M&A Hot Topics

Quarterly Update (January 14, 2020)

1. SEC and Other Regulatory Developments

- **Department of Commerce Proposes Rule for Securing the Nation's Information and Communications Technology and Services Supply Chain:** On November 27, 2019, the U.S. Department of Commerce published a notice of proposed rulemaking to implement Executive Order 13873, "Securing the Information and Communications Technology and Services Supply Chain." Executive Order 13873 gives the Secretary of Commerce authority to prevent or modify transactions involving information and communications technology and services originating in countries designated as "foreign adversaries" which pose an undue risk to critical infrastructure or the digital economy in the United States, or an unacceptable risk to U.S. national security or the safety of United States persons. All industries are potentially affected by the proposed regulations, whether directly or indirectly, which allow for case-by-case reviews of transactions at the Secretary of Commerce's discretion. Any transaction that is ongoing as of, or was initiated on or after, May 15, 2019 can be reviewed, and there is no mechanism by which a company may seek to clear transactions in advance. The proposed rule sets forth procedures the Secretary of Commerce will follow, except in instances where the risk of public harm or national security interests require a deviation from such procedures. Under the proposed rule, if the Secretary of Commerce makes a preliminary determination, in consultation with other agencies, to prohibit or mitigate a transaction, the Secretary of Commerce will provide notice to the parties engaged in the transaction. Notified parties will have an opportunity to submit a position, which may include proposed measures for mitigation, prior to any final determination issued by the Secretary of Commerce. The Secretary of Commerce will provide an unclassified, written final determination provided to the parties that, to the extent possible, will explain how the decision is consistent with the terms of the Executive Order 13873, and, as appropriate, a summary of the final determination will also be made publicly available.

- **Proxy Reform:** On October 31, 2019, ISS sued the SEC seeking to invalidate the SEC's August 21, 2019 interpretation and related guidance that proxy voting advice provided by proxy advisory firms constitutes a "solicitation" under the Exchange Act and is therefore subject to the federal proxy rules under Section 14(a) of the Exchange Act, including the antifraud provisions of Rule 14a-9. On November 5, 2019, the SEC proposed amendments to the proxy solicitation rules with respect to proxy voting advice businesses, which would codify its interpretation issued on August 21, 2019 that proxy voting advice generally constitutes a "solicitation", establish new procedural requirements for voting advice to qualify for the exemptions from the proxy information and filings requirements and add illustrative examples of when failure to disclose information in proxy voting advice may violate the anti-fraud provisions. Additionally, the SEC proposed amendments to the shareholder proposal rule, Exchange Act Rule 14a-8, to modernize the submission and resubmission requirements and to update procedural requirements. Read more on the SEC's interpretation and related guidance and proposed amendments in S&C's previously released client memos here and here.

- **Treasury Department and IRS Release Proposed Regulations under Section 382 and Additional Guidance:** On September 9, 2019, the Treasury Department and the IRS released proposed regulations (and published them in the Federal Register the next day), which would significantly alter existing guidance regarding the use of a corporation's tax attributes such as net operating losses. Section 382 of the Internal Revenue Code limits a corporation's ability to offset its income by tax attributes generated before a "50% Ownership Change" (such 50% Ownership Change being, generally, shifts of ownership of greater than 50% over a rolling three-year period). Guidance issued in 2003 allowed two alternative approaches for calculating that limitation, one such approach being the so-called "Section 338 approach," which is generally more favorable to loss corporations that have significant built-in gain assets. The proposed regulations would eliminate the 338 approach, thus causing the tax attributes of loss corporations to be generally less valuable by reducing the amount of the limitation. Read more in S&C's previously released client memo here. Concerned about the impact of the proposed regulations on pending transactions, the Treasury Department and the IRS issued additional guidance on January 10, 2020 that delays the effective date of the proposed regulations to 30 days after their finalization (rather than immediately upon finalization). In addition, the final regulations provide transitional relief so that they would not apply to a 50% Ownership Change occurring immediately after an ownership shift if such ownership shift is pursuant to a binding agreement, public announcement, SEC filing, court order or private letter ruling request submission before the date on which they would otherwise apply. The 2020 guidance on this matter specifies that such relevant owner shift must be a specific, identifiable transaction; for example, a stock buyback pursuant to an announced, ongoing program would not qualify.

- **CFIUS Modernization:** On September 17, 2019, the Treasury Department issued proposed regulations to implement CFIUS reforms enacted under FIRRMA. Certain provisions of FIRRMA went into effect immediately upon its adoption in August 2018, but many of the provisions of the legislation required regulations to be prescribed by CFIUS before becoming effective. The proposed rules, which would implement most of the provisions of FIRRMA that have not already gone into effect, have been issued in two separate proposals (read more in S&C's previously released client memo here):

    - TID Businesses. The first set of regulations would replace the existing CFIUS regulations codified at part 800 of title 31 of the Code of Federal Regulations and, among other things, would implement the provisions of the FIRRMA legislation pertaining to certain non-control but non-passive investments in critical technology, critical infrastructure and sensitive personal data businesses (so-called "TID" businesses).

    - Real Estate. The second set of regulations, to be codified at a new part 802 of title 31 of the Code of Federal Regulations, would implement the expansion of CFIUS jurisdiction under FIRRMA to certain real estate transactions.

The proposed regulations are intended to fully implement the provisions of FIRRMA, with the exception of (1) CFIUS's authority to impose filing fees, which will be the subject of a future rulemaking, and (2) CFIUS's authority to require parties to submit mandatory declarations for certain non-control investments involving critical technologies, which is the subject of a separate rulemaking.

2. Delaware Developments

- **Delaware Chancery Court Finds Termination Fee Provision Did Not Afford Exclusive Remedy:** In *Genuine Parts Company* v. *Essendant Inc.* (September 9, 2019), the Delaware Chancery Court held that Genuine Parts Company adequately pled facts at the pleading stage that supported the inference that Essendant Inc. materially breached Essendant's non-solicit obligations under its merger agreement with Genuine Parts. As a result, Genuine Parts was allowed to proceed with its claim for damages, in addition to the $12 million termination fee it accepted from Essendant when Essendant took a superior offer and purported to terminate the merger agreement with Genuine Parts, because the Court determined the agreement was clear and unambiguous in that the termination fee was Genuine's sole and exclusive remedy **only if** Essendant accepted a superior offer without breaching the agreement's non-solicit provision. The case illustrates the importance of understanding the limitations of exclusive remedy provisions and that if parties to an agreement want the payment of the termination fee to be the sole and exclusive remedy, the applicable agreement should clearly and unambiguously say so. It also serves as a reminder that a party's acceptance of a termination fee will not necessarily preclude that party from pursuing a breach of contract claim.

- **Terminating a Merger Agreement Pursuant to a MAE Clause Still a Steep Climb**: In *Channel Medsystems, Inc*. v. *Boston Scientific Corp., et al.* (December 18, 2019), the Delaware Chancery Court held that Boston Scientific Corp., the acquiror in the transaction, failed to prove the existence of an MAE and that its purported termination of its merger agreement with the target company, Channel Medsystems, was not justified despite the fact that an employee of Channel falsified documents that were part of Channel's then-pending application for FDA approval of Channel's only product (among other misconduct). The Court rejected BSC's claim that the effects of the employee misconduct were qualitatively and quantitatively material, as is necessary to prove an MAE in Delaware, in part, because they appeared to be litigation-driven justifications that nowhere appeared in any documents and instead conflicted with contemporary evidence. The Court also found BSC in breach of its contractual obligation to use "commercially reasonable efforts" to consummate the merger by "failing to vet any concerns" about the events with Channel and to "keep the transaction on track thereafter," instead "simply pull[ing] the ripcord." The Channel decision reinforces long-standing Delaware jurisprudence that MAE claims are highly fact-specific and present a very high bar to success. Read more in S&C's previously released client memo here.

- **Delaware's Renewed Focus on the "Duty to Monitor":** In both *In re Clovis Oncology, Inc. Derivative Litigation* (October 1, 2019) and *Marchand* v. *Barnhill* (June 19, 2019), the Delaware Chancery Court and the Delaware Supreme Court, respectively, found a so-called "duty to monitor" claim adequately pled because the applicable plaintiff had established that the directors either (1) "completely fail[ed] to implement any reporting or information system or controls," or (2) "having implemented such a system of controls, consciously fail[ed] to monitor or oversee its operations thus disabling themselves from being informed of risks of problems requiring their attention." *Marchand*, which involved a listeria outbreak in manufacturing plants of Blue Bell Creameries USA Inc. (one of the largest U.S. producers of ice cream) that caused three deaths and led the company to recall all its products, shut down all of its production and lay off a significant portion of its workforce, addressed the first prong, finding that "food safety was essential and mission critical" to the company's business and that bad faith was adequately pled following the listeria outbreak by alleging "that no board-level system of monitoring or reporting on food safety existed." *Clovis* addressed the second prong, concluding that, while a robust board-level compliance system was in place with respect to clinical trials, the board consciously failed in its duty to monitor the compliance system because the directors did understand (or should have understood) that Clovis Oncology, Inc., a biopharmaceutical firm whose business was dependent on a single product, was reporting clinical trial results for that product to the FDA that showed the drug was more effective than it actually was. The *Marchand* and *Clovis* decisions confirm the need for directors to review carefully their board processes and procedures to ensure that adequate compliance systems and protocols are in place, particularly with respect to important or otherwise highly regulated aspects of the business. Equally important, boards should ensure that appropriate and documented procedures exist to monitor and supervise reporting systems and risks that are—or in hindsight may be deemed—"mission critical" to the company. Read more in S&C's previously released client memos here and here.

- **Limits on "Proper Purpose" Under DGCL Section 220 Take Shape:**
  - In *Donnelly* v. *Keryx Biopharmaceuticals, Inc.* (October 24, 2019), the Delaware Chancery Court found that the Section 220 demand by a stockholder of Keryx Biopharmaceuticals, Inc. seeking information about Keryx's then-recent merger with Akerbia Therapeutics, Inc., particularly to investigate possible breaches of the duty of loyalty as to the fairness of the merger price, the potential influence of Keryx's largest stockholder, bonuses paid to management in connection with the transaction, the independence of the board and improper disclosure, expressed a proper purpose under Section 220. In granting the Section 220 demand, the Court rejected Keryx's argument that the demand should be denied because it was made under false pretenses, invoking the Court's decision in *Wilkinson* v. *A. Schulman, Inc.* (November 13, 2017) where the Court rejected a Section 220 demand after concluding that the stockholder "simply lent his name to [the] lawyer-driven" demand and that the purpose stated in the Section 220 demand differed substantially from the concerns voiced by the demanding stockholder in a deposition. Keryx contended *Schulman* applied because the demanding stockholder had not read the disclosures that the Section 220 demand letter claimed were inadequate. The Court reasoned that, unlike *Schulman* where there was "total" misalignment between the stockholder's concerns and the purpose in the demand letter, although there was some misalignment, there was also overlap.
  - In *High River Limited Partnership* v. *Occidental Petroleum Inc.* (November 14, 2019), the Delaware Chancery Court rejected a Carl Icahn-controlled entity's Section 220 demand to inspect Occidental Petroleum Inc.'s books and records for the purpose of obtaining information material to its communications with other stockholders in connection with a proxy contest and held that merely facilitating a proxy contest is not a "proper purpose" for a Section 220 demand where the stockholder simply "disagreed" with a board's decision and did not allege any misconduct on the part of the board. It is noteworthy that the Icahn-controlled entity launched the proxy contest and made the Section 220 demand after Occidental closed on its acquisition of Anadarko Inc., which Icahn advocated against because he believed Occidental was overpaying and required expensive financing as a result of reconfiguring the deal to increase the cash component of the consideration to avoid the need for an Occidental stockholder vote. It is also noteworthy that the Court acknowledged that the current law on Section 220 demands in the context of a proxy contest is "murky" and in need of "more clarity" and left the door open that there could be an occasion when a Delaware court would grant a request seeking documents to aid a proxy fight, but concluded that *High River* was not such a case and appeared to confirm that existing law would apply—for a stockholder to have a proper purpose for a Section 220 demand, it must credibly allege legally actionable wrongdoing by the board.

- In *Buck Employees Retirement Fund* v. *CBS Corporation* (November 25, 2019), issued shortly after and in contrast to *High River*, the Delaware Chancery Court granted a Section 220 demand made by a CBS Corporation stockholder for inspection of books and records regarding the CBS and Viacom Inc. merger. In *Buck*, the demand was made in the context of a pre-closing challenge to the board's conduct in approving the merger (not, as in *High River*, a post-closing proxy contest seeking to remove directors because of bad decision-making). Additionally, the merger at issue in *Buck* involved a conflicted controller and was subject to the "entire fairness" standard of review, not the business judgment standard that was applicable in *High River*. The key distinction, however, is that the plaintiff in *Buck* "demonstrated a credible basis to suspect wrongdoing" by the CBS board in its approval of the merger—the merger was not conditioned on the approval by the unaffiliated CBS stockholders, and it was not on terms materially different from a transaction that had been proposed and rejected a couple of years earlier by an independent CBS board.

- **Confidentiality and Privilege Tensions with DGCL Section 220 Demands:**

  - In *Tiger* v. *Boast Apparel, Inc.* (August 2019), the Delaware Supreme Court held that there is no presumption of confidentiality in a Section 220 action and remarked that confidentiality orders should not be "reflexively" granted. The Court took issue with language in the Chancery Court's ruling below stating that productions are "presumptively subject to a 'reasonable confidentiality'" order. The Court clarified that "there is no presumption of confidentiality in Section 220 productions," and suggested that "although 'a corporation need not show specific harm that would result from disclosure' before receiving confidentiality treatment in a Section 220 case, 'one cannot conclude reflexively that the need [for confidentiality] is readily apparent.'" While the Court nevertheless affirmed the Chancery Court's order that Section 220 information would remain confidential indefinitely under an abuse of discretion standard, the decision could be interpreted by the Chancery Court as signaling that it should do more to protect stockholders' interests in "free communication" instead of "reflexively" entering confidentiality orders that are often quite strict.

  - In *In re Oracle Corp. Derivative Litigation* (August 15, 2019), the Delaware Chancery Court found that a stockholder group pursuing a derivative suit related to Oracle Corp.'s $9.3 billion acquisition of NetSuite Inc. should obtain substantial access to documents gathered by Oracle Corp.'s own special litigation committee, which found that the stockholder plaintiffs should take control of the case. Although the decision fell short of a total release order, it called for the release of some documents for good cause that Oracle shared with the special litigation committee but considered attorney-client privileged. Individual parties named in the suit, however, must be given an opportunity to review the documents before their release, the Court concluded, among other rulings, and the stockholder lacked a supportable right to the special litigation committee's own privileged communications with its attorney.

- **Professional and Personal Ties to Controlling Stockholders May Undermine Independence of Board Members:** In *In re BGC Partners, Inc. Derivative Litigation* (September 30, 2019), the Delaware Chancery Court declined to dismiss derivative claims challenging the fairness of a transaction in which Howard Lutnick stood on both sides. In denying the motion to dismiss, the Court held that the stockholder plaintiffs were excused from having to make a pre-suit demand because the complaint, when viewed holistically, created a reasonable doubt that a majority of the directors who would have considered such a demand were independent from Lutnick for purposes of deciding whether to bring a lawsuit against him, and concluded that, although the outside directors of BGC

Partners, Inc. did not have a direct financial interest in the transaction, the complaint nonetheless stated a claim for breach of loyalty against them because it was reasonably conceivable from the allegations in the complaint that they acted to advance Lutnick's self-interest when they voted to approve the transaction to acquire Berkeley Point Financial LLC at an allegedly overvalued price. In analyzing the independence of the BGC directors who served on the special committee that reviewed and evaluated the acquisition of Berkeley, the Court deeply probed each of their relationships with Lutnick, including ties between spouses and family members, joint or shared charity work, and support of and affiliation with Haverford College, Lutnick's alma mater. The Court also noted that each of the special committee defendants was a "go-to" member of Lutnick-affiliated boards and derived a considerable portion of their income from those boards. The case is yet another reminder that Delaware courts take a skeptical view of transactions involving conflicted controllers and will take a comprehensive approach in evaluating whether or not a director is in fact independent.

- **Post-Aruba Appraisal Landscape:** Following the Delaware Supreme Court's decision in *Verition Partners Master Fund Ltd.* v. *Aruba Networks, Inc.* (April 17, 2019), in which the Supreme Court reversed the Chancery Court's finding that unaffected market price was fair value in favor of the deal price less synergies, there have been three appraisal decisions issued: (1) *In re Appraisal of Jarden Corporation* (July 19, 2019); (2) *In re Appraisal of Columbia Pipeline Group, Inc.* (August 12, 2019); and (3) *In re Stillwater Mining Company* (August 23, 2019). While the Delaware judiciary has not expressly established a presumption that the deal price is fair value, it has consistently, like in *Columbia* and *Stillwater*, relied on the deal price to determine fair value when the sale process has objective *indicia* of deal-price fairness (*e.g.*, (1) arm's-length transactions with third parties, (2) absence of board conflicts, (3) due diligence by the acquiror involving confidential target information, (4) multiple price increases extracted by the target company and (5) lack of alternative bidders (whether evidenced through active or passive market checks)). However, *Jarden* demonstrates that, in cases where there is a deficient sales process, unaffected market price may still provide a reliable indicator of fair value, and a finding that the deal price is unreliable does not necessarily mean that the fair value will be greater than the deal price. *Columbia* and *Stillwater* also highlight that a respondent must prove synergies to reduce fair value below the deal price and that traditional valuation analyses may not receive much weight, particularly if there is a legitimate debate among competing experts concerning the inputs.

3. Developments Outside Delaware State Courts

- **First Circuit Overturns Sun Capital Decision:** In *Sun Capital Partners III, LP* v. *New Eng. Teamsters & Trucking Indus. Pension Fund* (November 22, 2019), the U.S. Court of Appeals for the First Circuit unanimously held that two affiliated funds did not form a deemed "partnership-in-fact" with respect to a bankrupt portfolio company in which each fund was a co-investor and, therefore, the funds did not have controlled group liability under ERISA for that portfolio company's defined benefit pension liabilities. In the latest development in the Sun Capital litigation, the First Circuit clarified the factors that may result in affiliated private equity funds, which do not individually satisfy the 80%-owner test for controlled group liability, becoming jointly and severally liable for their portfolio company's pension liabilities. Specifically, the First Circuit determined that whether a partnership-in-fact is established requires analysis of the partnership factors adopted by the Tax Court in *Luna* v. *Commissioner* (1964): (1) the agreement of the parties and their conduct in executing its terms; (2) the contributions, if any, which each party has made to the venture; (3) the parties' control over income and capital and the right of each to make withdrawals; (4) whether each party was a principal and co-proprietor, sharing a mutual proprietary interest in the net profits and having an obligation to share losses, or whether one party was the agent or employee of the other, receiving for his services contingent compensation in the form of a percentage of income; (5) whether the business was conducted in the joint names of the parties; (6) whether the parties filed federal partnership returns or otherwise represented to persons with whom they dealt that they were joint venturers; (7) whether separate books of account were maintained for the venture; and (8) whether the parties exercised mutual control over, and assumed mutual responsibilities for, the enterprise. After reviewing the *Luna* factors, the First Circuit concluded that, while a number of factors pointed toward finding of a partnership having been established, most of the factors did not. Among the facts that the First Circuit found relevant in determining that a partnership had not been formed was the parties' express intent not to form a partnership, that the funds in question did not always invest in parallel; that they had overlapping but not identical limited partners and that each maintained separate books, records and accounts and filed separate tax returns. The decision does not change the First Circuit's prior finding that a private equity fund can be treated as a trade or business for purposes of the ERISA-controlled group rules and, thus, becomes liable for the pension liabilities of a portfolio company that is at least 80%-owned by the fund. Read more in S&C's previously released client memo here.

4. Antitrust

- **U.S. Antitrust Regulators Publish Significant Guidance Concerning Vertical Mergers:** For the first time in 36 years, U.S. antitrust regulators have published guidance concerning their analysis of vertical mergers. The guidelines, which were issued in draft form by the FTC and DOJ on January 10, 2020 for public comment until February 11, 2020, provide significant insights into the analyses that would be applied by U.S. regulators and will be significant for companies planning vertical combinations in many industries. Companies in the technology, healthcare, defense and telecommunications sectors are likely to have particular interest in commenting. The guidelines could substantially change: (i) the way in which vertical mergers are assessed in allocating antitrust risk in the context of merger negotiations; (ii) the number of vertical mergers subjected to lengthy investigations by the regulators; and (iii) the number of vertical mergers that lead to enforcement actions. The draft guidelines decline to adopt a standard under which regulators would view vertical mergers as presumptively lawful or unlawful but propose, among other things, a 20% "screen" that would serve as a preliminary indicator of whether a vertical merger warrants scrutiny (*i.e.*, if the merged firm has a less than 20% share in a relevant market and a less than 20% share in a market vertically "related" to the relevant market, the regulators are unlikely to view the merger as problematic). Although the "screen" is informative, the guidelines emphasize that enforcement decisions will continue to be subject to a fact-specific competitive effects analysis in each case. Read more in S&C's previously released client memo here.

- **Biopharma and Technology Sectors Face Escalating Antitrust Scrutiny.** On August 20, 2019, the DOJ initiated a lawsuit to block travel technology firm Sabre Corp's announced $360 million acquisition of Farelogix Inc. and noted in its suit that Sabre is "a dominant firm's attempt to eliminate a disruptive competitor." On January 2, 2020, Illumina, Inc. and Pacific Biosciences of California, Inc. abandoned their proposed $1.2 billion merger following antitrust probes by the CMA in the UK and the FTC in the United States. Both of these cases exemplify antitrust regulators' increased attention to the preservation of nascent competition and come on the heels of statements by authorities in the U.S. and in Europe that "the elimination of even a very small or nascent competitor could remove important source competition." Regarding the trend of biopharma mergers remaining in the global antitrust spotlight, read more in S&C's previously released client memo here.

- **Avoidance Devices May Subject Parties to Substantial Penalties:** On November 14, 2019, the FTC posted a statement on its website regarding avoidance devices following and in connection with the FTC and DOJ settlement with Canon Inc. and Toshiba Corporation over Canon and Toshiba's alleged violations of HSR Rule 801.90 in which Canon and Toshiba each agreed to pay $2.5 million. The $2.5 million settlement payments made by Canon and Toshiba to the U.S. antitrust regulators is in addition to the European Commission fine of €28 million imposed on Cannon for the same transaction earlier in the year for violations of the European notification and merger control regime. The FTC statement was a reminder that the enforcement agencies take the view that HSR Rule 801.90 poses a simple question—Does the benefit that is the motive behind the transaction's structure result from avoiding or delaying filing. If the answer is yes, the structure is an avoidance device under the Rule. In contrast, if a transaction's structure creates a benefit entirely unrelated to HSR filing—such as a tax benefit from a proposed structure that has nothing to do with filing—but the filing is delayed or avoided as an incidental consequence of the structure, there is no avoidance device.

- **Private Merger Challenges Can Result in Divestiture:** In *Steves and Sons Inc.* v. *Jeld-Wen, Inc.* (August 16, 2019) the U.S. District Court for the Eastern District of Virginia ordered Jeld-Wen, Inc. to divest a plant from its October 2012 acquisition of Craftmaster International. It is a rare instance in which a court has ordered a divestiture in a private merger challenge following a government decision to investigate, but not challenge, the transaction in court. It is an important reminder that (1) DOJ or FTC clearance under the HSR Act does not preclude a private challenge (the Clayton Act permits private parties to sue for violations of Section 7 (the prohibition on transactions that "substantially lessen competition, or tend to create a monopoly") for treble damages or for an injunction), and (2) post-merger integration does not immunize otherwise unlawful conduct even though both courts and antitrust agencies acknowledge the complexity and burden of unwinding a transaction.

- **Civil Antitrust Settlements with the DOJ are Subject to Federal Court Review**: On September 27, 2019, the U.S. District Court for the District of Columbia approved a settlement between the DOJ and CVS Health Corp. regarding CVS's acquisition of Aetna Inc. after almost a year following the transaction's closing, during which time CVS had to hold the Aetna business and assets separate. The Antitrust Procedures and Penalties Act (known as the Tunney Act) requires federal district court review of all civil antitrust settlements with the DOJ (although it does not apply to settlements with the FTC). Under the Tunney Act, a consent decree with the DOJ cannot be finalized without judicial review of the settlement and comment period. Traditionally, when the DOJ decides to settle with the parties to a transaction about which the DOJ has concerns, the DOJ files a complaint in federal district court alleging the transaction is anticompetitive, along with a proposed final judgment and hold separate order enabling settlement and resolution of the DOJ's concerns. The reviewing court, following receipt of the filings, typically (most of the time within a few days) signs and enters the hold separate order allowing the parties to consummate the pending transaction. The reviewing court cannot enter the proposed final judgment until the Tunney Act requirements have been met, including expiration of a public comment period to allow input on the proposed remedy. The CVS case is an extreme outlier—based on data from the past few years, the Tunney Act review of the CVS settlement took over 200 days longer than the average review. It is also an important reminder that, in evaluating antitrust risk, deal participants and advisors should be cognizant of the Tunney Act and its possible impact on a deal (*e.g.*, extending integration timelines and pressure on achieving (or reduction in) synergies if the transaction could be reviewed by the DOJ as opposed to the FTC).

5. In Memoriam

- The M&A world lost a handful of larger-than-life personalities recently.
  - On September 11, 2019, T. Boone Pickens, the wildcatter "Oracle of Oil," hedge fund founder and philanthropist who rewrote the playbook for corporate raiders, passed away at the age of 91.
  - On October 13, 2019, retired Chancellor William T. Allen, a legend of the corporate bar, the Delaware judiciary and, later in life, academia, passed away at the age of 75.
  - On December 8, 2019, Paul A. Volcker, former Federal Reserve Board chair and senior economic policy advisor across numerous U.S. administrations, passed away at the age of 92.
  - On December 14, 2019, Felix Rohatyn, the former child refugee who ascended to the upper echelons of Wall Street as the head of Lazard Freres & Co. and is credited with saving New York City from bankruptcy in the financial crisis of the 1970s, passed away at the age of 91.