Mtns.

Figure 1-19 shows that the geographical distribution of deals from the perspective of Acquirers has remained relatively constant from 2016 through 2023. For 2023, the regions with the most acquirers were the Southeast (1,507) and the Mideast (1,407). The regions with the fewest acquirers were the Southwest, New England, Plains, and Rocky Mountains. Note that these patterns generally hold across the years.

*§ 1:7.19 Recent Data on U.S. Regional Target Activity*

Figure 1-20, *U.S. Regional Target Activity 2018–2023*, depicts the geographic base of U.S. Targets for the years 2018–2023.

**Figure 1-20**  
**U.S. Regional Target (i.e., Seller) Activity 2018–2023**



Source: Regional Ranking 2019-2023, 2024 FactSet Review, pg. 136

Key: ME= Mideast, FW=Far West, SE=Southeast, GL=Great Lakes, SW=Southwest, NE=New England, PL=Plains, & RM=Rocky Mtns.

Figure 1-20 shows that the geographical distribution of deals from the perspective of the seller (i.e., Targets) has also remained relatively constant. For 2023, the regions with the most sellers were the Southeast (2,091) and the Far West (1,825). As with the regional buyer activity, the regions with fewest sellers were the Southwest, New England, Plains, and Rocky Mountains. Note that these patterns generally hold across the years.

### III. RECENT DATA: TAKEOVER DEFENSES, TENDER OFFERS AND RELATED ISSUES, SECTIONS 1:7.20 THROUGH 1:7.31

#### § 1:7.20 Recent Data on the Shareholder Rights Plan, i.e., the Poison Pill

##### [A] Introduction

##### [1] In General

As discussed in chapter 5, shareholder rights plans, or poison pills, can act as an effective, and sometimes an ineffective, deterrent to a hostile takeover attempt.

[2] The WilmerHale Primer on Poison Pills<sup>68</sup>

WilmerHale's *2022 M&A Report*,<sup>69</sup> contains a basic primer on poison pills, including NOL pills both of which are examined in depth in chapter 5. The *2022 M&A Report* describes as follows the basic operation of a pill, that is, a shareholder rights plan, which was first developed by my Marty Lipton of the Wachtell Lipton law firm:

A traditional stockholder rights plan (often referred to as a "poison pill") is a contractual right that allows all stockholders—other than those who acquire more than a specified percentage of the company's stock—to purchase additional securities of the company or a successor entity at a discounted price if a [hostile acquiror] accumulates shares of common stock in excess of the specified threshold, thereby significantly diluting that stockholder's economic and voting power.<sup>70</sup>

Thus, with a pill, in essence, the more the hostile acquirer acquires of the Target, the more the acquirer's interest is diluted. As a consequence, as discussed in chapter 5, there are very few pills that have been triggered by a hostile acquirer.

There is a significant question concerning whether pills are economically beneficial; however, from a purely legal perspective, they are a legitimate takeover defense in many, if not all, states. Indeed, some states have specifically adopted "pill validation" laws to make it clear that the poison pill is a legitimate device.

WilmerHale's *2022 M&A Report* discusses as follows the view of supporters of pills:

Supporters believe rights plans are an important planning and strategic device because they give the board time to evaluate unsolicited offers and to consider alternatives. Rights plans can also deter a change in control without the payment of a control premium to all stockholders, as well as partial offers and "two-tier" tender offers.<sup>71</sup>

Focusing on the views of the opponents of pills, WilmerHale's *2022 M&A Report* explains:

Opponents view rights plans, which can generally be adopted by board action at any time and without stockholder approval, as an entrenchment device and believe that they improperly give the board,

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68. I thank my Research Assistant at Penn State Law, Abdulrahman Abdullah H Azzouni, for suggesting that this section be added to the book.

69. WilmerHale, *2022 M&A Report* 1, 7 (Feb. 28, 2022) [hereinafter WilmerHale, *2022 M&A Report*], <https://perma.cc/BJ5R-3R4B>.

70. *Id.*

71. *Id.*

rather than stockholders, the power to decide whether and on what terms the company is to be sold.<sup>72</sup>

WilmerHale, in their *2023 M&A Report* also points out that “[w]hen combined with a classified board, a [poison pill] makes an unfriendly takeover particularly difficult.”<sup>73</sup> As discussed below and in chapter 5, with a classified board it will take a successful proxy contest in two succeeding years for a hostile bidder to take control of a Target’s board.

The WilmerHale Report also discusses NOL poison pills, which are also discussed in chapter 5. These plans are designed to protect a Target’s net operating losses, which generally can be carried forward by the Target and thereby reduce future tax liability. However, under section 382 of the Internal Revenue Code (discussed in chapter 9), if there is a “change of control” of a Target that has NOLs there is a significant limit on the ability of the Target to utilize the NOLs. And, the stated purpose of the NOL pill is to prevent a “change of control” of the Target and thereby preserve the Target’s NOLs. As will be seen in chapter 5, an NOL pill has been held to be a valid takeover defense.

In commenting on the advisability of adopting a NOL poison pill, which is much less common than a straight up pill, the WilmerHale *2022 Report* says:

Whether a company should implement an NOL plan depends on a number of factors, including the amount (and potential value) of the company’s NOLs, the likelihood of a Section 382 ownership change occurring due to public market trading or the company’s own actions (such as equity offerings), and anticipated investor reaction.<sup>74</sup>

[B] Illustration of an Effective Pill, *Air Gas*

The effectiveness of a pill in preventing an unwanted acquisition was illustrated, for example, in the *Air Gas* decisions in Delaware discussed in chapter 5.

[C] Illustration of an Ineffective Pill, *Twitter*

The ineffectiveness was illustrated in 2022 with the failure of Twitter’s poison pill to save it from the clutches of Elon Musk. An article in the *New York Times* on April 15, 2022, discussing the adoption of

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72. *Id.*

73. WilmerHale, *2023 M&A Report* 1, 8 (Mar. 31, 2023) [hereinafter WilmerHale, *2023 M&A Report*], <https://perma.cc/HU6T-EP3K>.

74. WilmerHale, *2022 M&A Report*, *supra* note 69, at 8.

Twitter's pill was entitled: *Twitter Counters a Musk Takeover With a Time-Tested Barrier*.<sup>75</sup>

The Twitter "*Time-Tested Barrier*" was effective for exactly ten days, because, as a result of shareholder complaints and threats of suit, Twitter's board entered into a merger agreement with Musk on April 25, 2022.<sup>76</sup>

This is an illustration that in Delaware, where Twitter is incorporated, a Target cannot use a pill to "Just Say No." On the other hand, in certain other states, such as Pennsylvania, it may be possible for a Target incorporated in Pennsylvania to use a pill to "Just Say No."

#### [D] Companies with Pills

##### [1] Pills from 2018 Through 2017 and in 2023

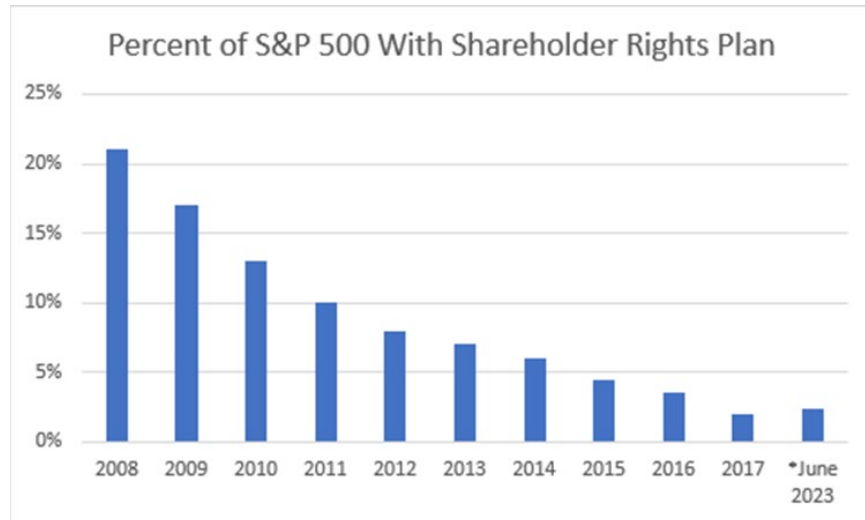
Notwithstanding the potential effectiveness of shareholder rights plans (i.e., poison pills), Figure 1-21, *Percentage of S&P 500 Companies with a Shareholder Rights Plan 2008–2017 and as of June 2023*, shows that from 2008 through 2017, the percentage of S&P 500 companies with poison pills steadily declined. Although the data for the period from 2017 to 2022 was not available, as of June 2023 there was a slight uptick in the percentage of firms with pills compared to the percentage in 2017. Apparently, as a result of COVID-19, there has been a slight increase in the number of pills in place.

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75. Lauren Hirsch & Kate Conger, *Twitter Counters a Musk Takeover with a Time-Tested Barrier*, N.Y. TIMES (Apr. 15, 2022), <https://perma.cc/T5LK-Q5DK>.

76. See Twitter Inc., Current Report (Form 8-K) (Apr. 25, 2022).

**Figure 1-21**  
**Percentage of S&P 500 Companies with a Shareholder Rights Plan 2008-2017 and as of June 2023**

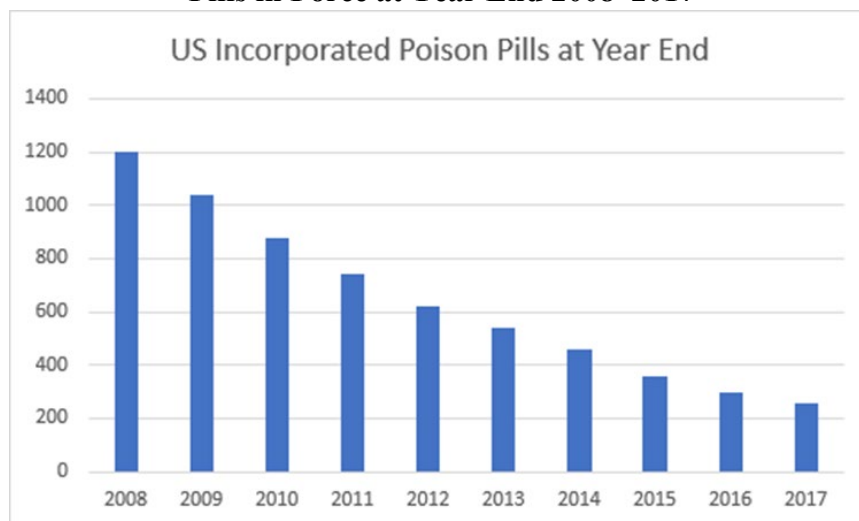


Source: Poison Pills in Force Year Over Year, SharkRepellent, 2018; and with respect to 2023 FactSet Universal Screening of S&P 500, as of June 2023.

Consistent with the data in Figure 1-21, Figure 1-22, *Total Number of U.S.-Incorporated Companies with Poison Pills in Force at Year End 2008–2017*, shows the decline in the actual number of firms with poison pills over this period



**Figure 1-22**  
**Total Number of U.S.-Incorporated Companies with Poison Pills in Force at Year End 2008–2017**



Source: Poison Pills in Force Year Over Year, SharkRepellent, 2018

#### [E] Pills and a Target's Board Fiduciary Duties

As indicated in chapter 5, which deals with a board's fiduciary duties, and chapter 28, which addresses shareholder activism, even though a company does not have a poison pill in place, its board can quickly adopt a pill if the need arises because of a potential or actual hostile offer. For example, as demonstrated in chapter 28, both Allergan and Family Dollar Stores immediately adopted a poison pill upon learning that an activist investor controlled approximately 10% of the firm's shares.

#### [F] Pills and COVID-19

Although the specific data was not available for 2018–2020, an article on the *Harvard Law School Forum on Corporate Governance*, reported the following with respect to the presence of pills during the time of COVID-19:

In addition to depressed valuations, companies are also more vulnerable today as a result of fewer active takeover defenses compared to twelve years ago. Only 3% of S&P 1500 companies have a poison pill in place today, compared to 34% in 2008. Over the last decade, companies have let shareholder rights plans expire in response to strong investor opposition to such measures. But given the decline in valuations, a spike in limited-duration poison pill introductions should come as no surprise. In fact, according to FactSet data, in the

first quarter of 2020, 41 companies adopted or amended poison pills, compared to only 23 poison pill adoptions or amendments during the same period in 2019.<sup>77</sup>

#### [G] Wachtell's Assessment of Poison Pills in 2024

In its April 2024 *Takeover Law and Practice* book,<sup>78</sup> the Wachtell law firm gives the following then current assessment of Shareholder Rights Plans, a.k.a. Poison Pills, which are examined in detail in chapters 5, Fiduciary Duties, and chapter 8, SEC Rules Governing Hostile Takeovers:

*Shareholder Rights Plans.* Although many large companies have shareholder rights plans (also known as a “poison pill”) “on-the-shelf,” ready to be adopted promptly following a specific takeover threat, these companies rarely have standing rights plans in place. At year-end 2022, only 1.0% of S&P 500 companies had a shareholder rights plan in effect, down from approximately 45% at the end of 2005. Importantly, unlike a staggered board, a company can adopt a rights plan quickly if a hostile or unsolicited bid or activist situation develops. But, as discussed further in Section VI.A, companies should be aware of ISS [a shareholder advisory firm] proxy voting policy guidelines regarding recommendations with respect to directors of companies that adopt rights plans. In the wake of the Covid-19 pandemic and the possibility of activists building a large stake rapidly and under the disclosure radar, a handful of companies, especially those whose market capitalization had dropped below \$1 billion, implemented shareholder rights plans, and a number of others kept rights plans “on the shelf” and ready to go. In one high-profile case, the adoption of a rights plan with a 5% threshold to deter activism during the pandemic resulted in litigation and a ruling adverse to the company, demonstrating the need for careful design and balance in any rights plan.<sup>79</sup>

The case referred to apparently is *Williams Companies*, which is discussed in section 5:5.2[B][16][c] *A COVID Pill with a 5% Trigger*.

#### [H] Wachtell's General Assessment of Shareholder Fiduciary Duty Litigation in 2023

As discussed above and elaborated upon in chapter 5, which deals with fiduciary duties, in many acquisitions of a publicly held corporation (particularly, a Delaware Target), there will be a shareholder challenge to

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77. Rodolfo Araujo et. al, *Blood in the Water: COVID-19 M&A Implications*, HARV. L. SCH. F. CORP. GOVERNANCE (May 4, 2020), <https://perma.cc/UM7E-7PR9>.

78. Wachtell, *2024 Takeover Law and Practice*, *supra* note 5, at 15.

79. *Id.*

the transaction alleging some type of breach by the directors of the Target of their state law fiduciary duties. In addition, as will be seen in chapters 7 and 8, in many of these transactions, there can be a claim of a violation of the disclosure duties under the Federal securities laws. When it comes to these types of actions, the Wachtell report presents the following insightful observations:

Shareholder litigation challenging merger and acquisition activity remains common, and, continuing the trend sparked by the Delaware Court of Chancery's 2016 *In re Trulia, Inc. Shareholder Litigation* decision curtailing the ability to settle such suits in Delaware by way of added disclosures, the bulk of these merger-objection suits in recent years have been styled as claims under the federal securities laws and were filed in federal court. Although recent reports from NERA and Cornerstone Research suggest that the number of such merger objection suits has continued their downward trend of the past several years,<sup>1</sup> these studies only account for class actions. There has been a significant shift by stockholders toward filing merger objection suits on an individual basis rather than on behalf of a putative class—potentially to avoid class action filing limitations and disclosure requirements under the PSLRA—and therefore, these studies do not necessarily reflect the change in the number of merger objection suits filed.<sup>80</sup>

Merger objection litigation generally challenges disclosures made in connection with M&A activity under the following section of the Securities Exchange Act of 1934 (see chapters 6, 7, and 8):

- Rule 10b-5 (e.g., prohibition against fraud or non-disclosure in sale or purchase of securities, see chapter 6), or
- Sections 14(a) (proxy rules), 14(d) (tender offers), and/or 14(e) (tender offers) of the Securities Exchange Act of 1934, see chapters 7 and 8.

The Wachtell report explains that the majority of such federal suits were “mooted” by the issuance of supplemental disclosures and payments of the fees of the stockholder plaintiffs.

*§ 1:7.21 Recent Data on the Percentage of S&P 500 Companies with Various Types of Defensive Measures*

[A] In General

Chapter 5, *Fiduciary Duties*, discusses various types of defensive measures in addition to the poison pill. Figure 1-23, *Percentage of Companies in the S&P 500 with Various Defensive Measures, 2022*,

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80. *Id.* at 7.

illustrates that defensive measures are not that prevalent among S&P 500 firms.

Although a board of a firm cannot unilaterally adopt many of these defensive measures, it can unilaterally adopt the most lethal defensive measure, the poison pill.

**Figure 1-23**  
**Percentage of Companies in the S&P 500 Index with Various Defensive Measures, 2022**

<b>Defensive Measure</b>	<b>Percentage/ of S&amp;P 500 Firms with the Measure</b>
<i>Poison Pill [See discussion above]</i>	2.40%
<i>Classified Board</i>	10.5%
<i>Majority Vote Standard to Elect Directors</i>	89.40%
<i>Plurality Vote Standard w/Resignation Policy</i>	8.20%
<i>Board Fills All Vacancies</i>	77.00%
<i>Shareholders Cannot Call Special Meetings [See the discussion below]</i>	31.80%
<i>No Action by Written Consent [See the discussion below]</i>	68.40%
<i>Fair Price Provision (company – charter/bylaws)</i>	10.40%
<i>Fair Price Provision (company or state)</i>	14.40%
<i>Supermajority Vote for Mergers</i>	21.8%
<i>Directors Removed Only for 2Cause</i>	25.2%
<i>Supermajority Vote to Remove Directors</i>	16.60%
<i>Expanded Constituency Provision (company – charter/bylaws)</i>	6.00%
<i>Expanded Constituency Provision (company or state)</i>	21.80%
<i>No Cumulative Voting</i>	97.60%

Source: FactSet Universal Screening of S&P 500, as June 2023.

#### [B] Special Meetings of Shareholders

In its April 2024 report on *Takeover Law and Practice*,<sup>81</sup> the Wachtell law firm gives the following then current assessment of the right of shareholders to call a Special Meeting:

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81. *See id.*

*Special Meetings.* Institutional shareholders continue to push for the right of shareholders to call special meetings in between annual meetings at companies that still do not provide this right. Shareholder proposals seeking such a right can generally be expected to receive substantial support. Proposals seeking to lower the threshold required to call a meeting can also be expected to receive significant support, depending on the specific threshold proposed by the shareholder and the company's governance profile. As of the end of 2023, approximately 70% of S&P 500 companies permit shareholders to call special meetings in between annual meetings.<sup>82</sup>

#### [C] Action by Written Consent

In its April 2024 report on *Takeover Law and Practice*, the Wachtell law firm gives the following assessment of the right of shareholders to take action by "Shareholder Written Consent:"

*Action by Written Consent.* Governance activists have also been seeking to increase the number of companies that may be subject to consent solicitations, although for companies that allow shareholders to call special meetings, this is rightly viewed with less urgency. At the end of 2023, approximately 68% of S&P 500 companies still prohibit shareholder action by written consent. However, this does appear to be the next domino targeted by shareholder activists. By way of example, from 2005 to 2009, only one Rule 14a-8 shareholder proposal was reported to have sought to allow or ease the ability of shareholders to act by written consent. From 2018 to 2022, however, there were 253 such proposals submitted at S&P 500 companies (of which approximately 12% passed). Hostile bidders and activist hedge funds have effectively used the written consent method, where it is permitted, to facilitate their campaigns[.]<sup>83</sup>

#### [D] WilmerHale's Recent 2023 Data on Various Takeover Defense Provisions Included in IPOs

In its *2023 M&A Report*,<sup>84</sup> WilmerHale reports, inter alia, that from 2021 to 2022, there were decreases in the rate of inclusion of the following defensive measures in the charters of IPO companies:

- Classified boards;
- Super-majority voting for mergers et al;
- Prohibitions against shareholder action by written consent;
- Limitations on rights to call special meetings;
- Advance notice requirements;

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82. *Id.* at 15.

83. *Id.*

84. WilmerHale, *2023 M&A Report*, *supra* note 73.

- Blank check preferred;
- Multiclass capital structures; and
- Exclusive form provisions for both internal corporate control and securities laws claims.

Also, in the case of Delaware corporations, there was an increase in the number of corporations opting out of Section 203,<sup>85</sup> which in certain cases prevents a Delaware corporation from engaging in a “business combination” with any “interested stockholder” for three years following the time that the interested shareholder became an interested stockholder.

*§ 1:7.22 Recent Data on U.S. Tender Offers, Contested and Uncontested*

[A] The Basic Data

Figure 1-24, *U.S. Tender Offers Contested and Uncontested 2018–2023*, shows the number of both hostile and uncontested (consensual) tender offers in years 2018 through 2023.

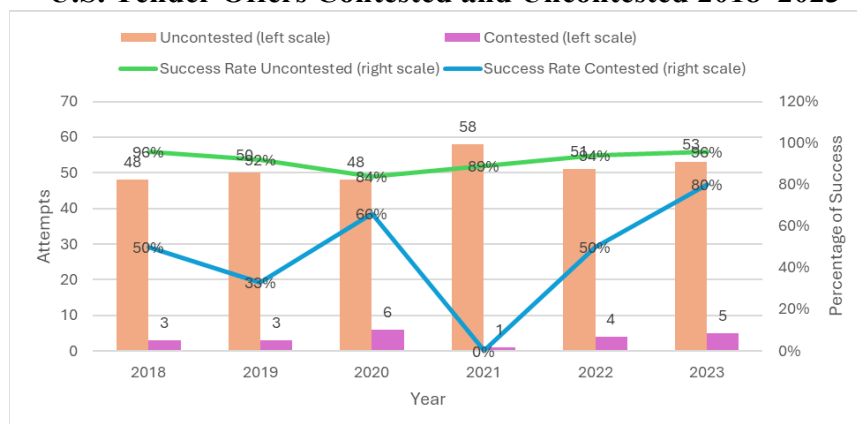
In a tender offer, an acquirer makes an offer directly to a public Target’s shareholders to purchase their shares. In a hostile tender offer, the Target’s board opposes the tender offer, and in a consensual tender offer, the Target’s board generally enters into a merger agreement with the acquirer providing for a first-step tender offer by the acquirer, which is to be followed by a second-step merger.

These two-step tender offer–merger transactions are addressed in (1) chapter 2, which deals with the drafting of acquisition agreements; (2) chapter 4, which, inter alia, discusses section 251(h) of the Delaware General Corporate law, which incentivizes certain two-step tender offer–merger transactions; (3) chapter 5, which addresses a board’s fiduciary duties; and (4) chapter 8, which addresses the SEC’s rules governing tender offers.

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85. Section 203 is discussed in chapters 4 and 5.

**Figure 1-24**  
**U.S. Tender Offers Contested and Uncontested 2018–2023**



Source: Tender Offers for Publicly Traded Sellers 2013–2023, 2024 *FactSet Review*, pg. 60

The first thing to notice in Figure 1-24 is that there are few hostile tender offers, and from 2018 through 2023, there were just 3, 3, 6, 1, 4 and 5 for each of those years. The success rate of these hostile tender offers is like taking a roller coaster ride: From 50% in 2018, to 0% in 2021, to 80% in 2023. What acquirer board is going to undertake a transaction in which it has a 25% or greater chance to fail?

It is as “clear as a bell” that the poison pill, which was developed by Marty Lipton of Wachtell Lipton, has been extremely successful in curtailing hostile tender offers. It is not clear whether this is good for corporate governance and shareholder welfare, because if a pill survives a shareholder challenge (see chapter 5) it essentially takes away from the shareholders the ability to decide to sell their shares to the “Highest Bidder.”

In each of the years from 2018 through 2023, the success rate for consensual tender offers was at least 85% and as high as 96%, which is probably consistent with the success rate of one-step public company mergers.

#### [B] The Target’s Defensive Measures Against a Hostile Tender Offer

The difficulty of completing hostile tender offers is largely attributable to the defensive measures a Target’s board may employ in opposing such an offer, particularly the adoption of a poison pill. As indicated, these defensive tactics are explored in chapter 5, dealing with directors’ fiduciary duties, and chapter 8, dealing with tender offers and related transactions.

The difficulties in completing a hostile acquisition are illustrated by (1) Microsoft's failure to acquire Yahoo! in a hostile bid, (2) CF Industries' year-long (but finally successful) battle to acquire Terra, and (3) Air Products' over a year-long unsuccessful tender offer for Air Gas, which had a staggered board provision pursuant to which only one-third of its board was up for election each year. A staggered board can delay an acquirer's attempt to take over a Target's board and redeem its pill, because it would take two annual meetings in which the acquirer prevailed for the acquirer to gain control of the Target's board. The *Air Gas* staggered board and poison pill cases are discussed in chapter 5.

Wachtell's assessment of hostile, friendly and other forms of tender offers for both 2022 and 2023 is contained in section 1:7.36.

Information on proxy contests generally is provided in section 1:7.30.

*§ 1:7.23 Recent Data on the Rise of Two-Step Transactions and the Top-Up Option*

[A] In General

Negotiated deals involving publicly held Targets in the United States are generally structured as either (1) one-step mergers, or (2) two-step transactions, with a first-step consensual tender offer followed by a second-step short-form or long-form merger. Figure 1-25, *Percentage of One-Step and Two-Step Transactions 2012–2016 and 2021*, presents the data below on one-step and two-step transactions for 2012 through 2016 and 2021.



**Figure 1-25**  
**Percentage of One-Step and Two-Step Transactions 2012–**  
**2016, and 2021**

Year	One-Step Merger	Two-Step, Tender Offer followed by Merger
2012 (a)	56%	44%
2013 (b)	60%	40%
2014 (b)	52%	48%
2015 (b)	58%	42%
2016 (c)	68%	32%
2021 (d)	83%	17%

Source: (a) Slide 95 of the ABA, 2014 Strategic Buyer/Public Target M&A Deal Points Study  
 (b) Slide 121 of the ABA, 2016 Strategic Buyer/Public Target M&A Deal Points Study  
 (c) Slide 121 of the ABA, 2017 Strategic Buyer/Public Target M&A Deal Points Study  
 (d) Slide 7 of the ABA, 2021 Public Target M&A Deal Points Study

In these six years, two-step deals accounted for no less than 17% and no more than 48% of public deals.

#### [B] Reason for Employing a Two-Step Deal

The principal reason for the employment of two-step transactions is speed. As discussed in chapter 8, the first step tender offer can be closed more quickly than a one-step merger transaction, because under Rule 14e-1(a) of the Securities Exchange Act of 1934 Act (the ‘34 Act), a tender offer can be closed after 20 business days. Also, recent amendments to Rule 14d-10 of the ‘34 Act (see chapter 8) reduced the possibility that arrangements between the acquirer and the Target’s management could violate the “all holders, best price” rule, and this change reduced a significant barrier to negotiated tender offers. Two-step transactions generally will not be utilized where there are significant regulatory issues that could delay the closing of the first step. Two-step transactions are examined in greater detail in chapters 2 and 4.

#### [C] Top-Up Options

Many two-step deals have a “top-up option.” These options kick-in, for example, when in the first-step tender offer the acquirer does not reach the 90% threshold needed to effectuate a short-form merger (see chapter 4). In such case, the top-up option gives the acquirer the right to purchase directly from the Target the shares needed to reach the 90% threshold.

[D] Delaware’s Section 251(h) Intermediate-Form Merger

As discussed in chapter 4, the addition in 2013 of section 251(h) to the Delaware General Corporation Law has, in many cases, eliminated the need for a top-up option in the acquisition of a Delaware Target. Under section 251(h), which is referred to as an “intermediate-form merger,” if an acquirer, pursuant to a negotiated transaction with the Target’s board, gets 51% control of a Target in a first-step tender offer, it generally can immediately effectuate a second-step merger without a vote of the Target’s shareholders.

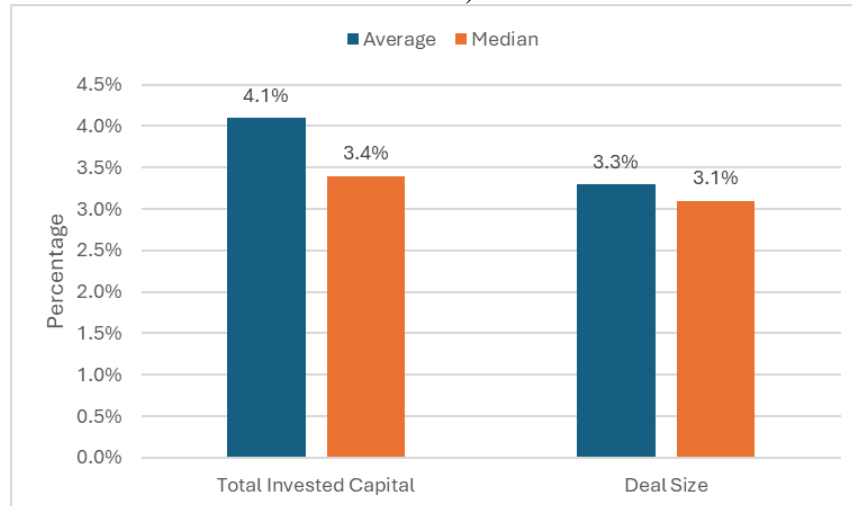
Thus, with this acquisition method, it is possible for an acquirer to acquire a 100% interest in a public Target after only 20 business days after the announcement of the transaction. As discussed in chapter 8, the 20-day waiting period is required by the tender offer rules under section 14 of the Securities Exchange Act of 1934. Obviously, such a transaction could be blocked or delayed by regulatory issues, such as antitrust concerns.

§ 1:7.24 *Recent Data on U.S. Termination Fees: Direct and Reverse*

[A] In General

As discussed in chapter 2, which deals with the drafting of acquisition agreements, and chapter 5, which deals with fiduciary duties, acquisition agreements in which a publicly held Target is acquired will, in many instances, contain a termination fee, direct and reverse. A direct termination fee is payable by the Target to the acquirer if, for example, the Target is acquired by a third party. Figure 1-26, *U.S. Direct Termination Fees—Average and Median Percentage of Total Invested Capital and Deal Size, 2023*, presents the average and median direct termination fees measured against total invested capital and deal size for 2023.

**Figure 1-26**  
**U.S. Direct Termination Fees—Average and Median**  
**Percentage of (1) the Target’s Total Invested Capital, and (2)**  
**Deal Size, 2023**



Source: Termination Fee Average and Median Percentage of Total Invested Capital and Deal Size 2023, *2024 FactSet Review*, pg. 76

Note that the range of these direct termination fees is quite narrow, from 3.1% to 3.3% of deal size and 3.4% to 4.1% of Total Invested Capital (which includes both stock and debt). The reason for this is addressed below and addressed more completely in chapters 2 and 5.

Figure 1-27, *Transactions with or Without Direct Termination Fees: Publicly Traded Sellers, Privately Held Sellers, and Divestitures, 2023*, shows that 54% of public deals but less than 1% of all other deals contained a termination fee, that is, a fee paid by the Target to the Acquirer if the Target walks from the deal.

**Figure 1-27**  
**Transactions with or Without Direct Termination Fees of**  
**Publicly Traded Sellers, Privately Held Sellers, and**  
**Divestitures 2023**

	Transactions	Transactions with Termination Fees	Percentage of All Transactions
<b>Publicly Traded Sellers</b>	335	181	54.0%
<b>Privately Held Sellers</b>	10,306	38	0.4%
<b>Divestitures</b>	2,646	33	1.2%
<b>Total</b>	13,287	223	1.9%

Source: Distribution of Termination Fees 2023, 2024 FactSet Review, pg. 76

As discussed in chapters 2 and 5, the law governing direct termination fees and other deal protection devices is still developing. The fundamental question is whether the termination fee serves to lock up the deal for the acquirer prior to the vote by the Target's shareholders on the transaction and, therefore, results in a breach of the fiduciary duties of the Target's directors. In examining this issue, courts will consider (1) if the level of fee is acceptable in a given circumstance, and (2) whether the fee should be measured against the size of the payment to the Target's shareholders (that is, "deal size"), or against the value of the Target's debt and equity (that is, "total invested capital"). As discussed in chapter 5, a termination fee in the range of 3% to 4% of deal size will likely be acceptable in Delaware in the absence of special circumstances.

As discussed in chapter 2, a growing number of transactions contain "reverse termination fees," which require the acquirer to pay the Target if the transaction does not close because, for example, the acquirer cannot get the financing. These fees do not present the same fiduciary duty issues surrounding a Target's direct termination fee; therefore, in many cases, reverse termination fees are significantly higher than the 3% or 4% level applicable to direct termination fees.

[B] The Direct and Reverse Termination Fees in the Acquisition of Twitter by Musk

The merger agreement for the acquisition of Twitter by Musk had both (1) a Direct Termination Fee payable by Twitter to Musk if Twitter walked from the deal in certain circumstances, and (2) a Reverse Termination Fee payable by Musk to Twitter if Musk walked in certain circumstances.

The SEC Form 8-K announcing the Twitter transaction<sup>86</sup> contains the following description of the Direct and Reverse Termination fees in that transaction:

*[Twitter's Direct Termination Fee]* Upon termination of the Merger Agreement under specified limited circumstances, Twitter will be required to pay Parent [that is, Musk] a termination fee of \$1.0 billion. Specifically, this termination fee is payable by Twitter to Parent because (1) Twitter terminates the Merger Agreement to allow Twitter to enter into a definitive agreement for a competing acquisition proposal that constitutes a Superior Proposal; or (2) Parent terminates the Merger Agreement because the Board recommends that Twitter's stockholders vote against the adoption of the Merger Agreement or in favor of any competing acquisition proposal . . . .

*[Musk's Reverse Termination Fee]* Upon termination of the Merger Agreement under other specified limited circumstances, Parent [Musk] will be required to pay Twitter a termination fee of \$1.0 billion. Specifically, this termination fee is payable by Parent to Twitter if the Merger Agreement is terminated by Twitter because (1) the conditions to Parent's and Acquisition Sub's obligations to consummate the Merger are satisfied and the Parent fails to consummate the Merger as required pursuant to, and in the circumstances specified in, the Merger Agreement; or (2) Parent or Acquisition Sub breaches of its representations, warranties or covenants in a manner that would cause the related closing conditions to not be satisfied.<sup>87</sup>

*§ 1:7.25 Recent Data on "No-Shop" and "Go Shop" Provisions of Acquisition Agreements in Negotiated Deals*

[A] In General

As discussed in chapter 5, a "no-shop" provision of a merger agreement, prevents the Target's board from shopping the Target after the signing of the merger agreement. These provisions are a common feature of public company acquisition agreements.

Chapter 5 also discusses the use of "go-shops" in public company acquisition agreements. These provisions may be employed by a Target's board to satisfy its *Revlon* (see chapter 5) duties to get the "best price reasonably available" where the Target has negotiated with, and entered into an acquisition agreement with, a single bidder. The "go-shop" provides that after signing the deal, the Target can actively seek a higher deal.

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86. See Twitter, Inc., Current Report (Form 8-K), (Apr. 25, 2022).

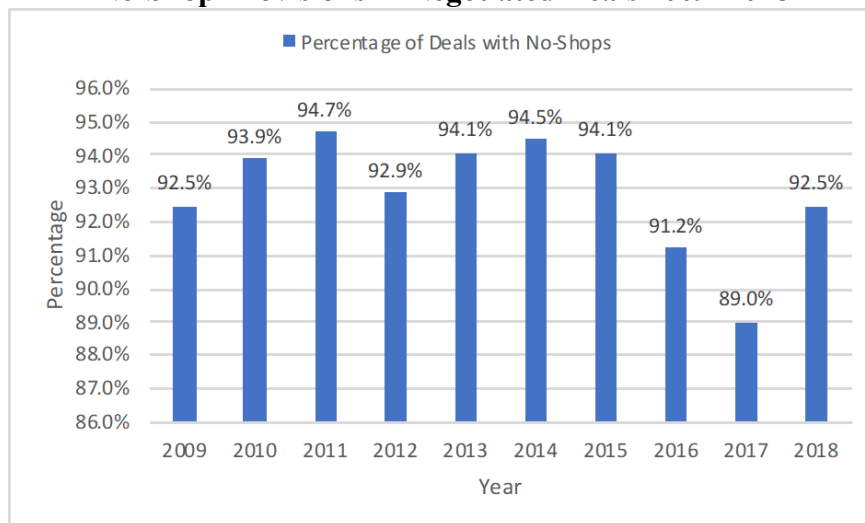
87. *Id.*

## [B] “No-Shops

## [1] “No-Shops” Generally

Figure 1-28, *No Shop Provisions in Negotiated Deals 2009–2018*, shows the prevalence of no-shop provisions in public company acquisition agreements.

**Figure 1-28**  
**No-Shop Provisions in Negotiated Deals 2009–2018**



Source: FactSet MergerMetrics, as of June 2019

Although all of the data after 2018 was not generally available, as noted below, there is data for 2022, which is addressed next.

## [2] Data on “No-Shops” for 2022

Although the specific info was not available from 2019 to 2021, the SRS, *2023 M&A Deal Term Study*,<sup>88</sup> which provides data on “*Private Target M&A Transactions that Closed between 2017 and 2022*,” reports that (1) 93% of 2022 deals had a “No-Shop, No-Talk” provisions, and (2) not one of the 93% had a fiduciary duty exception.<sup>89</sup> Such an exception is not likely to be required in the acquisition of a closely held Target where all of its shareholders support the transaction.

As discussed in chapter 5, under fiduciary duty principles, such exceptions are essentially required in public company acquisitions with respect to “No-Talk” provisions, because the shareholders of the Target, and not the board, have the ultimate say on whether the Target is going to

88. *2023 M&A Deal Term Study*, SRS ACQUIOM 1, 43 (2023), <https://perma.cc/6D7P-MMSQ>.

89. *Id.*

be sold. And, it is the board's responsibility to "talk" and not blind itself to other potentially superior offers.

[C] "Go-Shops"

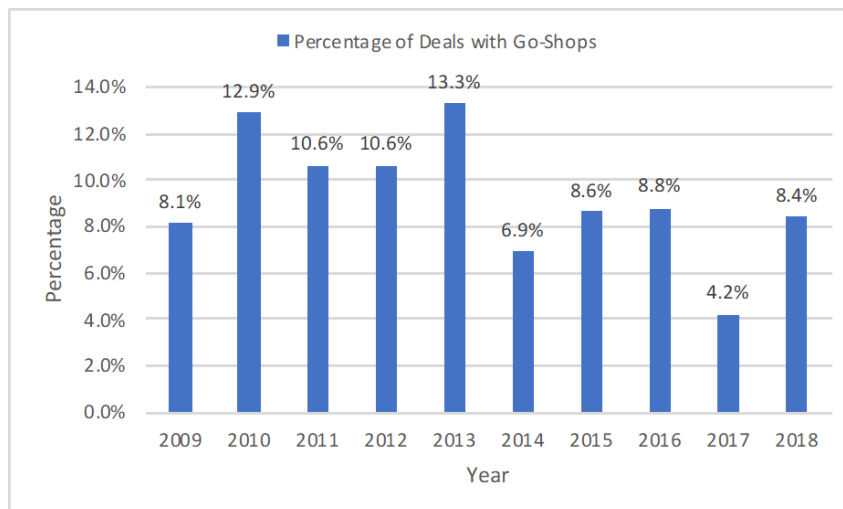
[1] "Go-Shops" Generally

Unlike the "no-shop," the "go-shop" specifically authorizes the Target to seek other purchasers for a specified period. In general, the termination fee the Target is required to pay if it terminates the first acquisition agreement and goes with a competing bidder is lower for topping transactions (that is, a higher offer from a third-party bidder) arising during the go-shop period than for such transactions arising after the go-shop period.

Figure 1-29, *Go-Shop Rights in Negotiated Deals 2009–2018*, shows that for 2013, the year during this ten-year period with the highest number of go-shops, these provisions were present in only 13.9% of public company deals. Data for years after 2018 were not available except for the data set out in the next section.

Generally, go-shops are more prevalent in deals with financial buyers (for example, private equity firms) than in deals with strategic buyers, such as an acquirer that is in the same line of business as the Target.

**Figure 1-29**  
**Go-Shop Rights in Negotiated Deals 2009–2018**



Source: FactSet MergerMetrics, as of June 2019

[2] Data on “Go-Shops” for 2022, 2023, and 2024

The Paul Weiss, *2023 M&A at a Glance*<sup>90</sup> provides significant data on go-shops for 2022 that shows, inter alia, that while (1) 32.7% of transactions with “Financial Buyers,” such as PE firms, had go-shops, only (2) 3.9% of transactions with “Strategic Buyers” had go-shops. The Paul Weiss, *June 2024 M&A at a Glance* report show that for the last 12 months as of June 2024, the percentages for go-shops were (1) 23.1% for Financial Buyers, and (2) 2.8% for Strategic Buyers.<sup>91</sup>

§ 1:7.26 *Wachtell’s Assessment of Hostile M&A Activity in 2022 and 2023*

As previously indicated, the corporate laws governing hostile takeovers is examined principally in chapter 5, which looks at, for example, the “poison pill” defensive tactic. The securities laws implications of tender offers and open market purchases are examined principally in chapter 8. The 2023 Wachtell report says the following about these transactions in 2022:

As valuations plunged across industries over the course of the year due to extreme stock market volatility, there arose greater opportunities for unsolicited acquirors to pursue Targets that may have been out of reach

90. Paul Weiss, *M&A at a Glance* 1, 3 (Feb. 2023), <https://perma.cc/L9EJ-W5C5>.

91. See Paul Weiss, *June 2024 M&A at a Glance*, *supra* note 18.



at the higher valuations of 2021. In 2022, hostile and unsolicited transactions accounted for approximately \$413 billion of overall deal activity, representing more than 10% of global M&A activity, compared to approximately 7% of global M&A activity in the previous year.<sup>92</sup>

In reporting on tender offers in 2023, the Wachtell report says:

Hostile and unsolicited transactions accounted for approximately 8% of global M&A activity in 2023, compared to about 10% in 2022 and 7% in 2021. Last year's crop of unsolicited approaches broadly vindicated prior experience: serious, well-funded, fairly valued proposals can result in the sale of a target, generally to the highest bidder in a sale process. Opportunistic behavior is typically not rewarded. Takeover preparedness remains critical in today's M&A environment.<sup>93</sup>

As shown above in Figure 1-24, *U.S. Tender Offers Contested and Uncontested 2018–2024*, in 2023 the *2024 FactSet Review* reports that there were only 5 hostile tender offers in the U.S. in 2023, with an 80% success rate. Thus, apparently most of these hostile and unsolicited transactions did not involve an actual tender offer.

§ 1:7.27 *Recent Information on Bankruptcies*

[A] In General

Corporate bankruptcies increase in recessionary times, and a bankruptcy may be followed by an acquisition of the bankrupt corporation in an M&A transaction. For example, in the 2002 recession, corporate bankruptcies increased from a near zero level to about 4% of M&A deal volume, and during the financial crisis of 2008 to 2009, corporate bankruptcies increased from approximately 1% of M&A deal volume to approximately 11% of such volume.<sup>94</sup> Chapter 16 explores acquisitions of bankrupt companies.

With the Federal Reserve Board's tight monetary policy resulting in significant increases in interest rates in 2022 and 2023, it can be expected that there will be an increase in bankruptcies and M&A activity associated with bankruptcies, and the next section discusses several 2023 transactions and one 2024 transaction that could signal that this is happening.

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92. Wachtell, *2023 Current Developments*, *supra* note 65.

93. Wachtell, *2024 Takeover Law and Practice*, *supra* note 5, at 2.

94. THOMSON REUTERS: MERGERS & ACQUISITIONS REVIEW at 8 (containing data from the Fourth Quarter 2009, on file with author).

[B] The Bankruptcy of Several Bank Holding Companies in  
2023 and 2024

[1] Introduction

As a result of the Federal Reserve Board's tight monetary policy (i.e., higher interest rates) for fighting inflation, there were the following three major bank bankruptcies during calendar year 2023:

- Signature Bank,<sup>95</sup>
- Silicon Valley Bank,<sup>96</sup> and
- First Republic Bank of San Francisco.<sup>97</sup>

Also, in April 2024 there was a bankruptcy of the Republic First Bank, a Philadelphia bank:<sup>98</sup>

This section merely provides a basic introduction to these bankruptcies, and these bankruptcies will be addressed further in chapter 16 which deals with bankruptcy M&A, and chapter 17, which deals with bank M&A.

[2] The Signature March 19, 2023, Bankruptcy

A March 19, 2023, FDIC press release on the Signature bankruptcy explained, in part:

The Federal Deposit Insurance Corporation (FDIC) entered into a purchase and assumption agreement for substantially all deposits and certain loan portfolios of Signature Bridge Bank, National Association, by Flagstar Bank, National Association, Hicksville, New York, a wholly owned subsidiary of New York Community Bancorp, Inc., Westbury, New York.

The 40 former branches of Signature Bank will operate under New York Community Bancorp's Flagstar Bank, N.A., on Monday, March 20, 2023. The branches will open during their normal business hours.<sup>99</sup>

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95. Press Release, FDIC, *Subsidiary of New York Community Bancorp, Inc., to Assume Deposits of Signature Bridge Bank, N.A., From the FDIC* (March 19, 2023) [hereinafter *Signature Bridge Press Release*], <https://perma.cc/5KR3-Q7ZR>.

96. Press Release, FDIC, *First-Citizens Bank & Trust Company, Raleigh, NC, to Assume All Deposits and Loans of Silicon Valley Bridge Bank, N.A., From the FDIC* (Mar. 26, 2023) [hereinafter *First-Citizens Press Release*], <https://perma.cc/8Z27-5T7J>.

97. Press Release, FDIC, *JPMorgan Chase Bank, National Association, Columbus, Ohio Assumes All the Deposits of First Republic Bank, San Francisco, California* (May 1, 2023) [hereinafter *JP Morgan Press Release*], <https://perma.cc/TZJ5-NKYW>.

98. FDIC, *Failed Bank Information for Republic First Bank DBA Republic Bank, Philadelphia, PA* (April 26, 2024) [hereinafter *Republic First Bank Press Release*], <https://perma.cc/Q9QU-2NTY>.

99. *Signature Bridge Press Release*, supra note 95.

The FDIC did an analysis of the failure of Signature that was released on April 28, 2023.<sup>100</sup> The press release announcing the report explains in part:

This detailed analysis identifies clearly that “the root cause of [Signature Bank’s] failure was poor management. [Signature Bank’s] board of directors and management pursued rapid, unrestrained growth without developing and maintaining adequate risk management practices and controls appropriate for the size, complexity and risk profile of the institution. [Signature Bank’s] management did not prioritize good corporate governance practices, did not always heed FDIC examiner concerns, and was not always responsive or timely in addressing FDIC supervisory recommendations (SRs). [Signature Bank] funded its rapid growth through an overreliance on uninsured deposits without implementing fundamental liquidity risk management practices and controls.”

In regard to the FDIC’s supervision of Signature Bank, the report finds that “the FDIC conducted a number of Targeted reviews and ongoing monitoring, issued Supervisory Letters and annual roll-up reports of examination (ROEs), and made a number of SRs to address supervisory concerns. In retrospect, FDIC could have escalated supervisory actions sooner, consistent with the Division of Risk Management Supervision’s (RMS) forward-looking supervision concept.<sup>101</sup>

[3] The Silicon Valley Bank March 26, 2023, Bankruptcy

The March 26, 2023, FDIC press release on Silicon Valley bankruptcy explained, in part:

The Federal Deposit Insurance Corporation (FDIC) entered into a purchase and assumption agreement for all deposits and loans of Silicon Valley Bridge Bank, National Association, by First-Citizens Bank & Trust Company, Raleigh, North Carolina.

The 17 former branches of Silicon Valley Bridge Bank, National Association, will open as First-Citizens Bank & Trust Company on Monday, March 27, 2023. Customers of Silicon Valley Bridge Bank, National Association, should continue to use their current branch until they receive notice from First-Citizens Bank & Trust Company that systems conversions have been completed to allow full-service banking at all of its other branch locations.

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100. Press Release, FDIC, *FDIC Releases Report Detailing Supervision of the Former Signature Bank*, New York, New York (April 28, 2023), <https://perma.cc/G96Z-KH5R>.

101. *Id.*

Depositors of Silicon Valley Bridge Bank, National Association, will automatically become depositors of First-Citizens Bank & Trust Company. All deposits assumed by First-Citizens Bank & Trust Company will continue to be insured by the FDIC up to the insurance limit.<sup>102</sup>

One analysis of the Silicon Valley bankruptcy provides the following introduction to this situation:

In March 2023, the failure of Silicon Valley Bank (SVB) shocked global financial markets. In many ways, the SVB failure was a classic bank run, with details that appear drawn from the 19<sup>th</sup> century rather than the 21<sup>st</sup>. With a deposit base more than 90% uninsured and a balance sheet badly damaged by a combination of bad luck and bad strategy, SVB could not be saved by the standard tools of the Federal Reserve and FDIC. Instead, the FDIC was forced to take the unusual step of a takeover during business hours, with many details of this resolution not released until the next weekend. These events began a series of bank interventions on both sides of the Atlantic that is still ongoing as of this writing. A long-horizon view through the prism of intervention patterns can allow for the identification of a “systemic” banking crisis long before the macroeconomic data of that period is complete; in this case the combination and size of interventions in March 2023 strongly suggest that we are already in the midst of a systemic event.<sup>103</sup>

#### [4] The First Republic May 1, 2023, Bankruptcy

A May 1, 2023, FDIC press release on the First Republic bankruptcy explains:

First Republic Bank, San Francisco, California, was closed today by the California Department of Financial Protection and Innovation, which appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. To protect depositors, the FDIC is entering into a purchase and assumption agreement with JPMorgan Chase Bank, National Association, Columbus, Ohio, to assume all of the deposits and substantially all of the assets of First Republic Bank.

JPMorgan Chase Bank, National Association submitted a bid for all of First Republic Bank’s deposits. As part of the transaction, First Republic Bank’s 84 offices in eight states will reopen as branches of JPMorgan Chase Bank, National Association, today during normal

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102. *First-Citizens Press Release*, *supra* note 96.

103. Andrew Metrick & Paul Schmlerz, *The March 2023 Bank Interventions in Long-Run Context – Silicon Valley Bank and Beyond*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 17, 2023), <https://perma.cc/7GW3-TEHD>.

business hours. All depositors of First Republic Bank will become depositors of JPMorgan Chase Bank, National Association, and will have full access to all of their deposits.

Deposits will continue to be insured by the FDIC, and customers do not need to change their banking relationship in order to retain their deposit insurance coverage up to applicable limits.<sup>104</sup>

The following basic discussion of the First Republic bankruptcy was provided by Bloomberg News:

JPMorgan Chase & Co. agreed to acquire First Republic Bank in a government-led deal for the failed lender, putting to rest one of the biggest troubled banks remaining after turmoil engulfed the industry in March.

The transaction, announced in the early morning hours Monday after First Republic was seized by regulators, makes the biggest US bank even larger while minimizing the damage to the Federal Deposit Insurance Corp.'s guarantee fund. JPMorgan agreed to the takeover after private rescue efforts failed to fill a hole in the troubled lender's balance sheet and customers yanked their deposits . . . .

First Republic was the second-biggest bank failure in US history, and the fourth regional lender to collapse since early March.<sup>105</sup>

[5] April 26, 2024, Bankruptcy of Republic First Bank in Philadelphia

On April 26, 2024, the FDIC announced as follows the bankruptcy of the Republic First Bank, a Philadelphia bank.<sup>106</sup>

On Friday, April 26, 2024, Republic First Bank dba Republic Bank ("Republic Bank") was closed by the Pennsylvania Department of Banking and Securities. The Federal Deposit Insurance Corporation (FDIC) was named Receiver. No advance notice is given to the public when a financial institution is closed. Fulton Bank, National Association (N.A.), Lancaster, PA, assumed substantially all deposit accounts and substantially all the assets. All shares of stock were owned by the holding company, which was not involved in this transaction.<sup>107</sup>

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104. *JP Morgan Press Release*, *supra* note 97.

105. Rick Green, *JPMorgan Ends First Republic's Turmoil After FDIC Seizure*, Bloomberg News (May 1, 2023), <https://perma.cc/376P-PWAS>.

106. *Republic First Bank Press Release*, *supra* note 98

107. *Id.*

A Forbes article<sup>108</sup> provided the following background on this bankruptcy:

Republic First reported a decline in deposits in a presentation to investors last year, which also indicated the value of the company’s mortgage loan portfolio had “declined substantially in a rising rate environment.”

The company said at the time it would “wind down and exit” the mortgage business and instead focus on consumer deposits, of which about 60% were uninsured as of last June[.]<sup>109</sup>

The uninsured deposits must have been deposits in excess of the \$250,000 FDIC insured deposit limit, which is addressed in chapter 17. The Forbes article goes on to explain:

The Pennsylvania Department of Banking and Securities seized Republic First on Friday, following speculation the bank would be seized by regulators as it looked for a potential buyer. Fulton Bank reached an agreement to take over Republic First’s 32 branches across Pennsylvania, New York and New Jersey, which will reopen under the Fulton Bank name. Before the seizure, Republic First was delisted by Nasdaq in August, after the bank failed to file its fiscal year 2022 report with the Securities and Exchange Commission.<sup>110</sup>

The article goes on to explain that this bankruptcy is likely different from the Silicon Valley, Signature, and First Republic 2023 bankruptcies that are discussed above. In distinguishing these bankruptcies, the article explains:

Bank failures last year—which happened in rapid succession—were “really banks with a certain specialization.” . . . “[S]mall banks are in good shape.” Silicon Valley Bank was a lender to tech startups, while Signature Bank was a leader in cryptocurrency lending and First Republic had a largely high-net-worth clientele.<sup>111</sup>

#### § 1:7.28 Recent ABA Deal Point Studies

##### [A] Introduction to the ABA Deal Point Studies

Since 2006, the Market Trends Subcommittee of the ABA Mergers and Acquisitions Committee has published a number of Deal Points Studies, which are referred to here as the *ABA Deal Point Studies*, *infra*

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108. Ty Roush, *Here’s What Led To Republic First’s Collapse—And Why It’s Different From 2023 Failures*, FORBES (April 27, 2024), <https://perma.cc/93LV-77XW>.

109. *Id.*

110. *Id.*

111. *Id.*

Table of References. The Subcommittee publishes, inter alia, the following studies:

1. Strategic Buyer/Public Target M&A Deal Points Study,
2. Private Target M&A Deal Points Study,
3. Canadian Public Target M&A Deal Points Study,
4. Canadian Private Target M&A Deal Points Study, and
5. European Private Target M&A Deal Points Study.

These studies present data on the frequency of certain contract provisions, along with sample contract language. The studies are available on the website of ABA, Committee on Mergers and Acquisitions, and obviously in advising on any transaction, it is necessary to review the most current study. The following is a brief introduction to some these studies, and when addressing any significant issue in an M&A transaction, the adviser should consult the current applicable Deal Point Study.

The *Strategic Buyer/Public Target M&A Deal Points Study* generally is published annually. It contains analyses of the frequency of certain contract provisions in acquisition agreements for publicly traded U.S. Targets by strategic buyers. Among other things, the study examines the frequency of contract provisions relating to representations and warranties made by the Target; conditions to closing; deal protection devices; remedies; employee benefit matters; negotiated tender offers; and various covenants, including those related to business operations, antitrust, and reliance.

The *Private Target M&A Deal Points Study* generally is published biennially with analyses of deals in the previous calendar year. It analyzes the frequency of certain contract provisions in publicly available acquisition agreements where a private Target is acquired by a public company. The study examines, inter alia, the frequency and structure of contract provisions relating to post-closing price adjustments and earnouts; representations and warranties; covenants; conditions to closing; indemnification; and dispute resolution.

The *Canadian Public Target M&A Deal Points Study* generally is published biennially with analyses of the previous two calendar years. It analyzes the frequency of certain contract provisions in publicly available acquisition agreements for Canadian publicly traded Targets. It examines the frequency of contract provisions relating, inter alia, to representations and warranties; conditions to closing; deal protection; covenants; reliance; choice of law; and remedies.

The *Canadian Private Target M&A Deal Points Study* generally is published biennially with analyses of the previous two calendar years. It analyzes the frequency of contract provisions in publicly available acquisition agreements of Canadian private Targets being acquired or sold by public companies. It examines the frequency of contract provisions

relating, inter alia, to post-closing price adjustments and earnouts; representations and warranties; covenants; conditions to closing; indemnification; and dispute resolution.

The *European Private Target M&A Deal Points Study* generally is published biennially with analyses of acquisition agreements for deals where the Target is a private company substantially operating in Europe. The acquisition agreements are provided by the firms of various subcommittee members and may not represent market practices as a whole. The study examines the frequency and structure of contract provisions relating, inter alia, to payment terms and post-closing price adjustments; representations and warranties; conditions to closing; indemnification; and dispute resolution.

These ABA *Deal Point Studies* are discussed throughout this book, particularly in chapter 2, *General Principles in Drafting an Acquisition Agreement—Merger Agreement, Asset Acquisition Agreement, and Stock Purchase Agreement*, and chapter 5, *Fiduciary Duties of Directors, Officers, and Controlling Shareholders*. It must be emphasized that the reader should make sure he or she has the latest copy of the applicable Deal Point Study, as the version discussed in this book may not be the latest study.

[B] SRSAcquiom, 2023 M&A Deal Term Study

In addition to the ABA studies, in evaluating various terms of M&A agreements, one should consider the following: SRS, *2023 M&A Deal Term Study*, *infra* section 1:7.44. This study focuses on deal terms in private transactions.

[C] The WilmerHale, 2023 M&A Report on Deal Terms

The *WilmerHale, 2023 M&A Report*, *supra* section 1:7.44, contains the following two very helpful sections addressing current issues with provisions of M&A agreements:

- A Comparison of Deal Terms in Public and Private Acquisitions; and
- Trends in VC-Backed Company M&A Deal Terms.

§ 1:7.29 *Recent Information on the Top Ten M&A Investment Banks and Law Firms Ranked by U.S. Deal Size*

Figure 1-30, *Top 10 M&A Investment Banking Firms and Law Firms Ranked by U.S. Deal Volume 2023*, sets out the top ten investment banking and law firms ranked by U.S. M&A deal volume for 2023.



**Figure 1-30**  
**Top 10 M&A Investment Banking Firms and Law Firms**  
**Ranked by U.S. Deal Volume 2023**

	<b>Investment Banking Firms (a)</b>	<b>Law Firm (b)</b>
1	Goldman Sachs & Co. LLC	Kirkland & Ellis LLP
2	JPMorgan Chase & Co.	Sullivan & Cromwell LLP
3	Morgan Stanley	Wachtell, Lipton, Rosen & Katz
4	Bank of America Securities Inc.	Latham & Watkins LLP
5	Citigroup Inc.	Skadden, Arps, Slate, Meagher & Flom LLP
6	Centerview Partners Advisory Holdings LLC	Cravath, Swaine & Moore LLP
7	Evercore, Inc	Paul, Weiss, Rifkind, Wharton & Garrison LLP
8	RBC Capital Markets	Fried, Frank, Harris, Shiver & Jacobson LLP
9	Barclays PLC	Davis Polk & Wardwell LLP
10	USB Group AG	Simpson Thacher & Bartlett LLP

Source: (a) 2023 Mergerstat Financial Advisor Rank by Total Value, *2024 FactSet Review*, pg. 74

(b) 2023 Mergerstat Legal Advisor Ranking by Total Value, *2024 FactSet Review*, pg. 75

Two traditional investment banking firms, Goldman Sachs and Morgan Stanley, are in the top three. J.P. Morgan, principally a traditional bank, but with an investment bank, is number two. Evercore is a boutique investment banking firms.

All of the law firms are headquartered in New York City, except for Kirkland, Chicago, and Latham, Los Angeles. These two firms are illustrations of the fact that leaders in the legal M&A practice are located throughout the country, not just in New York City.

§ 1:7.30 *Recent Information on Proxy Contests*

[A] The Number of Proxy Contest from 2018 to 2022

Proxy contests can involve, inter alia, (1) an attempt by an insurgent individual or group to gain control of the board of a publicly held company, and (2) an attempt by a potential acquirer to replace the board of a publicly held Target company with the purpose of facilitating the acquisition of the Target by the acquirer. Proxy contests may also involve the efforts of an activist shareholder, such as Carl Icahn, to use such a technique to gain control of the board for the purpose of changing the Target corporation's business policies. Activist proxy contests are generally addressed in the next section.

As seen below in Figure 1-31, *Number of U.S. Proxy Contests, 2018 to 2022*, FactSet Universal Screening reports that the number of these contests ranged from 102 in 2018 to 85 in 2022, with the number going straight down yearly from 2018 to 2022. The reasons for this drop are not clear to this author; however, it can be expected that the SEC's new "Universal Proxy" rules, which as indicated in section 8:11.3[J][2] were adopted in 2021, could have an impact on the number of proxy contest.

**Figure 1-31**  
**Number of U.S. Proxy Contests**

Year	Number of Contests
2018	102
2019	98
2020	96
2021	89
2022	85

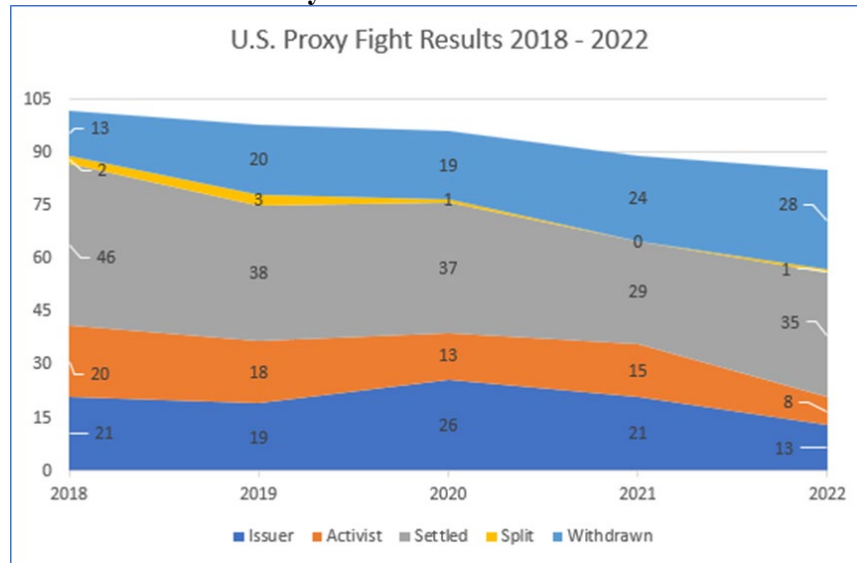
Source: 2018-2022 Proxy Contest Winners for U.S. Incorporated Companies, FactSet Universal Screening, as of June 2023

[B] The Results of Proxy Contests from 2018 to 2022

Figure 1-32, *U.S. Proxy Contest Results 2018-2022* shows the number of proxy contests over this period that had the following results:

- Won by the Issuer,
- Won by the Activist or other Contestant,
- Settled,
- Split, and
- Withdrawn.

**Figure 1-32**  
**U.S. Proxy Contest Results 2018-2022\***



Source: 2018-2022 Proxy Contest Winners for U.S. Incorporated Companies, FactSet Universal Screening, as of June 2023.

\*The author gives a special thanks to his Research Assistant, Sergio Porras, a student at Penn State Law, for his initiative and skill in developing this Figure 1-32.

Note that in each of these years, the largest category is “Settled,” and the “Activist” does not prevail often. For example, in 2022 the Activist prevailed in eight of the 85 contests.

A very helpful tool in addressing proxy issues is Sullivan & Cromwell’s annual *Review and Analysis of U.S. Shareholder Activism*, which is discussed below.

#### [C] An Early 2024 Report on Proxy Contests

An article in Harvard Law School Forum on Corporate Governance gives the following picture of proxy contests as of the early part of 2024:

Overall, we anticipate that there will be a slightly higher number of proxy contests than last year. As we highlighted in our 2024 governance trends, the introduction of universal proxy does not guarantee that management will lose one or more seats in every contest that goes to a vote. Therefore, it is essential for boards to closely

monitor these contests and identify winning strategies that align with their companies' goals and values.<sup>112</sup>

*§ 1:7.31 The Role of Activist Shareholders Specifically*

[A] In General

Chapter 28 deals with activist shareholders, including activist hedge funds. These funds will acquire a stock position in a public company with the purpose of causing the company to change its business strategy or to enter into a transaction such as a merger. In many instances, an activist shareholder will wage a proxy contest.

Chapter 28 discusses in detail the joint attempt, several years ago, by Valeant, a publicly held Canadian company, and Pershing Square, a large activist hedge fund, to acquire Allergan, the publicly held U.S. firm that makes Botox.

As indicated by the following observation in a 2014 issue of the *Harvard Business Review*, there has been a significant growth in shareholder activism:

The new activists have dramatically upped the pressure on corporate executives and boards. Nearly every business day they Target another company: More than 200 activist campaigns were launched in 2013, according to the law firm Wachtell, Lipton, Rosen & Katz, and assets under management at activist funds were up more than 50%. Although the value of those funds was estimated at \$100 billion—a mere fraction of 1% of the total stock market value of American corporations—the activists' leverage and impact far exceed the dollars they invest.<sup>113</sup>

[B] Sullivan & Cromwell's 2022 Activism Study

Sullivan Cromwell's December 2022 *Review and Analysis of 2021 U.S. Shareholder Activism and Activist Settlement Agreements*<sup>114</sup> provides the following high-level summary of the 2022 activity:

- Aided by record-breaking Q1 activity, overall activism activity in 2022 has returned to pre-pandemic levels despite continued macroeconomic uncertainty and market volatility.
- Activist focus areas have shifted . . . leading to an increase in campaigns Targeting [1] corporate strategies and operations, [2]

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112. Matt DiGuseppe, Maria Castañón Moats, and Paul DeNicola, *Proxy Preview 2024*, HARV. L. SCH. F. CORP. GOVERNANCE (April 14, 2024), <https://perma.cc/CSY5-88L8>.

113. Bill George & Jay W. Lorsch, *How to Outsmart Activist Investors*, HARV. BUS. REV. (May 2014), <https://perma.cc/T9U2-8RRL>.

114. Sullivan & Cromwell LLP, *2022 U.S. Shareholder Activism and Activist Settlement Agreements 1* (Dec. 13, 2022) [hereinafter Sullivan & Cromwell, *2022 Shareholder Activism*], <https://perma.cc/HJC2-PQVW>.

management changes, and [3] environmental, social and governance (ESG) issues.

- Companies have demonstrated their willingness to defend against activist campaigns, resulting in an uptick in the adoption of rights plans and a decrease in the board seats obtained by activists.
- Companies and activists also reached fewer settlements[.]<sup>115</sup>

With respect to its projections of activism in 2023, the report says that activist campaigns are expected to be impacted by “[1] continued macroeconomic uncertainty, [2] the universal proxy rules [see chapter 6], and [3] other regulatory changes[.]”<sup>116</sup>

Also, the Review introduces as follows the successful Environmental, Social and Governance (ESG) initiative by Engine No. 1, an investment firm,<sup>117</sup> at Exxon Mobile:

Although activists have incorporated ESG themes into their campaigns for the past few years as a way to appeal to a wider stakeholder base, the success of Engine No.1’s 2021 proxy contest at Exxon Mobile Corp. (the first successful U.S. proxy contest to focus primarily on environmental and social demands) prompted a considerable uptick in the number of activism campaigns with ESG critiques at the center of the activist’s thesis.<sup>118</sup>

One interesting observation from Sullivan and Cromwell’s *2021 Review* is the following discussion of a campaign by Carl Icahn:

One recent example of M&A activism is Carl Icahn’s opposition to Southwest Gas Holdings Inc.’s \$1.97 billion acquisition of Questar Pipelines. In its letter to shareholders and the board, Icahn Enterprises argued Southwest Gas was overpaying for Questar Pipelines and asserted numerous governance related critiques of the board. Southwest Gas adopted a short-term shareholder rights plan [that is, poison pill] in response to Icahn’s intent to launch a proxy contest to replace the entire board, after which Icahn Enterprises launched an unsolicited tender offer for the company’s outstanding shares. In response, Southwest Gas’s board of – directors asked shareholders to reject the tender offer and named two new directors unrelated to Icahn. On December 2, 2021, Icahn filed suit in the Delaware Chancery Court seeking a temporary restraining order to prevent Southwest Gas from selling stock below Icahn’s tender offer price and/or to investors

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115. *Id.*

116. *Id.*

117. Engine No. 1 describes itself as an “investment firm purpose-built to create long-term value and bring common sense back to capitalism.” See ENGINE NO.1, <https://perma.cc/F4V5-9GBG>.

118. Sullivan & Cromwell, *2022 Shareholder Activism*, *supra* note 114, at 7.

friendly to Southwest Gas to purportedly prevent the company from interfering with Icahn's proxy campaign.<sup>119</sup>

The Delaware Chancery Court refused to block the sale.

[B] Wachtell's Assessment of Shareholder Activism in 2024

The *Wachtell, 2024 Takeover Law and Practice*<sup>120</sup>, contains the following discussion of shareholder activism:

Recent years have consistently seen elevated levels of activity by activist hedge funds, both in the U.S. and abroad. Such funds often seek the adoption of corporate policies that would increase short-term stock prices, such as increasing share buybacks, selling or spinning off one or more businesses of a company or selling the entire company. There has been a resurgence of activism activity after the temporary drop during the Covid-19 pandemic; 2023 saw a 9% increase in global activism campaigns compared to 2022, which itself saw a 38% year-on-year increase in the number of campaigns launched in 2021. Approximately 17% of S&P 500 companies have a known activist holding more than 1% of their outstanding shares. Activists' assets under management ("AUM") have grown substantially in recent years, with the 50 most significant activists ending 2023 with approximately \$156 billion in equity assets.<sup>121</sup>

Wachtell reports that the focus of activist activity generally relates to: "[1] Matters of business strategy, [2] operational improvement, [3] capital allocation and structure, [4] CEO succession, [5] M&A, [6] options for monetizing corporate assets, [7] stock buybacks, and [8] other economic decisions[.]"<sup>122</sup>

With respect to proxy contests, the Wachtell report says: "Of the 92 proxy fights launched in the United States in 2023, activists scored wins in only 19 fights, with many (25%) contests resulting in an announced settlement, consistent with trends over recent years."<sup>123</sup>

With respect to M&A Activism, the Wachtell report explains generally: "[A]ctivists have worked to block proposed M&A transactions, mostly on the target side but sometimes also on the acquiror side, with the goal of either sweetening or scuttling the transaction."<sup>124</sup> And, the report elaborates as follows on M&A Activism:

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119. Sullivan & Cromwell LLP, *Review and Analysis of 2021 U.S. Shareholder Activism and Activist Settlement Agreements* 8-9 (Dec. 20, 2021), <https://perma.cc/HAD2-U4TR>.

120. Wachtell, *2024 Takeover Law and Practice*, *supra* note 5.

121. *Id.* at 8.

122. *Id.*

123. *Id.*

124. *Id.*

A large portion of shareholder activism is oriented wholly or partially towards M&A, a trend which continued into 2023 with over 40% of all activist campaigns featuring an M&A-related thesis. There are three types of M&A activism, each accounting for about a third of M&A activism campaigns in 2023: first, campaigns to sell the entire target company; second, campaigns aimed at breaking up a target company or having the target company divest a non-core business line; and, third, campaigns that attempt to scuttle or improve an existing deal. “Sell the company” campaigns were a key driver (slightly ahead of the other two last year), reflecting an increasing push by activists for companies to explore or pursue transformative M&A as an alternative to perceived “stalled” or “failed” stand-alone strategies. Activists also commonly pushed for break-ups or divestitures in portfolio-based campaigns. In addition, some activists launched (often unsuccessful) campaigns after a transaction was announced to scuttle or sweeten an announced deal.<sup>125</sup>

[B] “Diligent Market Intelligence’s” Assessment of Shareholder Activism in 2024

A March 2024 assessment of shareholder activism by an officer of Diligent Market Intelligence<sup>126</sup> identifies these “Key Shareholder Activism Trends [that] Emerge[d] from 2023:”

1. An increasing number of U.S. companies are identifying activism as a risk in their corporate disclosures . . . .
2. Activism levels remain high in many markets, with shareholders looking further afield for value creation opportunities. In 2023, 982 companies were subject to activist campaigns globally, a 4% rise compared to a year prior and the highest level since 2019 . . . .
3. Activists are increasingly focusing on corporate remuneration policies, looking for companies to be prepared to weather the challenges brought on by rising costs and slowing economic growth. In the U.S., 81 companies faced remuneration-related demands last year, a 37.3% increase compared to the 59 seen in 2022 and the highest increase of any demand type . . . .
4. In a period of rising costs, some of the most high-profile campaigns were a result of what activists deemed to be costly

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125. *Id.* at 10-11.

126. Rebecca Sherratt and Diligent Market Intelligence, *Shareholder Activism Annual Review 2024*, HARV. L. SCH. F. CORP. GOVERNANCE. (Mar. 12, 2024) <https://perma.cc/RHD8-EGDR>.

M&A transactions. 2023 saw a 20.8% increase in the number of U.S.-based companies subjected to oppose M&A demands. 14 (48.3%) of resolved oppose M&A demands were at least partially successful in the U.S., compared to 11 (37.9%) in 2022.

5. 2023 saw the first increase in the number of activist short campaigns [i.e., a “Short Slate Proxy Contest,” where the dissident shareholders propose to replace some by not all of the company’s directors] recorded globally for four consecutive years, increasing 14.6% on 2022 levels to 110.<sup>127</sup>

#### IV. RECENT DATA: CROSS BORDER M&A, SECTIONS 1:7.32 TO 1:7.36

##### § 1:7.32 *Recent Data on Cross-Border M&A Activity*

###### [A] Introduction

Chapters 19 through 22 address various aspects of inbound and outbound cross-border M&A. This section 1:7.32 provides a high-level review of some of the financial and economic considerations of this activity.

Wachtell Lipton publishes an annual *Cross-Border M&A Guide*,<sup>128</sup> and the *2024 Guide*, which was issued in early 2024 covering principally 2023 activity, provides the following excellent overview of Cross-Border M&A activity during 2023:

Cross-border merger and acquisition (“M&A”) transactions are a significant part of the global M&A landscape, representing approximately one-third of all deal activity annually in recent years. After a record-shattering year for M&A in 2021 and a reversion to mean M&A levels in 2022, the year 2023 experienced even greater tempering in the global M&A market. Worldwide M&A volume decreased to \$2.9 trillion in 2023, from total volume of \$3.6 trillion in 2022, \$6.4 trillion in 2021 and an average of \$4.5 trillion annually in the ten years prior (in 2023 dollars). This approximate 20% decline in volume from 2022 to 2023 took a particular toll on venture capital and private equity firms, which saw estimated volume declines of 39% and 35%, respectively, from 2022 to 2023, while strategic deals fell by an estimated 14%. This plunge in M&A activity reflects the impact of ongoing geopolitical tensions and the steepest monetary tightening in

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127. *Id.*

128. Wachtell, Lipton, Rosen & Katz, *2024 Cross-Border M&A Guide* 1 (May 2024), [hereinafter Wachtell, *2024 Cross-Border M&A Guide*], <https://perma.cc/VXK7-PQDM>.



decades, which have contributed to challenging debt markets and an overall uncertain economic outlook. At the same time, an aggressive antitrust agenda in the United States deterred dealmakers from pursuing transactions that posed risks of a significant delay or litigation with the government.

Despite the challenges confronting dealmakers in 2023, cross-border deal volume remained close to 2022 levels, with total volume of approximately \$950 billion in 2023 as compared to 2022 volume of approximately \$1.0 trillion. The proportion of cross-border volume to total activity in 2023 (33%) aligned with the average proportion (35%) over the prior decade. Acquisitions of U.S. companies by non-U.S. acquirors constituted \$165 billion in transaction volume and represented 17% of total 2023 cross-border M&A volume. Canadian, Irish, French, Swiss and British acquirors accounted for 42% of the volume of cross-border acquisitions of U.S. targets, while acquirors from China, India and other emerging economies accounted for about 9%. With proper planning and understanding of the relevant rules and considerations, cross-border transactions can continue to offer compelling opportunities for U.S. and foreign acquirors in 2024 and beyond.<sup>129</sup>

It is interesting to note that the bulk of M&A activity takes place in North America and Europe. For example, Litera reports that for 2022:

North America and Europe are the primary drivers of global M&A. In 2021, North American M&A accounted for 54.2% of global deal value and 47.9% of global deal count. Combined with Europe, it was responsible for 88.1% of global M&A value and 87.7% of global deal count. In other words, almost nine in 10 deals that happened last year were in those two regions. The story is largely the same this year [i.e., 2022], though slightly diminished at 84.4% for deal value and 86.9% for deal count.<sup>130</sup>

The Paul Weiss, *June 2024 M&A at a Glance*<sup>131</sup> gives the following picture of the state of inbound M&A (i.e., an acquisition by a foreign acquirer of a U.S. Target) and outbound M&A (i.e., an acquisition by a U.S. acquirer of a Foreign Target) as of June 2024:

- Inbound M&A was down 8.7% in the number of deals and down 30.3% in dollar amount of deals; and
- Outbound M&A was down 13.2% in the number of deals and down 6.6% in dollar amount of deals.<sup>132</sup>

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129. *Id.* at 1

130. Litera, *2023 M&A Report*, *supra* note 33.

131. Paul Weiss, *June 2024 M&A at a Glance*, *supra* note 18.

132. *Id.*

[B] The Impact of the Dollar and “Foreign Exchange” on Cross-Border M&A, In General

If the dollar becomes weaker (that is, it takes less of a foreign currency to purchase a dollar) when measured against the currencies of the major trading partners of the United States, then (1) it will be cheaper for potential acquirers located in such countries to buy U.S. Targets, and (2) at the same time, it will become more expensive for potential U.S. acquirers to buy Targets located in such countries. The reverse is true if the dollar becomes stronger (that is, it takes more of a foreign currency to purchase a dollar).

[C] Cross-Border M&A by Region of the Target, 2016–2021, with a Prediction for 2022

[1] A Note on the UNCTAD, *World Investment Report*<sup>133</sup>

This section relies on a U.N. Conference on Trade and Development (UNCTAD) *World Investment Report* issued in 2022. The 2023 UNCTAD, *World Investment Report* was not available at the time this section was prepared. Consequently, the data in the figures in this section runs only through 2021 and relies on the 2022 UNCTAD, *World Investment Report*. The 2023 UNCTAD, *World Investment Report*, which will include information for 2022, should be available in June or July of 2023.

[2] Cross Border M&A as Reported in the UNCTAD, *World Investment Report*

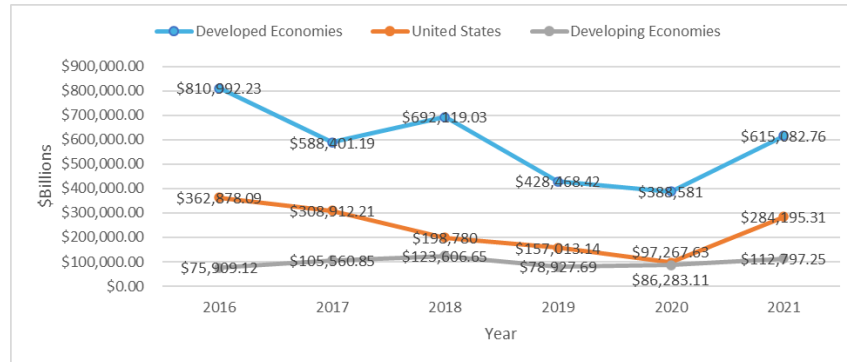
The following figure provides information from 2016 through 2021 on the regions in the world in which the Target in cross-border M&A was located. Figure 1-33, *Value of Cross-Border M&As, by Region/Economy of Target, 2016–2021*, is based on data in the 2022 UNCTAD, *World Investment Report*.

Figure 1-33 shows the value of cross-border M&As from the perspective of the Target from 2016 through 2021 for the following economies: (1) Developed Economies, (2) the United States, and (3) Developing Economies.

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133. I thank Akshaya Senthil Kumar, an LLM student at Penn State Law, for her assistance with this section.

**Figure 1-33**  
**Value of Cross-Border M&As, by Region/Economy of Target, 2016–2021**



Source: Annex Table 5, Value of cross-border M&As, by region/economy of seller/purchaser. UNCTAD, World Investment Report 2022

Figure 1-33 shows that from 2016 to 2020, the trend in the value of cross-border M&A deals (on the Target side) in these economies was (1) downward for both the U.S. and Developed Economies, and (2) steady for Developing economies. This may mean that M&A was more negatively impacted by COVID-19 in the U.S. and other the Developed Countries than in Developing Countries.

However, as with the previous slides showing increases in the level of U.S. domestic M&A from 2020 to 2021, there was a significant increase in cross-border M&A from 2020 to 2021 in each of these areas.

### [3] The 2022 Decrease in Cross Border M&A

Although the 2024 UNCTAD, *World Investment Report* was not available at the time of the writing of this section in June 2024, the 2023 UNCTAD, *World Investment Report*<sup>134</sup> discussed M&A at several places in the report and gave the following high-level report on Cross-Border M&A Trends for 2022:

#### Cross-border M&A trends

Cross-border M&A sales reached \$707 billion in 2022 – down 4 per cent (table I.7). In manufacturing, cross-border M&As fell by 42 per cent to \$142 billion, while deals targeting services decreased slightly, by 5 per cent, to \$442 billion. In the primary sector, M&A values more than quadrupled to \$122 billion, breaking the decade-long downward trend. After the rise in value in 2021, M&A sales in pharmaceuticals

134. UNCTAD, *2023 World Investment Report* (June 2023) <https://perma.cc/Z5RU-6Q57>.

fell by 51 per cent to \$36 billion, while the number of deals dropped by 22 per cent to 169. The largest deal of the year was recorded in the pharmaceutical industry: the \$11 billion acquisition of Vifor Pharma

(Switzerland) by CSL Behring (Australia) and the purchase of the biosimilars business of Viatris (United States) by Biocon Biologics (India) for \$3.3 billion.<sup>135</sup>

[D] Cross-Border M&A: Foreign Acquirers and U.S. Acquirers, 2018–2022

Figure 1-34, Cross-Border M&A Foreign Buyers [i.e. Acquirers] of U.S. Targets and Foreign Sellers [i.e., Targets] to U.S. Acquirers 2018–2023, shows for years 2018 through 2023 the following:

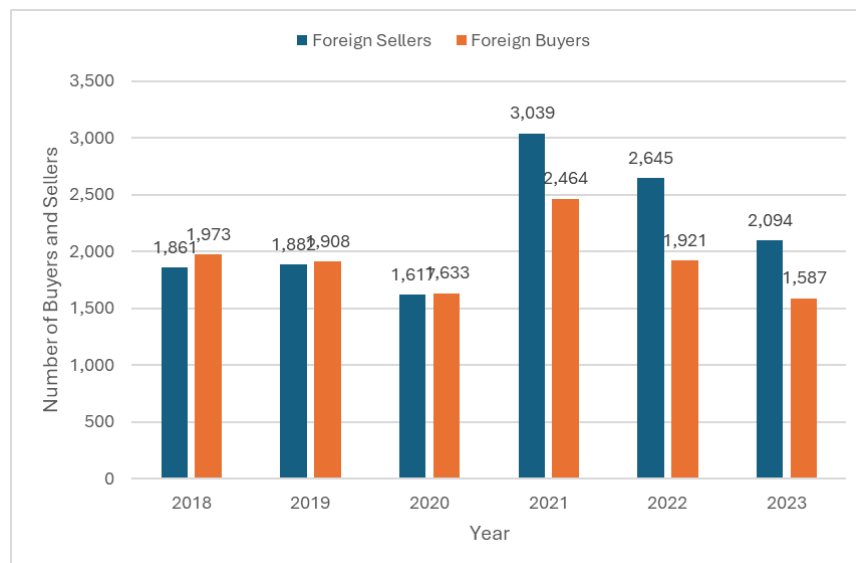
- (1) the number of foreign acquirers of U.S. Targets in inbound cross-border M&A transactions, and
- (2) the number of U.S. acquirers of foreign Targets in outbound M&A deals.

As indicated, chapters 19 through 22 address various aspects of inbound and outbound transactions.

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135. *Id.* at 20.

**Figure 1-34**  
**Cross-Border M&A Foreign Buyers of U.S. Targets and**  
**Foreign Sellers to U.S. Acquirers 2018–2023**



Source: U.S. Acquisitions of Foreign Businesses 2004–2023, pg. 72,  
 Foreign Acquisitions of U.S. Companies 2008–2023, pg. 140, 2024  
*FactSet Review*

Figure 1-34 shows that in all of these years, (1) the number of U.S. acquirers of foreign Targets (i.e., outbound acquisitions), exceeded (2) the number of foreign acquirers of U.S. Targets (i.e., inbound acquisitions).

In elaborating on one aspect of inbound activity, a 2022 article entitled *American Companies You Didn't Know Were Owned By Chinese Investors*,<sup>136</sup> contains, inter alia, the following description of well-known U.S. companies that have significant Chinese shareholders:

Popular cinema company AMC, short for American Multi-Cinema, has been around for over a century and is headquartered in Leawood, KS. In 2012, Beijing-based Dalian Wanda Group became the majority stakeholder . . . .

While [GM, America's largest automobile manufacturer] isn't owned by a Chinese company, it relies on its partnership with Shanghai Automotive Industry Corp (SAIC) to stay profitable. In 1998, the two auto giants teamed up to form SAIC-GM, a Chinese brand with a 6 million square-foot facility in Shanghai . . . .

136. Don Buckner, *American Companies You Didn't Know Were Owned By Chinese Investors* (Jan. 12, 2021), <https://perma.cc/GHK8-ESZK>.

Originally a Swedish company, Spotify now has headquarters in multiple areas across the globe including New York City. While its CEO and founder holds a large percentage of the company, Chinese investor Tencent Holdings Limited LLC bought 10% of the company back in 2017 while Spotify bought 10% of Tencent's holdings . . . .

Snapchat's founders never could've estimated the level of long-term success that the app would achieve. Just last year, the app counted a total of 187 million active users . . . .

Although rival company Facebook offered to buy Snapchat for \$4 billion, [the Snapchat board] opted out. Instead, Tencent Holdings bought a large share of yet another tech giant. The Chinese Investor owns about 14% of Snapchat's shares.

Since 1919, Hilton has become a household name throughout the U.S. and other countries. In 2016, HNA Group, Chinese aviation and shipping giant, bought a 25% stake for \$6.5 billion . . . .

[I]n 2016, Chinese investor Haier bought [GE's] appliance division, [which is located in the United States] for \$5.4 billion.<sup>137</sup>

#### [E] The Growth of Investment Restrictions on Cross-Border M&A

UNCTAD's *World Investment Report 2021* provides an extensive discussion of the growing number of countries adopting investment restrictions like the CFIUS (that is, Committee on Foreign Investment in the United States) law in the United States, which is briefly introduced below and addressed in chapter 19. These laws can prevent, inter alia, a foreign acquirer from acquiring a domestic Target. This UNCTAD report explains:

*National security concerns and the pandemic underpin rising FDI scrutiny.* The trend towards more investment regulations and restrictions related to national security intensified in 2020 and in the first quarter of 2021, including in reaction to the pandemic. Currently concentrated in developed countries and emerging economies, it is likely to have a growing impact on FDI inflows in coming years. Twenty-five countries and the European Union (EU), nearly all of them developed economies, adopted or reinforced screening regimes for foreign investment, bringing the total number of countries conducting FDI screening for national security to 34. Together, these countries account for 50 per cent of world FDI flows and 69 per cent

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137. *Id.*

of the world stock of FDI. More than half of the recent changes were made in reaction to the pandemic.<sup>138</sup>

[F] Wachtell's Assessment of Trends in National Security  
Considerations in the U.S. and Other Countries

As discussed in chapter 19, in the U.S., the law entitled *Committee on Foreign Investment in the United States* (CFIUS) grants a federal inter-agency committee named CFIUS, the power to prohibit, on national security grounds, inter alia, acquisitions by foreign acquirers of U.S. Targets. On this and related topics, the Wachtell, 2024 *Cross-Border M&A Guide*,<sup>139</sup> discusses the following recent developments in this area:

CFIUS is a federal interagency committee that reviews certain foreign investments in U.S. businesses for national security risks. CFIUS may conduct national security reviews of “covered transactions,” defined as proposed or completed mergers, acquisitions or takeovers that could result in “control” of an existing U.S. business by a non-U.S. person. As has occurred with respect to comparable regulatory entities in other countries, the reach of CFIUS has expanded over the past several years. The Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”) dramatically increased the scope of CFIUS’s jurisdiction to include non-passive, non-controlling foreign investments in U.S. businesses that deal in critical technology, operate critical infrastructure or collect or maintain sensitive personal data, each as defined in the CFIUS regulations (so-called “TID U.S. businesses”), and a mandatory filing requirement applicable to certain investments in critical technology companies or which result in the acquisition of a “substantial interest” (e.g., 49% or more) in a TID U.S. business by a foreign government-affiliated investor. While notification of a foreign investment to CFIUS remains largely voluntary, transactions that are not reviewed remain subject to potential CFIUS review in perpetuity. Thus, conducting a risk assessment for an acquisition of a U.S. company or investment early in the process is prudent to determine whether the investment will require a mandatory filing or may attract CFIUS attention.<sup>140</sup>

Chapter 19 contains additional discussions of recent CFIUS developments, and chapter 20 addresses initiatives by other countries that have adopted CFIUS-type investment restrictions.

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138. UNCTAD, *World Investment Report 2021* 111 (2021), <https://perma.cc/8Q77288E>.

139. Wachtell, 2024 *Cross-Border M&A Guide*, *supra* note 128.

140. *Id.* at 6.

*§ 1:7.33 Recent Data on the Top Ten Foreign Buyer Countries:  
Inbound Acquisitions*

Figure 1-35, *Top 10 Foreign Buyer Countries by Deal Volume 2022–2023*, presents for 2022 and 2023 the top ten countries as measured by deal volume in which foreign acquirers of U.S. Targets were located.

**Figure 1-35**  
**Top 10 Foreign Buyer Countries by Deal Volume 2022–2023**  
**(\$ Billions)**

2022			2023		
1	Canada	\$ 52,457.90	1	Canada	\$ 36,277.3
2	United Kingdom	\$ 23,641.10	2	Ireland	\$ 35,359.10
3	Netherlands	\$ 19,422.50	3	United Kingdom	\$ 24,768.6
4	Bermuda	\$ 9,061.40	4	France	\$ 17,166.8
5	Ireland	\$ 8,035.00	5	Switzerland	\$ 13,997.4
6	France	\$ 7,951.80	6	Bermuda	\$ 9,529.3
7	Singapore	\$ 6,542.70	7	Australia	\$ 7,790.6
8	Australia	\$ 5,988.20	8	Sweden	\$ 7,637.2
9	Switzerland	\$ 5,557.40	9	Saudi Arabia	\$ 4,900.0
10	Germany	\$ 4,970.80	10	Czech Republic	\$ 4,621.80

Source: Foreign Buyers, Dollar Value by Country 2019–2023, *2024 FactSet Review*, pg. 144–145

Note that in both 2022 and 2023, the top two Foreign Buyer Countries were English-speaking countries.

As will be seen in the next section, a similar pattern applies when considering the Top Ten Foreign Seller Countries.

*§ 1:7.34 Recent Data on the Top Ten Foreign Seller Countries:  
Outbound Acquisitions*

Figure 1-36, *Top 10 Foreign Seller Countries by Deal Volume 2022–2023*, presents for 2022 and 2023 the top ten countries as measured by deal volume in which foreign Targets of U.S. acquirers are located.



**Figure 1-36**  
**Top 10 Foreign Seller Countries by Deal Volume 2022–2023**  
**(\$ Billions)**

2022			2023		
1	Ireland	\$30,313.30	1	United Kingdom	\$53,047.10
2	United Kingdom	\$29,767.80	2	Australia	\$24,555.70
3	Canada	\$24,666.70	3	Canada	\$20,091.1
4	Sweden	\$22,367.10	4	Germany	\$9,024.50
5	China	\$13,603.90	5	Spain	\$8,700.80
6	Japan	\$13,366.30	6	China	\$7,825.40
7	Israel	\$12,168.60	7	France	\$7,319.50
8	Germany	\$8,649.40	8	Switzerland	\$7,162.90
9	Australia	\$8,454.80	9	Bermuda	\$6,603.80
10	France	\$8,443.50	10	Austria	\$6,217.30

Source: Foreign Sellers, Dollar Value by Country 2019–2023, 2024 *FactSet Review*, pg. 148–149

Three English speaking countries were on the list of top ten Foreign Seller Countries for both 2022 and 2023.

As noted, a similar pattern with English-speaking countries exists above in Figure 1-35, which focuses on Foreign Buyer Countries. Could this mean that when it comes to cross-border M&A, there is a bias in favor of an acquisition of a Target located in a country that has the same predominant language as the predominant language in the acquirer's country? Also, is this the result of the active involvement of the U.K. in economic activity in many parts of the world over the past several centuries.

Although not shown here, Ireland was the number one seller country in both 2014 and 2015. This was probably attributable, in part, to inversion transactions with U.S. firms. In an inversion transaction, a U.S. publicly traded company becomes a subsidiary of a foreign publicly traded corporation with the shareholders of the U.S. company receiving a substantial stock interest in the foreign acquirer. Correctly structured, an inversion transaction can avoid certain provisions of the Internal Revenue Code. These transactions, which have become rare as a result of regulations issued under section 385 of the Internal Revenue Code and the enactment of the territorial system for taxing foreign income by the 2017 Tax Cuts and Jobs Act, are introduced below and discussed in detail in Chapter 22.

*§ 1:7.35 Resolution of the Trapped Foreign Income Problem by the 2017 Tax Cuts and Jobs Act (TCAJA)*

Prior to the enactment of the territorial system by the 2017 Tax Cuts and Jobs Act (TCAJA) (see chapter 21), the United States had a deferral system for taxing active earnings of a foreign subsidiary of a U.S. parent corporation. Under this deferral system, such income of a foreign subsidiary was not subject to U.S. tax until it was distributed to the U.S. parent.

Consequently, under the prior deferral system, a U.S. parent corporation with off-shore operations conducted through a foreign subsidiary had a tax incentive to cause the subsidiary to reinvest the profits from those operations off-shore in order to avoid the U.S. tax that would apply to such earnings if they were repatriated to the United States.

There was evidence that the deferral system led to foreign subsidiaries of U.S. parents using foreign acquisitions as a way of reinvesting their active earnings.

As discussed in chapter 21, the TCAJA adopted a territorial system, pursuant to which the active income of a foreign subsidiary is generally not subject to U.S. tax (1) at the time it is earned, or (2) at the time it is repatriated to the United States.

There is some thought that the territorial system will eliminate the incentive for U.S. acquirers to engage in foreign acquisitions that was built into the deferral system, thus leveling the playing field between foreign and U.S. acquisitions. However, since under the territorial system, there is no U.S. tax at the time active foreign income is earned or repatriated, there is an inherent tax incentive in a territorial system for foreign investment by a U.S. corporation, including foreign acquisitions.

While a territorial system mitigates some of the “lock-out of the U.S. effect”<sup>141</sup> built into the previous deferral system, the author of this book has written several articles suggesting that the prior deferral system be replaced with an imputation system rather than a territorial system. Under an imputation system, the foreign earnings of controlled foreign corporations would be subject to U.S. tax on a current basis,<sup>142</sup> with, of course, a credit for foreign taxes paid. The adoption of such an imputation system would have several salutary effects, including, completely leveling

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141. This “lock-out effect” refers to the former tax deferral system having the incentive for a U.S. parent corporation with a foreign subsidiary to reinvest the earning of the foreign subsidiary abroad.

142. See, e.g., Samuel C. Thompson Jr., *Logic Says No to Options Y, Z, and C, but Yes to Imputation*, 143 TAX NOTES 579 (May 5, 2014); Samuel C. Thompson, Jr., *An Imputation System for Taxing Foreign-Source Income*, 61 TAX NOTES INT’L 691 (Feb. 28, 2011).

the playing field, from a U.S. tax perspective, between foreign and U.S. acquisitions.

The Biden Administration has proposed moving in the direction of an imputation system but has not proposed going all the way. The Biden proposals, which with the Republican controlled House will not become law, are discussed in chapter 22.

*§ 1:7.36 The Inversion Problem Before and After the TCAJA and the Section 385 Regs*

As pointed out in section 22:7, prior to the adoption of the TCAJA, some U.S. companies were using an inversion for the purposes of (1) avoiding the U.S. system for taxing foreign income, and (2) stripping interest and earnings out of the United States and into a foreign subsidiary.

In an inversion transaction, a U.S. company and a foreign company merge with the final result being a foreign holding company owning the stock of the U.S. firm and the foreign firm.

After the adoption of the territorial system by the TCAJA, there is generally no longer a need to invert to avoid the U.S. tax on foreign active income, and both before and after the TCAJA, foreign passive income, such as dividends or interest, earned by a foreign subsidiary of a U.S. parent is subject to immediate imputation to the United States, where it could be taxed.

However, inversions could continue to be used for interest stripping and earnings stripping, which involves a U.S. subsidiary corporation of a foreign parent corporation, paying to the foreign parent interest, royalties and similar amounts that are deductible for federal income tax purposes in the United States.

The Obama Administration issued regulations addressing inversions under both (1) section 7874 of the Internal Revenue Code, which deals directly with inversions, and (2) section 385 of the Code (which authorizes the Treasury to issue regulations distinguishing between debt and equity). These regulations were successful in slowing down inversions, with the section 385 regulations addressing the interest stripping aspect of inversions.

The Trump Administration did not take action to repeal either set of regulations, and it is highly unlikely that the Biden Administration will reverse these anti-interest/royalty stripping regulations. As of early 2024, it appears that there has not been a noticeable increase in inversions, and it could be expected that, if anything, the Biden Administration would strengthen these regulations, which would not require Congressional approval.

Also, the *Wall Street Journal* has noted, as follows, that some U.S. companies that inverted in the past are now being acquired by U.S. acquirers, thus undoing the inversion:

*Inversions are starting to revert.* When Mylan moved its corporate address to the Netherlands in 2015, the pharmaceutical company joined a wave of corporate inversion deals aided by tax advantages of a non-U.S. address. Now, Mylan’s address is coming back to the U.S. through a merger deal this week with part of Pfizer Inc . . . . a sign that the [TCAJA] is rendering these moves less attractive than they once were.

The deal comes a month after Allergan PLC—another inverted pharmaceutical company, based in Dublin—announced its return to a U.S. parent through a sale to AbbVie Inc.<sup>143</sup>

This does not mean that inversions are necessarily dead, for the article goes on to report: “On balance, say tax lawyers and analysts, foreign addresses still confer a slight tax advantage.”<sup>144</sup>

#### V. RECENT DATA: OTHER M&A ISSUES, SECTIONS 1:7.37 TO 1:7.43

##### *§1:7.37 Brief Introduction to Special Purpose Acquisition Companies (SPACs)*

###### [A] In General

Special Purpose Acquisition Companies (SPACs), which are addressed further in chapter 6, are companies organized through a blank check initial public offering (IPO). In these transactions, at the time of the IPO, the issuing company has no business other than the plan to use the funds raised in the IPO to acquire an operating company.

These transactions are introduced as follows by Wachtell Lipton in a February 2021 report:

In 2020, SPAC volume, in both offerings and M&A activity, set records, although views differ as to whether the SPAC bonanza will continue this torrid pace. [As will be seen below, the torrid pace came to a halt.] An immense surge of offerings, including many by vehicles with high-profile sponsors, led SPACs to raise a total of \$83.4 billion of proceeds from 248 IPOs, dramatically eclipsing the previous records, set in 2019, when SPACs raised \$13.6 billion in 59 IPOs. The average size of SPAC IPOs also grew from approximately \$230

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143. Richard Rubin & Jared S. Hopkins, *Going Out of Style: Tax-Driven Deals to Move Corporate HQs Outside U.S.*, WALL ST. J. (Aug. 1, 2019), <https://perma.cc/M9HF-EUBH>.

144. *Id.*

million in 2019 to more than \$336 million in 2020, with five SPACs raising over \$1 billion in the past year after none exceeded that mark in 2019.<sup>145</sup>

When a SPAC completes an acquisition, the transaction is sometimes referred to as a de-SPAC, and Wachtell describes as follows the de-SPAC activity in 2019 and 2020:

The de-SPAC side of the SPAC lifecycle also witnessed significant activity in 2020, with SPACs announcing 100 acquisitions (compared to just 39 in 2019), nearly half of which were transactions valued at \$1 billion or more.<sup>146</sup>

[B] Number of SPACs and Amounts Raised in 2019 to 2023

Figure 1-37, *Number and Dollars Raised by SPACS 2018–2022*, below, shows that since 2018 SPACs have been on a roller coaster ride with respect to both number of SPACs and dollar amounts raised. The roller coaster ride:

- (1) started small in both number of SPACs and the amount raised in 2019;
- (2) climbed high in both number and amount raised in 2020 and 2021;
- (3) fell significantly back (but not as far back as 2020 and 2019) in 2022;
- (4) crashed from 2021 to 2022 in both the number of SPACs and the dollars raised; and
- (5) continued close to the 2022 level in 2023.

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145. *Wachtell Lipton Discusses M&A Activity in 2020 and Expectations for 2021*, CLS BLUE SKY BLOG (Feb. 4, 2021), <https://perma.cc/LX6G-MERQ>.

146. *Id.*

**Figure 1-37**  
**Number and Dollars Raised by SPACS 2019–2023**

<b>YEAR</b>	<b>NO. OF SPACS</b>	<b>DOLLARS RAISED IN BILLIONS</b>
2019	29	\$20.4B
2020	98	\$222.3B
2021	210	\$538.1B
2022	118	\$69.4B
2023	127	\$57.4B

Source: *SPAC Transactions Last Five Years, 2024 FactSet Review*, pg. 82

As a result of the 2020-2021 significant increase in both the number of SPACs and the money raised by SPACs, as discussed in chapter 6, in early 2022, the SEC took aggressive regulatory actions, which, as discussed in section 6:9.11[C], has now been adopted, impacting SPACs. Morgan Lewis summarizes as follows the proposed actions:

[O]n March 30, 2022, the SEC proposed new rules and amendments intended to enhance disclosure and investor protections in SPAC IPOs and business combination transactions between shell companies, such as SPACs, and private operating companies. The proposals would, among other things, require additional disclosures about SPAC sponsors, conflicts of interest, and sources of dilution; more closely align the required financial statements of private operating companies in transactions involving shell companies with those required in registration statements for an IPO; and deem underwriters in a SPAC IPO to be underwriters in a subsequent de-SPAC transaction when certain conditions are met.<sup>147</sup>

[C] Wachtell’s Assessment of “SPAC Trends” in 2022

In its *2023 Current Developments*,<sup>148</sup> Wachtell reported as follows on some of the then recent developments with SPACs:

The [SPAC] phenomenon boomed in 2020 and 2021, and largely busted in 2022. Both [1] SPAC IPOs [i.e., the sale of stock of the SPAC to the public], and [2] “de-SPAC” M&A [i.e., the acquisition by the SPAC of a Target company] fell precipitously [from 2021 to 2022] . . .

Growing concerns regarding perceived conflicts of interest between SPAC sponsors and unaffiliated investors and the rigor of disclosures,

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147. Andrew L. Milano et al., *A Look at the SPAC Market In 2022*, MORGAN LEWIS (Apr. 7, 2022), <https://perma.cc/28LN-76KN>.

148. Wachtell, *2023 Current Developments*, *supra* note 65.

particularly financial projections, used to market some de-SPAC transactions have triggered heightened regulatory scrutiny, as the SEC and other regulators have grappled with the rise of SPACs as a means of bringing private companies to the public markets.

On March 30, 2022, by a three-to-one vote, the SEC proposed an important package of new rules that have had a profound effect on all participants in the SPAC market and all stages of the SPAC life cycle. [See chapter 6]

The proposals represent a broad effort both to enhance protections for public SPAC investors and to narrow perceived gaps between the disclosure and liability regimes applicable to de-SPAC transactions and those applicable to traditional IPOs, which in the SEC's view have led to opportunities for regulatory arbitrage despite de-SPAC transactions functionally serving as the de-SPAC Target's IPO.<sup>149</sup>

As indicated, the proposals mentioned in the above passage have now been adopted and are discussed in section 6:9.11[C].

*§ 1:7.38 Brief Introduction to Blockchain and Cryptocurrency M&A*

[A] In General

There has been an enormous interest in blockchain and cryptocurrencies, and this section provides only a rudimentary introduction to these concepts and the M&A issues they can present.

First, it is necessary to have a basic understanding of what these concepts mean, and the PwC accounting firm has provided the following basic explanation of these complex concepts:

Blockchain is the technology that enables the existence of cryptocurrency (among other things). Bitcoin is the name of the best-known cryptocurrency, the one for which blockchain technology was invented. A cryptocurrency is a medium of exchange, such as the US dollar, but is digital and uses encryption techniques to control the creation of monetary units and to verify the transfer of funds.

A blockchain is a decentralized ledger of all transactions across a peer-to-peer network. Using this technology, participants can confirm transactions without a need for a central clearing authority. Potential applications can include fund transfers, settling trades, voting, and many other issues.<sup>150</sup>

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149. *Id.*

150. *Making Sense of Bitcoin, Cryptocurrency and Blockchain*, PwC, <https://perma.cc/H2VC-8MG2> (last visited May 27, 2021).

On April 1, 2021, a firm named Coinbase became the “first major crypto company to go public” in an initial public offering under the Securities Exchange Act of 1933.<sup>151</sup> The Prospectus Summary provides the following background information on Bitcoin, the largest cryptocurrency:

Bitcoin sparked a revolution by proving the ability to create digital scarcity: a unique and finite digital asset whose ownership could be proven with certainty. This innovation laid the foundation for an open financial system. Today, all forms of value – from those natively created online such as in-game digital goods to traditional securities like equities and bonds – can be represented digitally, as crypto assets. Like the bits of data that power the internet, these crypto assets can be dynamically transmitted, stored, and programmed to serve the needs of an increasingly digital and globally interconnected economy.

Today, we enable customers around the world to store their savings in a wide range of crypto assets, including Bitcoin and USD Coin, and to instantly transfer value globally with the tap of a finger on a smartphone. We provide companies with new ways to transact, incentivize, and reward their users, from offering compounding rewards on savings that pay out by the second to compensating users for virtually completing tasks through global micropayments.

We power the cryptoeconomy by combining the best of both emerging blockchain technology and traditional finance to create trusted and easy-to-use products for the industry.<sup>152</sup>

[B] A Guide to a Very Helpful Introduction to Crypto by F.  
Dario de Martino

I must admit that I do not even begin to understand what is going on with cryptocurrencies generally and with M&A transactions involving firms in this industry. However, Dario de Martino, of Morrison & Foerster has provided an excellent introduction to the principal M&A issues involving cryptocurrencies in an article entitled: *Blockchain M&A: The Next Link in the Chain*.<sup>153</sup>

The article, which was published in January 2021, gives the following picture of the active M&A market involving cryptocurrencies:

While most transactions in this space are private, and their terms are confidential or otherwise not material enough to be publicly disclosed, the data available indicates that there have been approximately 400

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151. Coinbase Global, Inc., Registration Statement (Form S-1) (Feb. 25, 2021).

152. *Id.*

153. F. Dario de Martino, *Blockchain M&A: The Next Link in the Chain*, 4 STAN. J. BLOCKCHAIN L. AND POL’Y 121 (2021).



blockchain-related M&A transactions globally since 2013, with about 40 in the first half of 2020, for a total estimated value of approximately \$5 billion. If current deal flow holds steady, blockchain M&A will likely match or exceed the deal volume levels of 2019 at valuations that have already come close to, or exceeded, those of 2019, illustrating the industry's resilience.<sup>154</sup>

While this section of this book does not try to discuss the many points raised in this article, as would be expected, the article explains that “[v]aluation of a blockchain Target presents a few hurdles that require a nuanced approach.”<sup>155</sup> And, the article addresses some of these unique valuation issues. Valuation issues in M&A transactions generally are addressed in chapter 11 of this book and in this author's book: *Corporate Valuation in M&A*, which is published by PLI.

In a section of the article entitled Due Diligence, a topic covered in chapter 3 of this book, the author explains:

Blockchain Targets often present a host of complex legal issues. Accordingly, legal due diligence has taken on increased importance in this space.<sup>156</sup>

Set out below is a highly edited version of the ten essential due diligence issues addressed in the article:

1. *U.S. Federal Securities Laws Considerations [See Chapter 6 of this Book] . . .*

[I]n order for most if not all blockchain companies to offer digital assets to U.S. investors in capital-raising transactions, issuers should have (and still should) either: (i) registered the sale of their tokens under Section 5 of the Securities Act of 1933 (the “Securities Act”) by filing a registration statement, such as on Form S-1 or F-1, with the SEC [see chapter 6]; or (ii) relied on an exemption from the registration requirements of the Securities Act, such as Regulation CF, Regulation A and Regulation D [see chapter 6] . . . .

2. *Commodities Regulation Considerations [Not covered in this book]*

Digital assets are not a homogeneous asset class; they may feature characteristics of securities, but also commodities, currency units, or a combination thereof. As a result, the legal analysis relating to a particular digital asset should not be limited to whether securities laws are applicable, but instead include multiple regulatory regimes

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154. *Id.* at 121.

155. *Id.* at 125.

156. *Id.* at 127.

[including the U.S. Commodity Futures Trading Commission (“CFTC”)]. . . .

### *3. Federal and State Money Transmission Considerations [Not covered in this book]*

In general, unless otherwise exempt, a license is required to engage in the “business of money transmission”—that is, to receive and transmit money—under the money transmission laws of each U.S. state in which a person has customers . . . .

### *4. U.S. Anti-Money Laundering Considerations [Not covered in this book]*

Under the BSA [Federal Bank Secrecy Act] and its implementing regulations issued by FinCEN [Financial Crimes Enforcement Network, a bureau of the Treasury], a money transmitter engaging in virtual currency activity (or any other activity) that is deemed to be a MSB [a money services business] is required to (a) register as an MSB with FinCEN; (b) establish and maintain an effective AML [Anti-Money Laundering] program that is “reasonably designed to prevent the [MSB] from being used to facilitate money laundering and the financing of terrorist activities”; and (c) comply with certain recordkeeping and reporting requirements—including suspicious activity reports (“SARs”) and currency transaction reports (“CTRs”) . . . .

### *5. Sanctions Considerations [Not covered in this book]*

Sanctions refer to legal restrictions governments impose on transactions with specific persons or entire jurisdictions (that is, embargos) . . . .

A number of U.S. sanctions Targets, most notably, Venezuela, North Korea, Russia, and Iran, have attempted to use blockchain technology to either circumvent U.S. sanctions or engage in malign activity that U.S. sanctions Target . . . .

### *6. 1940 Act Considerations [Not covered in this book]*

The Investment Company Act of 1940, as amended (the “1940 Act”), imposes a strict regulatory regime on investment companies that are required to register under the Investment Company Act . . . .

Since many blockchain companies hold digital assets that likely would be deemed securities, it is critical to conduct an investment company analysis to determine whether the proposed Target is subject to regulation under the 1940 Act . . . .

### *7. IP Rights Considerations [Not covered in this book]*

While blockchain-related M&A transactions are relatively new in the M&A landscape, intellectual property rights considerations are simply variations on standard themes . . . .

An acquirer of a blockchain Target may, however, find additional potential risks, including those related to a more pronounced reliance on open source software, and a greater likelihood of a Target being subject to patent litigation claims. The following are a sampling of IP rights considerations that should be kept in mind when performing IP due diligence of a blockchain Target.

*8. Privacy and Cybersecurity Considerations [Not covered in this book]*

Unlike intellectual property considerations, using a blockchain in a business model presents novel privacy issues . . . .

*9. CFIUS Considerations [See chapter 19 of this book]*

[T]he U.S. Committee on Foreign Investment in the United States (“CFIUS”) . . . is an interagency committee of the U.S. government that reviews certain prospective transactions involving [for example, the acquisition of] a U.S. businesses by a non-U.S. person to determine, and potentially mitigate, the effect of such transactions on the national security of the United States, or otherwise prevent the transfer of technology, sensitive personal data, and other resources outside of the United States . . . .

CFIUS has the authority to review not only transactions through which a non-U.S. person could gain “control” of a U.S. business, but also certain non-controlling investments in U.S. businesses involving critical technologies, critical infrastructure, or sensitive personal data (so-called “TID” businesses) . . . .

[For example, a] U.S. blockchain Target that performs critical infrastructure functions, including by providing Internet protocol networks . . . may . . . fall within CFIUS’s heightened scrutiny on non-controlling investments.

*10. Tax Considerations [See chapter 9 of this book]*

Tax due diligence is an important aspect of every M&A deal. . . . For example, for U.S. tax purposes, the Internal Revenue Service has taken the general position that digital assets are treated as property (and specifically not as currency, regardless of how the assets may be treated by other governmental authorities). Therefore, tax due diligence applicable to property may broadly be applied and should include an analysis to confirm that the Target has been properly

reporting and sourcing receipts arising from the digital assets in all jurisdictions (U.S. and international) that may assert taxing nexus.<sup>157</sup>

### [C] The Risk with Crypto

As discussed in the press, there is significant concern with potential fraud and misrepresentation in the crypto industry. The following excerpt from Coinbase's May 2023 Form 10-Q<sup>158</sup> addresses some of these fraud and misrepresentation issues:

Crypto asset platforms are relatively new. Many of our competitors are unlicensed, unregulated, operate without supervision by any governmental authorities, and do not provide the public with significant information regarding their ownership structure, management team, corporate practices, cybersecurity, and regulatory compliance . . . .

Since the inception of the cryptoeconomy, numerous crypto asset platforms have been sued, investigated, or shut down due to fraud, manipulative practices, business failure, and security breaches. In many of these instances, customers of these platforms were not compensated or made whole for their losses. Larger platforms like us are more appealing Targets for hackers and malware, and may also be more likely to be Targets of regulatory enforcement actions. For example, in February 2014, Mt. Gox, the then largest crypto asset platform worldwide, filed for bankruptcy protection in Japan after an estimated 700,000 Bitcoins were stolen from its wallets. In May 2019, Binance, one of the world's largest platforms, was hacked, resulting in losses of approximately \$40 million, and in February 2021, Bitfinex settled a long-running legal dispute with the State of New York related to Bitfinex's alleged misuse of over \$800 million of customer assets . . . .

In addition, there have been reports that a significant amount of crypto asset trading volume on crypto asset platforms is fabricated and false in nature, with a specific focus on unregulated platforms located outside the United States . . . .

Negative perception, a lack of stability and standardized regulation in the cryptoeconomy, and the closure or temporary shutdown of crypto asset platforms due to fraud, business failure, hackers or malware, or government mandated regulation, and associated losses suffered by customers may continue to reduce confidence or interest in the

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157. *Id.* at 127-141.

158. Coinbase Global, Inc., Quarterly Report (Form 10-Q) (May 4, 2023).

cryptoeconomy and result in greater volatility of the prices of assets, including significant depreciation in value.<sup>159</sup>

§ 1:7.39 *The Impact of Environmental, Social and Governance (ESG) on M&A*

Wachtell's *2024 Takeover Law and Practice*<sup>160</sup> contains the following discussion of the current state of ESG:

*ESG Issues.* ESG issues continued to draw the attention of activists in 2023. Notably, in November 2023, the Strategic Organizing Center (“SOC”), a labor organizing group affiliated with the Service Employees International Union, the Communications Workers of America and the United Farm Workers of America, nominated three director candidates to the board of directors of Starbucks with the goal of addressing labor issues relating to freedom of association and other human capital matters. The overall number of ESG-related shareholder proposals submitted in 2023 continued to increase, notwithstanding declines in overall shareholder support for such environmental and social proposals. The “anti-ESG” backlash continued throughout 2023 in the form of public letters, congressional subpoenas and litigation; nevertheless, shareholder support for “anti-ESG” proposals continues to be muted.<sup>161</sup>

Two lawyers from Wachtell Lipton paint the following picture of the potential impact of ESG on M&A in 2022:

ESG has continued to gain momentum as corporate boards, managements, shareholders, and other stakeholders assess and recognize the bottom-line implications of environmental, employee, social and governance considerations generally and in the context of the long-term value of the corporation. In the past year, ESG has played an increasingly prominent role in activist campaigns, most dramatically exemplified by Engine No. 1's success in electing three directors to Exxon Mobil's board, as well as by the development of the two-front activist “pincer” attack in which an ESG activist attack is followed by an attack from an activist focusing on financial returns. Activists have also leveraged ESG to further their M&A theses: Third Point called for the breakup of Royal Dutch Shell, Elliott called for the separation of SSE's renewables business and Bluebell called on Glencore to divest its coal business.

ESG's influence is also increasingly evident in the context of M&A negotiations and larger deal considerations. As one example, it has become ever more critical for acquirors to comprehensively diligence

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159. *Id.*

160. *Wachtell, 2024 Takeover Law and Practice*, *infra* section 7:10.44.

161. *Id.* at 9.

the ESG profile of potential targets—a result of the SEC’s increased focus on the adequacy of ESG disclosures and the growing legal, financial and reputational costs of ESG underperformance.<sup>162</sup>

§ 1:7.40 *The Impact of ChatGPT and Other Artificial Intelligence (AI) Firms on M&A*

[A] Introduction

This section provides an introduction to Artificial Intelligence (AI), which burst onto the business scene in 2023. AI is a highly sophisticated and dynamic area, and the discussion in this section merely provides a basic introduction to some of the concepts, particularly AI concepts that likely will arise in M&A transactions. This section starts in section 1:7.40[B] with a discussion of AI issues as of June 2023, and subsequent sections discuss the impact of AI in subsequent years. In addition, section 3:3.2[T] addresses due diligence function with regard to AI. *See also* David A. Katz and Laura A. McIntosh, *Corporate Governance Update: A Formative Period for AI Regulation*, *New York Law Journal* (Jan. 24, 2024).

[B] The State of AI as of June 2023

As this section of the book was going to press in June 2023, there is an explosion in the business world of discussions concerning the use of Artificial Intelligence (AI) in business decision making. Much of the discussions is focused on the impact of ChatGPT, perhaps the best-known AI system, which was developed by OpenAI. Open AI describes ChatGPT as follows:

We’ve trained a model called ChatGPT which interacts in a conversational way. The dialogue format makes it possible for ChatGPT to answer followup questions, admit its mistakes, challenge incorrect premises, and reject inappropriate requests.<sup>163</sup>

Wikipedia gives the following background on ChatGPT:

The name “ChatGPT” combines “Chat”, referring to its chatbot functionality, and “GPT”, which stands for Generative Pre-trained Transformer, a type of large language model (LLM). ChatGPT is built upon OpenAI’s foundational GPT models, specifically GPT-3.5 and GPT-4, and has been fine-tuned (an approach to transfer

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162. Victor Goldfeld et al., *Mergers and Acquisitions: 2022*, HARV. L. SCH. F. CORP. GOVERNANCE (Jan. 27, 2022), <https://perma.cc/5TGQ-VXGB>.

163. OpenAI, *Introducing ChatGPT*, <https://perma.cc/65Y7-LKYA> (last visited June 3, 2023).

learning) for conversational applications using a combination of supervised and reinforcement learning techniques.<sup>164</sup>

In January 2023, Microsoft announced an expansion of its partnership with OpenAI. A Microsoft press release<sup>165</sup> on the transaction explained:

Today, we [IBM] are announcing the third phase of our long-term partnership with OpenAI through a multiyear, multibillion dollar investment to accelerate AI breakthroughs to ensure these benefits are broadly shared with the world.

This agreement follows our previous investments in 2019 and 2021. It extends our ongoing collaboration across AI supercomputing and research and enables each of us to independently commercialize the resulting advanced AI technologies.

- **Supercomputing at scale** – Microsoft will increase our investments in the development and deployment of specialized supercomputing systems to accelerate OpenAI’s groundbreaking independent AI research. We will also continue to build out Azure’s leading AI infrastructure to help customers build and deploy their AI applications on a global scale.
- **New AI-powered experiences** – Microsoft will deploy OpenAI’s models across our consumer and enterprise products and introduce new categories of digital experiences built on OpenAI’s technology . . . .
- **Exclusive cloud provider** – As OpenAI’s exclusive cloud provider, Azure [a computer system] will power all OpenAI workloads across research, products and API services.<sup>166</sup>

[C] President’s Executive Order on AI, October 2023

In October 2023, President Biden issued an Executive Order addressing “*Safe, Secure, and Trustworthy Artificial Intelligence*.”<sup>167</sup> This order could have an impact in dealing with AI issues in an M&A transaction, and consequently, it is briefly introduced here.

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164. ChatGPT, WIKIPEDIA [hereinafter, *ChatGPT*], <https://perma.cc/W22Z-EWCN>, (last visited June 3, 2023).

165. *Microsoft and OpenAI Extend Partnership*, MICROSOFT (Jan. 23, 2023), <https://perma.cc/Y9NR-TUKS>.

166. *Id.*

167. Press Release, White House, *FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence* (Oct. 30, 2023), <https://perma.cc/YHZ2-8W68>.

Pursuant to this Order, the “President directs the most sweeping actions ever taken to protect Americans from the potential risks of AI systems[.]”<sup>168</sup> Among other things, the Order does the following:

- Require[s] that developers of the most powerful AI systems share their safety test results and other critical information with the U.S. government. . . .
- Develop[s] standards, tools, and tests to help ensure that AI systems are safe, secure, and trustworthy. . . .
- Protect[s] against the risks of using AI to engineer dangerous biological materials by developing strong new standards for biological synthesis screening . . . .
- Protect[s] Americans from AI-enabled fraud and deception by establishing standards and best practices for detecting AI-generated content and authenticating official content.
- Establish[es] an advanced cybersecurity program to develop AI tools to find and fix vulnerabilities in critical software, building on the Biden-Harris Administration’s ongoing AI Cyber Challenge . . . .
- Order[s] the development of a National Security Memorandum that directs further actions on AI and security, to be developed by the National Security Council and White House Chief of Staff.<sup>169</sup>

[D] E.U. Adopts the E.U. Artificial Intelligence Act, 2024

In 2024, the E.U. adopted its Artificial Intelligence Act. The following is an excerpt from a “Four Point, High-Level Summary of this AI Act:”<sup>170</sup>

- 1, The AI Act classifies AI according to its risk:
  - Unacceptable risk is prohibited (e.g. social scoring systems and manipulative AI).
  - Most of the text addresses high-risk AI systems, which are regulated.

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168. *Id.*

169. *Id.*

170. EU Artificial Intelligence Act, *High-Level Summary of the AI Act* (Feb. 27, 2024), <https://perma.cc/D4KK-EX3M>.



- A smaller section handles limited risk AI systems, subject to lighter transparency obligations: developers and deployers must ensure that end-users are aware that they are interacting with AI (chatbots and deepfakes).
- Minimal risk is unregulated (including the majority of AI applications currently available on the EU single market, such as AI enabled video games and spam filters – at least in 2021; this is changing with generative AI).

2, The majority of obligations fall on providers (developers) of high-risk AI systems.

- Those that intend to place on the market or put into service high-risk AI systems in the EU, regardless of whether they are based in the EU or a third country.
- And also third country providers where the high risk AI system's output is used in the EU.

3, Users are natural or legal persons that deploy an AI system in a professional capacity, not affected end-users.

- Users (deployers) of high-risk AI systems have some obligations, though less than providers (developers).
- This applies to users located in the EU, and third country users where the AI system's output is used in the EU.

4, General purpose AI (GPAI):

- All GPAI model providers must provide technical documentation, instructions for use, comply with the Copyright Directive, and publish a summary about the content used for training.
- Free and open licence GPAI model providers only need to comply with copyright and publish the training data summary, unless they present a systemic risk.
- All providers of GPAI models that present a systemic risk – open or closed – must also conduct model evaluations, adversarial testing, track and report serious incidents and ensure cybersecurity protections.<sup>171</sup>

The Act also sets out the following “Prohibited AI systems:

AI systems:

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171. *Id.*

- deploying **subliminal, manipulative, or deceptive techniques** to distort behaviour and impair informed decision-making, causing significant harm.
- **exploiting vulnerabilities** related to age, disability, or socio-economic circumstances to distort behaviour, causing significant harm.
- **biometric categorisation systems** inferring sensitive attributes (race, political opinions, trade union membership, religious or philosophical beliefs, sex life, or sexual orientation), except labelling or filtering of lawfully acquired biometric datasets or when law enforcement categorises biometric data.
- **social scoring**, i.e., evaluating or classifying individuals or groups based on social behaviour or personal traits, causing detrimental or unfavourable treatment of those people.
- **assessing the risk of an individual committing criminal offenses** solely based on profiling or personality traits, except when used to augment human assessments based on objective, verifiable facts directly linked to criminal activity.
- **compiling facial recognition databases** by untargeted scraping of facial images from the internet or CCTV footage.
- inferring emotions in workplaces or educational institutions, except for medical or safety reasons.
- ‘real-time’ remote biometric identification (RBI) in publicly accessible spaces for law enforcement, [subject to certain exceptions]<sup>172</sup>

[E] Wachtell Lipton’s The State of AI as of May 2024

The Wachtell Lipton 2024 *Takeover Law and Practice*<sup>173</sup> (2024) book gives the following summary of AI developments during 2023:

In 2023, artificial intelligence continued to be one of the most important current areas of technological development and investor focus, as highlighted by, among many other things, the meteoric rise of NVIDIA and OpenAI’s noteworthy governance developments. Artificial intelligence has driven a number of significant M&A transactions, as companies look to either enhance existing artificial intelligence capabilities or acquire artificial intelligence capabilities to transform existing businesses. In 2023, Microsoft increased its investment in OpenAI as part of their ongoing partnership and, in February, announced a new partnership with French start-up Mistral

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172. *Id.*

173. Wachtell, *2024 Takeover Law and Practice*, *supra* note 5..

AI. In September of 2023, Cisco announced its \$28 billion acquisition of cybersecurity software firm Splunk, which has significant artificial intelligence capabilities . . . . In January of 2024, Hewlett Packard Enterprise announced its \$14 billion acquisition of Juniper Networks, a leader in artificial intelligence-native networks. In March 2024, Amazon announced an additional \$2.75 billion investment in artificial intelligence startup Anthropic, increasing Amazon’s total stake to \$4 billion. Developments in artificial intelligence and investor focus on the space may continue to drive technology M&A in 2024.<sup>174</sup>

#### [F] Use of ChatGPT and Other AI Systems in M&A

It is possible that ChatGPT and other AI systems will be utilized in a variety of contexts relating to M&A. However, Wikipedia points out the following very important caveat on the general use AI: “[A] notable drawback has been [the] tendency [of ChatGPT] to confidently provide inaccurate information.”<sup>175</sup>

It must be emphasized that this whole area of AI is highly dynamic, and it is key for any lawyer or analyst who is faced with an issue involving, or touching on, AI to ensure that the most current information is consulted.

An introduction to the potential uses of AI in valuation in the context of M&A, which is addressed in chapter 11, is provided in an article in the May 2023 issue of *Business Valuation Update*. The article is entitled: “*Alerding Gives Some Insights Into AI and BV.*”<sup>176</sup> The following are some of the points made in this article concerning the impact of AI on the computation of free cash flows (see chapter 11) for use in a DCF model (see chapter 11) for valuing a Target:

To perform the DCF, Alerding advises analysts to ask members of their subject company’s management as many questions as possible about the impact of AI on their business both currently and in the future. The analyst should:

- Work with management to determine the yearly impact of AI on the cash flows of the subject company;
- Determine the time periods when impacts are likely to occur in the industry;
- Examine the impact of likely AI changes in the industry as they apply to the subject company (some clues can come from information from public companies);

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174. *Id.* at 13.

175. *ChatGPT*, *supra* note 164.

176. *Alerding Gives Some Insights Into AI and BV*, 29 *BUSINESS VALUATION UPDATE* 5 (May 2023).

- Investigate whether and when the subject company will implement AI changes, and what the impact will be if they do not keep up with the industry and competitors; and
- Determine the costs that the subject company will incur to implement AI changes required to keep up with the industry and competitors and the feasibility of funding those changes.<sup>177</sup>

And, with respect to the impact of AI on the computation of the discount rate (see chapter 11), for use in the DCF model, the article says:

When cash-flow impacts cannot be determined, the analyst is left to assess the impact on the denominator [i.e., the interest rate] of the valuation equation. The needle on the company-specific risk factor may need to be moved depending on the analyst's findings.<sup>178</sup>

It would appear that AI considerations will also be important in the conduct of other valuation techniques and in many non-valuation contexts.

So the bottom line: In a variety of M&A contexts, consideration will have to be given to the potential impact of AI.

#### [G] A Related Tech Acquisition—Apple's Acquisition of AR Headset Startup--Mira

In early June 2023, it was reported that Apple had acquired Mira a closely held Augmented Reality (AR) headset maker. The transaction was not announced by Apple, but was reported by the press, including Reuters,<sup>179</sup> which described the transaction as follows:

Apple . . . has acquired Mira, a Los Angeles-based AR startup that makes headsets for other companies and the U.S. military . . . matter.

This comes a day after Apple unveiled a costly augmented-reality headset called the Vision Pro, one of its riskiest bets since the introduction of the iPhone more than a decade ago, barging into a market dominated by Meta Platforms.<sup>180</sup>

As an illustration of how small this acquisition is for Apple, it was reported that in connection with the acquisition Apple “brought on at least 11 of Mira’s employees as part of the acquisition[.]”<sup>181</sup>.

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177. *Id.*

178. *Id.*

179. *Apple buys AR headset startup Mira*, *The Verge reports*, REUTERS (June 6, 2023), <https://perma.cc/QXY2-PWA2>.

180. *Id.*

181. *Id.*

### [H] Discussions of AI in the Due Diligence Context

As indicated above, section 3:3.2[T] addresses due diligence function with regard to AI.

#### *§ 1:7.41 The Impact of Monetary Policy on the Level of M&A Activity*

M&A activity can be impacted by the level of interest rates. If interest rates are low, the cost of borrowing for the purpose of making an acquisition in both LBO and non-LBO transactions will be lower than when interest rates are high. Thus, low interest rates can be a positive factor in promoting M&A, and on the other hand, high interest rates can have the opposite effect.

As a general matter, if interest rates go up, the purchase prices in M&A transactions will fall. This is because as discussed in chapter 11, higher interest rates increase the cost of borrowing, which in turn will reduce the prices acquirers will be willing to pay in M&A transactions.

Monetary policy, which in the U.S. is conducted by the Federal Reserve Board (the Fed), an independent agency of the federal government, can have a significant impact on the level of interest rates. The Fed describes Monetary Policy as follows:

Monetary policy in the United States comprises the Federal Reserve's actions and communications to promote maximum employment, stable prices, and moderate long-term interest rates--the economic goals the Congress has instructed the Federal Reserve to pursue.<sup>182</sup>

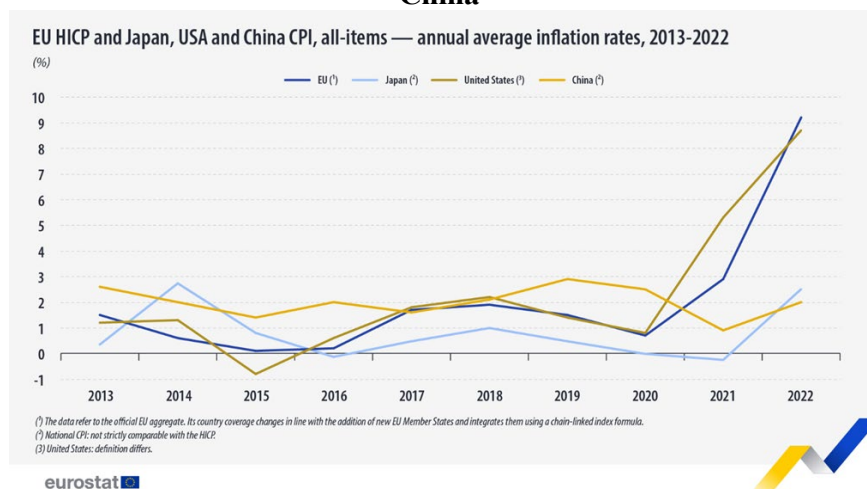
Monetary policy is the principal tool for promoting "stable prices." A tight monetary policy and the high interest rates that come with it, will have a cooling impact on the economy, and a loose monetary policy and the low interest rates that come with it will have a heating impact on the economy.

These basic principles are illustrated in the following figure: Figure 1-38A, From 2021 to 2022, Annual Inflation (1) More Than Tripled in the U.S., and EU, and (2) Significantly Increased in Japan and China:

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182. Available on the Fed's website here: <https://www.federalreserve.gov/monetarypolicy.htm>, visited May 31, 2023.

**Figure 1-38A**  
**From 2021 to 2022, Annual Inflation (1) More Than Tripled in the U.S., and EU, and (2) Significantly Increased in Japan and China**



Source: European Commissions, Eurostat, *Global Measures of Consumer Price Inflation*, available at <https://perma.cc/QP6P-TGTR> SPAC Transactions Last Five Years, 2024 FactSet Review, pg. 82

Note that in each of these jurisdictions, inflation was at a very low level from 2013 to 2020 and then increased in each of these jurisdictions in 2021 and 2022, with dramatic increases in the U.S. and EU. These significant increases can be traced to the impact of COVID-19 on the macro-economy.

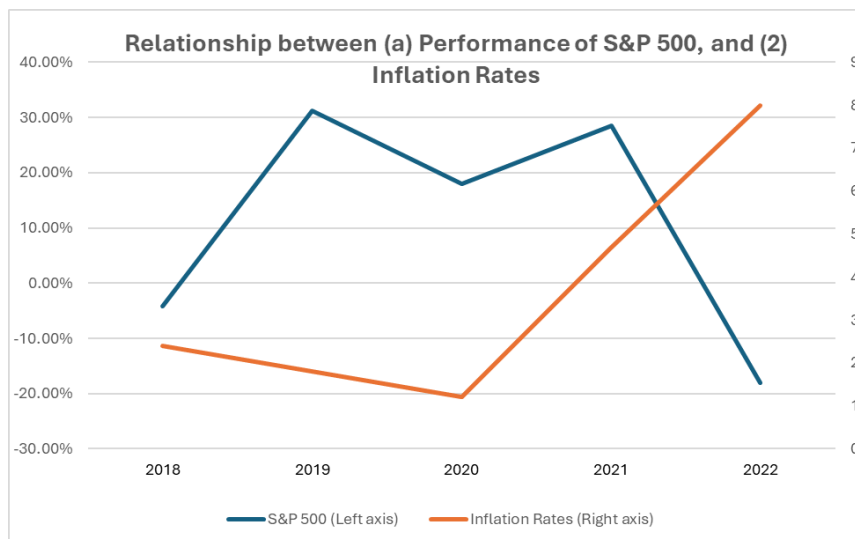
As of early June 2024, inflation is coming down in the U.S., with the following rates for the associated period: 2020-1.4%; 2021-7%; 2022-6.5%; 2023-3.4%; and 2024 through May- 3.4%.<sup>183</sup>

The Fed's conduct of monetary policy over the last several years is an illustration of the impact of both (1) a loose monetary policy, and (2) a tight monetary policy, on the performance of the stock market. During the period of loose monetary policy (i.e., 2016 to 2020), both interest rates and inflation were low, and the stock market boomed. However, during the period of tight monetary policy (i.e., 2021-2022), interest rates rose, and the stock market declined significantly. However, even though as of May 2024, the Fed is keeping interest rates high, the stock market has gone up significantly, possibly in anticipation of future interest rate cuts.

183. *U.S. Inflation Calculator*, <https://perma.cc/K5SJ-RUTJ> (last visited June 8, 2023).

These relationships between the level of inflation and the performance of the stock market are illustrated in Figure 1-38B, Illustration of the General Relationship Between the Recent (1) Level of Inflation, and (2) Performance of the Stock Market—2018-2022:

**Figure 1-38B**  
**Illustration of the General Relationship Between the Recent (1)**  
**Level of Inflation, and (2) Performance of the Stock Market—**  
**2018-2022**



This graph shows that when interest rates were low in 2018, 2019, and 2020, the stock market as measured by the S&P 500, a measure of the performance of a large number of stocks, generally performed at a high level. On the other hand, when, as a result of the Fed's tight monetary policy in 2021 and 2022, interest rates increased significantly, then the stock market, as measured by the S&P 500, fell significantly. Also, as discussed above as of June 2024, it is anticipated that the Fed soon will reduce interest rates, and this could have been one of the reasons for significant increases in the stock market in 2023 and the first part of 2024.

This clearly makes intuitive sense. As discussed in chapter 11, the value of the stock market is a function of the market's view of the future free cash flows to be realized and the level of interest rate that is going to be needed to generate the free cash flows. If one assumes that a company's FCFs do not change, an increase in interest rates will result in a reduction of the price of a security, which happened here with the stock market.

Pitchbook has the following summary of some of the background on the Fed's decision to significantly increase interest rates in 2021 and 2022:

Staggering inflation figures across global markets, driven by rising demand, supply chain issues, and labor shortages, led central banks to aggressively raise interest rates in 2022. The US Federal Reserve (the Fed) announced seven interest rate hikes during the year, boosting the federal funds rate to its highest level in 15 years. Europe also moved away from decades of quantitative easing [i.e., low interest rates]: The Bank of England hiked interest rates to 3.5% in its ninth increase of the year while the European Central Bank raised its rate to 2%.<sup>184</sup>

And, Pitchbook addresses as follows the dramatic adverse impact the Fed's increase in interest rates in 2021 and 2022 had on the stock market:

In the US, stock markets experienced sharp losses and pulled potential investors out of the market. Three major indexes saw the biggest annual drop since 2008: S&P 500 finished the year with a 19.4% decline, shedding roughly \$8 trillion in market cap, while the Dow Jones Industrial Average fell by 8.8% and the Nasdaq Composite a whopping 33.1%.<sup>185</sup>

*§ 1:7.42 Preliminary Report on M&A Activity in 2024*

[A] In General

This section provides a brief report on M&A activity during 2024 through May 31, 2024. The next update of this chapter will have a more complete analysis of the activity in all of 2024.

[B] The General Level of M&A Activity During the First Quarter of 2024

A *S&P Global Market Intelligence* report<sup>186</sup> issued on April 30, 2024, provides the following basic observation on the level of M&A activity during the First Quarter of 2024:

Despite Global M&A deal volume falling to the lowest level in almost four years, global M&A value increased in the first quarter of 2024, according to S&P Global Market Intelligence's newly released *2024 Q1 Global M&A and Equity Offerings Report*. The total value of first quarter global M&A deals reached \$594.47 billion, an 18.5% increase compared to the first quarter of 2023; however, the value of M&A transactions remains far below the levels recorded in the second half of 2020 and throughout 2021.

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184. Choi, PitchBook, *2022 Global M&A Report*, *supra* note 10, at 4.

185. *Id.* at 9.

186. Press Release, S&P Global, S&P Global Market Intelligence Quarterly Report Finds Global M&A Deal Value Rose 18.5% YOY in Q1, Volume Fell to Lowest Level Since Q2 2020 (April 30, 2024), <https://perma.cc/782H-6YJC>.



The continued drop in M&A transactions is an indication that the market still faces headwinds, which have plagued activity since the early part of 2022. Higher interest rates have increased economic uncertainty and the cost of financing, which have decreased demand for M&A activity.<sup>187</sup>

The following are “Key highlights” regarding M&A from the report:

- The number of global M&A announcements fell to 9,022, the lowest total since onset of the COVID-19 pandemic disrupted markets in the second quarter of 2020.
- During the first quarter, the number of \$10 billion-plus transactions reached 10, the highest level since the 11 recorded in the second quarter of 2022.<sup>188</sup>

A 2024 report by Litera<sup>189</sup> on M&A activity in 2023 and the first part of 2024 makes the following major points:

- Despite the array of challenges from grim economic predictions to outright wars, dealmakers shrugged off challenges to remain resilient, posting close to 35,000 completed M&A transactions in 2023 for nearly \$4 trillion.
- 2024 is shaping up to be as dynamic and complicated as 2023, if not more so . . . .
- Transaction metrics suggest dealmakers are still willing to pay up, especially if they opt to undertake cross-border deals, but usage of debt remains moderated. As a result, transaction multiples remain depressed, which conversely could encourage some dealmaking going forward as valuations could be perceived as having rightsized.
- Corporate development teams, executives, and buyout shops are as opportunistic as ever . . . .
- The dealmaking bump at the end of 2023 hints at a mild pickup in optimism, which must be robust to survive the ongoing volatility that is unlikely to abate.<sup>190</sup>

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187. *Id.*

188. *Id.*

189. Litera Corp., *M&A Activity Report: The Evolution of Dealing in a Competitive Environment* (Dec. 31, 2023) [hereinafter Litera, *2024 M&A Report*], <https://perma.cc/9AAM-NU6Q>.

190. *Id.* at 3.

## [C] 2023 Antitrust Enforcement in 2023

M&A, particularly M&A involving large firms, can be impacted by the antitrust enforcement policies of a U.S. presidential administration and by foreign antitrust authorities, which are generally referred to as “competition commissions.” The Biden Administration has a very aggressive antitrust agenda, which is summarized in section 1:7.43 *A Deal Lawyer’s “Takes” on the Impact on M&A of the Biden Administration’s Laws and Regulations*.

Also, antitrust enforcement in other countries can have a significant impact on M&A. For example, with respect to the 2023 acquisition by Microsoft of Activision, both U.S. based corporations:

- The U.K.’s Competition and Market Authority (CMA) initially blocked the acquisition;<sup>191</sup>
- The European Commission announced that it was “approving, with conditions” the acquisition;<sup>192</sup> and
- The FTC presumably is still challenging the transaction even though it has closed.

*§ 1:7.43 A Deal Lawyer’s “Takes” on the Impact on M&A of the Biden Administration’s Laws and Regulations*

## [A] The “First Take” Written in June 2021

When this section was written in early June 2021, the Biden Administration had not taken significant steps to change the direction of regulatory policies impacting M&A.

However, at that time, it could be expected that the Biden Administration generally would take a more aggressive approach to regulatory issues, such as antitrust, than the Trump Administration. However, the Trump Administration’s approach to antitrust enforcement was not outside of the mainstream. For example, Wachtell Lipton presents the following picture of antitrust enforcement by the Trump Administration in 2020 and 2019:

While much of the M&A landscape was disrupted during 2020, U.S. antitrust investigations and challenges to mergers and acquisitions continued unabated. The Federal Trade Commission and the U.S.

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191. *Microsoft / Activision deal prevented to protect innovation and choice in cloud gaming*, U.K. COMPETITION AND MARKET AUTHORITY (Apr. 26, 2023), <https://perma.cc/QWV7-NSB2>.

192. *Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions*, EUROPEAN COMMISSION (May 15, 2023), <https://perma.cc/2Q43U2LN>.

Department of Justice continued to pursue court challenges in cases that were pending at the beginning of 2020, while the FTC initiated court challenges to block an additional seven proposed, and two consummated, transactions, and the DOJ brought two additional merger challenges. In addition, the FTC and DOJ required remedies in 22 transactions during 2020. Companies also abandoned a number of transactions due to antitrust agency opposition, including three deals that were called off after the agency filed its court challenge but before the court rendered its decision. Transaction participants that sought to rely on financial distress, particularly based on Covid-19 shutdowns, as a basis for clearing deals rarely found success in altering agency enforcement decisions.<sup>193</sup>

This issue involving potential changes in regulatory policies impacting M&A enforcement under the Biden Administration was addressed as follows at the March 2020 Tulane Law School M&A Conference:

[T]here's confidence the Biden administration will . . . return to normalcy in the regulatory process.

When Donald Trump was in the White House, regulatory processes didn't always go by the book. The brouhaha over whether the Trump administration would [under CFIUS, see chapter 19] force TikTok to sell itself to a U.S. buyer is a prime example. While the idea that the government might look to compel the Chinese-owned app to make a deal was not groundbreaking in and of itself . . . the many public comments made by Trump and other federal officials was unusual.

[T]he anticipated return to regulatory norms means there will be "less interference from the executive branch for political motivations." . . .

"Anything that removes uncertainty, including a predictable regulatory environment, is good for M&A" . . .

[However,] a return to regulatory normalcy doesn't necessarily mean there will be massive changes across the board. The area of antitrust enforcement, for example, will likely continue to be a major focus for the federal government under Biden . . . .

"Trump was more aggressive on antitrust enforcement than is typical

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193. *Wachtell Lipton Discusses M&A Activity in 2020 and Expectations for 2021*, CLS BLUE SKY BLOG (Feb. 4, 2021), <https://perma.cc/LR9V-WVF6>.

in a Republican administration.” . . . “So don’t expect dramatic changes under Biden.”<sup>194</sup>

[B] The “Second Take” Written in June 2022

As of June 2022, it was clear that the Biden Administration and appointees were taking a more aggressive approach to various regulatory issues impacting M&A. For example, as noted above, in early 2022, the SEC, which is under the control of Biden appointees, announced several changes governing SPACs.

Also, as an indication of the Biden Administration’s aggressive approach to various regulatory issues, in July 2021, President Biden issued an Executive Order, which was named: *Executive Order on Promoting Competition in the American Economy*.<sup>195</sup> Among other things, the order said:

This order affirms that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony—especially as these issues arise in labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.<sup>196</sup>

[C] The “Third Take” Written in June 2023

[1] In General

As discussed in this section and in 12:1.4, *DOJ and FTC Antitrust Merger Enforcement as of May 2023: Enhanced Scrutiny by the Biden Administration*, the Biden Administration continues to take an aggressive stance on the enforcement of the antitrust laws. For example, the May 2023 Wachtell article *Takeover Law and Practice: Current Developments*,<sup>197</sup> reports as follows on a dispute between the FTC Chair, a Biden appointee, and one of the members, a Trump appointee:

One of the most significant areas of development in M&A in 2022 was in antitrust, and the effects of last year’s developments will likely factor into dealmakers’ decision making for years to come. New leadership appointed by the Biden administration at both the FTC and the DOJ have ushered in a new, more aggressive and unpredictable era

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194. Benjamin Horney, *5 Key Takeaways from Tulane’s 33rd Annual M&A Conference*, LAW360 (Mar. 12, 2021), <https://perma.cc/ZH3G-NEUN>.

195. Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).

196. *Id.*

197. Wachtell, *2023 Current Developments*, *supra* note 65.

of merger enforcement (and disagreements with the agenda and approach taken by new leadership have created friction within the agencies themselves, exemplified most recently by Commissioner Christine Wilson's publication of an op-ed criticizing FTC Chair Lina Khan's "disregard for the rule of law and due process" and announcement of her decision to resign as a commissioner). As new leadership attempts to make their mark on the U.S. antitrust environment, parties should expect continued aggressive enforcement in the years ahead.<sup>198</sup>

## [2] Specific Antitrust Initiatives of the Biden Administration

The following are several of the new Biden antitrust policy initiatives at the FTC and DOJ, some of which are also addressed in chapter 12, substantive antitrust, and chapter 13, pre-merger notification:

- (i) "the FTC's withdrawal of the vertical merger guidelines in September 2021, signaling the intention to increase enforcement in this area,"
- (ii) "the FTC's and DOJ's announcement in January 2022 of a joint inquiry to update the agencies' horizontal and vertical merger guidelines, in an effort "aimed at strengthening enforcement against illegal mergers" to "address mounting concerns" about increased consolidation across the American economy;"
- (iii) "the FTC's recent adoption of a new policy statement describing how it intends to enforce Section 5 of the FTC Act, which prohibits 'unfair methods of competition';" )
- (iv) "the January 2023 adoption by the FTC's Democratic majority, relying on that expansive interpretation of Section 5 of the FTC Act, of a controversial proposed rulemaking that would ban most employee non-compete agreements [this provision is introduced in chapter 2, which shows that the provision would generally not apply in the context of a sale of a business];"
- (v) "the temporary" suspension of early termination of the initial waiting period for HSR filings . . . ;"
- (vi) "the FTC's new practice of sending standard form pre-consummation warning letters to merging parties alerting them that, notwithstanding the expiration of the statutory waiting period, the FTC's investigation remains open, the agency may subsequently determine that the deal was unlawful . . . ;" and
- (vii) "the FTC's adoption of a policy requiring acquirers who settle merger enforcement actions to obtain prior approval from the

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198. *Id.*

FTC before closing transactions in the same or related relevant markets for a period of at least ten years;”

(viii) “the DOJ’s Antitrust Division [new focus] on Section 8 of the Clayton Act, which prohibits most interlocking directorates between competing companies;”

(ix) “Congress’s passage of the Merger Filing Fee Modernization Act of 2022 in December 2022, [which] substantially increase[s] resources with which to attempt to transform the antitrust laws through the courts and legislation, as well as indirectly through the adoption of new merger guidelines and informal and formal rulemakings.”<sup>199</sup>

In summing up on these and other antitrust initiatives, which it refers to as the “Biden administration’s aggressive antitrust agenda,” the Wachtell article concludes:

In sum, all indications point to continued aggressive enforcement in 2023. In particular, the agencies will continue to investigate and aggressively pursue vertical mergers and so-called “killer” acquisitions, or acquisitions of nascent competitors, in addition to traditional horizontal mergers. Additionally, leaders of the FTC and the DOJ have expressed a commitment to working together to advance their priorities, making it likely that interagency coordination will increase in the year ahead. Finally, enhanced collaboration between U.S. regulatory agencies and their international counterparts, including the European Commission and the UK’s CMA, which have also taken a keen interest in large transactions, especially in industries such as technology, will create a tougher environment for competition enforcement.

We expect that regulatory headwinds will affect levels of M&A activity in 2023, both by strategic acquirors and private equity firms, which have been subject to increased antitrust scrutiny by the current agency leadership, as officials continue working to implement the Biden administration’s aggressive antitrust agenda.<sup>200</sup>

#### [D] The “Fourth Take” Written in June 2024

As discussed in chapter 12, in December 2023, the FTC and DOJ issued revised Merger Guidelines. Also, as discussed in chapter 13, as of June 3, 2024, the FTC has proposed substantial amendments to the Hart-Scott-Rodino Pre-Merger Notification rules that would tighten the reporting rules. President Biden’s *2024 Domestic Business Tax Proposals* are discussed in section 9:1.4[I].

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199. *Id.*

200. *Id.*

The Congress passed and President Biden a law to ban TikTok. A Washington Post article explains:

President Biden announced [that] he has signed legislation to ban or force a sale of TikTok, just hours after Congress dealt the video-sharing platform's Chinese ownership a historic rebuke following years of failed attempts to tackle the app's alleged national security risks . . . .

The provision now gives TikTok's parent company, ByteDance, roughly nine months to sell the wildly popular app or face a national ban, a deadline the president could extend by 90 days.<sup>201</sup>

§ 1:7.44 *A Guide to Some of the Literature Addressing Current Developments in M&A*

The following is a list of the principal sources of data and information discussed in this current developments' section of this chapter. Some sources that are not used in this update but were cited to in past updates are also included:

- Business Valuation Resources (BVR), *2023 FactSet Review* (May 2024) [hereinafter “2024 FactSet Review”];
- BVR, FactSet IdeaScreening M&A Database, as of June 2023;
- BVR, FactSet Universal Screening of S&P 500, as of June 2023;
- Igor Kirman, Victor Goldfeld, Elina Tetelbaum, Wachtell Lipton Rosen & Katz, *Takeover Law and Practice: Current Developments*, HARV. L. SCH. F. CORP. GOVERNANCE (May 3, 2023) [hereinafter “Wachtell, 2023 Current Developments”], <https://perma.cc/95JP-2CD3>;
- Ethan Klingsberg, Takeaways from the [Berkeley] 20th Annual Spring Forum on M&A and the Boardroom (May 31, 2024), [hereinafter “Klingsberg, “Berkeley 2024 Spring Forum on M&A”], available at <https://perma.cc/YW6H-NCZA>;
- Litera Corp., *Return to Normal: Resilience and Resetting* 12 (Dec. 1, 2022) [hereinafter “Litera, 2023 M&A Report”], <https://perma.cc/QS5E-BVKA>;

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201. Cristiano Lima-Strong, *Biden signs bill that could ban TikTok, a strike years in the making*, WASH. POST (April 24, 2024), <https://perma.cc/U6EA-Z4KA>.

- Litera Corp., M&A Activity Report: The Evolution of Dealing in a Competitive Environment (Dec. 31, 2023) [hereinafter “Litera, 2024 M&A Report”], <https://perma.cc/9AAM-NU6Q>;
- Jake Henry and Mieke Van Oostende, McKinsey & Company, *Top M&A Trends in 2024: Blueprint for Success in the Next Wave of Deals 1* (2024) [hereinafter “McKinsey & Company, *Top M&A Trends in 2024*”], <https://perma.cc/3A7C-2F7U>.
- Moelis & Co., Presentation at the American Bar Association M&A Subcommittee Meeting: Current M&A Environment 11 (Apr. 2023) (presentation on file with author);
- Jen Muller, *American Bar Association, International M&A Subcommittee*, Houlihan Lokey (April 20, 2023) [hereinafter “Muller, *M&A Subcommittee 2023*”], presented at the ABA M&A Committee Meeting April 2023;
- Paul Weiss, *M&A at a Glance 1, 3* (Feb. 2023) [hereinafter “Paul Weiss, *2023 M&A at a Glance*”], <https://perma.cc/L9EJ-W5C5>.
- Paul Weiss, *M&A at a Glance 1* (June 10, 2024) [hereinafter “Paul Weiss, *June 2024 M&A at a Glance*”], <https://perma.cc/5X2F-BX69>;
- PitchBook Data, Inc., *B2C*, in GLOBAL M&A REPORT (2022) [hereinafter “Pitchbook, *2022 Global M&A Report*”];
- PitchBook, *Global Markets Snapshot* (May 2023) [hereinafter “PitchBook, *May 2023 Global Markets Snapshot*”];
- Miles Ostroff and Zane Carmean, PitchBook Data Inc., *Global Markets Snapshot 2* (March 2024) [hereinafter “PitchBook, *March 2024 Global Markets Snapshot*”], <https://perma.cc/6T5F-DTQ4>;
- PitchBook Data, Inc., *Q1 2023 U.S PE Breakdown 1, 37* (Apr. 11, 2023) [hereinafter “PitchBook, *May 2023 PE Breakdown*”], <https://perma.cc/T67U-MGHH>;
- PitchBook Data, Inc., *Q1 2024 U.S PE Breakdown 1, 19* (Apr. 9, 2024) [hereinafter “PitchBook, *April 2024 U.S. PE Breakdown*”], <https://perma.cc/SA32-BJV6>;
- Refinitiv, *M&A Monthly Snapshot*, May 2023, Refinitiv, *Deals Intelligence* (May 2023) [hereinafter “Refinitiv, *M&A Monthly Snapshot, May 2023*”];



- 2023 *M&A Deal Term Study*, SRS ACQUIOM 1, 43 (2023) [hereinafter “SRS, 2023 *M&A Deal Term Study*”], <https://perma.cc/6D7P-MM5Q>;
- Sullivan & Cromwell LLP, 2022 *U.S. Shareholder Activism and Activist Settlement Agreements* 1 (Dec. 13, 2022) [hereinafter “Sullivan & Cromwell, 2022 *Shareholder Activism*”], <https://perma.cc/HJC2-PQVW>;
- *The Economic Report of the President 2024* (March 2024), <https://perma.cc/A876-JZV2>;
- UNCTAD, 2023 *World Investment Report* (June 2023) [hereinafter “UNCTAD, 2023 *World Investment Report*”], <https://perma.cc/Z5RU-6Q57>;
- Wachtell, Lipton, Rosen & Katz, *Cross-Border M&A Guide* 1 (Apr. 2023) [hereinafter “Wachtell, 2023 *Cross-Border M&A Guide*”], <https://perma.cc/UNC3-6CMF>;
- Wachtell, Lipton, Rosen & Katz, 2024 *Cross-Border M&A Guide* 1 (May 2024), [hereinafter “Wachtell, 2024 *Cross-Border M&A Guide*”], <https://perma.cc/VXK7-PQDM>;
- Wachtell, Lipton, Rosen & Katz, *Takeover Law and Practice* (Apr. 4, 2024), [hereinafter “Wachtell, 2024 *Takeover Law and Practice*”], <https://perma.cc/753W-L32B>;
- Igor Kirman, Victor Goldfeld, Elina Tetelbaum, Wachtell Lipton Rosen & Katz, *Takeover Law and Practice: Current Developments*, HARV. L. SCH. F. CORP. GOVERNANCE (May 3, 2023) [hereinafter “Wachtell, 2023 *Current Developments*”], <https://perma.cc/95JP-2CD3>;
- Victor Goldfeld et al., *Mergers and Acquisitions—2024*, HARV. L. SCH. F. CORP. GOVERNANCE (Jan. 9, 2024) [hereinafter “Wachtell, *M&A as of January 2024*”], <https://perma.cc/3QCU-BWJS>;
- WilmerHale, 2022 *M&A Report* 1, 7 (Feb. 28, 2022) [hereinafter “WilmerHale, 2022 *M&A Report*”], <https://perma.cc/BJ5R-3R4B>; and
- WilmerHale, 2023 *M&A Report* 1, 8 (Mar. 31, 2023) [hereinafter “WilmerHale, 2023 *M&A Report*”], <https://perma.cc/HU6T-EP3K>.

**Appendix 1A, Guide to the Economic and Financial M&A  
Related Factors Addressed in Chapter 1, with the Associated Figure  
or Figures, if any, Illustrating the Factor, June 2024**

SECTIONS OF CHAPTER ONE DISCUSSING THE ECONOMIC AND FINANCIAL M&A RELATED FACTORS	FIGURE, IF ANY, ASSOCIATED WITH THE M&A RELATED FACTOR SECTIONS 1:7.5 THROUGH 1:7.42
§ 1:7.4 Introduction To Recent Data On The M&A Marketplace Contained In Sections 1:7.5 Through 1:7.44	NA
<b>I. Recent Data: Macro View of the Recent Economic and Financial Impact of M&amp;A, Sections 1:7.5 through-1:7.10</b>	NA
§ 1:7.5 Review of 2023 Trends in U.S. M&A Activity	<p>Figure 1-1A, Returns on the S&amp;P 500, for Various Recent Periods, as of May 29, 2024</p> <p>Figure 1-1B, Trends in U.S. Mergers and Acquisition Activity 2013–2023</p> <p>Figure 1-1C, U.S. Mergers and Acquisition Activity 2020, 2021, 2022, and 2023</p> <p>Figure 1-2, Percent Change in U.S. Deals Volume and Percent Change in U.S. Number of Deals 2019–2023</p> <p>Figure 1-3, Top Five Seller Industries by Number of Announcements 2023</p> <p>Figure 1-4, Top Five Seller Industries by Dollar Value of Offers 2023</p>
§ 1:7.6, Recent Trends in U.S. and Worldwide M&A Activity	Figure 1-5, Trends in U.S. and Worldwide M&A Activity 2013–2023
§ 1:7.7, Recent U.S. M&A Volume (1) Related to Aggregate U.S. Gross Domestic	Figure 1-6, U.S. M&A Volume Related to Aggregate GDP 2013–2023

Product, GDP, and (2) as a Percentage of Aggregate GDP	Figure 1-7, U.S. M&A Volume as a Percentage of Aggregate GDP 2013–2023
§ 1:7.8, Recent U.S. M&A Volume Related to Investment Component of GDP	Figure 1-8, U.S. M&A Volume Related to the Nonresidential Investment Component of GDP 2013–2023 Figure 1-9, Recent U.S. M&A Percent Change Related to Investment Component of GDP 2017–2023
§ 1:7.9, Recent U.S. M&A Volume Related to the Performance of the S&P 500 Stock Index	Figure 1-10, Recent U.S. M&A Volume Related to S&P 500 Index 2013–2023
§ 1:7.10 Wachtell’s Overall Assessment of M&A Activity in 2022.	NONE
<b>II. Recent Data: Structural Issues in Recent M&amp;A Deals, Sections 1:7.11 through 1:7.19</b>	NA
§ 1:7.11, Recent U.S. M&A Activity by Type of Transaction	Figure 1-11, Breakdown of U.S. M&A Activity by Type of Transaction: Number of Deals and Deal Value 2018–2023
§ 1:7.12, Recent P:E Ratios and Premiums Paid in U.S. Public Deals	Figure 1-12, U.S. P:E Ratio and Premiums Paid 2016–2023
§ 1:7.13, Recent U.S. Payment Trends: Cash, Stock, Mixed, and Other	Figure 1-13, U.S. Payment Trends 2016–2023
§ 1:7.14, Recent Data on Acquisitions of Domestic and Foreign Publicly Traded Companies and the Returns to the Target’s and Acquirer’s Shareholders	Figure 1-14, Acquisitions of Domestic and Foreign Publicly Traded Companies 2018–2023
§ 1:7.15 Recent Data on Acquisitions of Privately Owned Companies	Figure 1-15, Acquisitions of Privately Owned Companies 2018–2023

§ 1:7.16, Recent (1) Private Equity (PE) Capital Raising, (2) Leveraged Buy-Out Activity, and (2) Related Issues	Figure 1-16, Capital Raised by Private Equity Funds 2011–2021 Figure 1-17, Leveraged Buy-Out Activity in Relation to Private Equity Activity 2013–2022
§ 1:7.17, Recent Data on U.S. M&A Deal Size	Figure 1-18, Number of Deals by U.S. Deal Size 2016–2023
§ 1:7.18, Recent Data on U.S. Regional Buyer Activity	Figure 1-19, U.S. Regional Buyer Activity 2016–2023
§ 1:7.19, Recent Data on U.S. Regional Seller Activity.	Figure 1-20, U.S. Regional Seller Activity 2018–2023
<b>III. Recent Data: Takeover Defenses, Tender Offers and Related Issues, Sections 1:7.20 through 1:7.31</b>	NA
§ 1:7.20, Recent Data on the Percentage of S&P 500 Companies with a Shareholder Rights Plan, that is, a Poison Pill	Figure 1-21, Percentage of S&P 500 Companies with a Shareholder Rights Plan 2008–2017 and as of June 2023 Figure 1-22, Total Number of U.S.-Incorporated Companies with Poison Pills in Force at Year End 2018–2017
§ 1:7.21, Recent Data on the Percentage of S&P 500 Companies with Various Types of Defensive Measures	<i>Figure 1-23, Percentage of Companies in the S&amp;P 500 Index with Various Defensive Measures, 2022</i>
§ 1:7.22, Recent Data on U.S. Tender Offers, Contested and Uncontested	Figure 1-24, U.S. Tender Offers Contested and Uncontested 2018–2023
§ 1:7.23, Recent Data on the Rise of Two-Step Transactions (that is, negotiated tender offer followed by a merger) and the Top-Up Option	Figure 1-25, Percentage of One-Step and Two-Step Transactions 2012–2016, and 2021

<p>§ 1:7.24, Recent Data on U.S. Termination Fees: Direct and Reverse</p>	<p>Figure 1-26, U.S. Direct Termination Fees—Average and Median Percentage of Total Invested Capital and Deal Size 2023</p> <p>Figure 1-27, Transactions with or Without Direct Termination Fees of Publicly Traded Sellers, Privately Held Sellers, Divestitures, and Foreign Sellers 2023</p>
<p>§ 1:7.25, Recent Data on “No-Shop” and “Go-Shop” Provisions in Negotiated Deals</p>	<p>Figure 1-28, No-Shop Provisions in Negotiated Deals 2009–2018</p> <p>Figure 1-29, Go-Shop Rights in Negotiated Deals 2009–2018</p>
<p>§ 1:7.26 Wachtell’s Assessment of Hostile M&amp;A Activity in 2022 and 2023</p>	<p>NONE</p>
<p>§ 1:7.27, Recent Information on Bankruptcies</p>	<p>NONE</p>
<p>§ 1:7.28, Recent ABA Deal Point Studies</p>	<p>NONE</p>
<p>§ 1:7.29, Recent Information on the Top Ten M&amp;A Investment Banks and Law Firms Ranked by U.S. Deal Size</p>	<p>Figure 1-30, Top 10 M&amp;A Investment Banking Firms and Law Firms Ranked by U.S. Deal Volume 2023</p>
<p>§ 1:7.30, Recent Information on Proxy Contests Generally</p>	<p>Figure 1-31, Number of Proxy Contests, 2018–2022</p> <p>Figure 1-32, U.S. Proxy Contests Results 2018–2022</p>
<p>§ 1:7.31, The Role of Activist Shareholders Specifically</p>	<p>NONE</p>
<p><b>IV. Recent Data: Cross Border M&amp;A, Sections 1:7.32 to 1:7.36</b></p>	<p>NA</p>
<p>§ 1:7.32, Recent Data on Cross-Border M&amp;A Activity</p>	<p>Figure 1-33, Value of Cross-Border M&amp;As, by Region/Economy of Target, 2016–2021</p>

	Figure 1-34, Cross-Border M&A Foreign Buyers of U.S. Targets and Foreign Sellers to U.S. Acquirers 2018–2023
§ 1:7.33, Recent Data on the Top Ten Foreign Buyer Countries, that is, countries home to acquirers	Figure 1-35, Top 10 Foreign Buyer Countries by Deal Volume 2022–2023
§ 1:7.34, Recent Data on the Top Ten Foreign Seller Countries, that is, countries home to target	Figure 1-36, Top 10 Foreign Seller Countries by Deal Volume 2022–2023
§ 1:7.35, Resolution of the Trapped Foreign Income Problem by the 2017 Tax Cuts and Jobs Act (TCAJA)	NONE
§ 1:7.36 The Inversion Problem Before and After the TCAJA and the Section 385 Regs	NONE
<b>V. Recent Data: Other M&amp;A Issues, Sections 1:7.37 to 1:7.42</b>	NA
§ 1:7.37 Presents a Brief Introduction to Special Purpose Acquisition Companies (SPACS), Which, as Discussed in Greater Detail in Chapter 6, Have Become a More Active Part of the M&A Scene	Figure 1-37, Number and Dollars Raised By SPACS 2019–2023
§ 1:7.38 Provides a Brief Introduction to Blockchain and Cryptocurrency M&A	NONE
§ 1:7.39 Takes a Brief Look at the Impact of Environmental, Social and Governance (ESG) on M&A	NONE
§ 1:7.40 Briefly Introduces the Impact of ChatGPT and Other Artificial Intelligence (AI) Concepts on M&A	NONE
§ 1:7.41 Discusses the Impact of Monetary Policy on the Level of M&A Activity	Figure 1-38A, From 2021 to 2022, Annual Inflation (1) More Than Tripled in the U.S. and EU, and (2) Significantly Increased in Japan and China  Figure 1-38B, Illustration of the General Relationship Between the Recent (1) Level of

	Inflation, and (2) Performance of the Stock Market—2018-2022
§ 1:7.42 Presents a Preliminary Report on M&A Activity in 2023	NONE
§ 1:7.43, Because the Policies of the Current President and his or Her Administration Can Have a Significant Impact on M&A Activity, Section 1:7.43 Presents A “First (2021), Second (2022), Third (2023), and Fourth (2024) Take” on The Impact on M&A of the Biden Administration’s Policies, Including Tax, Antitrust, and Healthcare Policies	NONE
§ 1:7.44 A Guide to Some of the Literature Addressing Current Developments in M&A	NONE