M&A Hot Topics

Quarterly Update (April 9, 2020)

1. M&A COVID-19 Considerations

- **Pending M&A Transactions**: In the midst of the ongoing COVID-19 pandemic, recent market moves and the potential for a prolonged period of economic uncertainty, parties to pending M&A transactions may be considering their rights, obligations and options with respect to such transactions. Many parties will choose to consummate such transactions on their original terms, but some are starting to respond in other ways, for example:

    - On April 1, 2020, Bed Bath & Beyond Inc. filed a complaint in Delaware Chancery Court alleging that 1-800-Flowers.com, Inc. unilaterally refused to close its pending $252 million acquisition of BB&B's Personalizationmall.com, LLC business due to the uncertainty and negative impacts of the COVID-19 pandemic. In its correspondence with BB&B, 1-800-Flowers did not invoke the "material adverse effect" clause, the absence of which was a condition to 1-800-Flowers's obligation to close, or any other provisions of the underlying purchase agreement.

    - On March 30, 2020, BorgWarner Inc. delivered a notice to Delphi Technologies PLC asserting that Delphi had materially breached the parties' transaction agreement, pursuant to which BorgWarner would acquire Delphi, by drawing down the full $500 million available under its revolving credit facility without BorgWarner's prior written consent, and that BorgWarner has the right to terminate the transaction agreement if the breach is not cured within 30 days. Delphi noted that it had drawn down on its credit facility in order to best position itself to "weather the current market conditions" and disputed BorgWarner's breach assertion on the basis that BorgWarner unreasonably withheld its consent. While the parties' announcements note that they are still working towards closing the transaction in the second half of 2020, there can be no assurance that they will reach a resolution or that the transaction will close.

    - In contrast to the disputes between BB&B and 1-800-Flowers and between BorgWarner and Delphi, on April 6, 2020, Hexcel Corporation and Woodward, Inc. announced the mutual termination of their merger agreement that contemplated an all-stock merger of equals in response to economic uncertainties in the aerospace and industrial sectors. Notably, neither party will be required to make any termination payment.

  Although every transaction is different, depending on its development and outcome, the foregoing examples may encourage parties to other transactions to react similarly or dissuade disputes and encourage negotiated outcomes. As parties to pending deals weigh their options and practical realities of the COVID-19 pandemic they must carefully read and consider the transaction agreement's specific language, the applicable evolving business forecast, as well as applicable case law.

- **Corporate Governance Considerations**: The COVID-19 pandemic and its aftermath will heighten focus on corporate governance and the role of a talented management team and an engaged board as companies forge a path through the uncertain times ahead. Strong oversight, coordination and leadership will be critical in successfully navigating the crisis. Despite significant demands on their time and attention as they address emergencies, officers and directors must continue to satisfy their fiduciary duties, including the duty of care, which requires them to act reasonably to apprise themselves of available significant information and to participate actively in decision-making. In addition to focusing on the unprecedented crisis' impact on a company's business, operations, prospects, employees, customers, stockholders, other stakeholders and government/regulatory relationships, management teams and boards may:

  - wish to ensure that they are taking appropriate steps to protect and preserve valuable corporate assets, such as NOLs by adopting an NOL rights plan;

  - need to (i) address short selling and vulnerability to unsolicited takeover bids, (ii) prepare for proxy strategies, special meeting demands and written consent campaigns, (iii) prepare for responses to activist demands, (iv) engage with institutional shareholders (and, potentially, regulators and other stakeholders) and (v) respond to the changing legal and regulatory environment; and

  - need to take measures to protect against heightened cybersecurity threats.

  Read more about corporate governance considerations in response to the COVID-19 pandemic in S&C's previously released client memo here, about practical considerations to address unique corporate governance challenges created by COVID-19 here, about NOL rights plans here, about shareholder activism and unsolicited offers here, and about heightened cybersecurity risks resulting from the pandemic's effects on operations here.

- **Virtual and Hybrid Shareholder Meetings**: As 2020 annual shareholder meeting dates draw closer, many companies are considering the feasibility of implementing virtual-only or hybrid shareholder meetings (*i.e.*, an in-person meeting that also permits shareholder participation through electronic means) due to the public health concerns associated with the COVID-19 pandemic. As companies evaluate these approaches, it is important to consider the legal requirements under federal regulations, state law and a company's own governing documents, including recent SEC guidance clarifying the notice requirements for virtual-only meetings and hybrid meetings, and the views of shareholders, proxy advisory firms and other constituencies, which are generally permissive of virtual shareholder meetings in light of the pandemic. Several companies have recently filed proxy statements stating that they will conduct their annual meetings virtually, or that they preserve their option to switch from a physical meeting to a virtual or hybrid meeting. Although the focus of the guidance has been on annual shareholder meetings since it is proxy season, these considerations are just as relevant to companies that are planning and preparing for special meetings of shareholders to approve M&A transactions, some of which have decided to hold virtual-only meetings in light of public health concerns associated with the pandemic. For example, Cincinnati Bell Inc. announced on March 25, 2020 that it will hold a virtual-only special meeting of its shareholders to approve its acquisition by Red Fiber Parent LLC. Read more about virtual shareholder meetings in light of COVID-19 in S&C's previously released client memo here.

- **Antitrust Merger Review**: In light of the COVID-19 pandemic, the European Commission, the U.S. DOJ, and the U.S. FTC have announced new procedures that will affect the process and timing of merger reviews. While each agency remains operational, merging parties should expect delays in the review process and prepare accordingly. This may include assessing whether existing "drop dead" dates are likely to be met and whether the parties (to a pending transaction or contemplated transaction) wish to negotiate to extend "drop dead" dates to account for potential delays. In considering any such extensions, acquirers that are financing their deals will need to assess the potential consequences on the financing arrangements or commitments in place or that are being contemplated. In addition, as of March 17, 2020, the DOJ and FTC have put in place a temporary e-filing system for HSR pre-merger notifications and will not accept hard-copy filings. Read more about U.S. and European antitrust regulators' modified review processes and other considerations in S&C's previously released client memo here (which remains timely except that the FTC resumed granting early termination in appropriate circumstances on March 30, 2020). Other jurisdictions have taken similar actions: for instance, the Canadian Competition Bureau has acknowledged that delays may occur in completing notifiable merger reviews and that the pandemic poses challenges for the Bureau to meet its service standards. We are continuing to monitor other jurisdictions for any changes to the process and timing of merger reviews as a result of the COVID-19 pandemic.

- **European Commission Encourages Protection of Critical Assets by EU Member States**: On March 25, 2020—10 days after the news broke about an alleged U.S. attempt to acquire a German biotech company developing a vaccine against the coronavirus—the European Commission issued a guidance paper to the 27 EU Member States regarding investments by non-EU entities in strategic industries. The guidance paper addresses the EU's external relations, encouraging EU Member States to prevent a sell-off of Europe's strategic assets, including protecting certain companies having capital market valuations well below their "true value." Although the guidance paper is not legally binding, it will effectively result in increased national scrutiny of foreign investments (including the acquisition of minority stakes). A foreign investment review by an EU Member State may impact the deal timeline and its outcome could vary from an outright prohibition to mitigation measures (such as supply obligations) being imposed. Read more about the European Commission's new guidelines in S&C's previously released memo here.

- **Other COVID-19 Considerations**: Other developments in light of the COVID-19 pandemic that may have potential implications for M&A transactions and other activity include: (i) the enactment of the Coronavirus Aid, Relief, and Economic Security Act, or the CARES Act, which, among other things, authorizes the Secretary of the Treasury to make up to $500 billion in loans, loan guarantees, and other investments in support of certain businesses affected by the pandemic, as well as states and municipalities; (ii) the SEC's extension of filing periods and release of new disclosure guidance; and (iii) court closures, suspensions and reduced or modified operations across the U.S.—for example, the Delaware Court of Chancery will conduct hearings and trials only by telephonic or other electronic means (with those that cannot be conducted in this manner to be postponed), provided that a party may request an in-person hearing in the event of an exigent need, such as a threat of imminent irreparable harm, upon demonstrating good cause for the in-person hearing and that all other means of conducting the hearing are impracticable. Read more about the CARES Act in S&C's previously released memo here, about limits on share repurchases under the CARES Act and issues to consider as companies begin working through existing and potential future agreements that include an equity repurchase element here, and about compensation limits related to loans, loan guarantees and other assistance under the CARES Act here. Read more about the SEC's extension of conditional relief from reporting requirements and COVID-19 disclosure guidance in S&C's previously released client memo here. For additional updates outlining and explaining COVID-19-related legal and legislative developments, see S&C's Coronavirus Updates page here—we will continue to provide updates as events unfold.

2. Regulatory Developments

- **NLRB Issues Rule Defining Joint-Employer Standard**: On February 25, 2020, the NLRB announced a final rule modifying an earlier test, developed in NLRB decisions, to determine when a franchisor or a user of contracted services will be considered a joint employer along with the actual employer and, thus, subject to labor law obligations, including the requirement to bargain with the employees' union. Under the rule, a person or entity will be considered a joint employer only if the person or entity "possess[es] and exercise[s] such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees." This test provides clarity (with respect to determining whether a joint employer relationship exists and, in the context of an M&A transaction, evaluating the scope of employee compensation and benefit issues) and scales back the NLRB's 2015 decision in *Browning-Ferris Industries of California*, under which a person or entity would be considered a joint employer merely based on the right to control the terms and conditions of employment, irrespective of whether such control is directly exercised or exercised at all. Read more in S&C's previously released client memo here.

- **SEC Provides Guidance Regarding Third-Party Financed 251(h) Transactions**: The Chief of the Office of Mergers and Acquisitions at the SEC confirmed that the Staff will no longer issue comments, with respect to a first-step tender offer in connection with an acquisition pursuant to Section 251(h) of the DGCL, that the acquirer ensure that the tender offer remains open for several days following a waiver of a funding or financing condition to the offer. This means that acquirers relying on third-party financing may now consummate a tender offer, and thereafter, the second-step merger pursuant to Section 251(h), immediately after waiving the financing or funding condition upon the financing conditions being satisfied.

- **Proxy Reform Updates**: On October 31, 2019, shareholder advisory firm ISS filed a lawsuit alleging that the SEC's proxy solicitation guidance issued on August 21, 2019 (to which the SEC proposed amendments on November 5, 2019) was "unlawful" and "arbitrary and capricious" and should be rescinded. Read more on the SEC's interpretation and related guidance and proposed amendments and ISS's lawsuit in S&C's previously released client memos here and here. On January 17, 2020, the SEC filed an Unopposed Motion to Hold Case in Abeyance, which would stay the ISS litigation until the earlier of January 1, 2021 or the promulgation of final rules in the SEC's aforementioned proxy advisory rulemaking. In its motion, the SEC confirmed that it would not invoke its August 2019 interpretation and related guidance in any enforcement or other regulatory actions during the stay period, although the SEC may continue to maintain its interpretation. Therefore, during the stay period, companies should not expect proxy advisory firms to comply with such interpretation and guidance.

  Numerous proxy advisory firms, including ISS and Glass Lewis, as well as the Council of Institutional Investors, have submitted comment letters to the SEC opposing, and expressing various legal concerns regarding, the SEC's proposed proxy solicitation rules, including, among others, that the SEC lacks the authority to regulate proxy voting advice as though it were a solicitation and that the new interpretation would undermine the independence of proxy advisors and their ability to provide timely recommendations.

- **CFIUS Updates**:

    - **CFIUS Modernization Update**: On February 13, 2020, the Treasury Department's final regulations to implement CFIUS reforms enacted under the Foreign Investment Risk Review Modernizations Act, or FIRRMA, became effective. CFIUS has jurisdiction to review "covered transactions." Historically, that meant transactions that could result in foreign control (defined functionally) of a U.S. business, or what are now referred to as "covered control transactions." Under the expanded authorities, CFIUS jurisdiction has expanded to include "covered investments" (certain non-control, non-passive investments) in an unaffiliated "TID U.S. business" (*i.e.*, a technology, infrastructure or data business) and "covered real estate transactions" (certain purchases by, leases by, or concessions to foreign persons with respect to real estate related to airports or maritime ports, or within certain distances of specified military installations and other sensitive facilities or properties of the U.S. Government). The FIRRMA reforms also made expressly subject to CFIUS jurisdiction transactions that result in changes in a foreign person's rights with respect to a U.S. business that could result in foreign control of a U.S. business or a covered investment in a TID U.S. business, and transactions structured to evade or circumvent CFIUS review. Important features of the final regulations and the CFIUS regime going forward are discussed in detail in S&C's previously released client memo here, and include:

        - *Mandatory Declarations*. The final regulations implement a mandatory declaration requirement for certain covered investments in critical technology (previously the subject of temporary pilot program regulations discussed in S&C's previously released client memo here) and for certain investments in TID U.S. businesses in which a foreign government (other than the foreign government of an excepted foreign state) has a substantial interest in the foreign investor.

        - *Excepted Foreign States*. The final regulations identify Australia, Canada, and the United Kingdom as the initial "excepted foreign states" and "excepted real estate foreign states," which excludes from CFIUS jurisdiction applicable transactions by foreign investors with sufficient ties to those states that otherwise would be subject to CFIUS's expanded jurisdiction. This exception, however, does not extend to covered control transactions.

        - *Treatment of Investment Funds*. The final regulations include an exception to CFIUS's expanded jurisdiction over covered investments for foreign persons that have an indirect investment in a TID U.S. business through an investment fund even though a foreign person (or a designee thereof) is a member, a limited partner or equivalent, or on an advisory board or a committee of the investment fund, provided that certain conditions related to non-control of the investment fund and lack of access to material nonpublic technical information are met.

        - *Short-Form Declarations*. Under the CFIUS reforms, parties may opt to submit a declaration, which is designed to provide CFIUS with the critical information about a transaction, but to be less burdensome for the parties to compile than a full notice of transaction. The declaration review process is designed to be completed in 30 days; however, CFIUS may, after review of a declaration, request that the parties file a traditional joint voluntary notice and subject the transaction to a full review.

    Also, on March 9, 2020, CFIUS published a proposed rule that would establish a fee for parties filing a voluntary written notice of covered transactions for review by CFIUS. The proposed fees for notices are based on a tiered approach tied to the value of the notified transaction and can be up to $300,000 for transactions valued at $750 million or greater.

- **CFIUS Actions**: CFIUS recently completed its review of two major acquisitions of U.S. companies by foreign acquirers. On March 6, 2020, President Trump ordered Beijing Shiji Information Technology Co., Ltd., a Chinese public company, to divest all of its interests in StayNTouch, Inc., a U.S. hotel property management software company, which Shiji had previously acquired in 2018. The Order noted that there was "credible evidence" that Shiji might "take action that threatens to impair the national security of the United States" due to, in part, Shiji's access to StayNTouch's hotel guest data. CFIUS's decision with respect to Shiji's acquisition of StayNTouch highlights increased sensitivity regarding personal data (as demonstrated by reforms enacted under FIRRMA), increased scrutiny of Chinese influence and a willingness to reverse transactions even after they have been consummated. Conversely, in March 2020, CFIUS approved the $8.7 billion acquisition of Cypress Semiconductor Corp., a U.S. semiconductor manufacturer, by Infineon Technologies AG, a German semiconductor manufacturer, although Infineon had significant revenue in, and exposures to, China, and there had been reports of U.S. national security officials recommending that President Trump block the acquisition.

3. Delaware Developments

- **Arbitration Clause in Spin-Off Transaction Upheld**: In *The Chemours Company* v. *DowDuPont Inc.* (March 30, 2020), the Delaware Court of Chancery upheld DuPont's demand for arbitration of its dispute with Chemours, a previously wholly owned subsidiary of DuPont which was spun off as an independent entity, over post-spin-off liability relating to DuPont's multibillion-dollar environmental cleanup burdens, dismissing the case for lack of subject matter jurisdiction. A separation agreement entered into by the parties, which governed the terms of the spin-off, included a provision "referring all disputes arising from the agreement to binding arbitration" and providing "explicitly that arbitrability is a question for the arbitrator." Despite Chemours's arguments that it "was animated solely by the will of its parent" prior to the spin-off and that it did not truly consent to the arbitration provisions of the separation agreement, the Court found that Chemours could not "show that it did not consent in the *contractual* sense" required by the Federal Arbitration Act. In particular, a duly appointed board of directors of Chemours approved both the spin-off and the separation agreement, and a duly appointed executive of Chemours executed the separation agreement, with no dispute as to whether the executive signed the agreement in his capacity as an officer of Chemours. The *Chemours* court clarified that "[s]imply because the parent dictates terms to its wholly owned subsidiary is *not* a grounds under Delaware law to infer lack of consent such that the contract would not be enforceable" and reaffirmed that "Delaware courts lack subject matter jurisdiction to resolve disputes that litigants have contractually agreed to arbitrate."

- **Forum Selection for Securities Act Claims Upheld**: In *Salzberg* v. *Sciabacucchi* (March 18, 2020), the Delaware Supreme Court reversed the Delaware Court of Chancery and held that Delaware law permits corporations to include in their certificates of incorporation federal forum provisions that require stockholder actions asserting claims under the Securities Act of 1933 to be filed exclusively in a federal court. In rejecting a facial challenge to the validity of three similarly worded federal forum provisions, Delaware's highest court ruled that the federal forum provisions were permissible topics for regulating internal or intra-corporate affairs in Delaware corporate charters and that the federal forum provisions did not violate any positive Delaware law or public policy. Although recognizing that federal forum provisions remained potentially subject to challenge on an as-applied basis or under federal law, and that whether federal forum provisions would be enforced in other state courts is uncertain, the Delaware Supreme Court, in a carefully worded decision, provided some of the reasons why federal forum provisions comport with federal law and should be honored by courts in other states just like any other forum-selection contract. The *Salzberg* decision provides much-needed guidance regarding the ability of Delaware corporations to utilize federal forum provisions to avoid concurrent state and federal actions asserting the same Securities Act claims, which corporations have faced increasingly since the United States Supreme Court's 2018 decision in *Cyan, Inc.* v. *Beaver Cty. Emps. Ret. Fund*, barring removal of Securities Act claims filed in state courts. The *Salzberg* decision acknowledges that federal forum provisions "are a relatively recent phenomenon designed to address the post-*Cyan* difficulties presented by multi-forum litigation of Securities Act claims" and, if upheld in other jurisdictions, would give companies and their boards a potentially powerful tool to counter the growing trend of stockholders represented by different lawyers filing the exact same Securities Act claims in both state and federal courts. Read more in S&C's previously released client memo here.

- **Special Committees and the Business Judgment Rule**:
  - In *Salladay* v. *Lev* (March 4, 2020), the Delaware Court of Chancery found that conditioning a transaction with a conflicted board (absent a conflicted controller) upon approval by a special committee of non-conflicted directors does not cleanse the transaction and restore the business judgment standard of review if the special committee is formed and enters negotiations following commencement of discussions about price that "set the stage for future economic negotiations." The *Salladay* court provided further clarity that the rationale for a special committee that is "sufficiently constituted and authorized *ab initio*," as in *MFW*, cleansing a transaction in a control situation by serving as a "potent tool to extract good value for the minority" also applies in the context of a majority-conflicted board.
  - In *In re AmTrust Financial Services, Inc. Stockholder Litigation* (February 26, 2020), the Delaware Court of Chancery denied a motion to dismiss claims that AmTrust's controlling stockholders and allegedly self-interested members of the AmTrust board's special committee breached their fiduciary duties in connection with a November 2018 merger in which AmTrust's controlling stockholders teamed up with a private equity firm to take AmTrust private. The *AmTrust* court concluded that the complaint's allegations that the special committee had a material self-interest in the transaction because the merger would extinguish viable derivative claims in an unrelated litigation that exposed the committee members to significant personal liability were sufficient, at the pleading stage, to avoid dismissal on business judgment grounds under *Kahn* v. *M&F Worldwide Corp*. Read more in S&C's previously released client memo here.
- **Fiduciary Duties of Minority Members of an LLC**: In *Skye Mineral Investors, LLC* v. *DXS Capital (U.S.) Limited* (February 24, 2020), the Delaware Court of Chancery found at the pleading stage that it was reasonably conceivable that minority members of Skye Mineral Partners, LLC, which was majority-owned by the plaintiffs, Skye Mineral Investors, LLC and Clarity Copper, LLC, exercised "actual control" over SMP and breached their fiduciary duties by using their blocking rights (granted under SMP's constitutive documents) to intentionally drive SMP's operating subsidiary into bankruptcy and purchase its assets at a discount. Because the blocking rights granted the minority investors "the unilateral power to shut SMP down—full stop," they contributed to an inference of control. Further, the minority investors' use of their blocking rights to harm SMP "was not exculpated by the clear terms of SMP's constitutive documents." The Court also retained claims of aiding and abetting breaches of fiduciary duty against members of the group that controlled the minority members that orchestrated the scheme to divest SMP of its assets. The *Skye* decision serves as a reminder of the fiduciary obligations of LLC members and managers, as well as their affiliates, where the LLC Agreement does not expressly disclaim fiduciary duties, and that a determination of control

can be a fact-intensive exercise that may not be readily apparent based on the percentage equity stake minority members hold in the LLC.

- **Presumption of Board Independence**: In assessing the demand requirement of derivative suits, Delaware courts reaffirmed the presumption of independence of boards of directors in several recent cases, while also indicating that there may be a slight shift in Delaware law toward such presumption. For instance, in *McElrath* v. *Kalanick et al.* (January 13, 2020), the Delaware Supreme Court dismissed the plaintiff's complaint because it found that the majority of the directors of Uber Technologies Inc. were disinterested and independent in approving what ended up being a deeply flawed transaction presented to the board by Uber's ex-CEO. Similarly, in *Owens* v. *Esperion Therapeutics, Inc.* (February 13, 2020), the Delaware Chancery Court dismissed a derivative suit against biopharmaceutical company Esperion, concluding that the plaintiff failed to adequately plead demand futility given the directors' independence. At the 2020 Forum on M&A and Governance conference hosted by the Berkeley Center for Law and Business, Vice Chancellor McCormick observed, in her personal capacity and not in her capacity as Vice Chancellor, that there has been a slight shift in Delaware law such that "independence is effectively presumed, and it's very hard to show that even at a pleading stage, that [a board] lacks independence." Nonetheless, board independence remains a facts-and-circumstances test, as illustrated by the Delaware Chancery Court's recent decision in *Voigt* v. *Metcalf* (February 10, 2020). In that case, the Court declined to dismiss plaintiff's allegations of control against private equity firm Clayton Dubilier & Rice, which held nearly 35% of the voting power of NCI Building Systems and had four insiders on its 12-member board of directors, in connection with a challenge to the fairness of NCI's acquisition of Ply Gem Parent.

- **Appraisal Update**: As demonstrated by *Verition Partners Master Fund Ltd.* v. *Aruba Networks, Inc.* (April 17, 2019), *In re Appraisal of Columbia Pipeline Group, Inc.* (August 12, 2019) and *In re Stillwater Mining Company* (August 23, 2019), the Delaware judiciary has, in recent times, consistently relied on the deal price to determine fair value when the sale process has objective indicia of deal-price fairness (*e.g.*, (i) arm's-length transactions with third parties, (ii) absence of board conflicts, (iii) due diligence by the acquirer involving confidential target information, (iv) multiple price increases extracted by the target company, and (v) lack of alternative bidders (whether evidenced through active or passive market checks)). While the presumptive metric of fair value is deal price less synergies (assuming the sales process has objective indicia of fair value), a respondent must prove synergies in order to reduce fair value below the deal price. *In re Appraisal of Panera Bread Company* (January 31, 2020) serves as an example of a case in which merger-specific synergistic gains were successfully proven and deducted from the deal price to determine fair value.

  In *Panera*, because the respondent had paid the appraisal petitioners the full merger price, it sought a refund of the amount of the deducted synergies. However, the *Panera* court clarified that there is no basis under Section 262 of the DGCL for a refund of the amount of the full merger price paid to such petitioners that was in excess of the fair value of the shares, describing prepayment of the deal price as a business decision. Therefore, companies electing to prepay the full merger price may want to consider stipulating claw-back rights in prepayment agreements so that they may recover any amount of prepayment that may be judicially determined to exceed the fair value of the appraisal shares. Of course, in practice, convincing a dissenting stockholder to agree to such a claw-back may not be feasible. Read more about the *Panera* decision in S&C's previously released client memo here.

Nevertheless, despite this trend of assessing fair value to be equal to or less than the deal price, in the absence of objective indicia of deal-price fairness with respect to a sale process, the Delaware courts may still find fair value above the deal-price. In *Manichaean Capital, LLC* v. *SourceHOV Holdings, Inc.* (January 31, 2020), the Chancery Court awarded dissenters a 12% premium above the deal price based on the petitioners' discounted cash flow analysis. The Chancery Court relied on the discounted cash flow analysis rather than market-based evidence of fair value because SourceHOV's managers "made no real effort to run a 'sale process'" in advance of the private company's three-way business combination through which it became a publicly traded company, with its board of directors not holding a single meeting to consider the transaction, and SourceHOV's equity did not trade in an efficient market.

4. U.S. Antitrust

- **Revised HSR Thresholds**: The thresholds set forth in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 have been revised—as they are annually—based on the change in gross national product. Effective as of February 27, 2020, the size-of-transaction threshold was increased to $94 million (up from $90 million). Read more in S&C's previously released client memo here.

- **Continued Focus on Preserving Nascent Competition**: On February 10, 2020, Edgewell Personal Care Co. announced that it would abandon its $1.37 billion acquisition of Harry's Inc. after the FTC sued to block the deal. Both Edgewell and Harry's sell razors, but while Edgewell is a longstanding incumbent in the industry with brick-and-mortar retail stores, Harry's began in 2013 as a direct-to-consumer retailer with an online sales model and, in 2016, expanded into retail outlets. The FTC's complaint, which treated online razor sales and sales made at brick-and-mortar stores as distinct markets, illustrates that it is closely scrutinizing acquisitions that may eliminate successful market disruptors, particularly in concentrated industries. Further, on April 6, 2020, the U.S. District Court for the District of Delaware found in favor of allowing travel technology firm Sabre Corp's acquisition of Farelogix Inc. to move forward, despite the DOJ's lawsuit seeking to block the acquisition. The DOJ had previously described Sabre's acquisition of Farelogix as a "dominant firm's attempt to eliminate a disruptive competitor." These two cases exemplify U.S. antitrust regulators' continued increased attention to the preservation of nascent competition. However, while Sabre's acquisition of Farelogix was allowed to move forward in the U.S., the UK CMA blocked the acquisition on April 9, 2020—for a discussion of the UK CMA's increased attention to the preservation of nascent competition, see the "Non-U.S. Antitrust" section below. Read more about the Edgewell/Harry's merger in S&C's previously released client memo here.

- **Additional Antitrust Challenges Post-Clearance or Post-Consummation**: The FTC announced several post-clearance or post-consummation challenges this quarter. On January 13, 2020, Post Holdings Inc. dropped its planned purchase of Treehouse Foods Inc.'s cereal business following the FTC's announcement of its challenge of the deal, although the FTC had granted early termination of the waiting period for the transaction nearly seven months prior. Similarly, the FTC recently informed Axon that it must unwind its $7 million acquisition of VieVu, a competing provider of police body cameras, following consummation of the acquisition in 2018, which transaction was not previously reported to the FTC as it fell below the relevant monetary thresholds for notification under the HSR Act.

5. Non-U.S. Antitrust

- **UK CMA Continues to Assert Jurisdiction Over Mergers With No Effects in the UK and Focus on Preserving Nascent Competition**: On February 10, 2020, the UK CMA cleared the proposed acquisition by Roche Holdings, Inc. of U.S.-based Spark Therapeutics, Inc. Although this acquisition had no obvious jurisdictional link to the UK and the target had no sales in the UK, the CMA asserted authority to review the acquisition by using the "share of supply test," noting that Spark's global R&D activities "form an integral part of the process of making [its Hemophilia A] treatment available in the UK." The CMA stressed that it has "broad discretion to choose a specific category of goods" for the purposes of the test and that it was entitled to "apply this rule in a flexible and purposive way" to find a link to the UK. Coming shortly after the CMA's prohibition of the proposed acquisition by Illumina, Inc. of Pacific Biosciences of California, Inc., the CMA's decision in Roche/Spark further demonstrates the CMA's willingness to apply the share of supply test creatively to assert jurisdiction over mergers in which the target has little or no UK market presence, and its keen interest in so-called "nascent competitors," especially in the pharmaceutical and technology sectors. Further, on April 9, 2020, the UK CMA blocked Sabre Corp's acquisition of Farelogix, Inc. on the basis that the acquisition would lead to less innovation of services, less choice for customers and higher prices, detrimentally impacting airlines, travel agents and passengers. For a discussion of U.S. antitrust regulators' increased attention to the preservation of nascent competition, see the "U.S. Antitrust" section above. Regarding the Roche/Spark acquisition and the CMA's trend of focusing on preserving nascent competition, read more in S&C's previously released client memo here. Regarding the trend of biopharma mergers remaining in the global antitrust spotlight, read more in S&C's previously released client memo here.

- **UK CMA Issues New Brexit Guidance**: On January 28, 2020, the UK CMA issued new guidance with respect to the UK's exit from the EU, focusing on the CMA's jurisdiction following the UK's exit. With respect to merger control, the EU's "one-stop shop" rule will continue to apply until December 31, 2020, the end of the transition period, with transactions notified to the European Commission during the transition period continuing to fall under the European Commission's exclusive jurisdiction. Contrary to guidance previously provided, the CMA would not be able to open an investigation into such transactions. With respect to competition law enforcement, the European Commission's jurisdiction remains intact until the transition period expires, and only then will the CMA be able to initiate investigations into alleged conduct without regard to EU law or the jurisdiction of the European Commission. Read more in S&C's previously released client memo here. We are monitoring whether there will be an extension of the transition period or any other changes to the CMA's Brexit guidance given the COVID-19 pandemic.

- **SAMR Publishes Proposed Amendments to China's Anti-Monopoly Law**: On January 2, 2020, China's competition regulator, the State Administration for Market Regulation, published draft amendments to its Anti-Monopoly Law for public comment. The public comment period ended on January 31, 2020. Notably, these draft amendments are the first proposed amendments to China's Anti-Monopoly Law since it came into force.

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