

Summary of New Developments in the M&A Marketplace as of December 31, 2024, with [1] Comments on 2025 Developments, and [2] Projections on Potential 2026 Developments¹

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INTRODUCTORY NOTE²

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*”). The author of the book is Penn State Dickinson 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 2024, which was principally prepared in May of 2025. In addition, this article discusses some of the 2025 developments, but data relating to many of the 2025 developments have not been published or finalized as of the writing of this article in January 2026. Thus, a more complete discussion of the 2025 developments will be included in the updated Chapter 1, which will be available in early Summer of 2026.

In addressing significant new 2025-2026 developments, section 1:7.42 discusses the Trump Administration’s approach to Tariffs; and

1. The 2025 developments were not completely available as of the writing of this article in late December 2025 and early January 2026.

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2. I want to thank my Research Assistants at Penn State Dickinson Law, Rinchen Yangzom, a 2025 LLM graduate, and Sydney Klien, a 2025-2026 second year student, for their very helpful assistance in the preparation of this January 2026 version of section 1:7.4 of *MATO*.

section 1:7.43 addresses some non-tariff developments in both the Trump and Biden Administrations.

The last substantive sections of this article are (1) section 1:7.44, which provides a *January 2026 Preliminary Report on M&A Activity in 2025*; and (2) section 1:7.45, which presents a *January 2026 Projection of M&A Activity in 2026*.

The numbering system in this Article is based on the numbering system of the New Developments section of chapter 1 of the *MATO* book, with section 1:7.4 providing an introduction to sections 1:7.5 through 1:7.45, which address different substantive concepts in M&A. Finally, section 1:7.46 provides a guide to some of the literature addressing M&A.

A CAVEAT

As indicated in section 1:7.4[B][1], a principal source of information in chapter 1 of *MATO* and in this article is the *2025 FactSet Review*,³ which is published by Business Valuation Resources (BVR) and became available in April 2025. Obviously, the *FactSet Review* for 2026 was not available at the time of the writing of this article in early 2026, but the 2026 version will be used in the updating of Chapter 1 of *MATO* in June 2026.

A SECOND CAVEAT: THE IRANIAN WAR

Between [1] the time this article was submitted by this author to the Penn State Dickinson Law Review in March 2026, and [2] April 12, 2026, the date the author is reviewing the edits to this article by the Law Review, a war started with the U.S. and Israel attacking Iran. One of the major economic impacts of the war was the closure by Iran of the Strait of Hormuz. This is a fast-moving story, but the following is a brief update on the potential effects of this war on M&A:

On April 12, 2026, as this section of the article was being written, the New York Times reported, as follows, on peace talks between Iran and the U.S. that were headed by Vice President J.D. Vance:

Vice President JD Vance said on Sunday that 21 hours of peace talks in Pakistan, between the United States and Iran had failed to produce an agreement to end the war, leaving the question of what happens after the current two-week cease-fire up in the air.⁴

3. See FACTSET MERGERSTAT, 2025 FACTSET REVIEW (April 2025) [hereinafter *2025 FactSet Review*].

4. Tyler Pager et al., *U.S. And Iran Fail to Agree on Peace Deal After 21 Hours of Talks, Vance Says*, N.Y. TIMES (April 12, 2026), <https://perma.cc/WLY4-DXKE>.

The Letter to Shareholders by the Chairman of J.P. Morgan, which was issued on April 6, 2026, provides the following economic assessment of the War:

[B]ecause of the war in Iran, we additionally face the potential for significant ongoing oil and commodity price shocks, along with the reshaping of global supply chains, which may lead to stickier inflation and ultimately higher interest rates than markets currently expect.⁵

In its April 7, 2026, Letter to Shareholders, the Lazard investment bank, without mentioning the name “Iran,” says the following about the impact of the war:

While our momentum persists, ongoing conflict in the Middle East is a reminder of the types of geopolitical developments that can reverberate across the global economy. The potential impact extends well beyond oil markets to include natural gas, aluminum, fertilizer, helium, and other critical inputs, underscoring how interconnected today’s economic system has become—and how uncertain the path forward can be. The need for strategic advice and investment solutions that consider the broader landscape is more apparent today than ever.⁶

Also, a March 11, 2026, early extensive assessment of the economic impact of the War by the Institute on Mergers, Acquisitions, and Alliances⁷ summarizes as follows the Institute’s analysis:

- The Iran conflict—barely two weeks old—has already shifted the M&A dynamic toward buyers. * * *
- Valuation methodology must evolve. Blanket discounts don’t capture asymmetric, sector-specific geopolitical risk. Factor in a meaningful geo-risk premium and stress-test synergy assumptions aggressively before signing off on a deal; [See chapter 11 for a discussion of valuation

5. J.P. Morgan Chairman and CEO, *Letter to Shareholders* (April 6, 2026).

6. Lazard, *2025 Annual Letter to Shareholders* (April 7, 2025).

7. Institute on Mergers, Acquisitions, and Alliances, *Dealmaking Under Fire: How the Iran Conflict Might Reshape the 2026 M&A Landscape* (March 11, 2026), <https://perma.cc/B9AP-QSN6>.

methods; also see Thompson, *Corporate Valuation for M&A* (2025)];

- Earn-outs are set to become mainstream in this cycle. * * * [See chapter 2];
- MAC clauses offer less protection than most buyers assume. Negotiate specific, quantifiable carve-ins rather than relying on boilerplate language to provide an exit; [See chapter 2];
- Sanctions compliance is now a valuation issue—not a legal formality. Integrate sanctionability into due diligence from day one. The liability exposure of getting it wrong is existential. [See chapter 3, due diligence]⁸

Notwithstanding these negative views, a March 31, 2026, Wall Street Journal article, discussed further in section 1:7.5[E], points out that M&A professionals seem to agree with Frank Aquila of Sullivan & Cromwell, who believes that the “floodgates could open to a phenomenal M&A year[.]”⁹ The major part of this trend probably came before the beginning of the Iran war, and it will be interesting to see the level of M&A activity in the Second Quarter and beyond.

Obviously, the business lawyer will have to keep a close watch on developments with this War. The following title of a CBS News article, dated April 28, 2026, the day of the final review of this article by the author, captures the state of the conflict as of 9:36 AM EDT on that day: “*Live Updates: Iran war and Strait of Hormuz stuck in limbo as Trump mulls latest Iranian offer.*”¹⁰ Obviously, “Stay Tuned!”

8. *Id.*

9. Ben Dummett and Lauren Thomas, *The Year is Off to the Strongest Start for Big Deals Ever*, WALL ST. J. (March 31, 2026), <https://perma.cc/ZND2-P4KP>.

10. See Tucker Reals and Frank Andrews, *Live Updates: Iran war and Strait of Hormuz stuck in limbo as Trump mulls latest Iranian offer* (last updated Apr. 29, 2026), <https://perma.cc/ZC4T-TKGM>.

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12. As used here Trump II refers to the second Trump Administration.

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I. RECENT DATA: INTRODUCTION AND MACRO VIEW OF THE
RECENT ECONOMIC AND FINANCIAL IMPACT OF M&A,
SECTIONS 1:7.4 THROUGH 1:7.10

*§ 1:7.4 Introduction to Recent Data on the M&A Marketplace
Contained in Sections 1:7.4 through 1:7.46¹³*

[A] The Purpose of Sections 1:7.4 Through 1:7.46

[A][1] In General

Sections 1:7.4 through 1:7.46 present recent data and information on the state of the M&A marketplace, in many cases, as of the end of 2024,¹⁴ with a brief look at this activity during 2025. Final information on 2025 was not available at the time of the writing of this article in January 2026, but the full set of information for 2025 will be addressed in the June 2026 update to the *MATO*. This section 1:7.4 provides:

- (1) an introduction to the guide to the *Principal Sources of Information* employed in this article (section 1:7.4[B]);
- (2) a guide to the manner in which the data and information in this article 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 Part I through Part V in which these recent developments sections (that is, sections 1:7.5 through 1:7.46) are organized (section 1:7.4[I]);

13. I want to thank my Research Assistants at Penn State Dickinson Law, Rinchen Yangzom, a 2025 LLM graduate, and Sydney Klien, a 2025-2026 second year student, for their very helpful assistance in the preparation of this January 2026 version of section 1:7.4 of *MATO*.

14. 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.

- (5) an introduction to Appendix 1A of the book, which is a guide to these recent developments but is not included in this article (section 1:7.4[J]); and
- (6) “*A Guide to Some of the Literature Addressing Current Developments in M&A*” (section 1:7.46).

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

[A][2] M&A Can Change “On a Dime”

It is important to keep in mind that the M&A marketplace and legal regime can “Change on a Dime.” Consequently, in any M&A transaction, it is key for each adviser, whether legal, investment banking, or other, to be aware of the most recent material developments in such adviser’s particular area of responsibility.

[A][3] The Different Legal Styles [i.e., U.S., U.K. or European] for Implementing M&A

As indicated in the following report on a presentation given at the Berkeley 2024 Spring Forum on M&A,¹⁵ law firms in different geographical areas of the United States 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 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 any of the different approaches associated with different geographies, including hybrid approaches.¹⁶

15. See Klingsberg, *Berkeley 2024 Spring Forum on M&A*, *infra* section 1:7.46.

16. *Id.*

[B] A Brief Introduction to the Principal Sources of Information

[B][1] *In General, 2025 FactSet Review and Forthcoming 2026 FactSet Review*

The principal source of data in this article, which is based on part of Chapter 1 of *MATO*, is the *2025 FactSet Review*,¹⁷ which is published by Business Valuation Resources (BVR) and became available in April 2025. Obviously, the *FactSet Review* for 2026 was not available at the time of the writing of this article in early 2026, but the 2026 version will be used in the updating of Chapter 1 of *MATO* in June 2026. The *FactSet Review* contains a significant amount of data and other information on M&A and related transactions. This section can only address a limited amount of the data and other information in the *FactSet* book. In addition to the *2025 FactSet Review*, this article addresses many other sources, including those mentioned below.

[B][2] *The Wealth of Industry Financial and Economic Data in the McKinsey & Company, M&A Annual Report 2025; The 2026 Report Was Not Published at the Time of the Writing of this Article*

McKinsey & Company, a world-famous management consulting firm, publishes an annual report analyzing various economic and financial aspects of M&A. The report issued in early 2025¹⁸ starts with a general analysis entitled “Peering around corners: Exploring the outlook for M&A in 2025.” One of the points made in this section of the report (which was a foretelling of what was to come with the President Trump’s tariffs, discussed in sections 1:7.4 [B][5] and section 1:7.42), was as follows: “Could fresh geopolitical, trade, or other policy hurdles challenge this [rosy M&A] picture?”¹⁹ The answer to the question is a resounding yes with respect to the Trump Administration’s tariff policies.

A large section of the McKinsey & Company, *M&A Annual Report 2025*, analyses the M&A scene in the following different business sectors:

- Advanced industries: *New technologies and supply chain shifts are driving key portfolio and investment decisions;*
- Financial services: *Dealmakers adapt to a shifting landscape;*

17. See *2025 FactSet Review*, *infra* section 1:7.46.

18. See McKinsey & Company, *M&A Annual Report 2025*, *infra* section 1:7.46.

19. *Id.* at 4.

- Consumer goods: *Seeking market expansion and growth*;
- Global energy and materials: *Overall deal value remains stable, but some segments are gaining share*;
- Life sciences: *Primed for an increase*;
- Private capital: *Investors' cautious stance in 2024 may give way to a more aggressive approach; . . .*
 - o Private capital firms have been active in several industries over the past few years—but activity in [] technology, media, and telecommunications . . . lead[s] the way [and firms pursued fewer megadeals, opting for midsize deals more often]; . . .
- U.S. healthcare: *Navigating through the headwinds*;
- Travel, logistics, and infrastructure: *Firms are finding opportunities in technology, changing consumer demographics, and global trade*; and
- Technology, media, and telecommunications: *Software deals and creative partnerships will carry the day.*²⁰

As a general matter, with respect to each of these sectors, the analyses are divided into the following sections, each containing a wealth of financial and economic data:

- Total Deal Value by Region;
- Total Deal Volume by Region;
- Share of Private Equity Activity;
- Share of Activity in 2024, by Subsector;
- Average Deal Size by Subsector;
- Total Deal Value by Size;
- Share of Deal Volume by Size;
- Share of Cross-Border Deals; and
- Top 10 Global Deals [by Sector and] by Deal Value.²¹

20. *Id.* at 2, 47.

21. *Id.* at 19-20.

A mere review of these sector analyses demonstrates that to properly value a target, the analyst must have access to, and mastery of, sector specific economic and financial data.

[B][3] The 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 (for example, a steel manufacturer) acquires its input from a business (for example, a producer of iron ore) and sells to another business (for example, a car manufacturer). On the other hand, a B2C business sells to the ultimate consumer.

A U.S. Chamber of Commerce article²² provides the following basic information on these B2B and B2C concepts:

While B2B and B2C follow essentially the same equation — a customer is buying something from a company — there are key differences in these two approaches that are worth . . . understanding.

B2B vs. B2C lifetime value differences

Lifetime value, or customer lifetime value (CLV), represents the total revenue a customer generates over their relationship with a company. This metric helps you optimize your marketing, but the figures often differ dramatically between consumer and B2B brands.

CLV in B2B relationships tends to be long term and strategic. B2B companies often offer complex products or services that require ongoing support and maintenance. As a result, B2B customers usually have a higher LTV [that is, Live Time Value] because they make repeat purchases over time, often involving larger transaction values.

In contrast, B2C transactions are typically more transactional and shorter in duration, resulting in lower LTV, as consumers may not return frequently for repeat purchases.

Accordingly, the sales and marketing strategies differ between B2B and B2C companies.²³

22. See Emily Heaslip, *B2B vs. B2C: What's the Difference?*, U.S. CHAMBER OF COMMERCE (last visited May 12, 2025), <https://perma.cc/PD94-T26M>.

23. *Id.*

This U.S. Chamber of Commerce article is a good starting point for understanding these B2B and B2C concepts.

[B][4] The “Elephant,” but Maybe the “Mouse,” in the Room—Trump’s Tariffs

As of May 2025, everyone knew that newly elected President Trump has been all over the place with his proposals on tariffs, which are taxes imposed by a government on imported goods. A tariff is sometimes referred to as an “import duty,” that is, a tax on imports into a country. President Trump has proposed substantial taxes on certain imports.

As a result of this development, in conducting any analysis of an M&A transaction, it is important to assess, or try to assess, the potential impact of actual or potential tariffs. As of the writing of this section in May 2025, it seemed that Trump’s approach had been changing daily.

The lesson: In doing an analysis of any potential M&A transaction, both the acquirer and target side must in their due diligence process, which is addressed in chapter 3, attempt to assess the impact of tariffs, if any, on the transaction.

An illustration of the type of document that may be utilized in implementing policy regarding tariffs and related issues can be found in the due diligence section of chapter 3, which contains the following joint U.S.-China statement regarding trade and related issues: “The White House, *Joint Statement on U.S.-China Economic and Trade Meeting in Geneva* (May 12, 2025).”

The principal discussion of tariffs generally and of the Trump tariffs is contained in section 1:7.42, which considers the “Impact of Tariff Policy on the Level of M&A Activity.” Section 1:7.42 discusses some development occurring through January 2026. It must be emphasized that this book only touches the surface on tariffs. Several outstanding law firms publish excellent evaluations of the current state of tariff issues, and, in addressing any issue, one might consult the latest discussion of the issues by one or more of such firms. For example, Sullivan & Cromwell periodically updates its *Tariffs Tracker*.²⁴

[B][5] A Caveat on the Data and the Interpretation of the Data

There is a lot of data in sections 1:7.4 through 1:7.45, and some of the data may, inter alia, (1) not present an accurate picture of the issue, and (2) be revised at a later time. Before relying on the presentation of the data in this article, the reader may want to confirm for himself or herself the accuracy of the data by referring to the source cited or another appropriate source.

24. See Sullivan & Cromwell, *Tariffs Tracker*, *infra* section 1:7.46.

In many cases, the data for past years may have been revised, and as a general matter, there is no attempt here to change data discussed in this article to reflect subsequent developments. The bottom line: in presenting data for a particular year, the analyst should consider the current presentation of such data by the source of the data.

[B][6] The Principal Sources of Information Used in this January 2026 Update

The following are the principal documents used in the preparation in the January 2026 update to “*Recent Data on the M&A Marketplace Contained in Sections 1:7.5 Through 1:7.47*”:

- ABA, Business Law Section, *Looking Back and Looking Forward: M&A Developments in 2025 and Outlook for 2026* (Dec. 4, 2025) [ABA, *Looking Back and Looking Forward on M&A, December 2025*];
- AO Shearman, Global M&A Insights (Quarter 4, 2025) [“AO Shearman, *Global M&A Insights, Fourth Quarter 2025*”];
- Frank Aquila and Catherine Yuh, *Hostile M&A Activity Could Spur Comeback of Takeover Defenses*, PERSPECTIVES: BLOOMBURG LAW (Oct. 30, 2025) [Aquila and Yuh, *Hostile M&A, October 2025*];
- J.P. Morgan, *2026 Global M&A Annual Outlook, from Turbulence to Transformation* (Feb. 2026) [J.P. Morgan, *2026 Global M&A Annual Outlook*];
- Sullivan & Cromwell, *Emerging Issues, S&C Tariffs Tracker*, <https://perma.cc/JA62-9HR4>, (last visited Jan. 10, 2026) [Sullivan & Cromwell, *Tariffs Tracker*].
- Sullivan & Cromwell, *President Trump Issues Executive Order on Proxy Advisors and Shareholder Proposals* (Dec. 12, 2025) [*Trump Executive Order on Proxy Advisors and Shareholder Proposals*];

- Sullivan & Cromwell, *Tax Policy Outlook for 2026* (Jan. 2, 2026) [“Sullivan & Cromwell, *Tax Policy Outlook for 2026*”];
- Wachtell Lipton, *Mergers and Acquisitions—Reviewing 2025 and Looking Ahead to 2026* (Dec. 17, 2025) [Wachtell, *M&A—Reviewing 2025 and Looking Ahead to 2026*];
- Wachtell Lipton, *Private Equity in 2025—A Push for Exits and a Positive Outlook* (Dec. 18, 2025) [Wachtell, *Private Equity in 2025*];
- Wachtell Lipton, *Shareholder Activism: Ten Trends in 2026* (Oct. 14, 2025) [Wachtell, *Shareholder Activism, 2026 Trends*].

Each of these documents is also listed in section 1:7.46.

[C] Part I of this Article: Introduction and Macro View of the Recent Economic and Financial Impact of M&A, Sections 1:7.4 Through 1:7.10

While this section 1:7.4 provides a general introduction, the following sections in Part I look at the macro impact of the M&A activity:

- § 1:7.5, Review of 2019–2025 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;
- § 1:7.9, Recent U.S. M&A Volume Related to the Performance of the S&P 500 Stock Index; and
- § 1:7.10 FactSet’s Overall Assessment of M&A Activity Over the 20-Year Period Ending in 2024.

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, 2023, and 2024, M&A activity significantly decreased from the level in 2021.

[D] Part II of this Article: Structural Issues in Recent M&A Deals, Sections 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;
- § 1:7.12, Recent (1) P:E Ratios,²⁵ (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 Acquirer Activity; and

25. 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.

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

[E] Part III of this Article: 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, That Is, 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 2022, 2023, 2024 and Projected for 2025;
- § 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;
- § 1:7.30, Recent Information on Proxy Contests; and

- § 1:7.31, The Role of Activist Shareholders.

[F] Part IV of this Article: 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: Inbound Acquisitions (that is, countries home to acquirers);
- § 1:7.34, Recent Data on the Top Ten Foreign Seller Countries: Outbound Acquisitions (that is, countries home to targets);
- § 1:7.35, Resolution of the Trapped Foreign Income Problem by the Trump-Supported 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] Part V of this Article: Other Recent Development M&A Issues, Sections 1:7.37 Through 1:7.46

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 discusses the Impact of ChatGPT and Other Artificial Intelligence (AI) concepts on M&A;
 - § 1:7.41 considers the Impact of Monetary Policy and Tariff Policy on the Level of M&A Activity;
 - § 1:7.42 provides an introduction to tariffs, which have been implemented by the Trump Administration, and to their potential impact on the economy generally;
 - § 1:7.43 discusses the M&A-related policies (other than Tariffs) of both the Biden and Trump Administrations because these policies can obviously have a significant impact on M&A activity:
 - The first part of section 1:7.43 presents a “First Take” of the impact on M&A of the first year of the second Trump Administration, which has been dominated, as indicated in section 1:7.42, by the impact of tariffs.
 - The second part of section 1:7.43 presents comments on the impact on M&A of some of the Biden Administration’s policies.
- [H] Part VI of this Article: Recent Data: 2025 and 2026 Data, and Guide to the Literature, Sections 1.7.44 Through 1:7.46.
- § 1:7.44 presents a Preliminary Report on M&A Activity in 2025;
 - § 1:7.45 provides some observations on potential 2026 developments; and
 - Finally, § 1:7.46 provides a Guide to Some of the Literature Addressing Current Developments in M&A.

[I] Summary of the Breakdown of the Recent Developments Addressed in Part I Through Part VI (That Is, Sections 1:7.4 Through 1:7.46)

As indicated previously, the following sections 1:7.5 through 1:7.46 address the Recent Economic and Financial Impact of M&A in the following Parts I through Part VI of this article.

- PART I OF RECENT DATA: INTRODUCTION AND MACRO VIEW OF THE RECENT ECONOMIC AND FINANCIAL IMPACT OF M&A, SECTIONS 1:7.4 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 THROUGH 1:7.36; and
- PART V OF RECENT DATA: OTHER M&A ISSUES, SECTIONS 1:7.37 THROUGH 1:7.43; and
- PART VI OF RECENT DATA: 2025 AND 2026 DATA AND GUIDE TO THE LITERATURE, SECTIONS 1:7.44 THROUGH 1:7.46.

[J] An Appendix Guide to the Economic and Related Factors Discussed in Sections 1:7.5 Through 1:7.46

A significant amount of economic and financial information is provided in these “Recent Developments” sections of the book—that is, sections 1:7.5 through section 1:7.46. 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 1:7.46*. Appendix 1A is not available in this article.

§ 1:7.5 Review of 2019–2025 Trend in U.S. M&A Activity

[A] In General

Before looking at M&A, it is helpful to have a general understanding of the recent general performance of stock markets. 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.

It is helpful when looking at the trend in M&A activity to keep in mind the general performance of the broader stock market. An early April 2025 report by U.S. Bank gave the following background on the then recent activity of the stock market, principally in response to tariffs implemented by the Trump Administration:

The Trump administration initiated new tariff policies beginning in mid-February and stepped up those efforts with an announcement in early April of sweeping new tariffs affecting virtually all aspects of global trade.

In early March [2025], the S&P 500 crossed into correction territory (a decline of 10% or more from its peak). After a modest recovery, stocks are again declining, with the technology-heavy NASDAQ Composite Index and the small-cap Russell 2000 crossing into bear market territory (a retreat of 20% from peak levels). The S&P 500 is on the precipice of a bear market, down 17.6% from its high on February 19. Since President Trump took office on January 20, the S&P 500 is down 15.6%. . . .

On April 2, President Trump laid out plans to impose tariffs as high as 54% on Chinese imports and sizable tariffs for products shipped from Southeast Asian nations. The White House also imposed 20% tariffs on products from European Union countries, and a minimum of 10% now applies to most countries' exports to the U.S. China already announced retaliatory tariffs against U.S. products, which could trigger additional tariffs imposed by the U.S.

“Markets continue to adjust to retaliations and retaliations on retaliations,” says Rob Haworth, senior investment strategy director at U.S. Bank Asset Management Group. “In addition, markets are dealing with an unclear timeline on implementing U.S. tariffs.” Haworth says businesses are having difficulty

planning under the current circumstances. “Businesses need a clearer plan to make investments, and we’re not there yet.”²⁶

As this update was going to press in early May 2025, U.S. Bank presented the following assessment of the U.S. equity markets:

Quick take: Stocks rallied across major geographies last week as U.S. economic data releases eased stagflationary concerns, Chinese authorities expressed interest in resolving trade conflicts and first quarter earnings results trended modestly above expectations.

Our view: Tariffs and the risk of economic slowing are an overhang to sentiment and equity prices. Companies are likely to provide more detailed guidance following the release of second quarter results beginning in mid-July when tariff visibility is expected to improve. At present, inflation, interest rates and earnings remain at levels supportive of equity prices.

Key points

- **The S&P 500 rallied 2.9% last week to 5,687, closing above the April 2 pre-Liberation Day announcement level** but remaining 7.4% below the February 19 all-time high. . . .
- **First quarter results are trending in line with or above expectations.** . . .
- **Consumer spending is showing pockets of weakness.** . . .
- **Consensus projections for earnings in 2025 and 2026 remain stable with downside bias.**²⁷

Obviously, by the time the reader is reading this section, there will have been significant changes in the stock market from its position in early May 2025, and obviously, in doing any analysis, it is important to review the current information regarding all relevant markets.

26. *Stock market under the Trump administration*, U.S. BANK (Apr. 5, 2025).

27. *Market analysis*, U.S. BANK (May 5, 2025).

According to Figure 1-1A, as of May 29, 2024, and May 11, 2025, the S&P 500 had the following performance record over the indicated time periods—that is, 5 Days to 1 Year:

Figure 1-1A
Returns on the S&P 500, for Various Recent Periods, As of May 29, 2024 and May 11, 2025

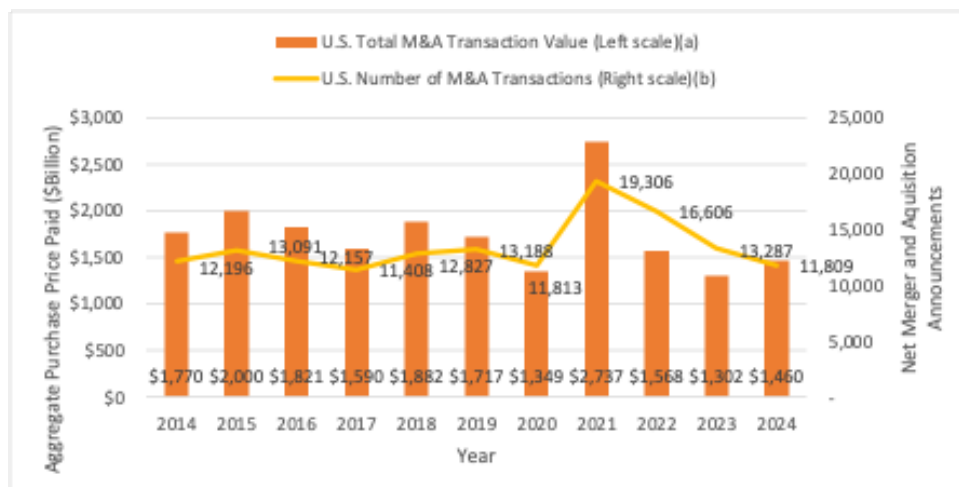
TIME PERIOD	RETURNS AS OF MAY 29, 2024	RETURNS AS OF MAY 11, 2025
5 DAYS	-.54%	-0.47%
1 MONTH	5.05%	5.53%
3 MONTHS	3.98%	-6.08%
YEAR TO DATE (YTD)	10.52%	-3.77%
1 YEAR	26.32%	8.37%

Source: *Market Watch*, MSNBC, <https://perma.cc/EX6G-R79U>, (last visited May 11, 2025).

[B] The General Trend in M&A Activity in the 2014–2024 Period

Figure 1-1B, Trends in U.S. Mergers and Acquisition Activity 2014–2024, 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 2014–2024



Source: (a) Net M&A Announcements 2005–2024, Right Scale, Line, 2025 *FactSet Review*, pg. 19; and (b) Purchase Price 2005–2024, Left Scale, Bar, 2025 *FactSet Review*, pg. 29

U.S. Number of M&A Transactions on the line, demonstrates that both value of deals and number of deals:

- (1) were fairly constant from 2014 to 2019;
- (2) experienced a fairly significant drop in 2020, during the COVID-19 crisis;
- (3) had a significant increase in 2021, a “post-real bad” COVID-19 year;
- (4) had a significant fall from 2021 to 2022 and from 2022 to 2023 in both number and dollar value of deals; and
- (5) from 2023 to 2024 had a fairly significant drop in number of deals but a slight increase in deal price.

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 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, but sort of holding up between 2023 and 2024.

As indicated in Figure 1-10, Recent U.S. M&A Volume Related to S&P 500 Index 2014–2024, 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. But, bucking this tendency: note that as shown in Figure 1-10, M&A activity was low in 2023 and 2024 even though the stock market did very well during those years.

As indicated in Figure 1-13, U.S. Payment Trends 2019–2024, 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, 2023, and 2024, 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 here, in significant part, 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, 2021, 2022, 2023,
and 2024

YEAR	ANNOUNCED DEALS	VALUE OF ANNOUNCED DEALS
2020	13,696	\$1.5 Trillion
2021	19,099	\$2.7 Trillion
2022	15,734	\$1.5 Trillion
2023	13,287	\$1.3 Trillion
2024	11,809	\$1.5 Trillion

Source: (a) Net M&A Announcements 2005–2024, *2025 FactSet Review*, pg. 20; and (b) Purchase Price 2005–2024, *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 from 2021 to 2022, clearly partially as a result of COVID. 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.²⁸

28. Moelis, *April 2023 M&A Environment*, *infra* section 1:7.46.

Note also that there was another fall in both number of deals and value of deals from 2022 to 2023. However, while there was a substantial drop in the number of deals from 2023 to 2024, there was a slight increase in the value of deals, probably indicating that in 2024 there were several large deals.

Figure 1-2, Percentage 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.

Figure 1-2
Percentage Change in U.S. Deals Volume and Percentage
Change in U.S. Number of Deals 2019–2024

Year/Factor	2019	2020	2021	2022	2023	2024
Percentage change in the US Deals Volume	-5%	-13%	73%	-50%	-18%	7%
Percentage Change in US No. of Deals	2.4%	-6.3%	48.8%	-17.6%	-19%	-14%
US \$100 Million to \$1 Billion Deals	878	802	1,250	867	694	711
US \$1 Billion + Deals	280	292	588	284	255	300

Source: Net Merger and Acquisition Announcements 2005 to 2024, Number of Deals 2005–2024, *2024 FactSet Review*, pg. 20; and (b) Purchase Price, 2005–2024, *2024 FactSet Review*, pg. 29

Note the “rollercoaster ride” in Figure 1-2; for example, the number of deals is (1) up dramatically from 2020 to 2021; and (2) down dramatically from 2021 to 2022, from 2022 to 2023, and 2023 to 2024. Note that the low point for \$1 billion plus deals was 2019, with 280 deals, and the high point was 588 deals in the 2021 post-COVID year.

Figures 1-3, Top Five Seller Industries Ranked by Number of Announcements 2024, and Figure 1-4, Top Five Seller Industries Ranked by Dollar Value of Offers 2024, provide information 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 [That Is, Target] Industries Ranked by Number of Announcements 2024

Rank By Number of Transactions	Industry	Number of Transactions
1	Technology services	2,440
2	Commercial services	1,610
3	Finance	1,475
4	Consumer services	849
5	Industrial services	785

Source: Sector Activity: Number of Transactions 2020–2024, 2024 *FactSet Review*, pg. 90

Figure 1-4
Top Five Seller [That Is, Target] Industries Ranked by Dollar Value of Offers 2024

Rank	Industry	Value (\$ in Millions)
1	Technology services	\$250,888
2	Finance	\$198,978
3	Health Technology	\$120,619
4	Energy Minerals	\$115,860
5	Consumer Services	\$110,879

Source: Sector Activity: Dollar Value Offered 2024, 2025 *FactSet Review*, pg. 92

The following industries are listed in both figures (that is, *Number of Announcements* and *Dollar Value of Offers*): Technology Services, Finance, and Consumer Services.

[C] The ABA’s Rather Muted Report on the Deal Count and Dollar Volume in 2025; and Slow Exits

The ABA’s *Looking Back and Looking Forward on M&A, December 2025*, explains that for 2025 “Deal count remain[ed] steady, which means [that] deal volume [was] affected by significant mega deal PE activity.”²⁹

²⁹ ABA, *Looking Back and Looking Forward on M&A, December 2025*, *infra* section 1:7.46, at Deal Count.

In addition, *Looking Back and Looking Forward* explains that “2025 [was] marked by creative searches for liquidity and exits.”³⁰ This means that many PE firms had a difficulty creating an exit (1) by a sale of the PE firm in an M&A transaction, the traditional exit method, or (2) by causing the PE firm to sell shares in itself in an Initial Public Offering (IPO), another common exit structure. Rather than these two common exit structures, many PE firms had to, among other things, turn to (1) the sale of a minority interest in the PE firm, or (2) the sale of a preferred stock interest in the firm.

Interestingly, *Looking Back and Looking Forward* also reports that both (1) “Long held companies [are] ready for exit (PE exits increased 40% in Q3 2025 from Q3 2024),”³¹ and (2) PE firms have “Lots of dry powder [i.e., cash equity] for PE [firms] to be . . . buyers.”³²

[D] Wachtell Lipton’s Rosy Picture of M&A Activity in 2025 and Rosy Projections for M&A Activity in 2026

In a December 17, 2025, news release, Wachtell Lipton painted the following very rosy picture of M&A activity in 2025 and projection for the direction of M&A activity in 2026.

In a year marked by not-insignificant change — geopolitical, economic, technological, regulatory and market — 2025 has been a year of much increased M&A activity, in the United States and around the world. M&A deal volume in the United States is on pace to reach approximately \$2.3 trillion, up 49% from 2024, and global M&A deal volume is expected to increase by over 25%. Notably, the number of very large M&A deals in the U.S. this year — four \$40 billion-plus deals year to date, up from zero such deals in 2024 — reflects a substantial increase in bolder transactions that may have been viewed as too risky in prior regulatory and market environments. Notwithstanding concerns around tariffs, inflation and ongoing global conflicts, the M&A market ends the year energized across numerous industries. With many deals, of all sizes, in the pipeline, we expect that 2025’s momentum will continue into 2026, even with a continued undercurrent of economic and political uncertainty. We review some key themes from 2025 and expectations of what may come in 2026.³³

30. *Id.* at 2025 Trends.

31. *Id.*

32. *Id.*

33. Wachtell, *M&A—Reviewing 2025 and Looking Ahead to 2026*, *infra* section 1:7.46.

Wachtell also explained that the year produced many “Mega Mergers:”

This year has witnessed the reemergence of the megadeal, with 63 deals globally worth \$10 billion or more through late November 2025, exceeding the prior annual high set a decade earlier. . . . Many of the largest transactions were announced in the second half of the year, after initial concerns regarding tariffs and their consequences subsided. Major transactions this year included [1] Union Pacific’s \$85 billion combination with Norfolk Southern, [and [2]] Netflix’s \$82.7 billion acquisition of Warner Bros.³⁴

The Warner Bros deal has not closed as of the writing of this section on February 1, 2026. This deal is discussed in greater detail in section 1:7.22[C], which is titled: *The 2025-2026 Fight Between Netflix and Paramount Skydance for the Acquisition of Warner Bros. Discover.*

[E] AO Shearman’s Rosy Picture of M&A Activity in 2025 and Rosy Projections for M&A Activity in 2026

A&O Shearman’s position regarding the state of M&A and related transactions in 2025 is similar to that of Wachtell. A&O Shearman explains: “[In 2025,] U.S. M&A [rose] sharply as big-ticket transactions return amid favorable policy developments.”³⁵ A&O Shearman goes on to explain: “Following a surge in U.S. M&A in the second half of 2025, hope for heightened activity in 2026 are high—even with the midterm elections on the horizon.”³⁶

[F] Sullivan & Cromwell’s March View that 2026 Could Be the Year of the Big Deal

In a March 31, 2026 Wall Street Journal article entitled *The Year is Off to the Strongest Start for Big Deals Ever*,³⁷ Frank Aquila, a Senior Partner at Sullivan & Cromwell, is quoted as saying:

If we get a bit of stability in the markets and the economy, the floodgates could open to a phenomenal M&A year where

34. *Id.*

35. AO Shearman, *Global M&A Insights, Fourth Quarter 2025*, infra section 1:7.46, at 6.

36. *Id.*

37. Ben Dummett and Lauren Thomas, *The Year is Off to the Strongest Start for Big Deals Ever*, Wall Street Journal (March 31, 2026), <https://perma.cc/ZND2-P4KP>.

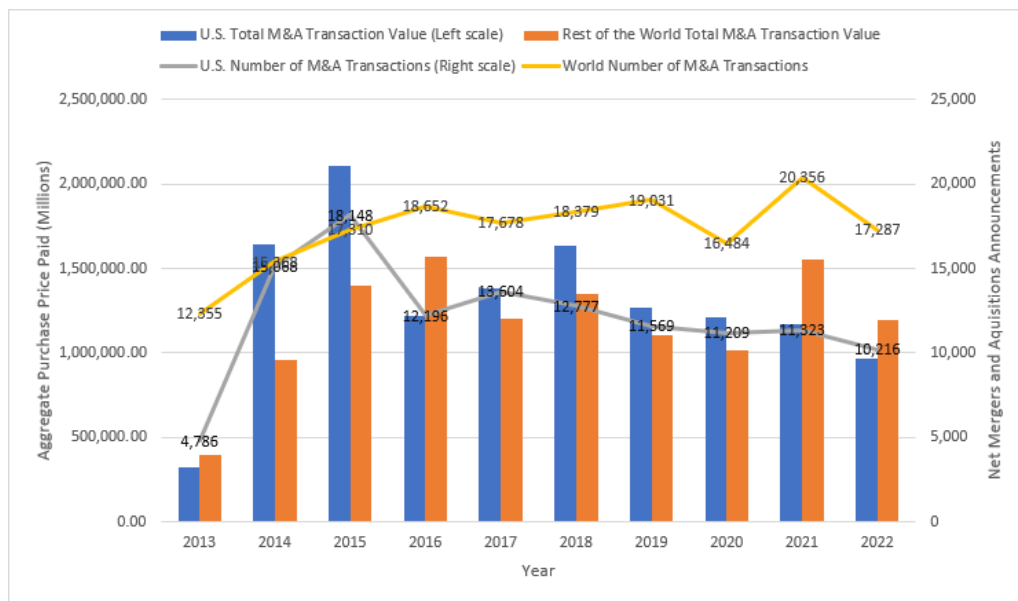
companies are doing \$100 million deals and \$2 billion deals, all the while the \$50- and \$100-billion deals continue[.]³⁸

§ 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,

38. *Id.*

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 Percentage Change in U.S. Number of Deals 2019–2024, from 2022 to 2023, there were significant drops in both U.S. Deals Volume and U.S. No. of Deals and a bit of a bounce back in 2024.

In Figure 1-5, the value of U.S. deals exceeded the value of foreign deals in all but one year (2015). In that 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 2024 View on the "M&A Market Durability"

In its 2024 report on M&A,³⁹ 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

39. See McKinsey & Company, *Top M&A Trends in 2024*, *infra* section 1:7.46.

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.⁴⁰

The McKinsey report also explains, as follows, that the macroeconomic conditions prior to the Trump Administration supported 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 shared by many investors who boosted stock market returns at the end of the year.⁴¹

Note, however, while the stock market went up dramatically, the level of M&A activity retreated under the last years of the Biden Administration. Additionally, as a result of the Trump Administration's pursuit of tariffs, as of May 2025, M&A activity is in a quiet period, as discussed in the next section.

[C] M&A Activity in Various Parts of the World

It is common for M&A professionals to analyze global M&A activity by breaking the world into the following four areas:

- APAC, which includes Asia and the Pacific;
- EMEA, which includes Europe, the Middle East, and Africa; with MENA including the Middle East and North Africa;

40. *Id.* at 2–3.

41. *Id.*

- LATAM, which includes Central America, including Mexico, South America, and Islands of the Caribbean; and
- NAMR, which includes North America (i.e., U.S. and Canada), Bermuda, and the Cayman Islands.

J.P. Morgan reports⁴² that during 2025 the following were the levels of M&A activity in each of these regions, from highest to lowest:

- NAMR, \$3.1T;
- EMEA, \$1.6T;
- APAC, \$1.4T; and
- LATAM, \$130B.⁴³

In commenting on this level of activity, J.P. Morgan explains, “[The] U.S. remained an M&A leader, commanding record premiums, while EMEA and APAC proved to be attractive markets, each shaped by unique policy shifts and country dynamics.”⁴⁴ J.P. Morgan’s report contains a map of the world showing the levels of M&A activity between various sections of the world.⁴⁵ It shows, for example, that:

- with respect to NAMR and LATAM, there was \$24B flow from NAMR into LATAM, and \$8B from LATAM into NAMR;
- with respect to NAMR and EMEA, there was \$194B flow from NAMR into EMEA, and \$247B from EMEA into NAMR; and
- with respect to NAMR and APAC, there was \$59B flow from NAMR into APAC, and \$144B from APAC into NAMR.⁴⁶

Thus, with respect to both EMEA and NAMR, in 2025, there was more inbound M&A activity than outbound activity. This would seem to show that a significant part of the business world considers the U.S. an attractive place in which to do business. Confirming this observation, another table entitled *Cross-Border M&A Volume by Country* shows that for both 2024 and 2025, the U.S. was both the top Acquirer Country and top Target Country.

42. See J.P. Morgan, *2026 Global M&A Annual Outlook*, infra section 1:7.46, at page 2.

43. *Id.*

44. *Id.* at 4.

45. *Id.* at 12.

46. *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

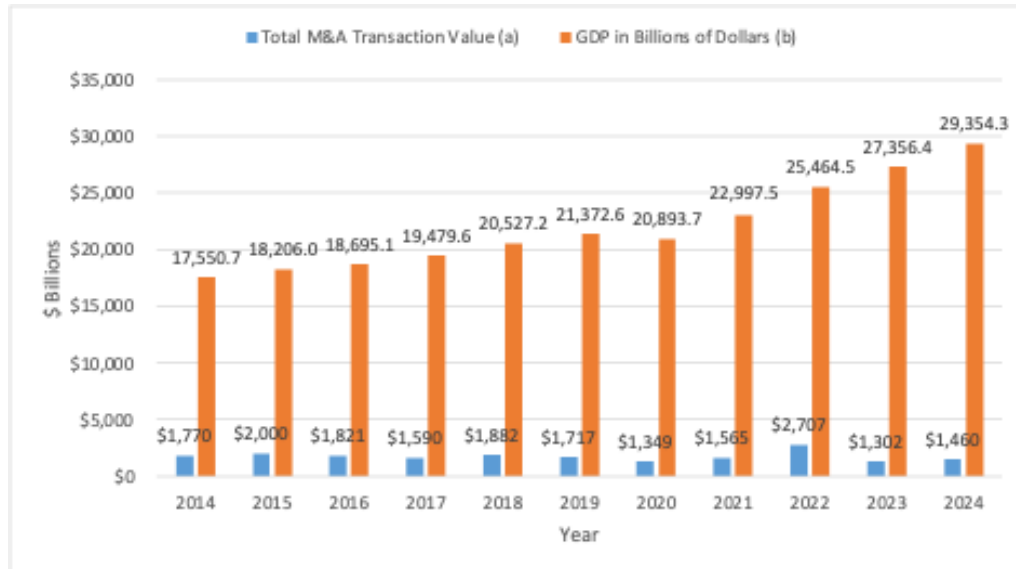
[A] What Is GDP and What Does It Have to Do with M&A

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 U.S. 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 Through 2024

Figure 1-6, U.S. M&A Volume Related to Aggregate GDP 2014–2024, shows the relationship between (1) aggregate GDP for the period from 2014 through 2024, 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 2014–2024



Sources: (a) Transaction Value 2014–2024, Left Bar, *2025 FactSet Review*, pg. 29 (b) Gross Domestic Product, Right Bar, *Economic Report of the President*, January 2025; Table B-3 Gross Domestic Product; GDP in billions of dollars; pg. 390

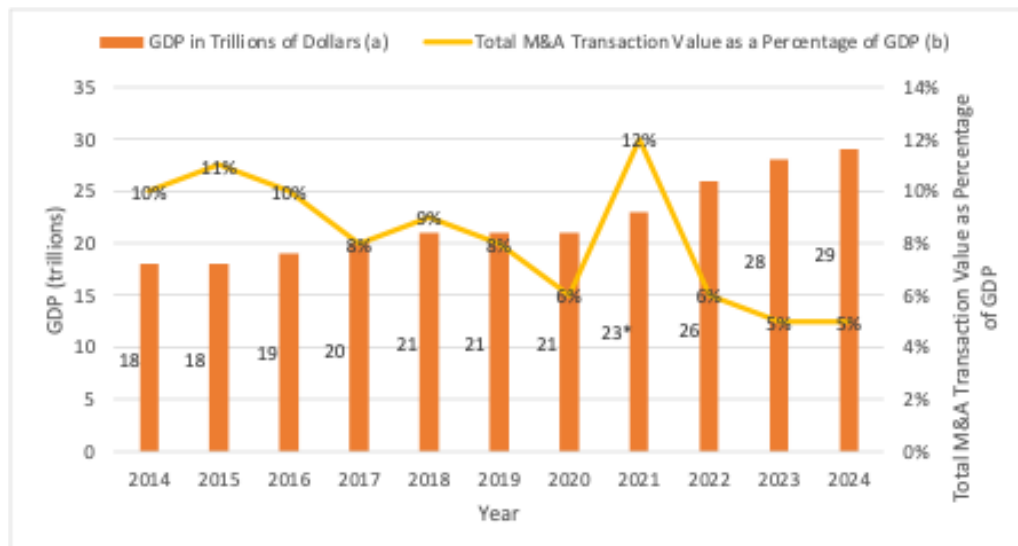
Figure 1-6 shows that M&A deal volume tends to move in lockstep with the growth or decline in GDP. Note that during 2020, the heart of the

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, for 2023 and 2024, although GDP continued to grow, deal volume declined, largely, at least in 2023, as a result of the Fed's increase in interest rates in its fight against inflation.

[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 2014–2024, 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 2014–2024



Sources: (a) Gross Domestic Product (GDP), the bars, *Economic Report of the President*, January 2025, Table B-3 Gross Domestic Product, GDP in billions of dollars, pg. 390; (b) The transaction value percentages are computed by dividing (1) the relevant year's "Total M&A Transaction Value" in Figure 1-6, which is \$1.5 Billion for 2024, by (2) the "GDP in Billions of Dollars," for the applicable year, which is \$29.4 Billion for 2024. Thus, for 2024 this number is 5%.

As seen in Figure 1-7, measured as a percentage of GDP, deal value (1) significantly increased from 2020 to 2021, (2) significantly decreased from 2021 to 2022, and (3) stabilized at 5% for 2023 and 2024. Note that these are the lowest levels of M&A activity relative to GDP during the

entire period from 2014 to 2024. Clearly, the significant increase in interest rates is one of the big reasons for the significant decline in M&A activity from 2021 to 2022.

One might ask, why did GDP keep growing from 2021 through 2023, while M&A activity kept 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 form of consideration paid 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.

Also, the Trump tariffs are almost certain to have an adverse impact on M&A activity, because, inter alia, tariffs present uncertainty and uncertainty creates caution in business decision-making.

[D] Early Estimate for 2025 of the Relationship Between [1] Annual M&A Volume, and [2] Global GDP Volume

A table in ABA, *Looking Back and Looking Forward on M&A, December 2025*, demonstrates that from 2024 to 2025 there was an increase in Global M&A activity as a percentage of Global GDP from approximately 3% in 2024 to about 4% in 2025.⁴⁷ This document also reports that the “M&A cycle [is] still at an early stage with indicators suggesting it could reach \$5tr in volumes,”⁴⁸ and that “[s]trategics [i.e., operating firms like IBM] [are] increasingly pursuing large, industry-defining transactions that will reshape the competitive landscape, while mid-market [M&A] remains subdued.”⁴⁹

As indicated, one reason for increased merger activity among “strategics” is the Trump II’s more relaxed approach to antitrust enforcement.

§ 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 2014–2024, 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.

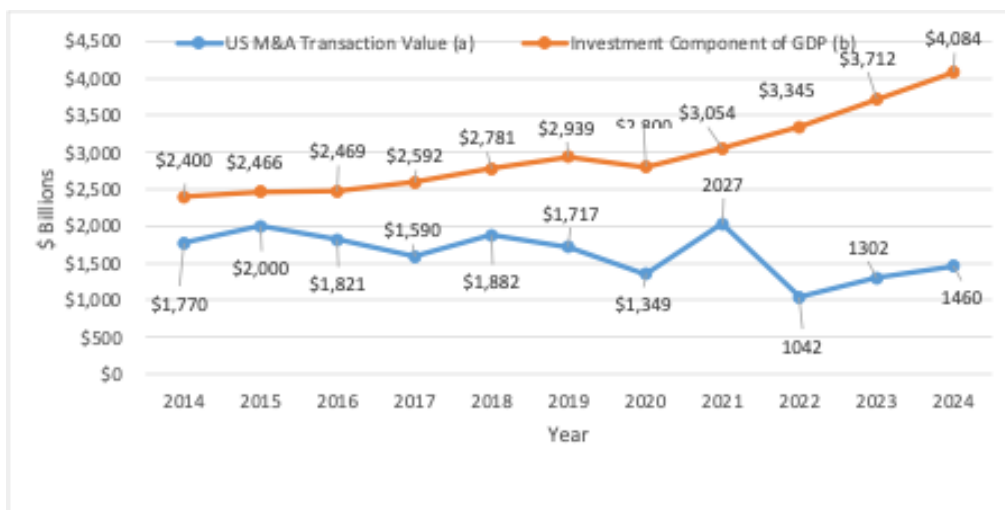
47. ABA, *Looking Back and Looking Forward on M&A, December 2025*, *infra* section 1:7.46, a page 1.

48. *Id.*

49. *Id.*

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, inter alia, from 2021 through 2022, firms were building capacity by investing in plants and equipment, while at the same time there was a decrease in M&A activity. The graph also shows that in both 2023 and 2024, there was a slight increase in M&A activity, which is also captured in Figure 1-1B, Trends in U.S. Mergers and Acquisition Activity 2014–2024.

Figure 1-8
Recent U.S. M&A Volume Related to the Nonresidential Investment Component of GDP 2014–2024



Sources: (a) U.S. M&A Transaction Value [that is, Purchase Price], 2005–2024, *2025 FactSet Review*, pg. 29; (b) Investment Component of GDP, *Economic Report of the President*, Jan. 2025; Table B-3 Gross Domestic Product; GDP in Billions of Dollars, pg. 290

Also, Figure 1-9, Recent U.S. M&A Percentage Change in Deal Volume Related to Investment Component of GDP 2018–2024, presents the percentage changes in these two metrics for the period 2018 through 2024.

Figure 1-9
Recent U.S. M&A Percentage Change in U.S. Deal Volume Related to Nonresidential Investment Component of GDP 2018–2024

Year	2018	2019	2020	2021	2022	2023	2024
Percentage change in	19%	-5%	-13%	73%	-50%	-14%	7%

US Deals Volume (a)							
Percentage Change in Investment Component of GDP (b)	7.40%	4.88%	-4.21%	8.11%	10.58%	10.98%	5%

Sources: (a) Purchase Price 2005–2024, *2025 FactSet Review*, pg. 29 (b) *Economic Report of the President*, Jan. 2025; Table B-3 Gross Domestic Product; GDP in billions of dollars; pg. 396

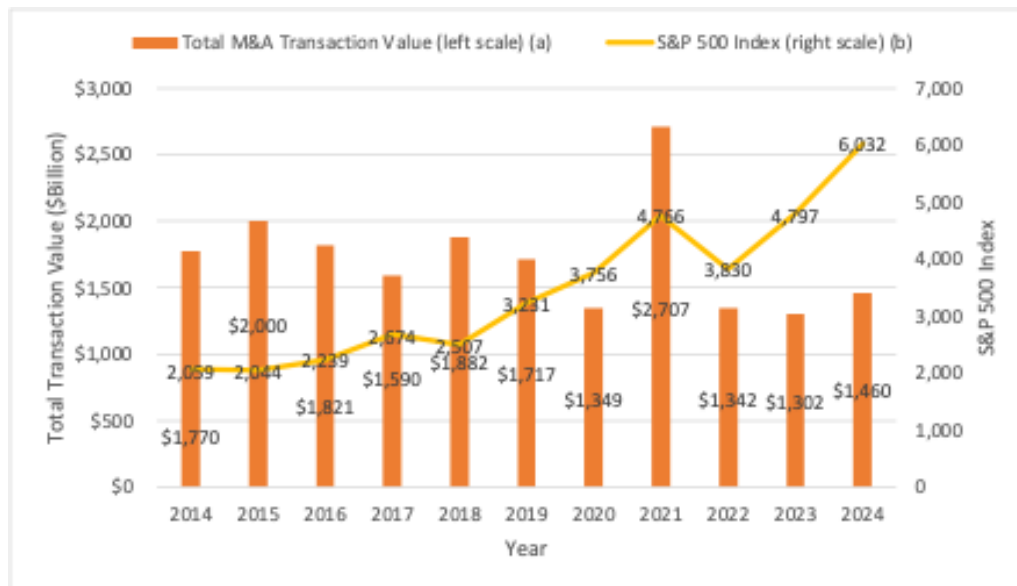
Figures 1-8 and 1-9 show that spending on M&A is much more volatile, on both the upside and the downside, than spending on Nonresidential Investment. This is another indication that, as a general matter, a strong economy means an even stronger M&A marketplace, and a weak economy means an even weaker 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 Trends in U.S. and Worldwide M&A Activity

[A] In General

Figure 1-10, U.S. M&A Volume Related to S&P 500 Stock Index 2014–2024, shows the aggregate value of U.S. M&A over this period as compared with movements in the S&P 500 over the same period.

Figure 1-10
Recent U.S. M&A Volume Related to S&P 500 Index 2014–2024



Sources: (a) Purchase Price 2002–2024, 2025 *FactSet Review*, pg. 29 (b) *Economic Report of the President*, Jan. 2025, Table B-56 Common stock prices and yields, 2000–2024; pg. 453

Figure 1-10 shows that from 2014 through 2019, 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*”⁵⁰ 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. After the jobs report from April 2021 revealed a much shakier labor recovery might be on the horizon, major indexes hit new highs.⁵¹

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*, as shown in Figure 1-10. These decreases were likely the result of the Federal Reserve increasing interest rates in its fight against inflation. Even though the Fed was successful in 2022 and 2023 in fighting inflation with higher interest rates, the M&A marketplace, while holding steady, has not approached its post-COVID 2022 high.

50. See Emily Stewart, *Why Stocks Soared While America Struggled*, VOX (May 10, 2021), <https://perma.cc/WZ3A-RB4F>.

51. *Id.*

[B] Paul Weiss Report on 2025 Deal Count and Deal Volume

In its *M&A at a Glance, 2025 Year End Roundup*,⁵² the Paul Weiss law firm presents the following picture of both M&A Deal Count and M&A Deal Volume (i.e., purchase price paid) during 2025 for both the U.S. and the World:

Figure 1-10A
U.S. and Global Deal Count and Deal Volume for 2025

U.S./Global Transactions	Number of Deals	Value of Deals (Deal Volume)
U.S.	11,000, down 1.9% from 2024	\$2.5T, up 60.7% from 2024
Global	41,229, down 2% from 2024	\$4.9T, up 45.5% from 2024

Source: Paul Weiss, Jan. 2026 *M&A at a Glance*, *infra* section 1:7.46.

It is interesting to note that both in the U.S. and in the World, for 2025, Deal Volume was dramatically up, while Deal Count was down slightly.

§ 1:7.10 FactSet's Overall Assessment of M&A Activity Over the 20-Year Period Ending in 2024

The *2025 Fact Set Review* makes the following point about the path of M&A activity over the past twenty years:

Over the past 20 years, M&A activity has seen three periods of downturns. From 2005 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 and 2024, likely due to interest rate hikes by the U.S. Federal Reserve, which resulted in increased costs for financing M&A activity. M&A activity in 2024 was at its

52. See Paul Weiss, Jan. 2026 *M&A at a Glance*, *infra* section 1:7.46.

lowest levels since 2013, but total deal value increased from 2023.⁵³

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: [1] Public Domestic; [2] Foreign; [3] Divestiture, Including Spinoffs; [4] Private Deals; and [5] Financial Institution (e.g., Bank Deals

[A] In General

Figure 1-11, Breakdown of U.S. M&A Activity by Type of Transaction: Number of Deals and Deal Value 2020–2024, provides a breakdown on the type of M&A deals for the years 2020 through 2024. The deals are divided into the following four categories:

- Public Domestic Targets, that is, publicly-held targets,
- Foreign, All Transactions,
- Domestic Divestitures, which include spinoffs; and
- Privately-Held Domestic Targets.

Spinoffs and Bank deals are discussed in separate sections below. “Divestitures” involve, inter alia, situations in which (1) a company sells an unwanted division, and (2) a company transfers a business to a newly formed subsidiary and then transfers the stock of the newly formed subsidiary to the parent’s shareholders in what is called a “spinoff.” Spinoffs and related transactions are discussed in chapter 15.

Figure 1-11
Breakdown of U.S. M&A Activity by Type of Transaction:
Number of Deals and Deal Value 2020–2024

Year	Public Domestic Targets	Foreign, All Transactions	Domestic Divestitures, Including Spinoffs	Privately Held Domestic Targets

53. 2025 FactSet Review, *infra* section 1:7.46, at 19.

	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)
2020	169	504.0	601	276	1,030	287.4	1,350	519
2021	264	570.1	818	663	1,112	480.7	2,027	975
2022	216	653.4	643	375	903	230.2	1,146	296
2023	234	603.8	551	219	917	239.7	800	304
2024	238	577.7	527	281	852	252.3	751	349

Source: Composition of Net Merger and Acquisition Announcements, 2025 FactSet Review, pg. 31

Note that from 2021 to 2022, which included the COVID-19 year, 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 can be significantly more than the aggregate deal value of private deals. For example, for 2024, there were 238 acquisitions of publicly held U.S. targets for a total of \$577.7 billion, while, on the other hand, in the same year, there were 751 (this number seems very low)⁵⁴ acquisitions of privately held targets for a total consideration of \$349.6 billion. The point here is that, as a general matter, the aggregate annual dollar value of public M&A deals generally will exceed, by a wide margin, the annual dollar value of private M&A deals.

In a section of a PWC January 2025 analysis of M&A entitled “Divestitures to drive business transformation,”⁵⁵ PWC reports:

54. Note that the number of Privately Held Domestic Targets in this Figure 1-11, which is based on 2025 FactSet Review, is significantly lower than the number of Private Targets in Figure 1-15, Acquisitions of Privately Owned Companies 2018–2024. The actual number has to be the number in Figure 1-15. For example, the number of such transactions in Figure 1-11 for 2024, which is 741, is a fraction of the number of such transactions in Figure 1-15 for 2024, which is 8,859. The other FactSet data in this Figure 1-11 appears to be accurate.

55. See Brian Levy, *M&A in 2025: Big deals, winning hands, and wild cards*, PWC 2025 OUTLOOK: GLOBAL M&A INDUSTRY TRENDS (Jan. 28, 2025), <https://perma.cc/NUZ8-ZUAK>.

Another trend we expect to see more of in 2025 is the refining of corporate portfolios as companies look to fill capability gaps and divest non-core or low-growth assets. In sectors including the industrials, consumer health and entertainment, among others, large corporates have been separating themselves from non-core business, either through spin-offs or sales. Recent examples include [1] GE's split [in a tax-free spinoff] into three public companies; [2] Sanofi's decision to transfer a controlling stake in its consumer health business, Opella, to CD&R, and [3] Comcast's plan to spin off [in a tax-free spinoff] its NBCUniversal cable TV networks, along with complementary digital assets.⁵⁶

[B] In General

[B][1] *In General*

The ABA's *2025 Looking Back and Looking Forward*⁵⁷ provides the following observations on spinoffs and other divestitures during 2025:

- Spinoffs and divestitures up roughly 31% to about \$915.5B through Q3 FY 2025, highest since Q3 FY 2021; break-ups represent a core lever for portfolio sharpening and funding growth.
- Several of the year's most prominent moves dismantle prior megamergers as boards reassess synergy delivery, complexity costs, and strategic fit.⁵⁸

It should be noted that since spinoffs generally involve the transfer by a parent corporation of a subsidiary to the shareholders of the parent, there generally will not be any significant antitrust issue, because, if anything, there is likely to be more, rather than less, competition.

[B][2] *The 2025-2026 Kraft Heinz Spinoff*

One of the largest and most visible recent spin-offs is the spinoff announced in September 2025 by Kraft Heinz, part of Warren Buffett's conglomerate.⁵⁹ The News Release announcing the deal reports in part:

56. *Id.*

57. See ABA, *Looking Back and Looking Forward on M&A, December 2025*, *infra* section 1:7.46.

58. *Id.*

59. See News Release, *The Kraft Heinz Company Announces Plan to Separate into Two Scaled, Focused Companies to Accelerate Profitable Growth and Unlock Shareholder Value*, KRAFTHEINZ (Sept. 2, 2025), <https://perma.cc/3SQT-QYB9>.

The Kraft Heinz Company Announces Plan to Separate into Two Scaled, Focused Companies to Accelerate Profitable Growth and Unlock Shareholder Value

- Transaction creates two scaled public companies with portfolios of iconic brands, leading capabilities, attractive financial profiles and unique value creation models
- Both companies will have greater strategic and operational focus to serve customers, delight consumers and accelerate performance⁶⁰

[C] Bank Acquisitions in 2025: “Not So Hard to Do!”

As discussed in chapter 17, acquisitions of banks, bank holding companies, and related firms present substantial regulatory issues, which can involve, inter alia, (1) the Comptroller of the Currency, which is part of the U.S. Treasury Department, (2) the Federal Reserve Board, and (3) state bank and insurance regulators. These regulators can make it “hard” or “not so hard” for parties in these industries to get M&A transactions completed.

As would be expected, the general approach of the Biden administration was to make it “not so easy” to get these deals done. Also, as would be expected, the Trump II administration is likely to be “not so hard” on these deals. The following discussion by Wachtell Lipton of this issue in December of 2025 describes the “not so hard” approach of the Trump II Administration:

Lift-off for Bank M&A. This year has also seen a sea change in regulatory receptivity for consolidation in the banking sector. Much has been written about quicker regulatory approvals, but the change in the banking sector is more fundamental. There is a consensus forming among the U.S. bank regulators that consolidation can result in a stronger, more efficient and more stable industry. In addition to the completion of Capital One’s \$35.3 billion acquisition of Discover in May, this year has seen a number of substantial regional bank transactions[.]⁶¹

Wachtell goes on to express the following opinion on this approach:

The welcome shift of focus of bank regulators away from micromanaging banks toward material financial risks has also given reason for optimism in acquiring and growing banking

60. *Id.*

61. Wachtell, *M&A—Reviewing 2025 and Looking Ahead to 2026*, infra section 1:7.46.

franchises. During 2025, M&A also remained active across the broader financial services sector in asset management, insurance, payments, fintech and other areas.⁶²

The Sullivan & Cromwell law firm, which represented Capital One, the acquirer, in the acquisition of Discover, describes the transaction as follows:

Discover Financial Services has merged with Capital One Financial in a \$50.6 billion all-stock transaction that combines Capital One's scale in credit cards and banking with Discover's vertically integrated global payments network, enhancing the combined company's ability to compete with the nation's largest credit card networks.

Discover's payments network accounts for more than 70 million merchant acceptance points in more than 200 countries and territories. The merger provides additional capital to scale Discover's customer network and allows Capital One to work directly with merchants and leverage its customer base, technology, and data ecosystem to drive more sales.⁶³

It is almost certain that if Senator Harris had won the election for President, this deal would not have been approved in May of 2025.

Although, as indicated elsewhere, this author is a strong supporter of enforcement of the antitrust laws against mergers that threaten competition, from what this author has learned about the Capital One-Discover Deal from discussions of it in my M&A class, he does not think the transaction posed any meaningful risk of higher prices for consumers.

§ 1:7.12 Recent (1) P:E Ratios.⁶⁴ (2) Premiums Paid, and (3) Revenue Metrics in U.S. Public Deals

[A] In General

Figure 1-12, U.S. P:E Ratio and Premiums Paid, shows the following information for acquisitions of publicly-held targets during that period:

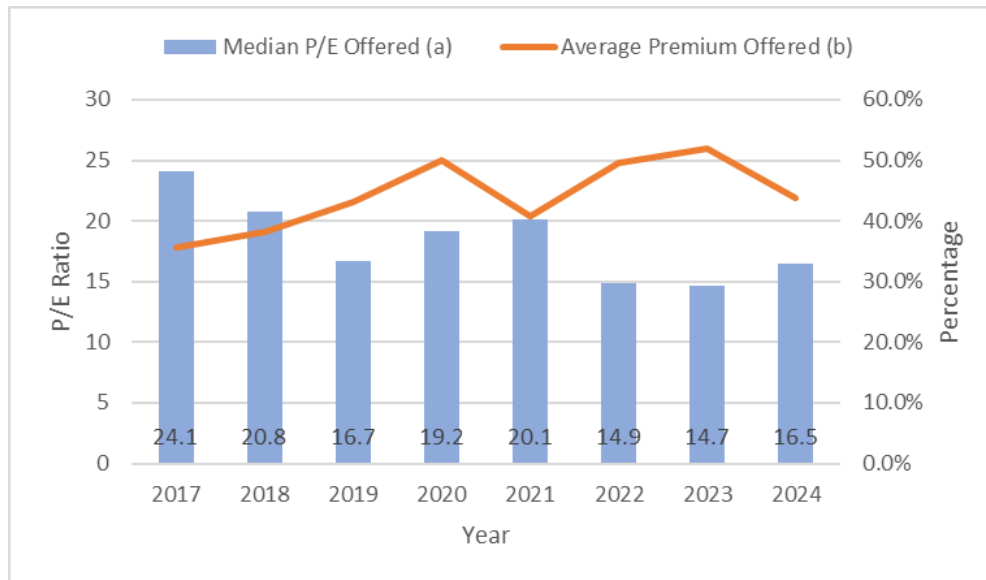
62. *Id.*

63. *Discover Completes \$50.6 Billion Merger with Capital One*, SULLIVAN & CROMWELL: FIRM HIGHLIGHTS (May 18, 2025), <https://perma.cc/37S4-BJV5>.

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

- (1) the ratio of the price offered by the acquirer to the target’s earnings, that is, the “Price to Earnings” (P:E) Ratio,⁶⁵ 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.”

Figure 1-12
U.S. P:E Ratio and Premiums Paid 2017–2024



Sources: (a) Distribution of P/E Ratios Offered 2018–2024, 2025 FactSet Review, pg. 39 (b) Percentage Premium Offered 2015-2024 for 2024, 2024 FactSet Review, pg. 44

Figure 1-12 shows that except for 2017, 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 approximately 36% to 52%. To be clear, this shows that during this period, in public M&A deals, on average, the price paid over the trading value of a public target’s stock ranged from 14.7% to 24.1%

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-

65. Valuations are high in some countries. In mid-January 2025, the forward price-to-earnings ratio for US stocks (based on the S&P 500) was 22.87, compared with 13.67 for non-US international stocks (based on the S&P International 700).

19 crisis, both the Median P:E Offered and Average Premium Offered would have declined, but the reverse was 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, came back to a significant extent from 2021 to 2023, and then fell from 2023 to 2024. The lesson for sellers and buyers: make sure you understand, *inter alia*, both the most recent (1) Median P:E Offered, and (2) the Average Premiums Offered.

A PWC analysis of valuations as of January 2025⁶⁶ reports the following on valuations based on the “forward price-to-earnings ratio” (that is, a ratio calculated by dividing (1) the current stock price by (2) an estimate of future earnings per share (EPS)):

In mid-January 2025, the forward price-to-earnings ratio for US stocks (based on the S&P 500) was 22.87, compared with 13.67 for non-US international stocks (based on the S&P International 700).⁶⁷

[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 1.⁶⁸ This means 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.⁶⁹

66. See Levy, *supra* note 46.

67. *Id.*

68. Houlihan Lokey, *M&A Market Overview*, at Slide 14: *Transaction Multiples Are Still High* (Jan. 2009).

69. Litera, *2023 M&A Report*, *infra* section 1:7.46, at 12.

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 (that is, 2023), 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.⁷⁰

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.⁷¹

The Litera article has an interesting table that shows the number of deals that have been completed over the years prior to 2024 by several PE firms, including (1) Shore Capital Partners at 586; (2) The Carlyle Group at 485, and (3) KKR at 438.⁷²

[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 multiple.⁷³ The graph shows, inter alia, that for this EV to

70. *Id.*

71. *Id.* at 13.

72. *Id.* at 14.

73. PitchBook, *2022 Global M&A Report*, *infra* section 1:7.46, at 7.

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 500.⁷⁴

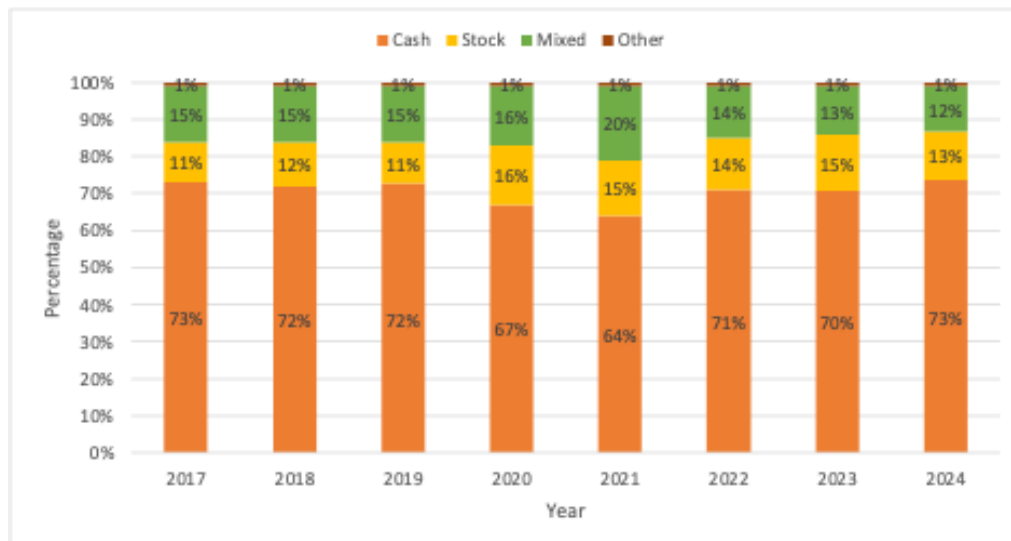
Note that in both cases the M&A multiple was higher than the S&P 500 multiple, which will be true virtually in every case because acquirers have to pay a price that is higher than the going market price in order to get a sufficient number of a target's shareholders to accept the transaction.

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

[A] General Principles

Figure 1-13, U.S. Payment Trends 2017–2024, sets out, for the applicable years, the percentage of transactions funded with the following types of consideration: cash, stock, mixed, and other.

Figure 1-13
U.S. Payment Trends 2017–2024, with (1) Cash Consideration, Followed by (2) Stock, (3) Mixed and (4) Other, from Bottom to Top



Source: Payment Trends 2014–2024, *2025 FactSet Review*, pg. 35

Figure 1-13 shows that, in each of the years covered, cash was the sole consideration offered in 64% and 73% of the transactions, and stock was the sole consideration in 11% 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

74. *Id.*

chapter 14, most acquisitions by private equity firms are either leveraged buyouts (LBOs) or management buyouts (a form of LBO) 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 2020 and 2024, the maximum number of publicly held targets in one year was 264, whereas the maximum number of private deals was 800.⁷⁵ Only in a subset of these transactions was the consideration paid principally 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.

[B] Taxable and Tax-Free Acquisitions: A Brief Introduction

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 of 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, pursuant to a complex formula, on the cash (but not on the stock) received.

Figure 1-13, U.S. Payment Trends 2017–2024, shows that for the periods presented, "Stock Only" deals were only between a low of 11% of deals and a high of 16% of deals. In many situations in which an elderly founder is disposing of a controlled corporation, the consideration will be structured as a tax free stock deal, rather than a taxable cash deal. This will allow the founder to hold the acquirer's stock until death, thereby resulting in a step up in basis of the stock in the hands of the founder's beneficiaries, which will avoid taxes on capital gain.

§ 1:7.14 Recent U.S. Payment Trends: Cash, Stock, Mixed, and Other

[A] In General

Figure 1-14, Acquisitions of Domestic and Foreign Publicly Traded Companies 2018–2024, provides the following information on acquisitions of publicly-held targets in each of the years 2018 through 2024:

75. In the author's judgment, this 800 figure is far too low.

- 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 2018–2024

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%
2024	342	\$676	72%	20%	7%	0%	45%

Sources: (a) Acquisitions of Publicly Traded Companies 2010–2024, *2025 FactSet Review*, pg. 57; (b) Acquisitions of Publicly Traded Companies by Method of Payment 2020–2024, *2025 FactSet Review*, pg. 58; (c) Going Private 2015–2024, *2025 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 2024, 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 20% of deals in 2024. Note that the percentage of stock paid in these public company acquisitions (that is, 20% to 34%) is, on average, much higher than the percentage of stock issued in acquisitions generally (that is, 11% to 16%), which is set out above in Figure 1-13, U.S. Payment Trends 2017–2024.

[B] The Tendency for Acquirers in Public Deals to Overpay:
The Salesforce-Slack Deal

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.⁷⁶

[C] Trump II's Potential Revision of Certain SEC Reporting Requirements

The SEC under Trump II has indicated that it is considering the relaxation of certain SEC reporting rules. On this issue, Wachtell explains:

76. Alex Wilhelm & Ron Miller, *Salesforce Slumps 8.5% As Its Post-Slack Selloff Continues*, TECH CRUNCH (Dec. 2, 2020), <https://perma.cc/E29Z-WANH>.

[T]he U.S. Securities and Exchange Commission has signaled several potential changes that are expected to be beneficial to public companies, such as easing disclosure obligations for smaller companies, ending mandatory quarterly reporting and creating more optionality for companies to exclude shareholder proposals from their proxy statements.⁷⁷

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

[A] In General

Figure 1-15, Acquisitions of Privately Owned Companies 2018–2024, 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 2018–2024

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%
2024	8,859	\$422	64%	18%	15%	0%

Sources: (a) Acquisitions of Privately Owned Companies 2015–2024, *2025 FactSet Review*, pg. 66; (b) Acquisitions of Privately Owned Companies by Method of Payment 2020–2024, *2025 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. During this period, the Total Dollar Value jumped from \$588 billion to \$1,248 billion and fell way back to \$337 billion in 2023, the lowest level in this six-year period.

77. Wachtell, *M&A—Reviewing 2025 and Looking Ahead to 2026*, infra section 1:7.46.

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 64% in 2024. On the other hand, the number of all-stock deals for such firms held steady at 18% in the years 2020, 2021, 2022, and 2024.

[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 had proposed to eliminate the "step-up in basis at death" rule in certain cases involving large estates, but with Trump in the White House and Republican control of Congress, there is virtually no chance of that proposal becoming law.

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

[A] Introduction

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) invest 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.⁷⁸

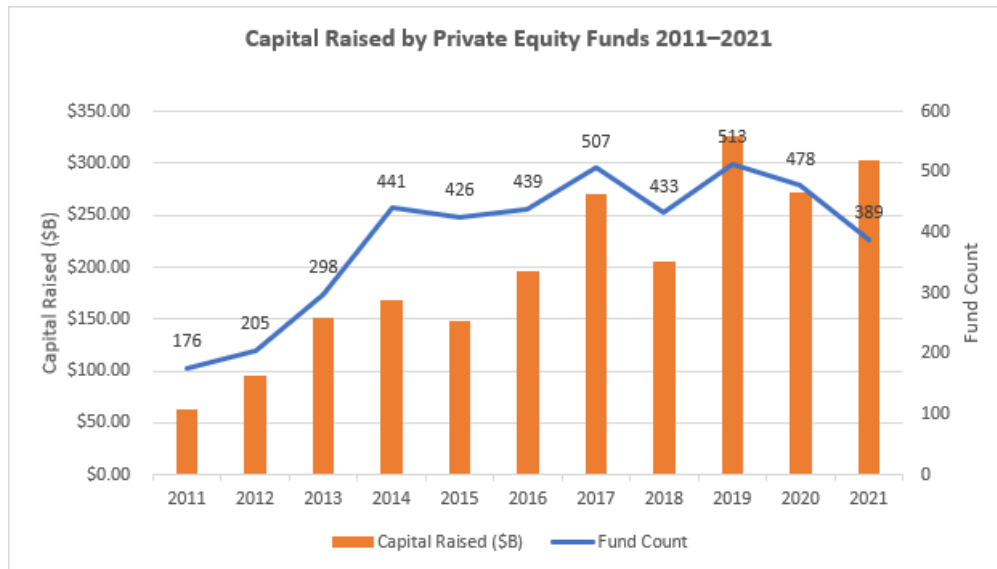
[B] PE Firms Are “on the Clock”

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.

[C] Capital Raised by PE Funds Generally

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



78. *Private equity*, PWC US DEALS 2023 OUTLOOK, <https://perma.cc/XVX2-JPG4>, (last visited June 13, 2023).

Source: PitchBook 2021 US PE Breakdown, PE Fundraising Activity by Year (As of Dec. 31, 2021) at p. 43, https://files.pitchbook.com/website/files/pdf/2021_Annual_US_PE_Breakdown.pdf

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 2023.⁷⁹

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. This brings us to an analysis of PE investing in 2025 by McKinsey.

[D] McKinsey's View on PE Investing in 2025

McKinsey's *M&A Annual Report* for 2025⁸⁰ presents the following picture of PE investing at the beginning of 2025:

The special role of private equity

One of the most compelling forces that could boost M&A in 2025 involves private equity (PE). Financial investors, which historically served as a huge engine to power M&A, have a substantial incentive to stir from their relative torpor of recent years. Dry powder [that is, funds raised but not yet invested] has reached extraordinary levels (estimated at more than \$2 trillion globally). Meanwhile, exits [that is, sales of PE held firms] beckon as investors look for ROI [Return on Investment] vintages that have remained bottled up far longer than anyone anticipated. For example, average exit hold times [that is, the period a target was held before it was sold in an exit transaction] reached an all-time high of 8.5 years in 2024—more than double the 4.1 years seen in 2007.

Although sponsor-led contributions to M&A volume are beginning to match or even exceed historical levels, their current contributions are considerably lower than those seen in the M&A highwater year of 2021, suggesting that there's still room for growth. For example, PE's contribution to M&A volume in the Americas in 2024 stood at \$398 billion (22

79. PitchBook, *May 2023 PE Breakdown*, at 37; PE deal activity by quarter, *infra* section 1:7.46.

80. See McKinsey & Company, *M&A Annual Report 2025*, *infra* section 1:7.46.

percent of M&A activity), down from \$865 billion (28 percent of activity) in 2021.⁸¹

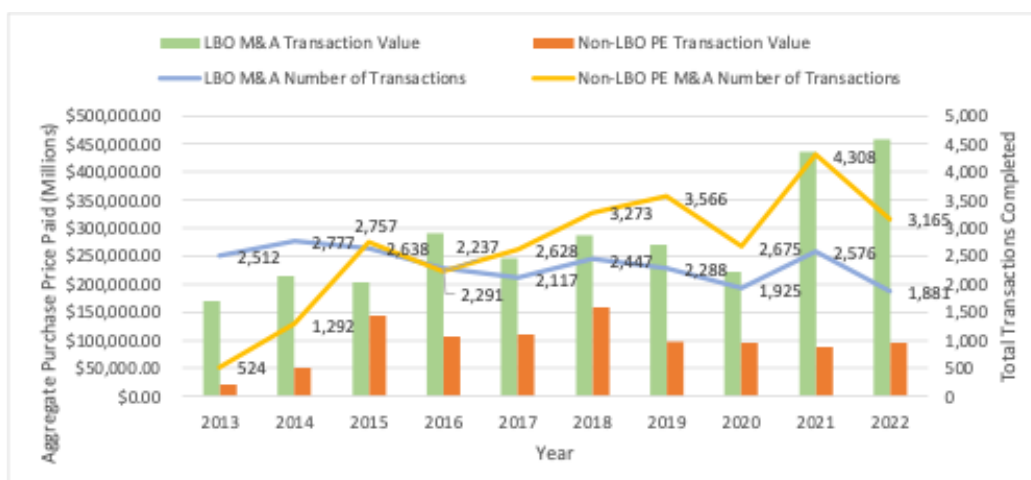
With respect to early 2025, McKinsey reports with respect to the consumer sector, which is also likely to be true in other sectors as well:

Financial buyers, for their part, are likely to be active . . . particularly given private equity (PE) funds’ proven ability to improve operational performance and create meaningful value. PE funds also hold substantial dry powder.⁸²

[E] Relationship Between LBOs and PE Activity

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

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.

81. *Id.*

82. *Id.* at 33.

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, no doubt, was attributable to a few large transactions.

[F] Cov-Lite Bonds

“Cov-Lite” bonds are corporate bonds that do not contain significant covenants saying that the borrower (1) must do this (that is, an affirmative or maintenance covenant), and (2) cannot do that (that is, a negative covenant). For example, a maintenance covenant could provide that a target must “maintain” a debt to EBITDA⁸³ ratio of less than five times EBITDA. Thus, if the target has EBITDA of \$100M, its debt cannot exceed \$500M.

A March 2023 LexisNexis article focusing on the “Trends in Covenant-Lite Loans”⁸⁴ 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 [that is, the loan is based on the expected cash flows] and asset-based lending [that is, the loan is based on the value of an asset, such as a building]. 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.⁸⁵

This 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.”⁸⁶ On the other hand, as would be expected with the increase in interest rates in 2022, the article

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

84. See *Trends in Covenant-Lite Loans: Q4 2022 Update*, LEXISNEXIS: LEGAL INSIGHTS (Mar. 7, 2023).

85. *Id.*

86. *Id.*

points out that the “percentage of covenant-lite deals fell during Q4 2022.”⁸⁷

[G] 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% gross return on its \$30M investment. On the other hand, if the equity was \$50M and the debt was \$50M, the PE firm receives \$60M after paying the \$50M of debt, a 20% gross return on its \$50M equity investment.

[H] The ABA Report on 2025 LBO, that is Private Equity
(PE) Activity

With respect to LBO activity in 2025, the ABA’s *Looking Back and Looking Forward on M&A, December 2025*⁸⁸ report makes the following points:

[LBO activity] [c]ontinued [to] rebound in sponsor [such as the KKR PE firm] activity driven by large take-private deals [i.e., LBOs involving acquisitions of public companies] and sponsors and SWFs [i.e., Sovereign Wealth Funds, such as the Saudi SWF, which are discussed below], underwriting larger LBO transactions.⁸⁹

While many LBOs done in the past were highly leveraged transactions, some, for example with 90% or more debt, the ABA’s report shows that from 2021 through 2025, the debt used in LBOs ranged from a

87. *Id.*

88. See ABA, *Looking Back and Looking Forward on M&A, December 2025*, *infra* section 1:7.46, a page 4.

89. *Id.* at 4.

low of 49% to a high of 54%.⁹⁰ Obviously, with higher levels of debt the potential for the target's shareholders to gain significantly increases but so does the risk of loss. This author thinks that there must be a large number of LBOs that are highly leveraged, thus giving the shareholders the opportunity for significant gains. Interestingly, there has been a steady increase in both Global and U.S. PE deals from about the second quarter of 2023 through the third quarter of 2025.⁹¹

[I] Wachtell's Assessment of Private Equity in 2025 and Projections for 2026

The Wachtell Lipton firm gives the following assessment of the condition of the PE market in 2025 with projections for developments in 2026:

Private Equity Investments Rise. A significant portion of this year's deal volume has been driven by private equity, as 2025 saw a rebound in sponsor exit activity, although exit hold periods continue to remain elevated as compared to pre-pandemic levels. Although the number of sponsor-led deals is up modestly year-over-year, deal volume is up more substantially as sponsors have focused on larger transactions. In fact, global private equity deal volume is expected to reach approximately \$2 trillion by the end of 2025, a high since the banner Covid-era year of 2021.⁹²

Wachtell also reports that the "largest leveraged buyout ever recorded" occurred in 2025: "The \$55 billion leveraged buyout of Electronic Arts by Silver Lake, Saudi Arabia's Public Investment Fund and Affinity Partners."⁹³

[J] A Further Note on Sovereign Wealth Funds (SWFs)

The ABA's *Looking Back and Looking Forward* has a section entitled "SWFs Are Deepening Their Role: From Passive LPs to Strategic, High-Influence Co-Investors."⁹⁴ The section discusses, inter alia, some of the "Key Terms in SWF Co-Investments."⁹⁵

90. *Id.*

91. *Id.* at Deal Volume.

92. *Private Equity Investments Rise, infra* at 1:7.46.

93. Wachtell, *M&A—Reviewing 2025 and Looking Ahead to 2026, infra* at 1:7.46.

94. *Id.*

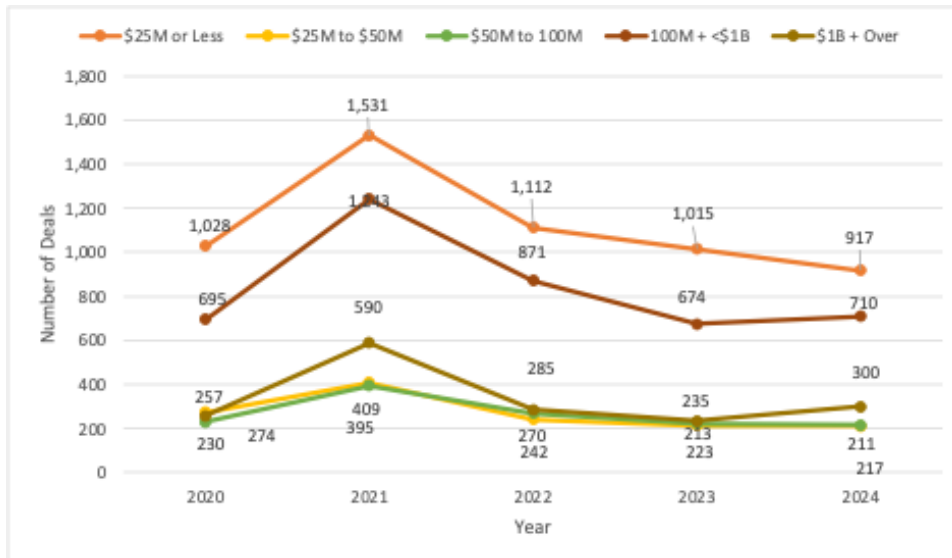
95. *Id.*

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

Figure 1-18, Number of Deals by U.S. Deal Size 2020–2024, presents the U.S. deal size for years 2020 through 2024, 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.

Figure 1-18
Number of Deals by U.S. Deal Size 2020–2024



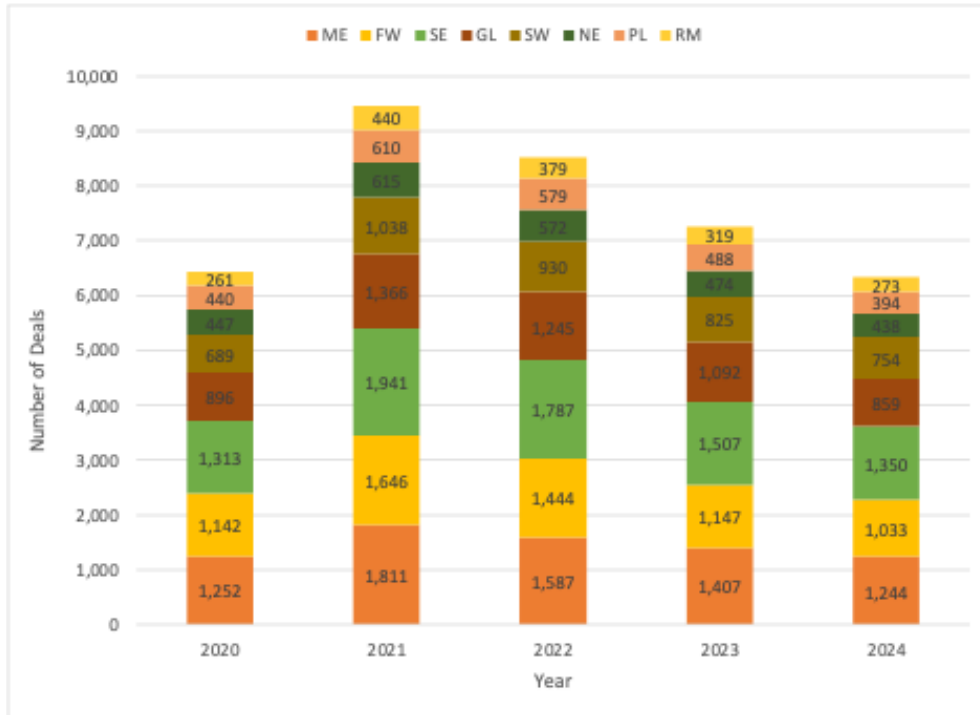
Source: Comparison by Value of Deals 2020–2024, 2025 FactSet Review, pg. 37

Note that for all of these categories, there was a rise from 2020 to 2021 and a fall from 2021 to 2023. The first thing to note is that, as would be expected, in all the years depicted in Figure 1-18, the most frequent deal size was under \$25 million. Also, except for under \$25 million, where there were decreases from 2023 to 2024, there were slight increases in the number of deals for the other categories from 2023 to 2024.

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

Figure 1-19, U.S. Regional Acquirer Activity 2020–2024, depicts the geographic base of U.S. acquirers for the years 2020 through 2024.

Figure 1-19
U.S. Regional Acquirer (That Is, Buyer) Activity 2020–2024, ,
with Regions Shown from Bottom to Top



Source: Regional Rankings, Buyers, 2020-2024, 2025 FactSet Review, pg. 136; Key, from Bottom to Top: 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 2020 through 2024. For 2024, the regions with the most acquirers were the Southeast (1,350) and the Mideast (1,244). The regions with the fewest acquirers, from highest to lowest, 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 2020–2024, depicts the geographic base of U.S. targets for the years 2020–2024.

Figure 1-20
U.S. Regional Target (That Is, Seller) Activity 2020–2024, with
Regions Shown from Bottom to Top



Source: Regional Ranking 2020–2024, 2025 FactSet Review, pg. 136; Key, from Bottom to Top: 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 (that is, targets) has also remained relatively constant. For 2024, the regions with the most sellers were the Southeast (1,900) and the Far West (1,564). 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, That Is, the Poison Pill

[A] Introduction

[A][1] In General

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

[A][2] *The WilmerHale Primer on Poison Pills*⁹⁶

WilmerHale's 2023 *M&A Report*⁹⁷ contains a basic primer on poison pills, including NOL pills, both of which are examined in depth in chapter 5. The *Report* describes as follows the basic operation of a pill, that is, a shareholder rights plan, which was first developed by 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 [that is, the hostile acquirer's] economic and voting power.⁹⁸

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, such as Pennsylvania, have specifically adopted "pill validation" laws to make it clear that the poison pill is a legitimate device.

WilmerHale's 2023 *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 [that is, tender offers in which those who tender get paid more than those that get taken out in the second step merger].⁹⁹

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

97. See WilmerHale, 2023 *M&A Report*, *infra* section 1:7.46.

98. *Id.* at 6.

99. *Id.*

Focusing on the views of the opponents of pills, WilmerHale's 2023 *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, rather than stockholders, the power to decide whether and on what terms the company is to be sold.¹⁰⁰

WilmerHale also points out that “[w]hen combined with a classified board, a [poison pill] makes an unfriendly takeover particularly difficult.”¹⁰¹ 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, for tax purposes, 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. 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 *Report* says:

Whether a company should implement an NOL plan depends on a number of factors, including [1] the amount (and potential value) of the company's NOLs, [2] the likelihood of a [Internal Revenue Code] Section 382 ownership change[, which would curtail the use of the NOLs,] occurring due to public market trading or the company's own actions (such as equity offerings), and [3] anticipated investor reaction [to the adoption of the plan].¹⁰²

[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.

100. *Id.*

101. *Id.*

102. *Id.*

[C] Illustration of an Ineffective Pill – Twitter

The potential ineffectiveness of a pill 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 Twitter’s pill, was entitled: *Twitter Counters a Musk Takeover with a Time-Tested Barrier*.¹⁰³

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, 2022.¹⁰⁴

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

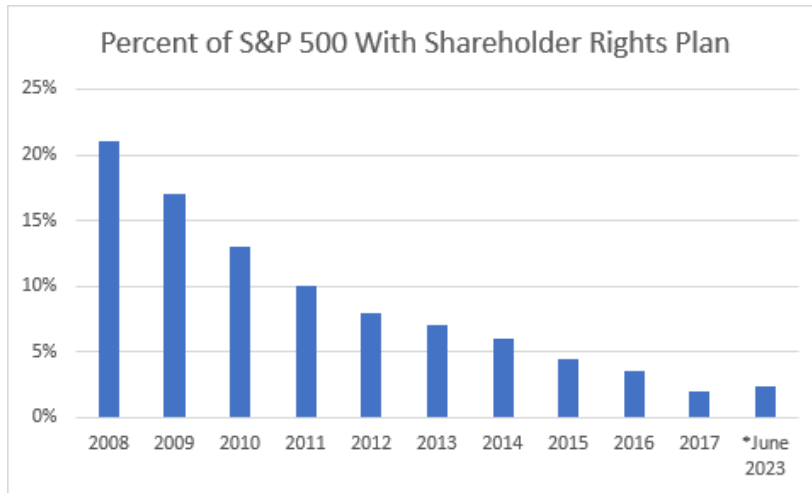
[D][1] Pills from 2008 Through 2017 and in 2023

Notwithstanding the potential effectiveness of shareholder rights plans (that is, 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, this increase was as a result of COVID-19.

103. See Lauren Hirsch & Kate Conger, *Twitter Counters a Musk Takeover with a Time-Tested Barrier*, N.Y. TIMES (Apr. 15, 2022), <https://perma.cc/5EFF-QX4B>.

104. See Twitter’s SEC Form 8-K, filed on Apr. 25, 2022.

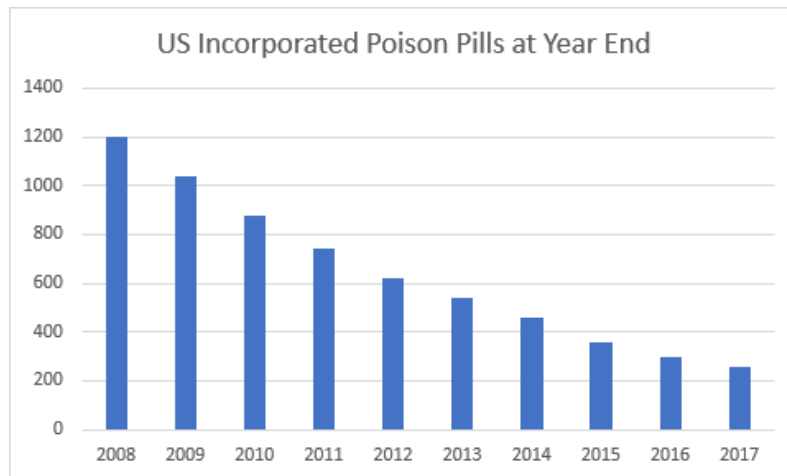
Figure 1-21
Percentage of S&P 500 Companies with a Shareholder Rights Plan 2008-2017 and As of June 2023



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.

Figurer 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 apparently is 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 2019.¹⁰⁵

§ 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. The *WilmerHale, 2025 M&A Report*¹⁰⁶ gives the following reasons for a board to adopt a defensive measure, such as a poison pill:

[1] Ensure stability and continuity in decision-making and leadership that will enable the company to focus on long-term value creation;

105. FTI Consulting, *Blood in the Water: COVID-19 M&A Implications*, HARV. CORP. GOV. FORUM (2020), <https://perma.cc/YL4R-9CAV>.

106. See *WilmerHale, 2025 M&A Report*, *infra* section 1:7.46.

- [2] Provide the board with adequate time to evaluate and react in an informed manner to unsolicited acquisition proposals;
- [3] Provide negotiating leverage for the board; and
- [4] Maximize overall stockholder value by providing economic disincentives against inadequate, unfair or coercive bids.¹⁰⁷

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

Defensive Measure	Percentage/ of S&P 500 Firms with the Measure
<i>Poison Pill [See discussion above]</i>	2.40%
<i>Classified Board [Such as with a 9 person board with three directors elected every year, thereby making it so that it would take two successful annual proxy contests to gain a majority of the 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%

107. *Id.*

<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 Cause</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.

Although the above table does not present the relevant percentages for years 2023 and 2024, it does not appear that there have been any dramatic changes in the relevant percentages since 2022.

As demonstrated in chapter 5, which deals with fiduciary duties, the most lethal defensive measure is a poison pill, and even though only a few public companies have a permanent poison pill, a board of a target could adopt a pill on a moment's notice.

[B] Special Meetings of Shareholders

In its April 2024 report on *Takeover Law and Practice*,¹⁰⁸ the Wachtell law firm gives the following then current assessment of the right of shareholders to call a Special Meeting:

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,

108. See Wachtell, 2024 *Takeover Law and Practice*, *infra* section 1:7.46.

approximately 70% of S&P 500 companies permit shareholders to call special meetings in between annual meetings.¹⁰⁹

Unless a vote on a merger is taken at a regularly scheduled annual meeting, a special meeting will have to be called to get shareholder approval for the merger.

[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[.]¹¹⁰

[D] WilmerHale’s 2023 Data on Various Takeover Defense Provisions Included in IPOs

In its *2023 M&A Report*,¹¹¹ 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;

109. *Id.* at 15.

110. *Id.*

111. See WilmerHale, *2023 M&A Report*, *infra* section 1:7.46.

- 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 203,¹¹² 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 stockholder became as such.

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

[A] The Basic Data

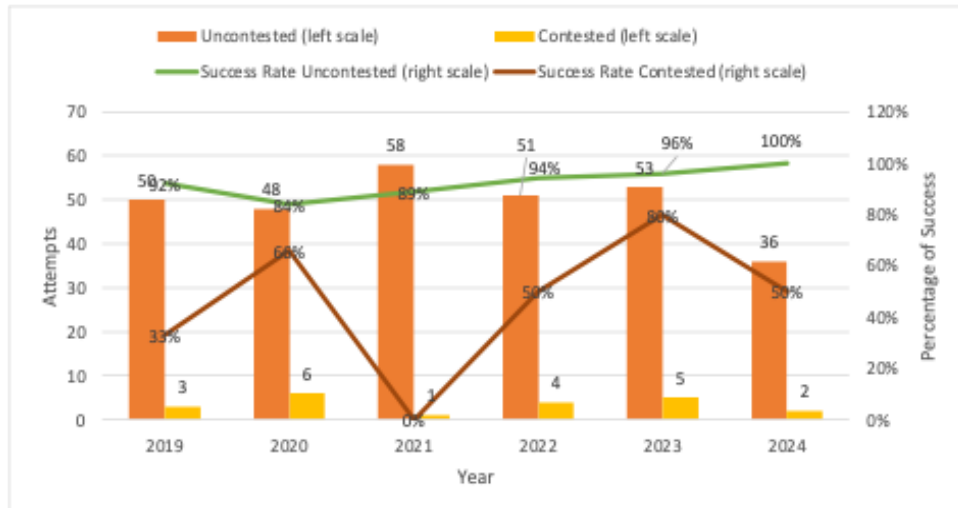
Figure 1-24, U.S. Tender Offers Contested and Uncontested 2019–2024, shows the number of both hostile and uncontested (consensual) tender offers in years 2019 through 2024.

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.

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

Figure 1-24
U.S. Tender Offers Contested and Uncontested 2019–2024



Source: Tender Offers for Publicly Traded Sellers 2019–2024, 2025 *FactSet Review*, pg. 60

The first thing to notice in Figure 1-24 is that there are few hostile tender offers, and from 2019 through 2024, there were just 3, 6, 1, 4, 5 and 2, respectively, in each of those years. The success rate of these hostile tender offers is like taking a roller coaster ride: From 33% in 2019, to 66% in 2020, to zero in 2021, to 50% in 2022, to 80% in 2023, and back down to 50% with the two hostile tender offers in that year. 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 2019 through 2024, 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. As addressed more completely in section 1:7.23, one of the reasons for using a tender offer in a consensual deal is speed in getting the deal closed. Assuming no regulatory or similar barriers, a consensual tender offer can be closed in twenty business days, which is a much shorter period than generally is required in a M&A transaction pursuant to a proxy statement, which requires the vote of the target’s and maybe the acquiror’s shareholders.

[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. As discussed previously, 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 in order 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.

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

[C] The 2025-2026 Fight Between Netflix and Paramount Skydance for the Acquisition of Warner Bros. Discovery

[C][1] *The Deal as of January 17, 2026*

As this section is being written in early January 2026, there is a raging M&A battle between Netflix (Acquirer # 1) and Paramount Skydance (Acquirer # 2) for the acquisition of Warner Bros. Discovery (the Target), all publicly held companies. In this deal, Warner Bros., the target, had entered into a merger agreement (see chapter 2) pursuant to which it would be acquired by Netflix. However, Paramount Skydance put in a "superior" offer that would be structured as a tender offer (see e.g., chapters 5 and 8).

As of the writing of this section in early January 2026, the final result of this corporate battle does not seem close to being resolved. For example, on January 8, 2026, the Warner Bros. board issued the following press release¹¹³ regarding its support of its merger agreement with Netflix and its rejection of the competing tender offer by Paramount Skydance:

Warner Bros. Discovery, Inc. ("Warner Bros. Discovery" or "WBD") (NASDAQ: WBD) [the Target] today announced that

113. See News Release, *Warner Bros. Discovery Board of Directors Unanimously Recommends Shareholders Reject Amended Paramount Tender Offer*, WARNER BROS. DISCOVERY (Jan. 7, 2026), <https://perma.cc/P6Q3-E3XM>.

its Board of Directors (the “Board”) has unanimously determined that Paramount Skydance’s (“PSKY”) (NASDAQ: PSKY) [Acquirer # 2’s] tender offer, as amended on December 22, 2025, is not in the best interests of WBD and its shareholders and does not meet the criteria of a “Superior Proposal” under the terms of WBD’s merger agreement [see chapters 2 and 5] with Netflix, Inc. (“Netflix”) (NASDAQ: NFLX) announced on December 5, 2025.

The Board unanimously reiterates its recommendation in support of the Netflix combination and recommends that WBD shareholders reject PSKY’s offer.

“The Board unanimously determined that the Paramount’s latest offer remains inferior to our merger agreement with Netflix across multiple key areas,” said Samuel A. Di Piazza, Jr., Chair of the Warner Bros. Discovery Board of Directors. “Paramount’s offer continues to provide insufficient value, including terms such as an extraordinary amount of debt financing that create risks to close and lack of protections for our shareholders if a transaction is not completed. Our binding agreement with Netflix will offer superior value at greater levels of certainty, without the significant risks and costs Paramount’s offer would impose on our shareholders.”¹¹⁴

The only thing that can be said about this transaction as this section is being written on January 17, 2026, is “Stay Tuned!”

[C][2] The Deal as of February 1, 2026

As of the writing of this section on February 1, 2026, the fight goes on! For example, on January 18, 2026, an article in The Guardian reports that “Trump buys \$1m in Netflix and Warner Bros bonds days after saying he’ll ‘be involved’ in merger.”¹¹⁵ Also, on January 22, 2026, Reuters reported: “Paramount extends deadline on hostile Warner Bros bid to February 20, 2026.”¹¹⁶

114. *Id.*

115. Adam Gabbatt, Trump buys \$1m in Netflix and Warner Bros. bonds days after saying he’ll ‘be involved’ in merger, THE GUARDIAN (Jan 17, 2026), <https://perma.cc/7MP8-B2FL>.

116. Harshita Mary Varghese, Aditya Soni & Svea Herbst-Bayliss, *Paramount extends deadline on hostile Warner Bros. bid to February 20, 2026*, REUTERS (Jan. 22, 2026), <https://perma.cc/5VYU-MFY7>.

*[C][3] The Deal as of April 28, 2026: Paramount
Prevailed and Warner's Shareholders Vote in Favor
of the Merger*

As of the final review of this article on April 12, 2026, the resolution of the battle between Netflix and Paramount Skydance for the acquisition of Warner Bros. Discovery has been resolved with Paramount Skydance prevailing. A Paramount February 27, 2026, news release announcing the deal explains:

[Paramount] and Warner Bros. Discovery, Inc. (NASDAQ: WBD) ("WBD") today announced they have entered into a definitive merger agreement under which Paramount will acquire WBD, forming a premier global media and entertainment company focused on expanding consumer choice and empowering creative talent worldwide.

Under the terms of the agreement, Paramount will pay \$31.00 per share in cash for all outstanding shares of WBD. The transaction has been unanimously approved by the Boards of Directors of both companies and is expected to close in Q3 2026, subject to customary closing conditions, including regulatory clearances and approval by WBD shareholders, with a vote expected in the early spring of 2026. In the event the transaction has not closed by September 30, 2026, WBD shareholders will receive a \$0.25 per share "ticking fee" for each quarter (measured daily) until closing.¹¹⁷

In a Form 8-K filed on April 23, 2026, Warner Bros. reported as follows on the result of the shareholder vote on the merger:

Item 5.07 Submission of Matters to a Vote of Security Holders.

On April 23, 2026, Warner Bros. Discovery, Inc. ("WBD") held a special meeting of stockholders (the "Special Meeting"), in connection with the Agreement and Plan of Merger, dated as of February 27, 2026 (as it may be amended from time to time, the "Merger Agreement"), by and among WBD, Paramount Skydance Corporation ("PSKY") and Prince Sub Inc. ("Merger Sub"), pursuant to which and subject to the terms and

117. Paramount News Release, *Paramount to Acquire Warner Bros. Discovery to Form Next-Generation Global Media and Entertainment Company* (February 27, 2026).

conditions therein, at the effective time of the Merger (as defined below), Merger Sub will merge with and into WBD, with WBD surviving as a wholly owned subsidiary of PSKY (the “Merger”).

The following matters were submitted to a vote of the WBD stockholders at the Special Meeting: (1) a proposal to adopt the Merger Agreement and (2) a proposal to approve, on an advisory (non-binding) basis, the compensation that may be paid or become payable to WBD’s named executive officers that is based on or otherwise relates to the Merger. These proposals are described in more detail in the definitive proxy statement filed by WBD with the Securities and Exchange Commission on March 26, 2026. The proposal to adopt the Merger Agreement was approved by the requisite vote of the WBD stockholders. . . .

[However, the] holders of WBD Common Stock did not approve, on an advisory (non-binding) basis, the compensation that may be paid or become payable to WBD’s named executive officers that is based on or otherwise relates to the Merger.¹¹⁸

Given this shareholder approval and the Trump Administration’s general support of the transaction, it is almost certain that the transaction will close.

§ 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.

118. Warner Bros. Discovery, Inc., *Form 8-K* (Apr. 23, 2026), <https://perma.cc/23VL-FVQR>.

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%

Sources: (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 twenty 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. In view of section 251(h) of the Delaware General Corporation Law, which is discussed next, in Delaware a top-up option is not needed.

[D] Delaware’s Section 251(h) Intermediate-Form Merger: Eliminating the Need for a Top-Up Option

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, the acquirer 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 twenty business days after the announcement of the transaction. As discussed in chapter 8, the twenty-day waiting period is required by the tender offer rules under section 14 of the ’34 Act. 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, Payable by a Walking Target, and Reverse, Payable by a Walking Acquirer

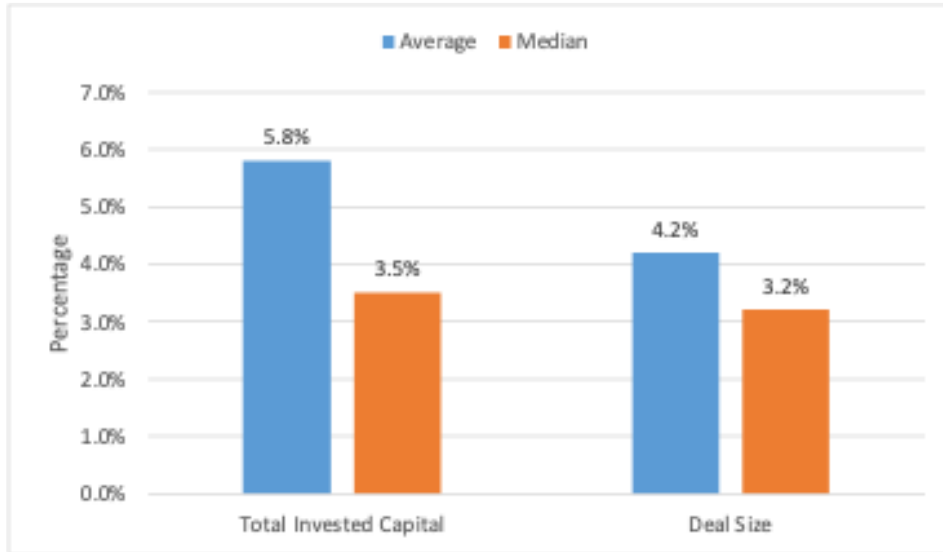
[A] In General

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. On the other hand, a Reverse Termination Fee is payable by the acquirer to the target if the acquirer walks from the deal.

[B] Elaboration on Direct Termination Fees

Figure 1-26, U.S. Direct Termination Fees—Average and Median Percentage of (1) Target’s Total Invested Capital, and (2) Deal Size, 2024, presents the average and median direct termination fees measured against total invested capital and deal size for 2024.

Figure 1-26
U.S. Direct Termination Fees—Average and Median Percentage of (1) the Target’s Total Invested Capital, and (2) Deal Size, 2024



Source: Termination Fee Average and Median Percentage of Total Invested Capital and Deal Size, 2024, *2025 FactSet Review*, pg. 76

Note that the average of these direct termination fees for 2024 was 4.2% of Deal Size (that is, the consideration paid by the acquirer). On the other hand, the average direct termination fee for 2024 that was based on Total Invested Capital (which includes both stock and debt), was higher, at 5.8%. As discussed in chapter 5, the level of these direct termination fees is limited by the fiduciary duty provisions of Delaware law, because a direct termination fee that is quite high could be used to coerce the target’s shareholders to approve the transaction. 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 of Publicly Traded Sellers, Privately Held Sellers, and Divestitures 2024, shows that 59.1% of public deals but less than 1% of all other private M&A contained a Direct 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 2024

	2024 Transactions	2024 Transactions	2024 Percentage of

		with Direct Termination Fees	All Transactions with Direct Termination Fees
Publicly Traded Sellers	342	202	59.1%
Privately Held Sellers	8,859	50	0.6%
Divestitures	2,608	51	1.2%

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.

[C] Elaboration on Reverse Termination Fees

As indicated, a Reverse Termination Fee is payable by the acquirer to the target if the acquirer walks from the deal. This type of fee generally does not present fiduciary duty issues, and generally there is no case law limitation on the amount of a Reverse Termination Fee, as there is with a Direct Termination Fee. However, as in the case of the Twitter Termination Fees, discussed below, in the Musk acquisition of Twitter, the amount of the Direct and Reverse Termination Fees were the same.

[D] 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 transaction¹¹⁹ 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 . . . its representations, warranties or covenants in a manner that would cause the related closing conditions to not be satisfied.¹²⁰

119. See Twitter's SEC Form 8-K, filed on Apr. 25, 2022.

120. *Id.*

§ 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, which deals with fiduciary duties, 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) fiduciary 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.

[B] “No-Shops”

[B][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 2024, which is addressed next.

[B][2] Data on “No-Shops” for 2024

The SRSAcquiom, *2025 M&A Deal Terms Study*¹²¹ reports that (1) 95% of 2024 deals had “No-Shop, No-Talk” provisions, and (2) only 2% of the deals had a fiduciary duty exception. 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 be sold. And, it is the board’s responsibility to “talk” and not blind itself to other potentially superior offers.

[C] “Go-Shops”

[C][1] “Go-Shops” Generally

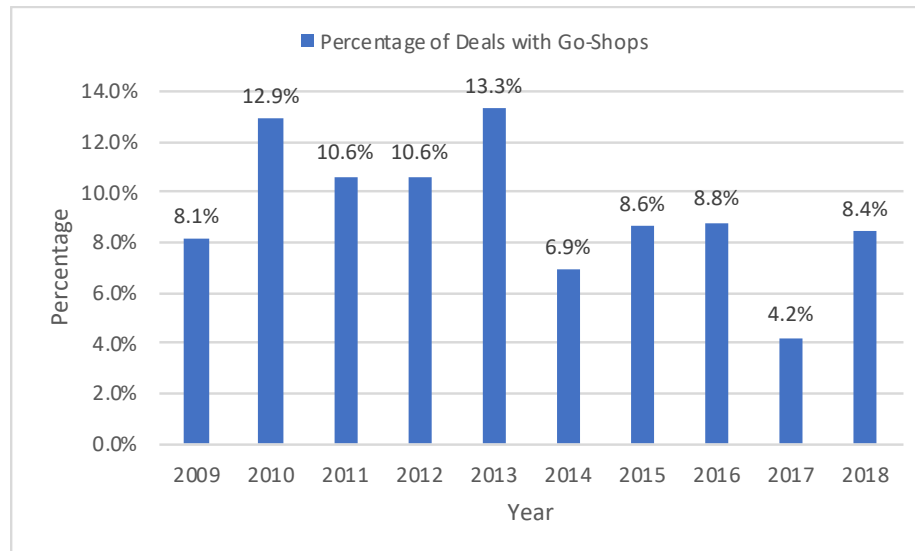
Unlike the “no-shop,” the “go-shop” specifically authorizes the target to seek other purchasers for a specified period. In general, the termination fee the target is required to pay if it terminates the first acquisition agreement and goes with a competing bidder is lower for topping transactions (that 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 13.3% 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.

121. See SRS, *2025 M&A Deal Term Study*, *infra* section 1:7.46.

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



Source: FactSet MergerMetrics, as of June 2019

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

The Paul Weiss, *May 2025 M&A at a Glance*¹²² provides significant data on go-shops that shows, inter alia, that for the twelve months leading up to May 2025, while (1) 20.6% of transactions with “Financial Buyers,” such as PE firms, had go-shops, only (2) 4.3% of transactions with “Strategic Buyers” had go-shops.¹²³

§ 1:7.26 Wachtell’s Assessment of Hostile M&A Activity in 2022, 2023, and 2024, and Projected for 2025

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 at the higher valuations of 2021. In

122. See Paul Weiss, *May 2025 M&A at a Glance*, *infra* section 1:7.46.

123. *Id.*

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.¹²⁴

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.¹²⁵

As shown above in Figure 1-24, U.S. Tender Offers Contested and Uncontested 2019–2024, the *2024 FactSet Review* reports that there were only (1) five hostile tender offers in the United States in 2023, with an 80% success rate, and (2) two hostile tender offers in 2024 with a 50% success rate. What potential acquirer is going to undertake the energy and time in initiating a transaction that has an 80% or 50% chance of succeeding?

In its publication entitled “M&A--*What Awaits in 2025?*,”¹²⁶ the Wachtell Lipton firm makes the following observations about its expectations regarding tender offers in 2025:

Hostile and unsolicited transactions, which accounted for approximately 11% of global M&A activity in 2024, may experience a boost from relaxed regulatory enforcement and increased dealmaking interest generally.¹²⁷

As noted above, there were few hostile tender offers in the United States over the past several years.

124. Wachtell, *2023 Current Developments*, *infra* section 1:7.44.

125. Wachtell, *2024 Takeover Law and Practice*, *infra* section 1:7.44 at 2.

126. See Wachtell Lipton, *Mergers and Acquisitions—What Awaits in 2025?* (Jan. 14, 2025).

127. *Id.*

§ 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.¹²⁸ Chapter 16 explores acquisitions of bankrupt companies, and chapter 17 deals with acquisitions of banks and bank holding companies.

In 2022 and 2023, as a result of inflation that was largely attributable to governmental spending in 2021 in the fight against COVID, the Federal Reserve Board (which, as a general matter, can, through its interest rate policies significantly impact interest rates) began a tight monetary policy resulting in significant increases in interest rates in 2022 and 2023.

At that time, there were several bank holding companies that had made fixed rate loans at low interest rates with the expectation that the banks could raise funds at rates lower than the loan rates. However, as a result of the Fed raising interest rates in its fight against inflation in 2022, these banks had to pay (1) higher interest rates on their borrowings, than (2) the interest rates they received on their loans. This led to several banks going into bankruptcy. Some of these transactions are examined in the next section.

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

[B][1] *Introduction*

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

- Signature Bank,¹²⁹
- Silicon Valley Bank,¹³⁰ and

128. Thomson Reuters, *Mergers & Acquisitions Review* 8 (Fourth Quarter 2009, Financial Advisors).

129. See Press Release, *Subsidiary of New York Community Bancorp, Inc., to Assume Deposits of Signature Bridge Bank, N.A., from the FDIC*, FDIC (Mar. 19, 2023), <https://perma.cc/UFA8-N4TZ>.

130. See Press Release, *First-Citizens Bank & Trust Company, Raleigh, NC, to Assume All Deposits and Loans of Silicon Valley Bridge Bank, N.A., from the FDIC*, FDIC (Mar. 26, 2023), <https://perma.cc/AM78-HTMG>.

- First Republic Bank of San Francisco.¹³¹

Also, in April 2024 there was a bankruptcy of the Republic First Bank, a Philadelphia bank.¹³²

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.

[B][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.¹³³

The FDIC did an analysis of the failure of Signature that was released on April 28, 2023.¹³⁴ 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

131. See Press Release, *JPMorgan Chase Bank, National Association, Columbus, Ohio Assumes All the Deposits of First Republic Bank, San Francisco, California*, FDIC (May 1, 2023), <https://perma.cc/5RF4-V7LD>.

132. See *Failed Bank Information for Republic First Bank DBA Republic Bank, Philadelphia, PA*, FDIC, (Apr. 26, 2024), <https://perma.cc/T22K-RPMG>.

133. *Subsidiary of New York Community Bancorp, Inc., to Assume Deposits of Signature Bridge Bank, N.A., From the FDIC*, *supra* note 118.

134. See News Release, *FDIC Releases Report Detailing Supervision of the Former Signature Bank, New York, New York*, FDIC (Apr. 28, 2023), <https://perma.cc/V75K-WXUA>

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.¹³⁵

*[B][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.

Depositors of Silicon Valley Bridge Bank, National Association, will automatically become depositors of First–Citizens Bank & Trust Company. All deposits assumed by

135. *Id.*

First–Citizens Bank & Trust Company will continue to be insured by the FDIC up to the insurance limit.¹³⁶

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 19th century rather than the 21st. 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.¹³⁷

[B][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

136. *First–Citizens Bank & Trust Company, Raleigh, NC, to Assume All Deposits and Loans of Silicon Valley Bridge Bank, N.A., From the FDIC, supra* note 119.

137. Andrew Metrick & Paul Schmeizing, *The March 2023 Bank Interventions in Long-Run Context – Silicon Valley Bank and Beyond*, HARV. CORP. GOV. FORUM (Apr. 17, 2023), <https://perma.cc/HVC9-MF3Y>.

transaction, First Republic Bank's 84 offices in eight states will reopen as branches of JPMorgan Chase Bank, National Association, today during normal 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.¹³⁸

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.¹³⁹

[B][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.¹⁴⁰

138. See *JPMorgan Chase Bank, National Association, Columbus, Ohio Assumes All the Deposits of First Republic Bank, San Francisco, California*, *supra* note 120.

139. Rick Green, *JPMorgan Ends First Republic's Turmoil After FDIC Seizure*, BLOOMBERG NEWS (May 1, 2023), <https://perma.cc/6XMT-WCQC>.

140. See *Failed Bank Information for Republic First Bank DBA Republic Bank, Philadelphia, PA*, *supra* note 121.

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.¹⁴¹

A *Forbes* article¹⁴² 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[.]¹⁴³

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.¹⁴⁴

The article further explains that this bankruptcy is likely different from the Silicon Valley, Signature, and First Republic 2023 bankruptcies

141. *Id.*

142. See Ty Roush, *Here’s What Led To Republic First’s Collapse—And Why It’s Different from 2023 Failures*, FORBES (Apr. 27, 2024), <https://perma.cc/F3SG-46S7>.

143. *Id.*

144. *Id.*

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.¹⁴⁵

§ 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 Point Studies, which are referred to here as the ABA *Deal Point Studies*, *infra* Table of References. The Subcommittee publishes, inter alia, the following studies:

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

145. *Id.*

The *Private Target M&A Deal Point 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 Point 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 Point 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 Point 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, 2025 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, *2025 M&A Deal*

Term Study, *infra* section 1:7.45. This study focuses on deal terms in private transactions.

[C] The WilmerHale, 2025 M&A Report on Deal Terms

The *WilmerHale, 2025 M&A Report*, *supra* section 1:7.45, contains the following two very helpful sections addressing current issues with provisions of M&A agreements:

- Purchase Price Adjustments in Financial Services M&A Transactions; and
- A Comparison of Deal Terms in Public and Private Acquisitions; and
- Trends in VC-Backed Company M&A Deal Terms.

Also, the *WilmerHale, 2023 M&A Report*, *supra* section 1:7.45, contains “A Comparison of Deal Terms in Public and Private Acquisitions.”

§ 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 2024*, sets out the top ten investment banking and law firms ranked by U.S. M&A deal volume for 2024.

Figure 1-30
Top 10 M&A Investment Banking Firms and Law Firms
Ranked by U.S. Deal Volume 2024

	Top Ten Investment Banking Firms (a)	Top Ten Law Firm (b)
1	Goldman Sachs & Co. LLC	Skadden, Arps, Slate, Meagher & Flom LLP
2	Morgan Stanley	Kirkland & Ellis LLP
3	JPMorgan Chase & Co.	Sullivan & Cromwell LLP
4	Citigroup Inc.	Latham & Watkins LLP
5	Bank of America Securities Inc.	Paul, Weiss, Rifkind, Wharton & Garrison LLP
6	Centerview Partners Advisory Holdings LLC	Wachtell, Lipton, Rosen & Katz
7	Barclays PLC	Cravath, Swaine & Moore LLP
8	Evercore, Inc	Simpson Thacher & Bartlett LLP

9	RBC Capital Markets	Gibson, Dunn & Crutcher LLP
10	Jefferies LLC	Davis Polk & Wardwell LLP

Sources: (a) 2025 Mergerstat Financial Advisor Rank by Total Transaction Value, 2025 *FactSet Review*, pg. 74; (b) 2025 Mergerstat Legal Advisor Ranking by Total Value, 2025 *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, number 8, is a boutique investment banking firm.

All of the law firms are headquartered in New York City, except for Kirkland, Chicago, and Latham. These three 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

A proxy contest is an effort by an incumbent group of a firm's directors to be reelected as directors by the firm's shareholders, while a contesting group of challenging directors are seeking to replace one or more of the incumbent group.

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 a proxy contest to gain control of the board for the purpose of changing the target corporation's business policies. Activists shareholder 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 contests.

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

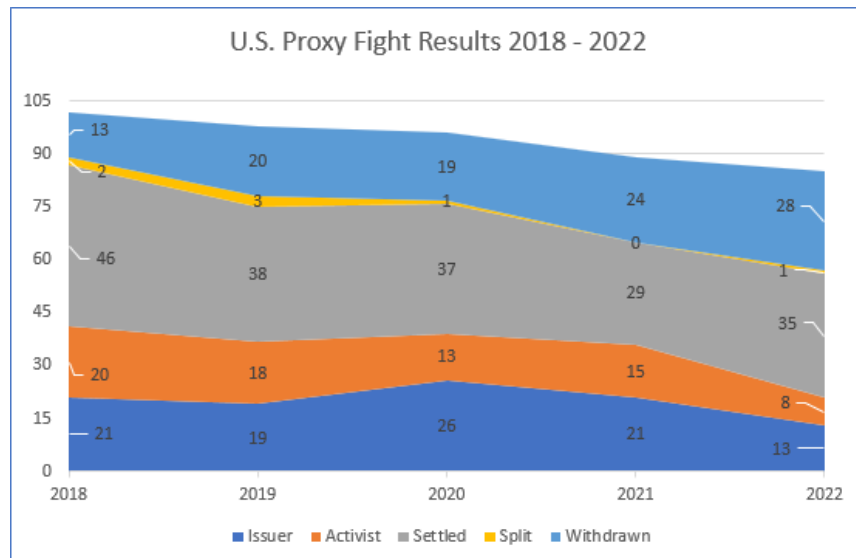
[B] The Results of Proxy Contests from 2018 to 2022

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.

The results for those won by the Issuer are at the bottom and those that were Withdrawn are at the top with the others shown from bottom to top.

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 second-year 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 eighty-five 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 2025 Report on Proxy Contests

An article in *Harvard Law School Forum on Corporate Governance*¹⁴⁶ gives the following introduction to proxy contests as of the early part of 2025:

2024 affirmed the power of the “Big Three” [investment management firms] (Vanguard, BlackRock, and State Street), and large, passive investors generally, to influence director elections and corporate governance. Several trends also emerged in 2024 highlighting expanded shareholder access to the corporate machinery: [1] increased familiarity with the universal proxy card (“UPC”) rules, [2] special interest campaigns focused on director elections and M&A, [3] the continued prevalence of ESG [that is, Environmental, Social, and Governance] proposals, and [4] new means to bring shareholders proposals to a vote, among others. But with the Trump administration back in power, a cooling M&A outlook, and sweeping legal and regulatory changes, the power of large, passive shareholders may be waning. 2025 could be the year management, and activists in some respects, emerge more empowered to tilt the corporate governance playing field in their favor.¹⁴⁷

146. See Arthur B. Crozier, Gabrielle E. Wolf & Jonathan L. Kovacs, *2025 Proxy Season Trends: The Pendulum Swings Toward Management*, HARV. CORP. GOV. FORUM (Mar. 14, 2025), <https://perma.cc/2UE6-SCR7>.

147. *Id.*

§ 1:7.31 *The Role of Activist Shareholders*

[A] In General

Chapter 28 deals with activist shareholders, including activist hedge funds. An activist shareholder fund 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.¹⁴⁸

[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*¹⁴⁹ 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] management changes, and [3] environmental, social and governance (ESG) issues.

148. Bill George & Jay W. Lorsch, *How to Outsmart Activist Investors*, HARV. BUS. REV. (May 2014), <https://perma.cc/Y84W-CJLY>.

149. See Sullivan & Cromwell, *2022 Shareholder Activism*, *infra* section 1:7.46 at 1.

- 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[.]¹⁵⁰

Also, the Sullivan & Cromwell *Review* introduces as follows the successful Environmental, Social and Governance (ESG) initiative by Engine No. 1, an investment firm,¹⁵¹ at Exxon Mobil:

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 Mobil 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.¹⁵²

One interesting observation from Sullivan and Cromwell's *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

150. *Id.*

151. 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/HK3E-C7DY>.

152. Sullivan & Cromwell, 2022 *Shareholder Activism*, *infra* section 1:7.46 at 7.

investors friendly to Southwest Gas to purportedly prevent the company from interfering with Icahn’s proxy campaign.¹⁵³

The Delaware Chancery Court refused to block the sale.

[C] Barclays Shareholder Advisory Group, Q1 Review of Shareholder Activism

A comprehensive report by Barclays on Shareholder Activism during the first quarter of 2025,¹⁵⁴ sets out the following highlights:

- Surging U.S. Activity Leads Another Strong Q1;
- Break-Up Campaigns Popular Despite Fewer M&A Demands Overall;
- Activists More Successful Gaining Board Seats in 2025;
- Barclays Shareholder Advisory Group, Q1 2025 Review of Shareholder Activism; and
- Changes at ISS and in the Regulatory Regime Inject Uncertainty Into Proxy Season.

Obviously, this whole comprehensive report should be consulted if faced with an activist issue.

[D] Trump’s Opposition to Climate Change and ESG

On April 29, 2025, President Trump issued an executive order opposing environmental regulation and ESG.¹⁵⁵ The order states, in part:

Sec. 2. State Laws and Causes of Action. (a) The Attorney General, in consultation with the heads of appropriate executive departments and agencies, shall identify all State and local laws, regulations, causes of action, policies, and practices (collectively, State laws) burdening the identification, development, siting, production, or use of domestic energy resources that are or may be unconstitutional, preempted by Federal law, or otherwise unenforceable. The Attorney General shall prioritize the identification of any such State laws purporting to address “climate change” or involving “environmental, social, and governance” [ESG] initiatives, “environmental justice,” carbon or “greenhouse gas”

153. Sullivan & Cromwell LLP, *Review and Analysis of 2021 U.S. Shareholder Activism and Activist Settlement Agreements* (Dec. 20, 2021), at 8–9.

154. Barclays Shareholder Advisory Group, Q1 Review of Shareholder Activism, p. 2.

155. See Exec. Order No. 14,260, Protecting American Energy from State Overreach, 90 Fed. Reg. 15513 (Apr. 8, 2025).

emissions, and funds to collect carbon penalties or carbon taxes.¹⁵⁶

One article contains the following observation on this initiative:

In a move stirring major debate across the sustainability sector, President Donald Trump issued a new executive order aiming to curtail state-level climate action and limit the influence of Environmental, Social, and Governance (ESG) policies. The order, according to ESG Dive, targets efforts like greenhouse gas (GHG) emissions regulations, cap-and-trade programs, and state-driven climate litigation. For sustainability professionals, this development signals a shifting landscape that demands renewed strategy, adaptability, and deeper expertise in ESG frameworks.¹⁵⁷

Obviously, in any transaction where ESG issues are presented, the most recent developments with the applicable issues will have to be carefully examined.

[E] M&A Activism from 2020 to 2025

Activism is addressed generally in chapter 28 of MATO. The ABA's *Looking Back and Looking Forward on M&A, December 2025*,¹⁵⁸ reports that between 2020 and 2025, the number of activist campaigns that were "Pushing for M&A" ranged from a low of 19% of such transactions during 2021, a COVID year, to 36% of such transactions in 2020. In 2025, it was only 26%. Suggesting that "M&A May Spur Activism in 2026,"¹⁵⁹ *Looking Back and Looking Forward* gives the following reasons for the potential increase:

- *Activists may seek to block announced deals, particularly deals that have been poorly received by shareholders
- *Activists may seek to recut the terms of announced deals
- *Activists continue to pressure companies to separate businesses with different growth trajectories
- *Activists may be increasingly successful in pushing for companies to evaluate strategic alternatives, particularly where operational changes have failed to deliver results

156. *Id.*

157. *Trump's New Executive Order Targets Climate and ESG Policies: What It Means for Professionals*, CSE (Apr. 29, 2025), <https://perma.cc/8TVK-9UUK>.

158. See ABA's *Looking Back and Looking Forward on M&A, December 2025*, 158 *infra* section 1:7.46, at pg. 5.

159. *Id.* at How M&A May Spur Activism in 2026.

*Potential return of activists teaming up with private equity to facilitate buyouts; return of private equity “white squires” [i.e., a friendly company that buys a stake in a target to prevent a hostile takeover] in activist campaigns involving M&A theses.¹⁶⁰

White Squires are similar to White Knights, except that with White Knights, the Target’s board likely will have to give up its control of the corporation to the White Knight. Wachtell has the following (1) assessment of “*M&A-related Activism*” during 2025, and (2) projection for such activity in 2026:

Beyond proxy season activities, activists kept busy in the “off season” by targeting M&A deals. Activist shareholders pressured Core Scientific shareholders to abandon its \$9 billion all-stock acquisition by Coreweave and continue to urge STAAR Surgical’s shareholders to vote down its \$1.6 billion all-cash sale to Alcon. Conversely, activists have been outspoken in several notable cases about encouraging boards to consider strategic alternatives, including sales or spin-offs, in hopes of monetizing their investments. Along with other trends, M&A is expected to continue to be a major thesis for activist campaigns, including pushing for large-cap companies to look at transactions that might now be achievable in the current regulatory climate.¹⁶¹

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*, and the *2025 Guide*,¹⁶² which was issued in early 2025 covering principally 2024 activity, provides the following excellent overview of Cross-Border M&A activity during 2024:

¹⁶⁰ *Id.*

¹⁶¹ Wachtell, *M&A—Reviewing 2025 and Looking Ahead to 2026*, *infra* section 1:7.46.

¹⁶² See Wachtell Lipton, *2025 Cross-Border M&A Guide*, *infra* section 1:7.46.

Although M&A activity was up only a bit in 2024 over 2023 – the least active year for global M&A since the great financial crisis – and trailed well below historical averages, at \$3.2 trillion, compared to an average of \$4.6 trillion over the past ten years (in 2024 dollars), optimists suspect that 2024 may have marked a turning point, and anticipate that 2025 may see a real return of animal spirits.

In 2024, geopolitical and macroeconomic conditions for M&A were mixed. Major elections, political turmoil and armed conflict, along with an aggressive antitrust agenda in the U.S. and elsewhere, deterred some dealmaking, but strong equity market returns, particularly in the U.S. and Japan, the beginning of a monetary easing cycle and U.S. election results that may herald a more tractable antitrust environment in the U.S., contributed to an improving climate for deals.

Against this backdrop, cross-border M&A continued to provide attractive opportunities to dealmakers in 2024. Cross-border deals were 32.4% (\$1.0 trillion) of global M&A in 2024, slightly less than the average over the prior ten years (34.7%). Acquisitions of U.S. companies by non-U.S. acquirors accounted for \$201 billion in transaction volume and represented 6.3% of 2024 global M&A volume and 19.6% of cross-border M&A volume. Japanese, Canadian, British, Danish and Swiss acquirors (in that order) represented 56.7% of the volume of cross-border acquisitions of U.S. targets, while acquirors from China, India and other emerging economies accounted for only 5.2%.¹⁶³

While indicating that Wachtell believes that inbound M&A will “offer compelling opportunities,”¹⁶⁴ the report presents this cautionary note:

As always . . . careful preparation for the [1] political, [2] regulatory [for example, antitrust], [3] cultural and [4] technical complexity inherent in cross-border deals are critically important for parties considering a cross-border transaction. Advance preparation, strategic implementation and deal structures calibrated to the current environment and the

163. *Id.*

164. *Id.*

particular circumstances of each deal will yield superior results.¹⁶⁵

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 [that is, 2022], though slightly diminished at 84.4% for deal value and 86.9% for deal count.¹⁶⁶

As discussed previously, Paul Weiss, *May 2025 M&A at a Glance*¹⁶⁷ gives the following picture of the state of inbound M&A (that is, an acquisition by a foreign acquirer of a U.S. target) and outbound M&A (that is, an acquisition by a U.S. acquirer of a foreign target) as of May 2025:

U.S. inbound cross border activity [see chapter 19] was down by all measures in April compared to March. Germany led inbound activity by deal value, while Japan led LTM. France, Germany, Japan and the United Kingdom tied for the leading number of inbound deals in April, while Canada saw the most inbound deals LTM. U.S. outbound cross border activity fell by deal value compared to March, but increased by deal count. The United Kingdom led outbound activity by deal value and number of deals in April and LTM.¹⁶⁸

The Paul Weiss, *May 2025 M&A at a Glance* also presents for the last twelve months ending in May 2025 (1) the “Top Five Countries of Origin for Inbound U.S. Crossborder Transactions,” and (2) the Top Five Countries of Destination for Outbound U.S. Crossborder Transactions.”¹⁶⁹ The Top Five countries for inbound, measured by dollar value, are Japan, Canada, Germany, Switzerland, and the U.K. The Top five for outbound, measured by dollar value, are the U.K., Canada, Hong Kong, Australia, and Switzerland.

165. *Id.*

166. Litera, *2023 M&A Report*, *infra* section 1:7.46, at 6.

167. See Paul Weiss, *May 2025 M&A at a Glance*, *infra* section 1:7.46.

168. *Id.*

169. *Id.*

Interestingly, when measured by deal value, two English speaking countries (that is, Canada and the U.K.) are on the Top Five inbound list, and three English speaking countries (that is, the U.K., Canada, and Australia) are on the Top Five outbound list.

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

The strength of the dollar, as compared with other currencies, can impact M&A. 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

[C][1] *A Note on the UNCTAD, World Investment
Report*¹⁷⁰

This section relies on a U.N. Conference on Trade and Development (UNCTAD) *World Investment Report* issued in June 2024. Consequently, the data in the figures in this section runs only through 2021 and relies on the 2022 UNCTAD *World Investment Report*.

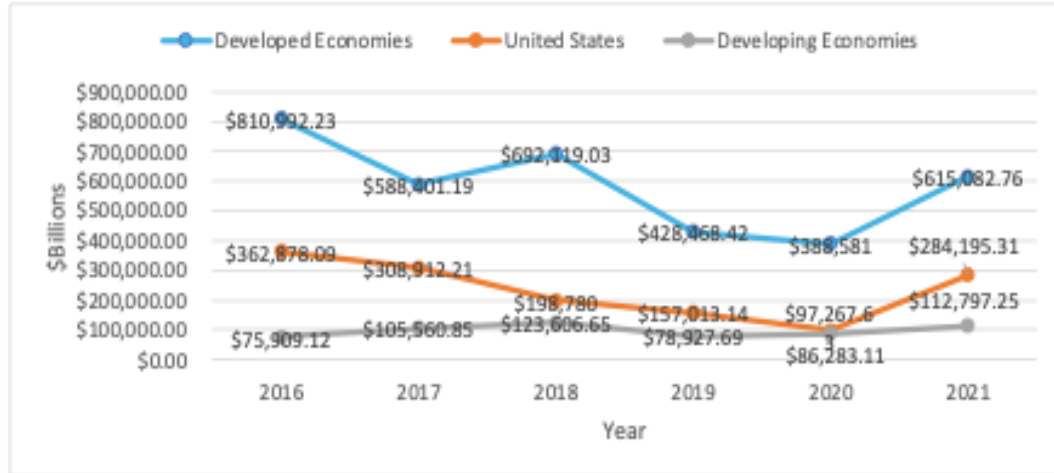
[C][2] *Cross-Border M&A As Reported in the
UNCTAD, World Investment Report*

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.

170. I thank Akshaya Senthil Kumar, an LLM student at Penn State Dickinson 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 United States and Developed Economies, and (2) steady for Developing Economies. This may mean that M&A was more negatively impacted by COVID-19 in the United States and other the Developed Countries than in Developing Countries.

However, as with the previous Figures 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.

[C][3] The 2024 Decrease in Cross-Border M&A

Although the 2025 UNCTAD *World Investment Report* was not available at the time of the writing of this section in May 2025, the 2024 UNCTAD *World Investment Report*¹⁷¹ discussed M&A at several places, and UNCTAD’s “Overview” of the report gave the following high-level report on Cross-Border M&A Trends for 2024:

[C]ross-border mergers and acquisitions (M&As) were especially weak in 2023. M&As, which mostly affect FDI in developed countries, fell by 46 per cent in value. . . . Tighter financing conditions, investor uncertainty, volatility in

171. See UNCTAD, 2024 *World Investment Report*, *infra* section 1:7.46.

financial markets and . . . tighter regulatory scrutiny were the principal causes of the [M&A] decline.¹⁷²

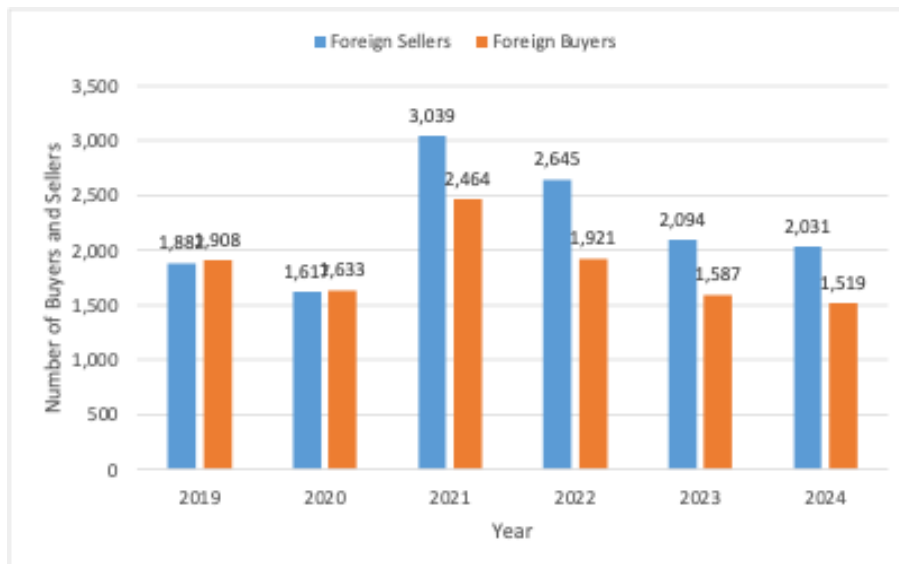
[D] Cross-Border M&A: Foreign Acquirers and U.S. Acquirers, 2019–2024

Figure 1-34, Cross-Border M&A Foreign Buyers [that is, Acquirers] of U.S. Targets and Foreign Sellers [that is, Targets] to U.S. Acquirers 2019–2024, shows for years 2019 through 2024 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.

Figure 1-34
Cross-Border M&A Foreign Buyers of U.S. Targets and Foreign Sellers to U.S. Acquirers 2019–2024



Source: U.S. Acquisitions of Foreign Businesses 2005–2024, pg. 72; Foreign Acquisitions of U.S. Companies 2005–2024, pg. 140, *2024 FactSet Review*

172. UNCTAD, 2024, *World Investment Report, Overview*, *infra* section 1:7.46.

Figure 1-34 shows that in all of the years between 2021 and 2024, (1) the number of U.S. acquirers of foreign targets (that is, outbound acquisitions), exceeded (2) the number of foreign acquirers of U.S. targets (that is, 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*,¹⁷³ 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. . . .

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. . . .

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

[I]n 2016, Chinese investor Haier bought [GE's] appliance division, [which is located in the United States] for \$5.4 billion.¹⁷⁴

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

UNCTAD's *World Investment Report 2024* 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.

The UNCTAD 2024 *World Investment Report, Overview*¹⁷⁵ provides, in part, the following summary of investment policy restrictions as of 2023:

The number of investment policy measures adopted in 2023 was 25 per cent lower than in 2022 but still in line with the five-year average. Most measures, 72 per cent, were favourable to investors. The overall balance between favourable measures (liberalization, promotion, facilitation) and less favourable ones (restrictions on entry and operation) was unchanged.

Developing countries mostly aim to promote and facilitate investment, whereas developed countries lean towards more restrictive measures. In developing countries, 86 per cent of measures were favourable to investors. In developed countries, 57 per cent of measures were less favourable to investors. Most of these concerned restrictions to address national security concerns.

Investment facilitation and incentives were the main types of measures favourable to investors in both developed and developing countries. Facilitation measures reached almost 40 per cent of favourable measures and 30 per cent of all measures – a record. For incentives, the services sector and renewable energy were the primary focus in 2023.

Heightened caution towards foreign investments in critical sectors persisted in 2023. The introduction or expansion of FDI screening mechanisms [like CFIUS in the United States,

174. *Id.*

175. See UNCTAD, 2024, *World Investment Report, Overview*, *infra* section 1:7.46.

discussed in the next section] accounted for nearly half of the measures less favourable to investors. Four additional countries implemented FDI screening in 2023, with several more expected to follow in 2024. Countries that conduct FDI screening now account for over half of global FDI flows and three quarters of FDI stock.

FDI restrictions also increasingly affect outward FDI. Outward FDI policies have evolved over the past decade, reflecting the growing importance of both sustainability and geopolitical considerations in shaping investment policies.¹⁷⁶

[F] Wachtell's 2025 Assessment of Trends in National Security Considerations in the United States and Other Countries

As discussed in chapter 19, in the United States, 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*¹⁷⁷ has an extensive discussion of the recent developments in this area, which is introduced as follows:

The scope and impact of regulatory scrutiny of foreign investments in the U.S. by CFIUS have expanded significantly over the last decade, particularly following passage of the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018, and a series of implementing rules adopted by the U.S. Department of Treasury. [These rules are discussed in chapter 19.] Most recently, new rules that became effective in December 2024 substantially expanded the scope of CFIUS's jurisdiction over real estate transactions involving foreign investors, by adding nearly 60 locations to the existing list of military installations whose proximity to a potential real estate purchase could create CFIUS jurisdiction As FIRRMA has been implemented, the role of CFIUS and the need to factor the risks and timing of the CFIUS review process into deal analysis and planning have been further heightened.¹⁷⁸

176. *Id.*

177. See Wachtell, *2024 Cross-Border M&A Guide*, *infra* section 1:7.46.

178. *Id.*

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

[G] The United States’s “Reverse CFIUS” Rules

As discussed above, the CFIUS rules regulate certain acquisitions by foreign acquirers of domestic targets. As addressed in section 20:2.8, in 2024, the United States also adopted rules prohibiting certain acquisitions by U.S. acquirers of certain foreign targets in what are referred to as Reverse CFIUS transactions. These rules became effective in January 2025.

[H] The Trump II Administration’s February 2024 Initial Approach to CFIUS and Reverse CFIUS

The Trump II Administration’s first initiative on CFIUS and Reverse CFIUS (*i.e.*, acquisition by a U.S. Acquirer of a foreign Target) was a February 2025 White House “Fact Sheet” entitled *President Donald J. Trump Encourages Foreign Investment While Protecting National Security*.¹⁷⁹ Among other things, this Fact Sheet announced the adoption of the National Security Presidential Memorandum (NSPM), which is discussed more completely in chapters 19 and 20, which deal with cross-border M&A. The following are a few of the initiatives described in the Fact Sheet:

- The NSPM establishes that welcoming foreign investment is crucial for economic growth, job creation, and innovation, ensuring that the United States leverages its world-leading financial markets to support American jobs and innovators.
- The United States will create a “fast-track” process to facilitate greater investment from specified allies and partners . . .
- The Committee on Foreign Investment in the United States (CFIUS) will be used to restrict Chinese investments in strategic U.S. sectors like technology, critical infrastructure, healthcare, agriculture, energy, raw materials, and others. . .
- The Trump Administration [through its Reverse CFIUS rules] will consider new or expanded restrictions on U.S. outbound investment to China in sensitive technologies[.]¹⁸⁰

179. See *Fact Sheet: President Donald J. Trump Encourages Foreign Investment While Protecting National Security*, THE WHITE HOUSE (Feb. 21, 2025), <https://perma.cc/4SUW-GHQV>.

180. *Id.*

- The NSPM establishes that welcoming foreign investment is crucial for economic growth, job creation, and innovation, ensuring that the United States leverages its world-leading financial markets to support American jobs and innovators.
- The United States will create a “fast-track” process to facilitate greater investment from specified allies and partners
- The Committee on Foreign Investment in the United States (CFIUS) will be used to restrict Chinese investments in strategic U.S. sectors like technology, critical infrastructure, healthcare, agriculture, energy, raw materials, and others. . .
- The Trump Administration [through its Revere CIFIUS rules] will consider new or expanded restrictions on U.S. outbound investment to China in sensitive technologies[.]¹⁸¹

[I] The Trump II Administration Clears the 2025 Acquisition by Nippon Steel of U.S. Steel with a Golden Share; the Deal Previously Blocked by Biden

Chapter 19 deals with inbound acquisitions, and section 19:8[[F][2] discusses the transaction in which Nippon Steel, a Japanese firm, in June 2025 acquired U.S. Steel, which was based in Pittsburgh. The transaction faced significant opposition in the U.S. but was cleared by CFIUS and later closed.

Interestingly the U.S. government’s approval of the transaction was contingent on the parties entering a National Security Agreement (NSA) with the U.S. Government, pursuant to which, inter alia, U.S. Steel granted a Golden Share to the U.S. Government. A Golden Share is a separate class of a corporation’s stock acquired by a government that gives the government a say or veto on certain actions of the corporation. The Golden Share in this case gave the U.S. Government, inter alia, (1) the right to appoint one independent director; and (2) certain consent rights regarding specific matters, including changing U.S. Steel’s name and headquarters.

Wachtell has provided the following observation on the Trump II approach to CFIUS generally and in the U.S. Steel deal:

[CFIUS] remains a key consideration in many transactions: the President has signaled great interest in deals that could impact national security or the American public, as evidenced by approval of Nippon Steel’s acquisition of U.S. Steel on the condition that the federal government receive a “golden share” with certain governance rights in the storied American

181. *Id.*

steelmaker, and despite the fact that President Biden had blocked the acquisition just months prior.¹⁸²

[J] AO Shearman's Analysis of the 2026 Prospects for M&A and Other Transactions in Several Different Parts of the World

AO Shearman's *Global M&A Insights*¹⁸³ contains a wealth of information on M&A and related transactions, not only for the U.S. but also for many other parts of the world. In addition to a section on the U.S. which is entitled *U.S. M&A rises sharply as big-ticket transactions return amid favorable policy developments* and is discussed elsewhere in this document, *Global M&A Insights* contains the following sections, which could be very helpful in structuring a cross border transaction:

- Transactional activity in Europe gains momentum heading into 2026;
- Middle Eastern sovereign wealth funds boost regional M&A; and
- Asia Pacific dealmaking fueled by strong activity in Japan and China.¹⁸⁴

[K] J.P. Morgan's [1] View of Cross Border Activity in 2025, and [2] Projection of Cross Border Activity for 2025

J.P. Morgan had the following observations on cross-border M&A activity in 2025 and projections for such activity in 2026:

Cross-border M&A activity remained robust, rising 49% YoY. In line with the broader market, growth was fueled by several large transactions, with cross-border volumes reaching \$1.3T, including 17 mega-deals with Tech and DI accounting for 50% of cross-border activity.

The U.S. led as both a top acquirer and target . . . The U.K. France and Japan also saw significant inbound and outbound flows, reflecting their active role in global deal making.

182. Wachtell, *M&A—Reviewing 2025 and Looking Ahead to 2026*, *infra* section 1:7.46.

183. AO Shearman, *Global M&A Insights, Fourth Quarter 2025*, *infra* section 1:7.46.

184. *Id.*

Heading into 2026, global valuation gaps and strategic priorities will continue to drive international transactions.¹⁸⁵

*§ 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 2023–2024, presents for 2023 and 2024 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 2023–2024
(\$ Billions)

2023			2024		
1	Canada	\$ 36,277.3	1	United Kingdom	\$47,758.3
2	Ireland	\$ 35,359.10	2	Japan	\$27,080.4
3	United Kingdom	\$ 24,768.6	3	Canada	\$21,368.1
4	France	\$ 17,166.8	4	Denmark	\$20,426.7
5	Switzerland	\$ 13,997.4	5	France	\$13,477.9
6	Bermuda	\$ 9,529.3	6	Germany	\$13,356.6
7	Australia	\$ 7,790.6	7	Switzerland	\$7,982.0
8	Sweden	\$ 7,637.2	8	Hong Kong	\$6,959..5
9	Saudi Arabia	\$ 4,900.0	9	Italy	\$5,923.0
10	Czech Republic	\$ 4,621.80	10	Sweden	\$4,220.7

Source: Foreign Buyers, Transaction Value by Country 2020–2024, *2025 FactSet Review*, pg. 144–145

Note that in both 2023 and 2024, two of the top three Foreign Buyer Countries were English-speaking countries: Canada and the U.K. Also, in 2023, the top three were all English-speaking countries: Canada, Ireland, and the U.K.

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

185. J.P. Morgan, *2026 Global M&A Annual Outlook*, *infra* section 1:7.46, at page 12.

§ 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 2023–2024, presents for 2023 and 2024 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 2023–2024
(\$ Billions)

2023			2024		
1	United Kingdom	\$53,047.10	1	United Kingdom	\$62,053.1
2	Australia	\$24,555.70	2	Canada	\$41,509.3
3	Canada	\$20,091.1	3	Australia	\$24,187.2
4	Germany	\$9,024.50	4	Italy	\$16,130.8
5	Spain	\$8,700.80	5	Japan	\$15,246.9
6	China	\$7,825.40	6	Ireland	\$13,425.6
7	France	\$7,319.50	7	Germany	\$11,131.6
8	Switzerland	\$7,162.90	8	India	\$10,023.5
9	Bermuda	\$6,603.80	9	Bermuda	\$8,284.9
10	Austria	\$6,217.30	10	Switzerland	\$6,366.3

Source: Foreign Sellers, Transaction Value by Country 2020–2024, 2025 *FactSet Review*, pg. 148–149

Three English speaking countries (that is, the U.K. Australia, and Canada) were in the top three Foreign Seller Countries for both 2023 and 2024.

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 United Kingdom 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, which was supported by the first Trump Administration, are introduced below and discussed in detail in chapter 22.

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

Prior to the enactment of the territorial system by the 2017 Tax Cuts and Jobs Act (TCJA) (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 TCJA adopted a territorial system, pursuant to which the active business income (not passive income such as interest and dividends) 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”¹⁸⁶ built into the previous deferral system, the author of this book has written several articles suggesting that the prior deferral system be

186. 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.

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,¹⁸⁷ with, of course, a credit for foreign taxes paid. The adoption of such an imputation system would have several salutary effects, including completely leveling the playing field, from a U.S. tax perspective, between foreign and U.S. acquisitions.

The Biden Administration proposed moving in the direction of an imputation system but did not propose going all the way. The Biden proposals are dead under the Trump Administration.

§ 1:7.36 The Inversion Problem Before and After the TCAJA and the I.R.C. 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 generally 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 section 385 regulations addressing the interest stripping aspect of inversions.

187. 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 first Trump Administration did not take action to repeal either set of regulations, and the Biden Administration, as would be expected, did not reverse these anti-interest/royalty stripping regulations. As of early 2025, it appears that there has not been a noticeable increase in inversions, and it will be seen whether under the second Trump Administration there is an increase in such transactions and, if so, the reaction of the Trump Administration.

A 2019 the *Wall Street Journal* article noted, as follows, that some U.S. companies that inverted in the past were 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 [inversions] 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.¹⁸⁸

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.”¹⁸⁹

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 more extensively in section 6:9, 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

188. 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/8L4U-Y6YC>.

189. *Id.*

plan to use the funds raised in the IPO to acquire an operating company, which may or may not have been identified.

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 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 2019.¹⁹⁰

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.¹⁹¹

[B] Number of SPACs and Amounts Raised in 2020 Through 2024

Figure 1-37, Number and Dollars Raised by SPACs 2020 through 2024, below, shows that since 2020 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 2020;
- (2) climbed high in both number and amount raised in 2021;
- (3) fell significantly back in 2022;
- (4) held steady in 2023; and
- (5) crashed significantly in both number and dollars raised in 2024.

190. *Wachtell Lipton Discusses M&A Activity in 2020 and Expectations for 2021*, THE CLS BLUE SKY BLOG (Feb. 4, 2021), <https://perma.cc/3XG4-9D8J>.

191. *Id.*

Figure 1-37
Number and Dollars Raised by SPACs 2020 to 2024

YEAR	NO. OF SPACS	DOLLARS RAISED IN BILLIONS
2020	98	\$222.3B
2021	210	\$538.1B
2022	118	\$69.4B
2023	127	\$57.4B
2024	63	\$32.1B

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], have now been adopted, impacting SPACs. Morgan Lewis summarizes as follows the proposed actions, which largely were adopted:

[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, [1] require additional disclosures about SPAC sponsors, conflicts of interest, and sources of dilution; [2] 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 [3] deem underwriters in a SPAC IPO to be underwriters in a subsequent de-SPAC transaction when certain conditions are met.¹⁹²

192. Andrew L. Milano, Thurston J. Hamlette & Caitlin Harrison, *A Look at the SPAC Market In 2022*, MORGAN LEWIS (Apr. 7, 2022), <https://perma.cc/AZM9-RKCR>.

[C] Illustration of a 2024 SPAC and a Related 2025 De-SPAC

Section 6:9.13 discusses a SPAC taking place in 2024 and the related De-SPAC taking place in 2025—the *HCM II Acq Corp SPAC and Terrestrial Energy De-SPAC*.

§ 1:7.38 *Brief Introduction to Blockchain and Cryptocurrency M&A*

[A] In General and the Trump II Effect

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. Some of these issues are also addressed in the due diligence section of chapter 3.

[B] The Starting Point: Trump II's Crypto Business

These issues have been receiving significant attention since the election of President Trump because he has been marketing a crypto coin. In fact, on the night before this section was written—May 24, 2025—President Trump hosted a pay-to-play crypto event at one of his golf courses outside of Washington D.C. The event was described, in part, as follows in an MSNBC article:¹⁹³

If you're looking for one image to summarize the grifter's paradise that was Donald Trump's cryptocurrency dinner Thursday night, behold:

The event was a private dinner with the president at Trump National Golf Club, where “investors spent an estimated \$148 million on the \$TRUMP meme coin to secure their seats ... with the top-25 holders spending more than \$111 million,” . . . Reuters . . . cited an analysis that found the Trumps have made \$320.19 million in fees from their meme coins.

And . . . Justin Sun, a MAGA-aligned crypto bro who said he was “awarded” what he identified as a “Trump Gold Tourbillon” (a Trump-branded watch that retails for \$100,000). . . [claims that he is] the largest investor) of Trump's meme coin, which has drawn many foreign investors — itself a whole ethical and legal quagmire.

193. Ja'han Jones, *Pro-Trump crypto bro Justin Sun embodied MAGA palm-greasing at Trump's crypto soiree*, MSNBC (May 23, 2025), <https://perma.cc/FZ5B-QRS9>.

His investments in Trump have been considerable — but, for him, arguably worthwhile. Sun has been in the news in the last few months because, after he plowed \$75 million into Trump family crypto, per NBC News, the SEC put a 60-day pause on the charges of market manipulation and offering unregistered securities it had been pursuing against him since 2023.¹⁹⁴

As indicated, this section and the due diligence section of chapter 3 provide only a basic introduction to this topic, and in the event crypto is involved on either side of an M&A transaction, the parties should give careful attention to the potential issues, including, if appropriate, engaging an expert to help with the analysis.

[C] The Basic Crypto Principles

First, it is necessary to have a basic understanding of what these crypto concepts mean. 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.¹⁹⁵

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 1933.¹⁹⁶ 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

194. *Id.*

195. *Making Sense of Bitcoin, Cryptocurrency and Blockchain*, PwC, <https://perma.cc/29BD-N6GZ>, (last visited May 27, 2021).

196. *Prospectus*, COINBASE GLOBAL, INC. (Apr. 1, 2021).

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.¹⁹⁷

[D] A Guide to a Very Helpful Introduction to Crypto by F.
Dario de Martino

This author admits that it is difficult to understand what is going on with cryptocurrencies generally and with M&A transactions involving firms in the cryptocurrency industry. However, Dario de Martino, of Morrison & Foerster, has provided an excellent introduction to the principal M&A issues involving cryptocurrencies in a 2021 article entitled: *Blockchain M&A: The Next Link in the Chain*.¹⁹⁸ Obviously, one may want to look for other articles by de Martino on this topic.

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 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

197. *Id.* at Summary.

198. See generally F. Dario de Martino, *Blockchain M&A: The Next Link in the Chain*, STAN. J. BLOCKCHAIN L. & POL'Y 121 (Jan. 4, 2021).

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.¹⁹⁹

While this section of this article does not try to discuss the many points raised in the above referenced 2021 article, as would be expected, that article explains that “[v]aluation of a blockchain target presents a few hurdles that require a nuanced approach.”²⁰⁰ The 2021 article also addresses some of these unique valuation issues. Valuation issues in M&A transactions generally are addressed (1) in chapter 11 of this author's *Mergers, Acquisitions, and Tender Offers* book and (2) in this author's book: *Corporate Valuation in Mergers and Acquisitions*. Both books are published by PLI.

In a section of the de Martino 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.”²⁰¹

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,

199. *Id.*

200. *Id.* at 125.

201. *Id.* at 127.

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 [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 an 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 article then discusses] 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.²⁰²

To emphasize: this list of ten crypto issues is not an exclusive list, and in any M&A transaction care must be taken to adequately identify and address all of the crypto issues.

[E] Brief Introduction to a Leading Publicly-Traded Firm
Active in the Crypto Industry—Coinbase

Coinbase Global, Inc. is a publicly-traded firm that is active in the crypto industry. Its annual report on SEC Form 10-K for its fiscal year

202. *Id.* at 127-40.

ending on December 31, 2024,²⁰³ gives the following general description of its business:

Our Business We offer products and services to three customer groups:

- Consumers: Retail customers seeking to invest in or trade crypto assets and engage onchain.
- Institutions: Businesses that include market makers, asset managers, hedge funds, banks, wealth platforms, registered investment advisors, payment platforms, and public and private corporations.
- Developers: Entrepreneurs, creators, merchants, crypto asset issuers, organizations and financial institutions, and other groups building decentralized protocols, applications, products, or other services onchain.

Our platform serves as a trusted and compliant on-ramp to the onchain economy and enables our users to engage in a wide variety of activities with their crypto assets in both our own proprietary and third-party product experiences enabled by access to decentralized applications.

Our business consists of products that we monetize through transaction fees, such as our consumer trading product suite, as well as subscription products and services, such as our stablecoin products.

This author must say that he does not have an understanding of most of what this description is addressing, which indicates the need for an M&A analyst to consult with a true expert on crypto regarding material, and possibly even immaterial, parts of an M&A transaction.

[F] The Risk with Crypto As Explained by Coinbase

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-Q²⁰⁴ addresses some of these fraud and misrepresentation issues:

203. See SEC Form 10-K for fiscal year ending December 31, 2024, COINBASE GLOBAL, INC. (Filed Feb. 13, 2025).

204. See SEC Form 10-Q, COINBASE GLOBAL, INC. (May 4, 2023).

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 cryptoeconomy and result in greater volatility of the prices of assets, including significant depreciation in value.²⁰⁵

[G] The SEC's Termination of Its Action Against Coinbase
After Trump Took Office

At the time of the federal election in November 2024, the SEC had an action against Coinbase that was working its way through the courts.

205. *Id.*

However, under the leadership of the Trump Administration, the SEC abandoned that action, explaining in part in a SEC news release:

The Securities and Exchange Commission today announced that the Commission has filed a joint stipulation with Coinbase Inc. and Coinbase Global Inc. to dismiss the ongoing civil enforcement action against the two entities.

On January 21, 2025, the Commission announced the formation of the Crypto Task Force, which is dedicated to helping develop a comprehensive and clear regulatory framework for crypto assets. Given the pending work of the Crypto Task Force, the Commission is dismissing this matter.

“For the last several years, the Commission’s views on crypto have been largely expressed through enforcement actions without engaging the general public,” said Acting Chairman Mark T. Uyeda. “It’s time for the Commission to rectify its approach and develop crypto policy in a more transparent manner. The Crypto Task Force is designed to do just that.”²⁰⁶

[H] Discussions of Crypto in the Due Diligence Context

As indicated above, section 3:3.2[M] addresses due diligence function with regard to Crypto.

§ 1:7.39 *The Impact of Environmental, Social and Governance (ESG) on M&A*

[A] In General: Not Including the Impact of President Trump on ESG

Wachtell’s *2024 Takeover Law and Practice*²⁰⁷ 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

206. Press Release, *SEC Announces Dismissal of Civil Enforcement Action Against Coinbase*, SEC (Feb. 27, 2025),

207. See *Wachtell, 2024 Takeover Law and Practice*, *infra* section 7:10.46.

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.²⁰⁸

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 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.²⁰⁹

208. *Id.* at 9.

209. Victor Goldfeld, Mark Stagliano & Anna D’Ginto, *Mergers and Acquisitions: 2022*, HARV. CORP. GOV. FORUM (Jan. 27, 2022), <https://perma.cc/Y88E-BLPB>.

[B] The Impact of Trump II on ESG as of May 2025

The impact of Trump on ESG as of May 2025 is captured in an article by the McNeese law firm entitled *The Impact of Executive Orders on ESG*.²¹⁰ The article explains, in part:

After years of building momentum, ESG efforts are now facing increasing scrutiny amid a shifting political landscape. Early in his second term, President Donald Trump’s administration rolled back several key policies, calling into question the future of ESG-related initiatives and investments across all three pillars: environmental, social, and governance.

Executive Orders Targeting ESG

The “Protecting American Energy from State Overreach” executive order, issued on April 8, 2025, states that American energy dominance is threatened when state and local governments seek to regulate energy beyond their constitutional or statutory authorities. This order looks to reduce the regulatory authority of state and local governments over various energy sources.

In addition to withdrawing, again, from the Paris Accord, the administration has also revoked billions of dollars in clean energy and transportation funding, rolled back environmental regulations, and taken aim at the Inflation Reduction Act (IRA) and diversity, equity and inclusion initiatives.²¹¹

§ 1:7.40 *The Impact of ChatGPT and Other Artificial Intelligence (AI) Firms on M&A*

[A] Introduction

This section provides an introduction to 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 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

210. See *Reframe and Refocus: The Impact of Executive Orders on ESG*, MCNEES LAW (May 16, 2025), <https://perma.cc/L9N4-J8Q4>.

211. *Id.*

addition, section 3:3.2[T] addresses the due diligence function with regard to AI.²¹²

[B] AI Burst onto the Scene in 2023

In 2023 there was an explosion in the business world of discussions concerning the use of AI in business decision-making. Much of the discussion was focused on the impact of ChatGPT, perhaps the best-known AI system, which was developed by OpenAI. OpenAI 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 follow-up questions, admit its mistakes, challenge incorrect premises, and reject inappropriate requests.²¹³

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 learning) for conversational applications using a combination of supervised and reinforcement learning techniques.²¹⁴

In January 2023, Microsoft announced an expansion of its partnership with OpenAI. A Microsoft press release²¹⁵ 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.

212. See David A. Katz & Laura A. McIntosh, *Corporate Governance Update: A Formative Period for AI Regulation*, N.Y. L. J. (Jan. 24, 2024).

213. *Introducing ChatGPT*, OPENAI (Nov. 30, 2022), <https://perma.cc/W5RZ-XKJR>.

214. *ChatGPT*, WIKIPEDIA, <https://perma.cc/5QBT-CZDZ>, (last visited June 3, 2023) [hereinafter, Wikipedia, *ChatGPT* (June 2, 2023)].

215. See Press Release, Microsoft and OpenAI Extend Partnership, OFFICIAL MICROSOFT BLOG (Jan 23, 2023), <https://perma.cc/8VQW-8L8X>.

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.²¹⁶

[C] President Biden’s Executive Order on AI, October 2023

In October 2023, President Biden issued an Executive Order addressing “*Safe, Secure, and Trustworthy Artificial Intelligence*.”²¹⁷ This order could have an impact in dealing with AI issues in an M&A transaction, and consequently, it is briefly introduced here.

Pursuant to this Order, the “President directs the most sweeping actions ever taken to protect Americans from the potential risks of AI systems[.]”²¹⁸

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

216. *Id.*

217. See *FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence*, THE AMERICAN PRESIDENCY PROJECT (Oct. 30, 2023), <https://perma.cc/LNG7-9BYW>.

218. *Id.*

- 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.²¹⁹

[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.”²²⁰

1, The AI Act classifies AI according to its risk:

- Unacceptable risk is prohibited (for example, social scoring systems and manipulative AI).
- Most of the text addresses high-risk AI systems, which are regulated.
- 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).

219. *Id.*

220. *High-Level Summary of the AI Act*, EU ARTIFICIAL INTELLIGENCE ACT (Feb. 27, 2024), <https://perma.cc/NGZ3-MNKH>.

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.²²¹

The Act also sets out the following “Prohibited AI” systems:

- deploying **subliminal, manipulative, or deceptive techniques** to distort behaviour and impair informed decision-making, causing significant harm.

221. *Id.*

- **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**, that is, 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]²²²

[E] Wachtell Lipton’s View of the Impact of AI on M&A as of January 2025

In its publication “*Mergers and Acquisitions—What Awaits in 2025?*,”²²³ Wachtell Lipton makes the following observation of the impact of AI on M&A:

Artificial intelligence will continue to be a focal point, as AI advances and adoption affect productivity across virtually all

222. *Id.*

223. See Press Release, *Wachtell Lipton: Mergers and Acquisitions—What Awaits in 2025?*, LAWDRAGON NEWS (Jan. 14, 2025), <https://perma.cc/84MD-6989>.

industries, and as the companies that do everything from offering AI services to providing the chips, data centers and energy required to power them explore opportunities for inorganic growth and capital-raising.²²⁴

[F] Trump II's January 23, 2025 Executive Order on AI

On January 24, 2025, the Trump Administration issued a Fact Sheet entitled: *President Donald J. Trump Takes Action to Enhance America's AI Leadership*.²²⁵ Among other things, the Fact Sheet provides:

Today, President Donald J. Trump signed an Executive Order eliminating harmful Biden Administration AI policies and enhancing America's global AI dominance.

- President Trump is fulfilling his promise to revoke Joe Biden's dangerous Executive Order that hinders AI innovation and imposes onerous and unnecessary government control over the development of AI.
- The Biden AI Executive Order established unnecessarily burdensome requirements for companies developing and deploying AI that would stifle private sector innovation and threaten American technological leadership.
- Today's executive order:
 - Revokes the Biden AI Executive Order which hampered the private sector's ability to innovate in AI by imposing government control over AI development and deployment.
 - Calls for departments and agencies to revise or rescind all policies, directives, regulations, orders, and other actions taken under the Biden AI order that are inconsistent with enhancing America's leadership in AI.

224. *Id.*

225. See *Fact Sheet: President Donald J. Trump Takes Action to Enhance America's AI Leadership*, THE WHITE HOUSE (Jan. 23, 2025), <https://perma.cc/8YWE-ZKD3>.

ENHANCING AMERICA'S AI LEADERSHIP: The United States must act decisively to retain leadership in AI and enhance our economic and national security.

- This Executive Order establishes the commitment of the United States to sustain and enhance America's dominance in AI to promote human flourishing, economic competitiveness, and national security.
- American development of AI systems must be free from ideological bias or engineered social agendas

CONTINUING PRIORITIZATION OF AI: President Trump has made American leadership in AI a priority and is now building on his actions during his first administration.²²⁶

[G] 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 of AI: “[A] notable drawback has been [the] tendency [of ChatGPT] to confidently provide inaccurate information.”²²⁷

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*.”²²⁸ 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:

226. *Id.*

227. Wikipedia, *ChatGPT* (June 2, 2023), *supra* note 202.

228. See Business Valuation Resources, *Alerding Gives Some Insights Into AI and BV*, 29 BUSINESS VALUATION UPDATE (May 2023).

- 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);
- 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.²²⁹

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 [that is, 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.²³⁰

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.

[H] 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,²³¹ which described the transaction as follows:

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See *Apple buys AR headset startup Mira*, *The Verge reports*, REUTERS (June 6, 2023), <https://perma.cc/3Z9Z-7ETV>.

Apple . . . has acquired Mira, a Los Angeles-based AR startup that makes headsets for other companies and the U.S. military . . .

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.²³²

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[.]”²³³

[I] The “Deepfake Act” Almost Faked Me Out!

As this author was working on this section, he thought it best to check and see if Trump or the government had taken any recent action regarding AI.” Not to this author’s surprise, he discovered that just a few days before, on May 23, 2025, President Trump signed the “AI Deepfake Act” into law. The Mintz law firm summarizes as follows the essential features of this law and related legislative activity:²³⁴

- On May 19, President Trump signed the TAKE IT DOWN Act into law, which criminalizes the publication of non-consensual intimate imagery (NCII), including AI-generated deepfakes.
- The TAKE IT DOWN Act is the first US law to substantially regulate a certain type of AI-generated content. It was passed by Congress in April in a rare moment of nearly unanimous support for AI legislation.
- On May 22, House Republicans passed by a 215-214 vote the reconciliation package that includes AI measures, including a 10-year ban on state AI regulations and over \$1.7 billion in investments in the federal government’s use of AI. The package is now headed to the Senate, where Senator Ted Cruz (R-TX) also plans to introduce legislation prohibiting state AI regulations for 10 years.

232. *Id.*

233. *Id.*

234. See Christian Tamotsu Fjeld et al., *President Trump Signs AI Deepfake Act into Law and House Passes AI Measures — AI: The Washington Report*, MINTZ (May 22, 2025), .

- On May 15, President Trump announced \$200 billion in business deals with the United Arab Emirates (UAE) involving AI and other advanced technologies and a new US-UAE AI Acceleration Partnership between the two countries.²³⁵

[J] 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 and Tariff 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 United States 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.²³⁶

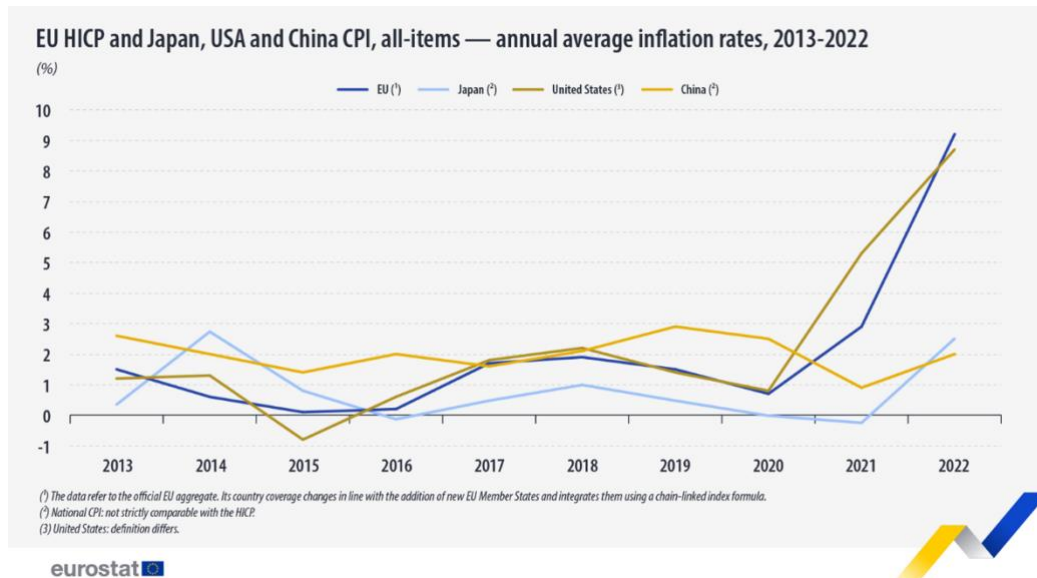
Monetary policy is the principal tool for promoting “stable prices.” A tight monetary policy and the high interest rates that come with it, will have a cooling impact on the economy, and a loose monetary policy and the low interest rates that come with it will have a heating impact on the economy.

235. *Id.*

236. BOARD OF GOVERNORS OF THE FEDERAL RESERVE, <https://perma.cc/ZH7M-LNUM>, (last visited May 31, 2023).

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:

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*, <https://perma.cc/8YU6-82YV> (last visited June 8, 2023).

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 United States and European Union. These significant increases can be traced to the impact of COVID-19 on the macro-economy.

As of the time of the writing of this section in late May 2025, inflation is coming down in the United States, with the following rates for the associated period from 2020 to 2025:

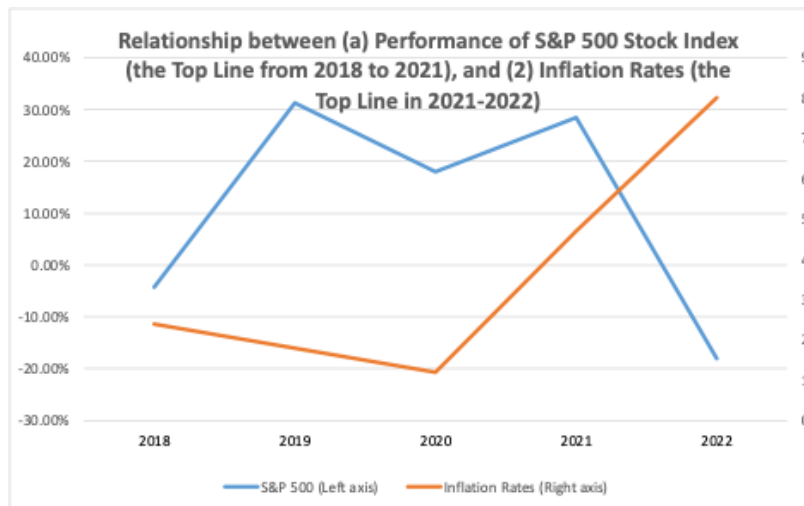
- 2020—1.4% (pre-COVID very low rates);
- 2021—7% (as a reaction to the Fed's tight monetary policy of high interest rates in its fight against inflation brought on by the world's fight against COVID-19);
- 2022—6.5% (the rates begin to fall as the Fed's tight monetary policy begins to work in reducing inflation);

- 2023–3.4%;
- 2024–2.9%;
- 2025–2.3%.²³⁷

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 (that is, 2016 to 2020), both interest rates and inflation were low, and the stock market boomed. However, during the period of tight monetary policy (that is, 2021–2022), interest rates rose, and the stock market declined significantly. However, even though as of May 2024, the Fed was keeping interest rates high, the stock market went up significantly, possibly in anticipation of future interest rate cuts.

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: As Inflation Goes Up, the Stock Market Generally Goes Down



Source: Unknown, but the two lines seem to be correct representations of the Performance of the S&P 500 and the Inflation Rates over this period.²³⁸

237. U.S. INFLATION CALCULATOR, <https://perma.cc/3DZK-RWJK> (last visited May 25, 2025).

238. I thank my Research Assistant, Rinchen Yangzom, for help with clarifying this graph.

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, the stock market, as measured by the S&P 500, fell significantly. Also, as of June 2024, it was anticipated that the Fed would soon reduce interest rates. 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 (FCFs) to be realized and the level of interest rate that is going to be needed to generate the FCFs. 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 [that is, 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%.²³⁹

And, Pitchbook addressed 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%.²⁴⁰

239. PitchBook, *2022 Global M&A Report*, *infra* section 1:7.46, at 4.

240. *Id.* at 9.

§ 1:7.42 An Early 2025 Introduction to the Trump II²⁴¹ Tariffs and Their Negative Economic Impact on Markets

[A] Introduction

[A][1] General Introduction to the Issues

As virtually every professional knows, in early 2025, the Trump II Administration proposed, and sometimes imposed, tariffs on goods coming into the United States from certain countries. This is obviously an important issue for the economy generally, M&A, and other business transactions, particularly cross-border transactions involving a U.S. firm.

This section provides a brief introduction to tariffs generally and to some of the issues presented by Trump's tariff policies. It must be emphasized that this is a fast-moving story. For example, as this section was being drafted over the Memorial Day weekend of Friday, May 23, 2026, through Monday, May 26, 2025, the following events, as described by NBC, occurred:

The European Union has pushed back against President Donald Trump's latest suggestion [made on Friday May 23, 2025] that he will impose a 50% import tariff on all E.U. goods, warning that trans-Atlantic trade must be built on "respect, not threats."

The rebuke came after Trump said in a Friday post on his Truth Social platform that trade negotiations with Brussels were "going nowhere" and suggested he would slap a 50% blanket duty [that is, tariff] on all European goods entering the U.S. starting June 1.

But on Sunday [May 25, 2025], Trump announced that the new date for the tariff to go into effect would be July 9, after he said Ursula Von Der Leyden — president of the European Commission — called him and requested he push back the date.

It was just the latest bellicose remark from Trump and came amid a broader souring of relations between the two global powers that has seen months of distrust and economic sparring.²⁴²

241. As used here, Trump II refers to the second Trump Administration.

242. Freddie Clayton, *Trump's tariff threat risks a trade war with Europe years in the making*, NBC NEWS (May 25, 2025), <https://perma.cc/YWC2-3G79>.

This makes it clear that with Trump's position on tariffs, what is decided on a Friday may be undone by that Sunday.

[A][2] General Introduction to This Section

Because of the fluidity of this issue, this section 1:7.42 provides a short introduction to this very complex topic. Section 1:7.42[B] addresses the following two questions: *What Is a Tariff and Who in the United States Has the Authority to Impose a Tariff?* Section 1:7.42[C] addresses the following question: *What Is the Essential Economic Case Against Tariffs?* Section 1:7.42[D] addresses the following very important question: *What Has Been the General Reaction of the Experts to These Trump Tariffs?*

Section 1:7.42[E] provides a historical perspective on the Trump tariffs by discussing various sections of an excellent CNN article that answers the following question: *What Tariffs Has President Trump Imposed or Threatened to Impose During His First 100 Days?* As this author was writing this on Monday, May 26, 2025, he had already answered this question above as it relates to what happened with the Trump tariffs over that Memorial Day weekend.

Finally, section 1:7.42[F] provides the Author's assessment of this tariff issue as of May 26, 2025.

[B] *What Is a Tariff and Who in the United States Has the Authority to Impose a Tariff?*

A tariff is a tax imposed by a country (for example, the United States) on imports into that country (for example, the United States) of goods (but generally not services) from another country (for example, the United Kingdom). In the United States, the President has, in essence, the unilateral authority to impose a tariff. Although the Constitution grants the authority to impose tariffs to the Congress, as indicated below, Congress has delegated its authority to the President:

The Constitution actually grants Congress the power to levy tariffs, but in recent years as a result of certain laws Congress has passed, the president and the executive branch have controlled when and how tariffs are placed on goods entering the United States.

The Constitution's Article I, Section 8 states: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, ... but all Duties, Imposts and Excises shall be uniform throughout the United States."

Over time, as Congress gave the president expanded powers on its behalf to enact tariff policies, opponents to several tariffs

laws argued the statutes were an unconstitutional congressional delegation of authority to the president.²⁴³

However, these Constitutional challenges have not been successful, and, as a consequence, President Trump, like the presidents before him, has the unilateral authority to impose tariffs.

[C] What Is the Essential Economic Case Against Tariffs?

Tariffs have been around for centuries. So, what is the economic case against tariffs? CNN has provided the following excellent and convincing answer to this question:²⁴⁴

Tariffs are a tax on imported goods, meaning businesses that rely on international supply chains could see an increase in costs. Tariffs can raise expenses for consumers because that tax is often passed on in the form of higher prices. Tariffs also deter international trade and global economic growth.

High tariffs can contribute to weak consumer sentiment and higher inflation, both of which can negatively impact the economy. Tariffs complicate business decisions and hamper growth, stoking uncertainty for investors who much prefer a stable business environment with robust economic growth.²⁴⁵

[D] What Has Been the General Reaction of the Experts to These Trump Tariffs?

It seems that the Trump tariffs are all over the place—high one day, low another day, and none the next day. In addressing the purpose of the Trump tariffs in a May 2025 *Tax Notes International* symposium on the topic,²⁴⁶ Kyle Pomerleau, one of the discussants, expressed the following view on the Trump tariffs, which seems to be common among the experts:

I think there's been a lot of confusion over what the purpose of these policies are. In fact, I think that there are a lot of narratives out there that are just flat wrong in trying to describe what is going on with the administration and trade policy.

243. Scott Bomboy, *How Congress delegates its tariff powers to the president*, CONSTITUTION DAILY BLOG (Apr. 2, 2025), <https://perma.cc/PCE6-UJ2P>.

244. See *CNN's Analysis of the Stock Market Impacts of Trump's First 100 Days*, *infra* section 1:7.46.

245. *Id.*

246. See *Trump's Tariff and Tax Policy 2.0*, TAX NOTES INT'L (May 15, 2025) (a discussion with David D. Stewart, Ryan Finley, Ernie Tedeschi, Erica D. York, and Kyle Pomerleau).

I think the short and easy answer is that for a very long time, decades in fact, Donald Trump has been a big trade skeptic, and that he is pursuing these tariffs because he thinks trade is bad and is a loss for the U.S. economy, and that tariffs, by reducing trade, will be beneficial. Now, lots of reasons that is wrong, but I think that is the starting point in understanding why these are happening.

I think the more sophisticated narratives we've seen coming from people like his CEA Chair Steve Miran or even the Treasury secretary, that these tariffs are about some sort of currency deal or about raising revenue for tax cuts. I think those are some more after-the-fact justifications for the tariffs. I think you really just need to go back to what Trump says about tariffs in trade to understand what's going on here. Because the starting point is just this general distrust of trade and no real strategy; that's why we get a lot of these tariffs that seem contradictory and don't make sense in the context of some of these more sophisticated justifications.

If you thought the tariffs were going to be a source of revenue to pay for or partially offset the Tax Cuts and Jobs Act, you wouldn't see other advisers in the Trump administration talking about how these are negotiating tools meant to reduce trade barriers overall. You're not raising much revenue if the tariffs are just going to go away.²⁴⁷

[E] CNN's Superb Answer to the Question: "What Tariffs Has President Trump Imposed or Threatened to Impose During His First 100 Days[, which Included His 'Liberation Day']?"

The following is a heavily edited excerpt from CNN's superb article entitled: *100 days: The US stock market's rollercoaster ride since Trump took office*, which was written by John Towfighi, Eleanor Stubbs, Soph Warnes, Marco Chacón and Sarah-Grace Mankarious. As indicated in the references, this CNN article is generally referred to as: "*CNN's Analysis of the Stock Market Impacts of Trump's First 100 Days*."²⁴⁸

Here we go with the Trump tariff 100-day tariff ride from November 6, 2025 to April 30, 2025

247. *Id.*

248. See *CNN's Analysis of the Stock Market Impacts of Trump's First 100 Days*, *infra* section 1:7.46.

[Nov. 6, 2025] The “Trump bump” The stock market soars . . . on Wall Street’s expectations for a pro-business Trump administration . . .

[Dec. 5, 2024] Bitcoin [cryptocurrency] crosses \$100,000; [highest ever; the Trump Bump]. . . .

[Jan. 2, 2025] The U.S. stock market opens for the New Year . . . After the S&P 500 gained 23% across 2024, and 24% across 2023 [both Biden years]

[Jan. 20, 2025] Inauguration Day . . .

[Feb. 1, 2025] Trump announces tariffs [that is, 25% on Mexico and Canada] but market rallies . . .

[Feb. 2, 2025] Trump signs executive order on tariffs: [10% on China and 25% on Mexico and Canada] . . .

[Feb 2, 2025] Markets react to Trump’s tariff announcement [by sliding] . . .

[Feb. 3, 2025] The S&P 500 closes at an all-time record high [The high point] . . .

[Feb. 19, 2025] Bitcoin slides below \$80,000 for first time since November . . .

[Feb. 28, 2025] Trump’s tariffs go into effect [25% on Canada and Mexico, and 20% on China] . . . Many investors had thought tariffs would just be a bargaining tool, as opposed to full-fledged policy

[March. 4, 2025] Markets react to higher tariffs [S&P Down 1.2%] . . .

The ‘Trump bump’ that gave a boost to stocks after Trump’s election evaporates as the S&P 500 closes at its lowest level since November

[As a result of tariffs:] Trucks queue near the Mexico-US border . . .

[March 6, 2025] Markets tumble in response to tariffs

The tech-heavy Nasdaq Composite Index enters correction territory, down more than 10% from its record high in December. A

correction is a Wall Street term for falling 10% or more from a recent peak

[March 6, 2025] Trump declines to rule out recession . . .

[March 10, 2025] Stocks see biggest one-day loss for the year to date

The S&P 500 drops 2.7% and the Dow drops 2.08% in one day, both recording their steepest one-day loss so far in 2025.

The Nasdaq records its biggest single-day decline since 2022

[March 13, 2025] Correction territory

The S&P 500 closes in correction territory (down 10% or more from a record high) for the first time since 2023

[March 13, 2025] Volatility persists as Wall Street tries to assess tariffs . . .

[March 13, 2025] Dow posts worst week since 2023 . . .

[March 16, 2025] Stock market records worst quarter since 2022 . . .

[April 2, 2025] Trump’s “Liberation Day”

Trump unveils his “Liberation Day” tariffs after the closing bell. Trump announces his plan for “reciprocal” tariffs during a ceremony at the White House. He holds up a chart depicting massive tariff rates on dozens of countries

[April 3, 2025] Global markets plunge in response to Trump’s tariffs

US stock futures plunge. Dow futures drop more than 1,100 points, or 2.7%. Markets in Asia also tumble

[April 3, 2025] Stocks drop as investors digest Trump’s tariffs . .

The Dow plunges by 2,231 points, or 5.5%. The S&P 500 drops 5.97%. The Nasdaq slides 5.82%.

The Nasdaq closes in a bear market — down more than 20% — for the first time since 2022

[April 4, 2025] Market slumps to lowest level of the year as fear on Wall Street spikes . . .

[April 9, 2025] Pause on tariffs: Trump unveils a 90-day pause on most reciprocal tariffs . . .

[April 9, 2025] Markets rebound on 90-day tariff pause . . .

[April 9, 2025] Bond market freaks out . . .

While Trump didn't blink over drops in the stock market, a historically volatile and rare sell-off in U.S. government bonds raised concerns among market watchers and likely led to him backing down on most tariffs

[April 9, 2025] Stocks slump again as reality sets in . . .

The stock market tumbles again as the White House clarifies its plan for a massive 145% tariff on China, escalating the trade war.

The Dow, after rising nearly 3,000 points the day before, falls 1,015 points

[April 10, 2025] Apple is rattled by the trade war . . .

[April 11, 2025] Exemptions on some key tariffs

Exemptions for tariffs on smartphones, computers and various electronics are posted in a note on the Federal Register

[April 12, 2025] Consumer sentiment plunges to second-lowest level on record . . .

[April 13, 2025] Stocks rebound on tariff exemptions . . .

[April 14, 2025] Fed Chair Jerome Powell offers stark warning on tariffs

Federal Reserve Chair Jerome Powell offers a stark warning about the economic impact of Trump's tariffs, saying they could contribute to inflation and drag on economic growth. That would complicate the Fed's ability to make decisions on whether it should cut its benchmark interest rate

[April 16, 2025] Trump bashes Powell on social media, spooking investors . . .

[April 17, 2025] Markets tumble, U.S. dollar hits three-year low as Trump attacks Fed chair Powell . . .

[April 21, 2025] Gold prices hit record high . . .

[April 22, 2025] [Treasury Secretary] Bessent says U.S.-China trade war is “unsustainable” . . .

[April 22, 2025] Trump walks back attack on Powell

Trump tells reporters in the Oval Office that he has “no intention” of firing Fed Chair Powell

[April 22, 2025] Stocks push higher as Trump signals U-turn on Powell, China trade war . . .

[April 23, 2025] Relief rally takes shape on Wall Street as Trump softens tone on China

The S&P 500 posts its first four-day rally since January

[April 25, 2025] The S&P 500 rallies . . .

[April 30, 2025] 100 days into Trump’s second term

The S&P 500 has shed \$3.66 trillion in market value since Trump was inaugurated.²⁴⁹

[F] The Author’s Question Regarding This Tariff Issue As of May 26, 2025

If Vice President Harris had won the election and taken the above actions on tariffs, which would have been the reaction of citizen Donald Trump:

- Go on President Harris; you are really doing it right: or
- Girl, you are as dumb as 100 doornails

249. *Id.*

[G] The Sullivan & Cromwell's Tariff II Tracker

An excellent source of information for an up-to-date view of developments with Tariffs is the *S&C Tariff Tracker*, which is published and updated periodically by the Sullivan & Cromwell law firm.²⁵⁰ The *Tracker* explains:

The Tariffs Tracker summarizes the status of various tariffs and trade measures that the Trump administration has announced, is implementing, or is actively considering for implementation.²⁵¹

In its *S&C Tariffs Tracker*, which was updated as of January 16, 2026, Sullivan & Cromwell explains:

In recent days, the Trump administration made several announcements relating to certain previously announced and contemplated tariff and trade actions:

- First, President Trump imposed a 25% tariff on certain advanced computing chips while directing the U.S. Secretary of Commerce and U.S. Trade Representative to continue trade negotiations regarding semiconductors. The 25% tariff will not apply to “chips that are imported to support the buildout of the U.S. technology supply chain and the strengthening of domestic manufacturing capacity for derivatives of semiconductors.”
- Second, President Trump directed the Secretary of Commerce and the U.S. Trade Representative to negotiate trade agreements regarding processed critical minerals and their derivative products, and deferred imposing tariffs on critical minerals.
- Third, the United States and Taiwan entered into a trade deal pursuant to which Taiwan will invest \$250 billion in U.S. chipmaking in exchange for more favorable tariff rates.²⁵²

§ 1:7.43 *A Deal Lawyer's "Takes" on the Impact on M&A of the Trump II²⁵³ and Biden Presidential Administration's Laws and Regulations, Other than the Trump II Positions on Tariffs, which*

250. Sullivan & Cromwell, *Tariffs Tracker*, infra section 1:7.46.

251. *Id.*

252. *Id.*

253. As used here, Trump II refers to the second Trump Administration.

Are Addressed in Section 1:7.42

[A] The Trump II Administration's Non-Tariff Impact on M&A

[A][1] The First Take: the "First 100 Days," Beginning January 2025

[A][1][a] General Trump II Approach to Regulation: For Every New One, Get Rid of Ten Old Ones

Shortly after taking office for the second time in January 2025, President Trump announced a "Massive 10-to-1 Deregulation Initiative."²⁵⁴ We will have to see how this approach plays out. Indeed, the Trump Administration's helter-skelter approach to tariffs, which is examined in section § 1:7.43, looks like a policy of "Ten New Tariff Regulations for Every One Non-Tariff Regulation." Apparently, this is essentially the view of Trump's principal financial supporter: Elon Musk, who apparently "views tariffs as bad."²⁵⁵

[A][1][b] Trump II's Approach to Both (1) Substantive Antitrust Enforcement of Mergers, and (2) Pre-Merger Notification

With respect to the Trump II Administration's approach to antitrust enforcement of mergers, which is addressed in chapter 12, and pre-merger notification, which is addressed in chapter 13, an April 30, 2025, Skadden Arps publication²⁵⁶ set out the following "Key Points":

- The government's new antitrust leaders have signaled a less skeptical stance on mergers but a continued focus on enforcement, especially in Big Tech and the health care and agriculture sectors.
- President Trump has fired the FTC's two Democratic commissioners, which may impact ongoing cases.
- The Biden administration's 2023 Merger Guidelines [discussed in chapter 12] and new HSR [pre-merger] filing rules [[discussed in chapter 13] remain in effect.

254. See *Fact Sheet: President Donald J. Trump Launches Massive 10-to-1 Deregulation Initiative*, THE WHITE HOUSE (Jan. 31, 2025), <https://perma.cc/J3ZC-ZQ33>.

255. Pras Subramanian, *Musk on Trump tariffs: I'm an advocate for 'free trade and lower tariffs'*, YAHOO! FINANCE (Apr. 23, 2025), <https://perma.cc/6PCY-TXA3>.

256. See *Antitrust Enforcers Will Take a Friendlier Approach to Mergers but Retain Biden-Era Guidelines and HSR Rules*, SKADDEN ARPS, (Apr. 30, 2025), <https://perma.cc/QQ6N-YEMB>.

- Both FTC and DOJ heads have stated that they plan to streamline merger review where feasible and have indicated an openness to remedies.

This approach does not seem to be a dramatic move away from the general “hold the line” view of both past Democratic and Republican Administrations to (1) antitrust enforcement of mergers, and (2) pre-merger notification.

On this note of consistency in enforcement, the new Chairman of the Federal Trade Commission in a communication to the FTC staff said:²⁵⁷

I write to clarify the standards which should guide your review of transactions. Insofar as there is any ambiguity, let me be clear: the FTC’s and DOJ’s joint 2023 Merger Guidelines are in effect and are the framework for this agency’s merger-review analysis.

The first ever joint Horizontal Merger Guidelines in 1992 were an important milestone. Before 1992, only DOJ had merger guidelines. But it is better for everyone—the courts, businesses, workers, and Congress—when the two agencies are singing from the same song sheet. Since the 1992 Guidelines, the agencies have been going it together. The first revisions to the 1992 Guidelines came in President Clinton’s second administration in 1997. The 1997 revisions remained in effect until President Obama’s administration issued revisions in 2010. Those 2010 revisions, in turn, remained in effect through President Trump’s first administration until 2023.

Stability across administrations of both parties has thus been the name of the game. President Clinton retained the 1992 Guidelines promulgated by the George H.W. Bush Administration until 1997. President George W. Bush retained the 1997 Guidelines unchanged. And President Trump retained unchanged the 2010 Guidelines issued by the Obama Administration. I have been asked a number of times about the fate of the 2023 Guidelines now that I am Chairman. I think

257. See Chairman Andrew N. Ferguson, *Memorandum to FTC Staff on Merger Guidelines*, FTC (Feb. 18, 2025), <https://perma.cc/25AU-CHLA>.

the clear lesson of history is that we should prize stability and disfavor wholesale rescission.²⁵⁸

[A][2] Trump II's Approach to Antitrust Enforcement of Mergers

As was the case with the Trump I administration, the Trump II administration is continuing to enforce the antitrust laws, including the antitrust laws governing mergers, which are addressed generally in chapter 12. With respect to antitrust enforcement of mergers, the ABA's *Looking Back and Looking Forward on M&A, December 2025*²⁵⁹ explains: "US: Continued intensive antitrust scrutiny (albeit less than the prior administration), but more openness to divestiture remedies, enabling targeted settlements in some sectors."²⁶⁰

And, along these same lines, Wachtell Lipton explains:

In general, the tone and approach of federal regulators, including those at the Federal Trade Commission and the Department of Justice, swung back toward more traditional antitrust analysis and enforcement, jettisoning the recently espoused anti-consolidation mindset and some of the more novel theories advanced by the prior administration. These changes should not be viewed, however, as suggesting that companies undertaking strategic transactions will be given a free pass. Antitrust authorities continue to closely scrutinize M&A transactions, including in industries — such as technology and healthcare — that are at the center of the Trump administration's economic agenda.²⁶¹

[B] The Biden Administration's Impact on M&A

From the beginning of the Biden Administration in January 2021, it was clear that the Administration and its appointees were taking a more aggressive approach to various regulatory issues impacting M&A.

For example, as an early indication of the Biden Administration's aggressive approach to various regulatory issues, in July 2021, President Biden issued an Executive Order, titled: *Executive Order on Promoting*

258. *Id.*

259. See ABA, *Looking Back and Looking Forward on M&A, December 2025*, *infra* section 1:7.46, a page 12.

260. *Id.*

261. Wachtell, *M&A—Reviewing 2025 and Looking Ahead to 2026*, *infra* section 1:7.46.

Competition in the American Economy.²⁶² 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.²⁶³

Also, in early 2022, the SEC, which was under the control of Biden appointees, announced several changes governing Special Purpose Acquisition Companies (SPACs). These changes are addressed briefly above and in chapter 6.

In addition, the Biden Administration took an aggressive stance on the enforcement of the antitrust laws, which included revisions of both (1) the DOJ-FTC Merger Guidelines, and (2) the Hart-Scott-Rodino (HSR) Pre-Merger Notification rules. However, as of May 2025, the Trump Administration has not walked away from those rules even though the very aggressive Biden-appointed former FTC Chair, Lina Khan, was instrumental in (1) developing the current DOJ-FTC Merger Guidelines, and (2) the expansion of the reach of the HSR Pre-Merger Notification rules.

VI. RECENT DATA: 2025 AND 2026 DATA AND GUIDE TO THE LITERATURE

§ 1:7.44 *A January 2026 Summary and Preliminary Report on M&A Activity in 2025*

[A] In General

This section provides a brief summary report on M&A activity during 2025. Many of the topics are discussed in earlier sections. However, this section relies principally on a January 2026 publication by the Paul Weiss law firm entitled: *M&A at a Glance, 2025 Year End Roundup*.²⁶⁴

262. See Exec. Order No. 14,036, Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 9, 2021).

263. *Id.*

264. See Paul Weiss, Jan. 2026 *M&A at a Glance*, *infra* section 1:7.46.

[B] Assessment by the Paul Weiss Law Firm of M&A
Activity in 2025

[B][1] *General Observations*

The “Highlights” of the January 2026 *M&A at a Glance* makes the following observations, among others:

*The year 2025 heralded the return of the megadeal, with total deal values in the U.S. and globally increasing by 61% and 46% over 2024 levels, respectively, amid relatively flat deal counts. .

..

*Computers & Electronics was the most active U.S. target industry by deal value and deal count

*The average reverse break fee (5.8%) was at its lowest level in the last three years (5.9% in 2024 and 6.0% in 2023

*The percentage of public deals with go-shops (8.3%) returned to roughly the percentage seen in 2023 (8.2%) after dipping slightly in 2024 (7.7%).

*Similarly, the rate of tender offers (16.0%) increased to almost match the 2023 rate (16.4%) after having fallen in 2024 (10.6%).

*The percentage of hostile and unsolicited deals (14.1%) was the lowest seen in the last three years (17.6% in 2024 and 17.9% in 2023).²⁶⁵

[B][2] *A Question About the Rate of Tender Offers*

It appears to this author that the 16% rate for tender offers is not likely to be applicable in the U.S. For example, Figure 1-24, *U.S. Tender Offers Contested and Uncontested 2019–2024*, shows that in the U.S. for 2024 there were only 2 hostile tender offers and 36 consensual tender offers.

However, as discussed in chapter 20, in the E.U. and the U.K, for example, the tender offer is the principal form of acquisition of a publicly-held target, both consensual and hostile. However, in the U.S. the principal transactional form for the acquisition of a publicly-held corporation is either a merger or asset acquisition, and principally both require at least a majority vote of the target’s shareholders.

[B][3] *The Direction of the Deal Value and Deal Count in the U.S. and World from 2024 to 2025*

As discussed previously, the *January 2026 M&A at a Glance* shows that for both the U.S. and the World, there was a curious pattern of Deal

265. *Id.*

Value and Deal Number. In the U.S., while the Deal Value was up by 60.7%, the Deal number was down by 1.9%. For the World, the Deal Value was up by 45.5%, while the Deal number was down by 2%. This means, of course that the average deal size in 2025 was substantially more than the average deal size in 2024.

[B][4] The More Relaxed Approach of the Trump Administration to Antitrust Enforcement

This significant increase can, in many ways, be explained by the Trump Administration's more relaxed approach to mergers than the Biden Administration. For example, an article, entitled *How the Trump administration supercharged M&A activity*,²⁶⁶ gives the following explanation:

By mid-July of this year, bankers and mergers & acquisitions (M&A) advisors were cancelling their vacations. Hard-earned time off in the dog days of summer was completely undone by about \$1 trillion of global deal flow between June and August of 2025, marking the best year since the end of the pandemic for global M&A markets and a new sense of optimism for private equity markets after a sustained slump in activity. One portfolio manager explains that the catalyst for this shift begins with US Presidential policy.

Amar Pandya, Portfolio Manager at Penderfund, explains that under President Biden, the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) pursued an aggressive and novel set of approaches to dampen M&A activity, with a view to consumer protection and fostering competition. The policy approach was personified in the figure of FTC chair Lena Khan, who went after major deals like the Microsoft-Activision merger, resulting in a slower process with greater regulatory burdens. The onerous nature of deals under the past administration resulted in an overall downturn in M&A activity. Now, however, the Trump administration and FTC Chair Andrew Ferguson have set a new tone that's driving waves of M&A again.²⁶⁷

266. See David Kitai, *How the Trump administration supercharged M&A activity*, WEALTH PROFESSIONAL (Nov. 5, 2025), <https://perma.cc/HM4M-N5PJ>.

267. *Id.*

[B][5] Is the More Relaxed Approach of the Trump Administration to Antitrust Enforcement Wise?

This author considers himself a Hawk when it comes to enforcement of the antitrust laws. He is certain that there is a sound economic basis for prohibiting mergers that “may”, in the words of Section 7 of the Clayton Act, “substantially lessen competition,”²⁶⁸ which basically means raise prices for consumers.

However, notwithstanding this author’s strong support for merger antitrust enforcement, he thinks the Biden Administration was probably challenging transactions that were in no way going to lead to an increase in price for consumers. This type of “over enforcement” of the antitrust laws could cause companies that would otherwise pursue a significant and visible merger to say: “No way, I don’t have time for that fight!” This type of approach has deleterious impact on consumers because it in fact prevents competition that would otherwise take place if the merger were to proceed.

§ 1:7.45 A January 2026 Projection of M&A Activity for 2026

In this author’s view, the M&A market is likely to continue to be quite active in 2026. Given Trump II’s relaxed approach to antitrust and regulatory issues, it can be expected that deals that would not have been tried in the Biden Administration, will be undertaken and will succeed in the Trump II Administration. As indicated previously, although this author believes in strong antitrust enforcement, he does not believe that Trump II’s more relaxed antitrust enforcement approach is necessarily unwise.

In this author’s view, if there is not a significant Antitrust or Regulatory issue in a transaction, then let the companies merge, as long as the shareholders (1) are fully informed, and (2) are not being coerced into a deal. This type of approach is likely to enhance market efficiency. It will also give the regulators more time to focus on the transactions that in the words of section 7 of the Clayton Act “may . . . substantially . . . lessen competition, or . . . tend to create a monopoly.”²⁶⁹

This view on what is likely to happen is also shared by many of the sources discussed in this article including J.P. Morgan, which has said: Momentum is expected to continue into 2026 as boards and C-suites continue to pursue scale while capitalizing on innovative deal structures, valuation mismatches and supportive financing markets – both public and private.²⁷⁰

268. 15 U.S.C. § 18, Acquisition by one corporation of stock of another (2026).

269. *Id.*

270. J.P. Morgan, *2026 Global M&A Annual Outlook*, infra section 1:7.46, at pg.

§ 1:7.46 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:

- ABA, Business Law Section, *Looking Back and Looking Forward: M&A Developments in 2025 and Outlook for 2026* (Dec. 4, 2025) [“ABA, *Looking Back and Looking Forward on M&A, December 2025*”];
- AO Shearman, Global M&A Insights (Quarter 4, 2025) [“AO Shearman, *Global M&A Insights, Fourth Quarter 2025*”];
- Frank Aquila and Catherine Yuh, *Hostile M&A Activity Could Spur Comeback of Takeover Defenses*, Perspectives, BLOOMBURG LAW (Oct. 30, 2025) [Aquila and Yuh, *Hostile M&A, October 2025*];
- Business Valuation Resources (BVR), *2023 FactSet Review* (May 2024) [“*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;
- CNN, *100 days: The U.S. stock market's rollercoaster ride since Trump took office* (Apr. 30, 2025) by John Towfighi, Eleanor Stubbs, Soph Warnes, Marco Chacón & Sarah-Grace Mankarious [“*CNN's Analysis of the Stock Market Impacts of Trump's First 100 Days*”];
- Igor Kirman, Victor Goldfeld & Elina Tetelbaum, *Takeover Law and Practice: Current Developments*, Harvard Law School Forum on Corporate Governance (May 3, 2023) [“Wachtell, *2023 Current Developments*”];
- Ethan Klingsberg, *Takeaways from the [Berkeley] 20th Annual Spring Forum on M&A and the Boardroom* (May 31, 2024), available at Takeaways from the 10th Annual Spring Forum on M&A and the Boardroom, Ethan Klingsberg (freshfields.us) [“Klingsberg, *Berkeley 2024 Spring Forum on M&A*”];

- J.P. Morgan, *2026 Global M&A Annual Outlook, from Turbulence to Transformation* (Feb. 2026) [J.P. Morgan, *2026 Global M&A Annual Outlook*];
- Litera, *2023 M&A Report, Return to Normal Resilience and Resetting* (December 1, 2022) [“Litera, *2023 M&A Report*”];
- Litera, *M&A Activity Report: The Evolution of Dealmaking in a Competitive Environment* (2024) [“Litera, *2024 M&A Report*”];
- McKinsey & Company, *M&A Practice, M&A Annual Report, Is the Wave Finally Arriving?* (February 2025) [“McKinsey & Company, *M&A Annual Report 2025*”];
- McKinsey & Company, M&A Practice, *Top M&A Trends in 2024, Blueprint for Success in the Next Wave of Deals* (2024) [“McKinsey & Company, *Top M&A Trends in 2024*”];
- Moelis, *Current M&A Environment* (April 2023) [“Moelis, *April 2023 M&A Environment*”], presented at the ABA M&A Committee Meeting April 2023;
- Jen Muller, *American Bar Association, International M&A Subcommittee*, Houlihan Lokey (April 20, 2023) [“Muller, *M&A Subcommittee 2023*”], presented at the ABA M&A Committee Meeting April 2023;
- Paul Weiss, *M&A at a Glance* (2023) [“Paul Weiss, *2023 M&A at a Glance*”];
- Paul Weiss, *M&A at a Glance* (June 2024) [“Paul Weiss, *June 2024 M&A at a Glance*”];
- Paul Weiss, *M&A at a Glance* (May 2025) [“Paul Weiss, *May 2025 M&A at a Glance*”];
- Paul Weiss, *M&A at a Glance, 2025 Year End Roundup* (Jan. 2026) [Paul Weiss, *January 2026 M&A at a Glance*];
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