## CONTENTS

### General chapter

*The MAC is back: Material adverse change provisions after Akorn*

Adam O. Emmerich & Trevor S. Norwitz, *Wachtell, Lipton, Rosen & Katz*  
1

### Country chapters

<table>
<thead>
<tr>
<th>Country</th>
<th>Authors</th>
<th>Firm</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Hartwig Kienast, Horst Ebhardt &amp; Jiayan Zhu</td>
<td><em>WOLF THEISS</em></td>
<td>12</td>
</tr>
<tr>
<td>Belgium</td>
<td>Luc Wynant &amp; Jeroen Mues</td>
<td><em>Van Olmen &amp; Wynant</em></td>
<td>19</td>
</tr>
<tr>
<td>Brazil</td>
<td>Lior Pinsky &amp; Gabriel Menezes</td>
<td><em>Veirano Advogados</em></td>
<td>25</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Yordan Naydenov &amp; Dr. Nikolay Kolev</td>
<td><em>Boyanov &amp; Co</em></td>
<td>32</td>
</tr>
<tr>
<td>Canada</td>
<td>Valerie C. Mann</td>
<td><em>Lawson Lundell LLP</em></td>
<td>42</td>
</tr>
<tr>
<td>China</td>
<td>Will Fung &amp; Hao Lu</td>
<td><em>Grandall Law Firm</em></td>
<td>49</td>
</tr>
<tr>
<td>France</td>
<td>Coralie Oger</td>
<td><em>FTPA</em></td>
<td>54</td>
</tr>
<tr>
<td>Germany</td>
<td>Sebastian Graf von Wallwitz &amp; Heiko Wunderlich</td>
<td><em>SKW Schwarz Rechtsanwälte</em></td>
<td>64</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>Joshua Cole</td>
<td><em>Ashurst</em></td>
<td>72</td>
</tr>
<tr>
<td>India</td>
<td>Anuj Trivedi &amp; Sanya Haider</td>
<td><em>Link Legal India Law Services</em></td>
<td>77</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Eric Pratama Santoso &amp; Barli Darsyah</td>
<td><em>Indrawan Darsyah Santoso, Attorneys At Law</em></td>
<td>83</td>
</tr>
<tr>
<td>Ireland</td>
<td>Alan Fuller, Aidan Lawlor &amp; Elizabeth Maye</td>
<td><em>McCann FitzGerald</em></td>
<td>95</td>
</tr>
<tr>
<td>Ivory Coast</td>
<td>Annick Imboua-Niava, Osterth Tella &amp; Hermann Kouao</td>
<td><em>Imboua-Kouao-Tella &amp; Associés</em></td>
<td>106</td>
</tr>
<tr>
<td>Japan</td>
<td>Hideaki Roy Umetsu &amp; Yohsuke Higashi</td>
<td><em>Mori Hamada &amp; Matsumoto</em></td>
<td>112</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Marcus Peter &amp; Irina Stoliarova</td>
<td><em>GSK Stockmann</em></td>
<td>123</td>
</tr>
<tr>
<td>Malta</td>
<td>David Zahra</td>
<td><em>David Zahra &amp; Associates Advocates</em></td>
<td>127</td>
</tr>
<tr>
<td>Mexico</td>
<td>Jaime A. Treviño Gonzalez, Carlos Alberto Chavez Pereda &amp; Tracy Delgadillo Miranda</td>
<td><em>JATA – J.A. Treviño Abogados</em></td>
<td>140</td>
</tr>
<tr>
<td>Morocco</td>
<td>Dr Kamal Habachi, Salima Bakouchi &amp; Houda Habachi</td>
<td><em>Bakouchi &amp; Habachi – HB Law Firm LLP</em></td>
<td>147</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Alexander J. Kaars, Willem J.T. Liedenbaum &amp; David van der Linden</td>
<td><em>Houthoff</em></td>
<td>155</td>
</tr>
<tr>
<td>Norway</td>
<td>Ole K. Aabø-Evensen</td>
<td><em>Aabø-Evensen &amp; Co</em></td>
<td>167</td>
</tr>
<tr>
<td>Spain</td>
<td>Ferran Escayola &amp; Rebeca Cayón Aguado</td>
<td><em>Garrigues</em></td>
<td>184</td>
</tr>
<tr>
<td>Sweden</td>
<td>Jonas Bergquist, Alban Dautaj &amp; Katerina Madzarova</td>
<td><em>Magnusson Advokatbyrå</em></td>
<td>192</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Dr. Mariel Hoch &amp; Dr. Christoph Neeracher</td>
<td><em>Bär &amp; Karrer Ltd.</em></td>
<td>201</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Michal Berkner, Ed Lukins &amp; James Foster</td>
<td><em>Cooley (UK) LLP</em></td>
<td>205</td>
</tr>
<tr>
<td>USA</td>
<td>Nilufer R. Shaikh &amp; M. Corey Connelly</td>
<td><em>Pepper Hamilton LLP</em></td>
<td>218</td>
</tr>
</tbody>
</table>
Overview

2018 M&A numbers
Following 2017’s market decline, overall M&A volume trended in a positive direction in 2018. While the almost 20,000 transactions closed globally in 2018 did represent a 15% drop from the previous year, a record median deal size of $48.2 million more than made up the difference. The $3.6 trillion worth of transactions closed in 2018 is less than 2% off the all-time volume peak of 2016 and represents a significant rebound from the previous year’s mark. Furthermore, enterprise value/earnings before interest, taxation, depreciation and amortisation (“EV/EBITDA”) multiples for all deals reached 12.3× in 2018, decreasing slightly year-over-year but remaining well above the 10-year median EV/EBITDA multiples of 10.9×.

The domestic M&A market was once again robust, with the overall value of transactions based in North America exceeding $2.0 trillion for the fourth year in a row. This volume level was aided by a large number of “mega-deals”: seven of the top 10 announced transactions for U.S. targets in 2018 were valued in excess of $30 billion. Indeed, the 10 largest transactions announced in 2018 accounted for approximately 23% of the overall value of domestic M&A activity. Average transaction size continued to increase as a whole, as transactions in excess of $1 billion constituted roughly 75% of the aggregate deal value of M&A activity while accounting for less than 10% of the number of total transactions. This activity was significantly driven by large-scale deals in the healthcare and technology sectors. The median transaction size in North America was $60 million, an $11 million increase from 2017.

In contrast to the robust domestic M&A market, there has been a substantial and continuous drop in deal volume representing inbound investment activity. Total deal volume for inbound M&A transactions involving U.S.-based targets dipped almost 20% last year from 2017’s already declining numbers. Macroeconomic deceleration and political tension both have a role to play. In particular, isolationist rhetoric and trade disputes may have dissuaded potential Chinese buyers from purchasing U.S.-based assets. Last year marked the second straight year of decreases in cross-border transactions with China: Chinese entities accounted for only 5.6% of acquirors of North American targets, down from a peak of 9.4% in 2016.

Notably, inbound investment levels from Canada and Europe have similarly declined. Negotiations surrounding the North American Free Trade Agreement (NAFTA) likely impacted Canadian investments, while the continued uncertainty over Brexit in the United Kingdom and much of the European Union has had a negative ripple effect on Europe. The relatively strong dollar value and equity markets that were high for much of the year have
also served to make inbound U.S. acquisitions more expensive. Canada remains the leading nation for inbound M&A activity, followed by Japan and the United Kingdom, over the past 12 months, measured by the number of transactions as well as aggregate dollar value. Cumulatively, given these challenging headwinds, it is not surprising that foreign companies seem less willing to spend on North American acquisitions, with no significant signs of any shift in this trend over the short-term.

**Dealmaking**

**Strategic vs. PE dealmaking**

Sponsor-backed M&A activity levels increased slightly in 2018 in absolute terms, but more meaningfully as a proportion of overall M&A activity. Last year, 29% of all transactions were closed by financial buyers, and the remaining 71% of all transactions were closed by strategic buyers, according to S&P Capital IQ Data. In 2017, only 13% of all transactions were closed by financial buyers, and 87% of all transactions were closed by strategic buyers. Of all 2018 transactions having U.S. buyers, 34% of the transactions were closed by U.S. financial buyers, and the remaining 66% were closed by U.S. strategic buyers. Strikingly, in 2017, these numbers stood at 9% and 91%, respectively.

This continued rise in prominence of PE- and VC-backed companies in proportion to the total M&A market has been one of the reasons for the increased volume in the market, despite the 15% drop in overall deals completed. As an example, the median leveraged buyout size in 2018 was approaching $140.0 million, nearly triple the median M&A deal size for both strategic and sponsor-led transactions. In 2018 alone, private equity firms in the United States consummated over 5,500 acquisitions and the number of U.S. private equity-backed companies stood at just under 8,000. This is dramatically higher than the approximately 1,500 private equity-backed companies existing in 2000.

The competition to deploy capital among private equity firms remains strong as there is a scarcity of quality assets. Political unrest and the spectre of a prolonged trade war continue to concern investors and they are responding by more carefully reviewing the potential for disruptions in upstream supply chains and downstream end-markets. New ultra-large infrastructure funds have been announced leading to expectations of large leveraged buyout transactions in the infrastructure space in the near-term. During the 2007–2009 downturn, sponsors looked for alternate ways to use surplus capital, including by acquiring minority stakes in companies challenged by liquidity issues. This pattern has undergone a resurgence in recent years; there are mounting examples of private equity firms developing or contemplating affiliated funds (The Riverside Company, Huron Capital and Balance Point Equity) specifically to invest in minority investments and other structured equity. More than $21 billion has been raised in 2018 by private equity firms for the purpose of minority investments, which is in addition to the record-high $23 billion that was raised in 2017 according to PitchBook data. These minority investments offer middle-market private equity firms a chance to differentiate themselves in a crowded market and present the company owners the option to maintain control of the business and to cash out at a later date.

**Shareholder activism and hostile bid activity**

In 2018, the number of activist campaigns against U.S.-based targets saw a slight increase. Of the 493 activist campaigns last year, 74% of the activist demands were board-related or related to other governance matters. Only 12% of the activist demands were related to M&A or breakup demands (pushing for M&A, opposing M&A or demanding spinoff/breakup). In addition to supporting the M&A market directly, this sort of activist involvement has
encouraged companies to more aggressively engage in transaction discussions in order to preempt anticipated activist activity.

The number of unsolicited M&A bids rebounded in 2018, after seeing a substantial decline in 2017. According to Houlihan Lokey data, the largest hostile M&A bid was Comcast Corp.’s bid for Twenty-First Century Fox, Inc., an American multinational mass media corporation (valued at $77.5 billion; withdrawn July 19, 2018). The next three largest hostile bids in 2018 were: MGM Growth Properties LLC’s bid for VICI Properties Inc., an experiential-asset real estate investment trust (valued at $11.8 billion; January 16, 2018); certain Nordstrom family members’ bid for Nordstrom, Inc., a fashion specialty retailer in the United States (valued at $7.4 billion; March 5, 2018); and Gebr. Knauf KG’s bid for USG Corp., the largest distributor of wallboard in the United States and the largest manufacturer of gypsum products in North America (valued at $6.1 billion; March 26, 2018).

Industry sector focus

In 2018, Information Technology (“IT”) and Industrials were the two sectors with the most M&A activity, as determined by number of transactions, according to S&P Capital IQ data. Approximately 21% of the U.S. transactions closed in 2018 were in the IT sector, and 19% of the U.S. transactions were in the Industrials sector. These numbers are similar to the industry breakdown of M&A activity that was seen in 2017.

In terms of deal volume, the Energy sector once again led the U.S. market with deal volume totalling $407.5 billion, accounting for a 23.6% share of the U.S. M&A market according to Thomson Reuters data. The IT sector followed, with $324.8 billion in deal volume accounting for an 18.8% share of the U.S. M&A market. The Healthcare sector rounded out the top three sectors, by volume, representing $215.4 billion in deal volume and a corresponding 12.5% U.S. M&A market share.

Key developments

Case law developments

There have been certain significant decisions in 2018 originating out of the Delaware courts that are of particular interest to the M&A legal community. The cases highlighted below are among the most notable:

- As discussed elsewhere more extensively in this volume, in Akorn, Inc. v. Fresenius Kabi AG, the Court found, for the first time, the occurrence of a material adverse effect (“MAE”) between signing and closing of a purchase agreement, thereby permitting the valid termination by Buyer of such purchase agreement. This case involved an extreme set of facts supporting an MAE, including a drastic and “durationally significant” business downturn, whistleblowers, “pervasive compliance problems” and “widespread regulation violations” and confirmed that Delaware courts will enforce all contract provisions, including MAE provisions, in accordance with their terms upon an appropriate evidentiary record. Despite this finding, which was affirmed by the Delaware Supreme Court, practitioners should continue to negotiate for specific, bright-line triggers for the MAE definition because a Buyer has a high bar to establish the occurrence of an MAE.

- In Manti Holdings, LLC v. Authentix Acquisition Co., the Court held, for the first time, that a contractual appraisal waiver in a board-approved sale was enforceable against holders of common stock (the Court had previously upheld prospective waivers by holders of preferred stock, whose rights are primarily contractual in nature). The
stockholders’ agreement had provided that they “refrain” from exercising, without expressly waiving, appraisal rights, leading the plaintiffs to argue that their appraisal rights were not extinguished, but only temporarily suspended. This case involved an appraisal action brought by holders of common stock under Section 262 of the Delaware General Corporation Law (as amended, “DGCL”) in connection with a cash merger in which they would receive little, if anything, for their shares. The merger was initiated by the controlling stockholder, The Carlyle Group, pursuant to the exercise of drag-along rights, which allowed it to force a sale of the portfolio company, under a stockholders’ agreement, to which the appraisal petitioners were parties. The ruling brings certainty to private equity investors who customarily include drag-along provisions and appraisal waivers in their investment documents and flags the importance of including appropriate language expressly waiving appraisal rights.

• Eagle Force Holdings LLC v. Campbell involved a question as to whether certain documents signed by the transaction parties met all requirements to be fully enforceable agreements. In this case, the Delaware Supreme Court enunciated a clear standard as to whether a contract has sufficiently definite terms so as to be valid: “A contract is sufficiently definite and certain to be enforceable if the court can – based upon the agreement’s terms and applying proper rules of construction and principles of equity – ascertain what the parties have agreed to do.” In the matter at hand, the parties’ execution of transaction documents marked “DRAFT” with blank schedules and several unresolved issues was ruled not to be binding. Equally interesting to the deal community was the inclusion of a footnote in the opinion by the Court that suggested that Delaware law is not as settled as previously thought on the issue of whether a Buyer must prove reliance on a contractual representation or warranty to recover for a breach. The footnote provided that the majority of states do not require proof of reliance for recovery in cases of breach of an express representation or warranty, but that Delaware “has not yet resolved this interesting question”. A Buyer, therefore, should consider whether to negotiate for an express “pro-sandbagging” clause in order to avoid disputes about what they knew and when they knew of a breach of a Seller’s contractual representations and warranties. At the very least, this footnote opens the issue for debate.

• Morrison v. Berry represents a continued refining of the so-called Corwin doctrine, which provides business judgment rule deference to directors in the case of transactions that are approved by a majority of disinterested, fully informed and uncoerced stockholders. In contrast to some of the decisions covered in the 7th edition of Global Legal Insights – Mergers & Acquisitions, this case turned on whether the voting stockholders were truly “fully informed” in light of several material disclosure violations regarding the role of a significant stockholder in a sale process (such as his undisclosed prior dealings with the buyer, pressure on the board and other external influences that may have impacted the transaction process), which came to light as a result of a demand for books and records under Section 220 of the DGCL. The Delaware Supreme Court reversed the lower court’s dismissal, which was based on application of the Corwin doctrine, similar to another 2018 reversal by the Delaware Supreme Court in Appel v. Berkman due to material disclosure deficiencies for a transaction. The protections of business judgment review will not be applied to stockholder-approved transactions when “partial and elliptical” disclosures leave voting stockholders with an unclear and incomplete view.
• **Flood v. Synutra International, Inc.** clarified that the MFW *ab initio* (meaning “from the beginning”) requirement for application of the deferential business judgment rule to a controlling stockholder transaction, is satisfied so long as such stockholder conditions its offer on both of the requisite MFW procedural protections prior to the commencement of any economic negotiations between the special committee and the controlling stockholder. In a 2014 case, *Kahn v. M&F Worldwide Corp.* (“MFW”), the Delaware Supreme Court had established that the director-friendly protections of the business judgment rule will apply to a going private transaction proposed by a controlling stockholder when the controlling stockholder conditions the transaction *ab initio* on two procedural protections: (1) approval by an independent, fully empowered special committee that fulfills its duty of care; and (2) the uncoerced, informed vote of a majority of the minority stockholders. In *Flood v. Synutra International, Inc.*, the plaintiff argued that the MFW requirements were not met because the controller’s initial offer was not conditioned on either of the two requisite procedural safeguards, and it was only after the formation of the special committee that he sent a second offer letter containing these two safeguards. While the Court affirmed the dismissal of the plaintiff’s action, citing compliance with MFW requirements, the vigorous dissent urging adoption of a bright-line rule regarding the first offer should encourage a strict adherence to the MFW procedures.

• In *Sciabacucchi v. Salzberg*, the central question was whether forum selection provisions in a certificate of incorporation that require federal securities laws disputes to be brought only in Delaware federal courts, are enforceable. The courts had previously affirmed, most recently in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, that bylaws could require that fiduciary duty actions and other corporate governance disputes be filed only in Delaware state and federal courts, which was later codified by the Delaware legislature. However, in this case, the Court ruled that such requirements were not enforceable with respect to federal securities disputes because the federal Securities Act of 1933 gave concurrent jurisdiction to state courts over disputes arising under it. Further, the Court held that forum selection provisions were invalid for a body of law that was external to the corporate contract and did not involve the internal affairs of the corporation.

• *In re Tesla Motors Inc. Stockholder Litigation* highlighted the rare scenario where a minority stockholder could exercise sufficient control, even at a 22.1% ownership threshold, that a transaction could be subject to the stringent entire fairness review in the absence of other procedural safeguards. In this case, Elon Musk, the founder and largest stockholder of Tesla Motors (holding 22.1% of the stock) and the founder (together with his cousins) and largest stockholder of SolarCity (holding 21.9% of the stock), was found to dominate the board in its discussions over the proposed acquisition by Tesla Motors of SolarCity. Although the Delaware courts seldom find control where ownership levels are this low, this Court concluded, for purposes of the motion to dismiss before it, that Musk was a controlling stockholder of Tesla Motors with respect to the SolarCity transaction due to: (1) Musk’s history of removing management when displeased; (2) the board’s lack of procedural safeguards, such as the formation of an independent special committee, to mitigate his potentially coercive influence; (3) voting board members interested in the transaction or not independent of Musk due to personal and business ties; (4) public filings acknowledging his outsized influence; and (5) Musk himself led the board’s discussions and engaged the board’s advisors for the proposed acquisition. The Court has shown it is willing to look past
low percentage ownership levels of a minority stockholder who is on both sides of a transaction if the facts suggest that there are indicia of control over the board and the company, without appropriate cleansing procedures, to merit an entire fairness review.

- In *City of North Miami Beach General Employees’ Retirement Plan v. Dr. Pepper Snapple Group Inc.*, the Court refined its approach to appraisal rights under Section 262 of the DGCL by clarifying the meaning of a “constituent corporation” under that Section. In this case, the Court decided that stockholders of the Dr. Pepper parent entity in a reverse triangular merger lack appraisal rights and that only the stockholders of the entity actually being merged or combined (i.e., a “constituent corporation”) are entitled to petition for such rights. The Court held that the parent’s continuing stockholders were not entitled to appraisal rights due to this literal reading, notwithstanding the fact that control had shifted to the target’s stockholders who held approximately 87% of the parent post-merger while the legacy Dr. Pepper stockholders then held 13%. This case gives transaction parties additional certainty as to how Delaware courts will evaluate deals subject to Section 262 of the DGCL.

**FIRRMA and antitrust developments**

On August 13, 2018, the U.S. Foreign Investment Risk Review Modernization Act (“FIRRMA”) was signed into law. FIRRMA aims to reform and expand the interagency Committee on Foreign Investment in the United States (“CFIUS”) process currently used to review acquisitions by foreign persons of, or investments by foreign persons in, U.S. businesses from a national security perspective, with particular scrutiny of transactions with China. FIRRMA implements a number of changes to CFIUS as a whole, generally falling into two major areas: increasing CFIUS’ jurisdictional reach over a broader set of “covered transactions”; and amending the existing CFIUS review process to now require mandatory declarations for investments, whether controlling or non-controlling, in U.S. businesses involved in critical technologies.

CFIUS has been given latitude to further define the scope of covered transactions through its regulations. FIRRMA has expanded CFIUS so that it no longer covers only foreign acquisitions of controlling interests in relevant companies. Going forward, any non-passive, non-controlling foreign investment in foundational technology or critical infrastructure, or into companies dealing with certain sensitive U.S. personal data, now falls solidly under CFIUS’ purview. Further, real estate transactions (whether structured as a sale, lease or concession, whether developed or undeveloped land) involving air or maritime ports or close proximity to a U.S. military installation or other sensitive U.S. government properties, are subject to CFIUS review.

For purposes of determining a “foreign person” under CFIUS, private equity funds with foreign limited partners may not be “foreign persons,” and therefore may fall outside the scope of CFIUS. To do so, they must meet certain criteria such as management exclusively by a U.S. general partner, the absence of approval or block rights by investors over general partner decisions and the lack of access by investors to material non-public technical information. Conversely, private equity fund structures that provide foreign limited partners with access to material non-public technical information, board or observer rights or any other involvement in substantive decisions (other than through the voting of shares), of certain U.S. portfolio companies will not fall outside CFIUS’ jurisdiction because such investments are non-passive. The U.S. portfolio companies at issue are those dealing with the use, release or maintaining of sensitive personal data of U.S. citizens, the use, acquisition or release of critical technologies or the management, operation or supply of critical
infrastructure. FIRRMA also gives CFIUS the ability to institute new filing fees, which will be shaped by further regulation. This fee will be capped at the lesser of 1% of the value of the transaction or $300,000, and will only be applicable to transactions requiring full standard notice, not for the five-page mandatory declarations discussed below.

In October 2018, the U.S. Department of the Treasury issued interim regulations and introduced a “pilot program.” The new pilot program further implemented certain FIRRMA provisions, including the requirement for the filing of mandatory declarations by foreign persons acquiring either controlling or non-passive, non-controlling interests in U.S. companies involved with critical technologies in 27 specified industries such as electronics, semiconductor manufacturing and nanotechnology/biotechnology research and development. Critical technologies include: defense articles or defense services on the U.S. Munitions List set forth in the International Traffic in Arms Regulations; items on the Commerce Control List set forth in the Export Administration Regulations (when controlled for specific reasons); certain specially designed and prepared nuclear equipment, parts and components, materials, software, and technology; select agents and toxins; and yet to be named emerging and foundational technologies. The mandatory declaration must be filed at least 45 days prior to the closing. Upon receiving a mandatory declaration, CFIUS will begin a review process, which is statutorily limited to 30 days. Upon completion of the review, CFIUS may: (i) request the parties file a full standard notice; (ii) inform the parties that CFIUS is unable to reach a decision and that the parties may file a full standard notice regarding the transaction; (iii) initiate a unilateral review of the transaction; or (iv) clear the transaction. Failure by the parties to file mandatory declarations under the pilot program carries potentially harsh penalties. CFIUS is authorised to pursue civil penalties up to the full value of the transaction. It remains to be seen how aggressively this penalty will be pursued, but it is worth noting that 2018 marked the first time CFIUS imposed a monetary penalty: a $1 million penalty for violation of a mitigation agreement in connection with an unnamed party. More broadly, CFIUS may negotiate mitigation agreements to address national security risks of particular transactions and in extreme cases, has authority to unwind a transaction.

The mandatory declaration is a five-page mandatory filing, instead of the longer 45-page voluntary filing. However, while the intent of these short-form declarations may have been to streamline and expedite the review process, it has not resulted in quicker review by CFIUS staff already at capacity. In most cases, these declarations will end up in the “regular” review process, requiring submission of the lengthier filing, particularly if there is any complexity or perceived risk. The desired streamlining may yet occur, once additional personnel and attorneys have been hired to support CFIUS review as a result of a pending Department of Justice (“DOJ”) budget increase earmarked for this purpose. Notably, CFIUS is also establishing an office to review transactions that do not make a CFIUS notification.

The long-term effects of FIRRMA will not be known until CFIUS has had time to fully promulgate new regulations implementing the Act, which will be done no later than February 2020. There are several areas to watch as FIRRMA continues to evolve through future CFIUS regulations. Among the questions still to be answered is whether FIRRMA regulations will address joint ventures located overseas between foreign and U.S. companies. Restrictions on foreign joint ventures centered on reducing technology outflow from the United States were previously proposed. However, these restrictions were not included in the version of FIRRMA that was enacted in August. Interestingly, the interim regulations implemented in October do explicitly mention joint ventures as transactions that could result in foreign control of a U.S. business. The U.S. Export Control Reform Act of 2018, instead of FIRRMA, may be the tool through which the proliferation of critical technologies to
foreign countries using a joint venture is constrained. The definition of “foreign person” may be further refined in future regulations to exempt investors from the mandatory filing requirement through a “white list” of friendly countries. Another area to monitor is the mandatory filing triggered by non-controlling investments in companies that maintain or collect “sensitive personal data,” which, given current data-rich business models, could cover an extensive set of companies today.

In a transaction that highlighted the reach of CFIUS in 2018, the U.S. President blocked, through executive order, what would have been the largest technology deal ever – the $117 billion hostile bid by Broadcom, a Singapore chipmaker, to acquire California-based Qualcomm – citing national security concerns in ordering both companies to immediately abandon the proposed transaction. This move came soon after CFIUS issued a negative recommendation. Pointedly, CFIUS expressed concern that Qualcomm and, by extension, the United States, could be disadvantaged in the race to develop next-generation 5G wireless technology against rivals such as China’s Huawei Technologies Co., the largest supplier of telecommunications network equipment and the second-largest maker of smartphones, which in May 2019 was added to a U.S. trade blacklist. The swiftness of the decision was broadly seen as the U.S. President leveraging escalating tension with China to send a clear message about foreign investment in American technology. Recently, in 2019 CFIUS ordered a divestiture by a Chinese gaming company, Beijing Kunlun Tech Co. Ltd. (“Kunlun Tech”), of its interest in Grindr, LLC, a popular LGBTQ dating application, which includes a user’s location and HIV status. Kunlun Tech had not previously made a CFIUS filing in connection with its acquisitions of Grindr stock. In that transaction, CFIUS may have focused on the potential vulnerability to blackmail of military and intelligence officers whose data was available to the application.

Functionally, FIRRMA has given CFIUS a focus on foreign technology investments and empowers it to examine a wider range of deals. Practically speaking, these changes lay the framework for a more far-reaching and powerful CFIUS that could transform how acquisition and investment transactions are being sourced, structured, financed and executed. For example, sellers are more frequently requesting reverse termination fees for CFIUS failures secured by escrows with Western banks and requiring divestitures, and transaction parties are more focused on the interim covenants, given a potentially extended executory period. Many details of how FIRRMA will work to alter the process will continue to be made clear through the enactment of additional CFIUS regulations. Companies, lenders and acquirors will need to take these changes into account going forward and continue to monitor CFIUS developments to ensure compliance.

In connection with the antitrust aspect of transactions, 2018 saw more extensive scrutiny of “vertical transactions” with the other party’s customers or suppliers from the DOJ and the Federal Trade Commission (“FTC”), the chief antitrust/competition regulators in the United States. This was observed in both the DOJ’s challenge to the AT&T/TimeWarner transaction and their investigation of the CVS/Aetna transaction. Healthcare and Technology sectors were among the sectors where U.S. federal agencies seemed to focus their reviews. For example, the Cigna-Express Scripts deal with a value of $67 billion survived nearly 30 state regulatory reviews and input from the DOJ, and in the CVS/Aetna deal, regulators were able to secure major concessions from the companies, including the DOJ requesting that Aetna sell its Medicare Part D business to WellCare Health Plans.

Companies are increasingly finding it necessary to be flexible to appease regulators. In order to win approval from regulators for its $63 billion acquisition of Monsanto, Bayer was required to divest two of its business units. These divestures, for a seed and herbicide unit
and for a vegetable seed unit, led to two additional transactions, each closing for value in the area of $9 billion. Lastly, the DOJ and the FTC are taking note of larger companies that may be acquiring emerging competitors in the Healthcare and Technology sectors, with the DOJ preparing to open an antitrust investigation of Google and the FTC considering doing the same with both Facebook and Amazon.

**Year ahead**

When it comes to measuring the success of the global M&A market, the year 2018 was largely a tale of two halves. Despite the tremendous deal volume in 2018, the forward momentum stalled significantly in the 3rd and 4th quarters. This drop was partly due to concerns over a potential rise in interest rates, increased protectionism and punitive tariffs. Increased caution over the state of economic growth as a whole and sharpening fears of a global recession also took a toll on eroding institutional confidence. On the whole, some buyers may have delayed or even abandoned planned spending and expansion for the time being. Overall, U.S. deal volume in the second half of 2018 dropped over 20% from levels shown in the first half of the year and the global M&A market saw a dip of over 30%.

On the other hand, there is greater stability and certainty around the short-term domestic political climate due to the Democrats winning control in November of the U.S. House of Representatives for the next two years. As a result, it is less likely that a dramatically different legislative agenda will be passed. The international political climate, though, is still plagued by uncertainty arising from continued trade tensions with China, Mexico and most recently, India, the impact of Brexit and U.K. Conservative party leadership elections (the victor of which will become prime minister), and the expanded reach of CFIUS. These factors will have a dampening effect on the volume of cross-border transactions.

Nonetheless, there are large corporate cash reserves resulting from increases in savings, unprecedented profits and the favorable impact of the U.S. Tax Cuts and Jobs Act of 2017 (the “JOBS Act”). The JOBS Act, among other things, launched Qualified Opportunity Zones (“QOZs”), a designation for underprivileged communities where new investments may be eligible for preferential tax treatment. These corporate cash reserves are in addition to what is believed to be over $1 trillion in available capital in the private equity area, which is now exploring investments in over 8,700 different QOZs designated across the United States.

The data of the first quarter of 2019 did evidence a recovery in the levels of dealmaking from the dip towards the end of 2018: U.S. deal volume, which had dropped to levels as low as $70.61 billion in December 2018, rebounded to $197.71 billion in January 2019 and was solidly at $186.69 billion in April 2019. Notwithstanding the darkening clouds of regulatory uncertainty, unease over high valuations and geopolitical conflict on the horizon, 2019 should see continued healthy levels of dealmaking. The fears of a recession coming in 2020 and a slowing of the global economy may negatively affect company valuations. Financial sponsors are expected to use their dry powder to take advantage of this opportunity to invest in more attractively priced assets, further increasing the role that private equity plays in the overall M&A market. This changing dynamic is a key trend that will continue to reshape the M&A landscape in the year ahead.
Nilufer R. Shaikh
Tel: +1 212 808 2709 / Email: shaikhn@pepperlaw.com
Nilufer R. Shaikh is a Partner at Pepper Hamilton LLP’s New York office and a member of the Corporate and Securities group where she focuses on mergers and acquisitions, joint ventures, minority investments, recapitalizations, complex commercial transactions and general corporate law. She regularly advises private and public companies, strategic and financial sponsor clients in a variety of buy-side and sell-side transactions, both domestic and cross-border, across multiple industries, including technology, life sciences, consumer goods and manufacturing. Ms. Shaikh is also involved in the Firm’s administration, including the Diversity Committee, the Audit Committee and Technology Committee. Prior to joining Pepper Hamilton LLP, she worked at two international law firms, concentrating on mergers and acquisitions and private equity. Ms. Shaikh holds a M.A. degree in Middle Eastern Studies and a J.D. degree, both from Harvard University.

M. Corey Connelly
Tel: +1 212 382 7075 / Email: connellymc@pepperlaw.com
M. Corey Connelly is a corporate attorney at Pepper Hamilton LLP, concentrating on mergers and acquisitions and general corporate matters. He represents private and public clients in a range of U.S. and international transactions, including negotiated acquisitions, dispositions, auctions and joint ventures. He has advised clients in various industries on strategic matters and issues of corporate governance. In addition, he has represented multiple pro bono clients in hardship asylum cases. Prior to beginning his legal career, Mr. Connelly worked in wealth management for a multinational investment bank. Mr. Connelly holds a J.D. degree from New York University.
Other titles in the Global Legal Insights series include:

• Alternative Real Estate Investments
• AI, Machine Learning & Big Data
• Banking Regulation
• Blockchain & Cryptocurrency Regulation
• Bribery & Corruption
• Cartels
• Commercial Real Estate
• Corporate Tax
• Employment & Labour Law
• Energy
• Fintech
• Fund Finance
• Initial Public Offerings
• International Arbitration
• Litigation & Dispute Resolution
• Mergers Control
• Pricing & Reimbursement

Strategic partner:
Other titles in the Global Legal Insights series include:

• Alternative Real Estate Investments
• AI, Machine Learning & Big Data
• Banking Regulation
• Blockchain & Cryptocurrency Regulation
• Bribery & Corruption
• Cartels
• Commercial Real Estate
• Corporate Tax
• Employment & Labour Law
• Energy
• Fintech
• Fund Finance
• Initial Public Offerings
• International Arbitration
• Litigation & Dispute Resolution
• Mergers Control
• Pricing & Reimbursement

Strategic partner: