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WEBINAR

Tech M&A in the Age of COVID-19

MAY 21, 2020

Speakers: Mike Murray, Hal Leibowitz, Stephanie Evans and Joe Conahan

Webinar Guidelines

- Participants are in listen-only mode
- Submit questions via the Q&A feature
- Questions will be answered as time permits
- Offering 1 CLE credit in California and New York*
- The webcast is being streamed through your computer, so there is no dial-in number. For the best quality, please make sure your volume is up and other applications are closed. If you experience a delay or get disconnected, press F5 to refresh your screen at any time
- For additional help with common technical issues, click on the question mark icon at the bottom of your screen

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WEBINAR

Speakers

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WilmerHale

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Agenda

Looking at impact of COVID-19 on Tech M&A through two lenses:

- Banker's Perspective (Lazard):
  - *Impact on Tech M&A Market, including volume, valuations*
- Lawyer's Perspective (WilmerHale):
  - *Identifying and Allocating COVID-19 Related Risks in Tech M&A Deals*

The Banker's Perspective

U.S. Markets Update

Daily Update – May 18, 2020

Global markets finished notably higher Monday boosted by positive data on a potential coronavirus vaccine; U.S. new issue markets remained open and active

Debt Markets	• Treasury yields ticked up and credit markets rallied as investors responded to hopeful news around a potential coronavirus vaccine from Moderna who disclosed promising results from its first stage trials • Investment grade spreads tightened by 8bps to 212bps and high yield spreads tightened by 37bps to 741bps • The secondary high yield market traded stronger, with fallen angel bonds leading the way, with names like Occidental, Ford, and Royal Caribbean outperforming the broad high yield rally of 1-1.5 points • The secondary leveraged loan market posted a gain of 0.30% according to the S&P/LSTA Leveraged Loan Index • The investment grade and high yield markets continued to see inflows last week, while the leveraged loan market saw a third consecutive week of outflows

Equity Markets	• U.S. equity markets soared Monday after suffering weekly declines last week as promising developments for a potential coronavirus vaccine powered markets higher
	  ➢ The S&P 500 and Dow both enjoyed their biggest one-day gains since early April, with the S&P 500 closing +3.2% and the Dow surging over 900 points to close up 3.9%; the Nasdaq closed up 2.4% in its best day since April 29
	  ➢ With Monday's gains, the S&P 500 has rebounded 32% from its March 23 low, now sitting about 13% below its record high in February
	• Fed Chair Jerome Powell signaled the Fed has more firepower to lend to economic recovery efforts in a televised interview on Sunday evening, further bolstering market sentiment
	• Germany and France jointly proposed a €500bn recovery fund in a major step forward in developing a cohesive action plan to spur European recovery from the coronavirus crisis
	• The VIX fell to 29, retreating to levels just above recent lows (28)
	• Oil rallied to a two-month high (WTI closed +8%) on signs of increasing demand from China as the economy recovers and on rising hopes of broader global economic reopening

Source: Bloomberg, FactSet, Lipper Fund Flows, LCD Comps, ECM Analytics, Press Reports, Public Sources.

Daily Update – May 18, 2020

Capital Raising

- The investment grade, high yield and primary loan markets were all open on Monday
- U.S. investment grade new issuance volume totaled $10.3bn on Monday across 10 issuers, including Pfizer raising $4.0bn, Intercontinental Exchange placing $2.5bn and Diamondback Energy with a $500mm offering
- The high yield primary market saw $2.2bn of issuance on Monday across 4 issuers, including MSCI raising $1.0bn, Inspire Brands placing a $750mm secured note offering and Standard Industries placing a $350mm offering
- The leveraged loan market saw 1 new launch on Monday; commitments are due next week for Xperi's $1.1bn TLB
  - Cornerstone OnDemand launched a $1.0bn TLB to finance the previously announced acquisition of Saba Software at L+425 with a 0% LIBOR floor, offered at an OID of 95 – 96
  - Delek U.S. Holdings allocated its $200mm incremental TLB on Monday at L + 550 with a 1% LIBOR floor, at an OID of 93
  - Blackstone Mortgage Trust missed its commitment deadline on Monday, and continues to be in-market for its $250mm TLB
- On Monday, 2 issuers raised $650mm in follow-on stock offerings and 1 issuer, Envista Holdings, raised $400mm of convertible notes while the IPO market stayed quiet

Source: Bloomberg, FactSet, Lipper Fund Flows, LCD Comps, ECM Analytics, Press Reports, Public Sources.

Daily Update – May 18, 2020

Corporate Actions: Dividends, Buybacks, Revolvers, Poison Pills and Guidance	• **Dividend Changes**: 212 companies have suspended or decreased their policies, including 48 companies in the S&P 500 • **Share Repurchase Program Changes**: 323 companies have announced suspensions or reductions to their repurchase program, including 116 companies in the S&P 500 • **Revolver Draws**: 51 companies have drawn on revolvers • **Poison Pill Enactments**: 51 companies have enacted poison pills since February 15th • **Changes to Corporate Guidance**: 895 companies have announced guidance withdrawals or downward revisions to guidance, including 259 companies in the S&P 500 • *Dataset includes U.S. public companies with a market cap greater than $250mm at the time of announcement; Revolver Draws include those with a Revolving Credit Facility greater than $100mm*
Earnings Call Preparation, IR Q&A and Annual Meetings	• Companies should be prepared for a new line of questioning assessing the near and long-term impacts of the current health and economic crisis • **Annual Meeting Changes**: 176 U.S. companies have made changes to their AGM, with 175 opting for a virtual AGM and 1 postponing altogether

Source: Bloomberg, FactSet, Lipper Fund Flows, LCD Comps, ECM Analytics, Press Reports, Public Sources.

M&A Market Impacts

Evolution of M&A Market News

Slack, Broadcom Among Companies Seeing Mixed COVID-19 Impact

Broadcom, long a hardware provider, is increasingly betting also on software to serve enterprises and industry through a spate of acquisitions and asset sales…

Chief Financial Officer Tom Krause **signaled Broadcom's acquisition plans were on hold because of coronavirus uncertainty.** "We're focused on liquidity; we're focused on capital returns," he said on the call with analysts. **"At least for the time being, M&A is off the table, at least until visibility improves.".**

WALL STREET JOURNAL – MARCH 12, 2020

Dealmaking Grinds to a Halt on Coronavirus Impact

A multiyear boom in mergers and acquisitions activity came to a halt by the end of March, as the fallout from the coronavirus pandemic ravaged corporate share prices and redirected the focus of executives towards saving their own companies... **Deal activity last week totalled just $12.5bn, the lowest weekly total since the nadir of the financial crisis in April 2009...**

FINANCIAL TIMES – MARCH 30, 2020

Coronavirus Takes Toll on Global M&A as $1 Billion Deals Disappear

For the first time since September 2004, no merger and acquisition deal worth more than $1 billion was announced worldwide last week, according to data provider Refinitiv, as the new coronavirus stifles global M&A.

Worldwide merger activity so far this year is down 33% from a year ago and at $762.6 billion is the lowest year-to-date amount for dealmaking since 2013, the data showed. The number of deals also fell 20% year-on-year...

Regulators worldwide have also toughened rules for foreign investments to protect national assets. India last week ruled that investments by an entity from a country that shares a land border with it will require government approval in a move to curb "opportunistic takeovers/acquisitions".

Australia and Germany have also stepped up scrutiny over overseas investors.

With big deals largely put on hold as buyers wait to gauge the true impact of the pandemic, **dealmakers are seeking other, related work on companies needing rescues, restructurings and potentially nationalizations as governments and central banks try to shore up their economies.**

REUTERS – APRIL 20, 2020

Lazard Q1'20 Earnings Announcement Summary

($ in millions, except per share data)

Earnings Highlights

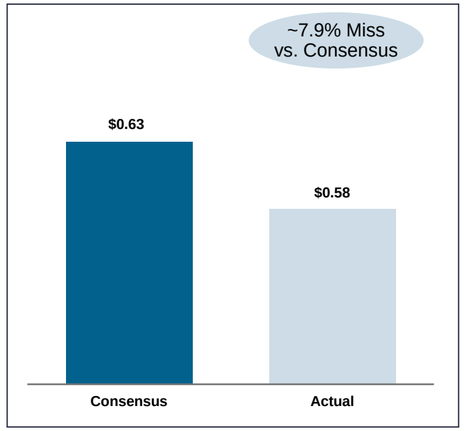
- Q1'20 operating revenue of $563m (-9% YoY), which was below the median consensus estimates by -1.0%
  - Financial Advisory operating revenue of $295m (-11% YoY), with Americas transaction volume declining, while European revenue increased YoY
  - Asset Management operating revenue of $269m (-5% YoY), reflecting the sell-off in global markets. Net outflows over the quarter were driven primarily by equity and debt emerging markets, as well as some local equity strategies
- Q1'20 adjusted net income per share of $0.58 (-33% YoY), and below median consensus estimates by -7.9%
- Forward outlook indicates that though new M&A announcements are mostly on pause, Lazard is seeing considerable opportunity in strategic advisory assignments centered around restructuring, Capital Advisory, and Sovereign Advisory, as well as liquidity focused mandates and divestitures
- Capital allocation remained intact, with $211m returned to investors in share repurchases and dividends – $0.47 per share dividend declared on April 29th

Revenue

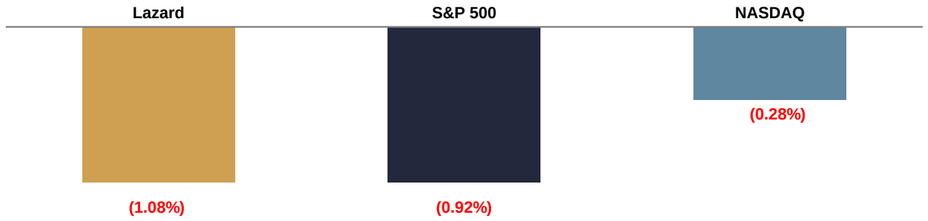
Q1'20 Results vs. Estimates

Non-GAAP EPS

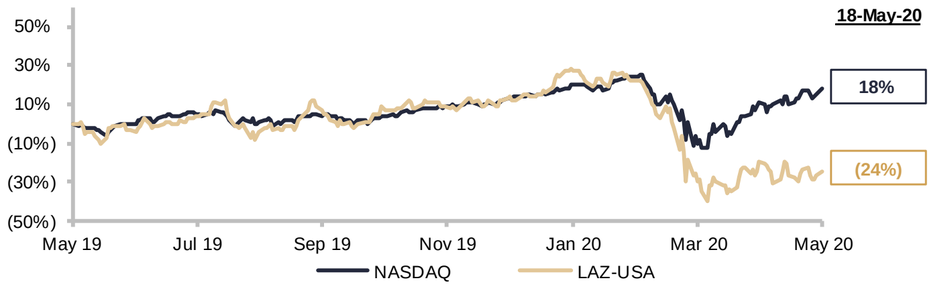
Q1'20 Results vs. Estimates



Stock Reaction (1-Day / April 30, 2020)



LTM Indexed Share Price Performance



Analyst Commentary

"While indicating that M&A announcements had essentially been put on "pause", management said the firm ranked #1 in announced restructuring mandates in 1Q20 with 75 restructuring deals currently in the pipeline. On the outlook for M&A in 2020, management expects to see an eventual uptick in distressed M&A transactions, as well as deals driven by supply chain disruptions and structural changes.

PIPER SANDLER, MAY 01, 2020

"Advisory revenues a bit better than expected but outlook cloudy…the commentary flagged several M&A mandates that LAZ has won since the outbreak of COVID, which was better than we had expected. Restructuring wins were also highlighted, which was less surprising.

UBS, APRIL 30, 2020

Source: Company filings, FactSet and Wall Street Research as of 05/18/20.

Lazard Q1'20 Earnings Announcement Summary – Management Commentary

Financial Advisory Outlook

For Lazard, projecting performance for the remainder of the year is challenging, given the uncertainty of the pandemic's course and its impact on the economy and market volatility…Our restructuring, capital markets advisory and Sovereign Advisory platforms are all highly active and position us well going forward. As the year progresses, we would expect to see distressed M&A activity across a range of impacted sectors, much as we saw in the 2008 and 2009 in the financial sector. **As the environment becomes more settled, we would expect additional M&A activity as companies address supply chain disruptions and adjust to structural changes in the economy resulting from the pandemic.**

Current Demands for Financial Advisory Services

For many companies, the current environment is, first and foremost, a liquidity crisis. **We are helping them find and assess innovative financing options and advising on strategy and capital structure moving forward.** Our preeminent restructuring franchise is experiencing a surge of activity. Our Sovereign Advisory practice has also seen an increase in activity, as we continue to advise countries on debt restructuring, including new assignments in Argentina and Lebanon, among others. In addition, we are advising governments and developed economies on programs to support the private sector.

Restructuring Advisory Pipeline

In '08, '09, we saw a very significant increase in restructuring backlog, but it never really substitutes for M&A, dollar for dollar. But at the same time, it does provide a very important buffer... **So far, the restructuring environment seems to have picked up a little quicker in the U.S. in part, I suspect that is because that the first wave of this restructuring involved a lot of companies that were already in a discussion around liquidity issues and balance sheet issues prior to the crisis.** And those quickly turned into more traditional restructuring assignments.

Source: Company filings, FactSet and Wall Street Research as of 05/04/20.

Political Landscape

Political Landscape and Congressional Proposals

Pandemic Anti-Monopoly Act

- Imposes a moratorium on risky mergers and acquisitions until the Federal Trade Commission (FTC) unanimously determines that small businesses, workers, and consumers are no longer under severe financial distress. The moratorium includes all mergers and acquisitions that involve:
  - Private equity companies, hedge funds, or companies that are majority-owned by a private equity company or hedge fund;
  - Companies with an exclusive patent that impacts the crisis, like personal protective equipment; and
  - Transactions that must otherwise be reported to the FTC under current law
- Pause all waiting periods and deadlines imposed on antitrust agencies during the moratorium
- Direct the FTC to engage in rulemaking to establish a legal presumption against mergers and acquisitions that pose a risk to the government's ability to respond to a national emergency

Restricting Predatory Acquisitions During COVID-19 Act

- H.R. 6706, introduced by Representative Jim Banks, seeks to place temporary restrictions on companies with ties to the Chinese government from owning more than 51% of shares in U.S. businesses that are deemed to be “critical infrastructure”
  - Critical infrastructure encompasses companies defined by the Defense Production Act of 1950, organizations engaged in the production and dissemination of news media, or entities otherwise determined to be critical to national security, critical infrastructure, or culturally significant by the president
- Bill is aimed at expanding the scope of cases that the Committee on Foreign Investment in the United States (CFIUS) has jurisdiction to review when considering acquisitions by companies with ties to the Chinese Communist Party during the COVID-19 pandemic

Call for a Temporary Merger Ban

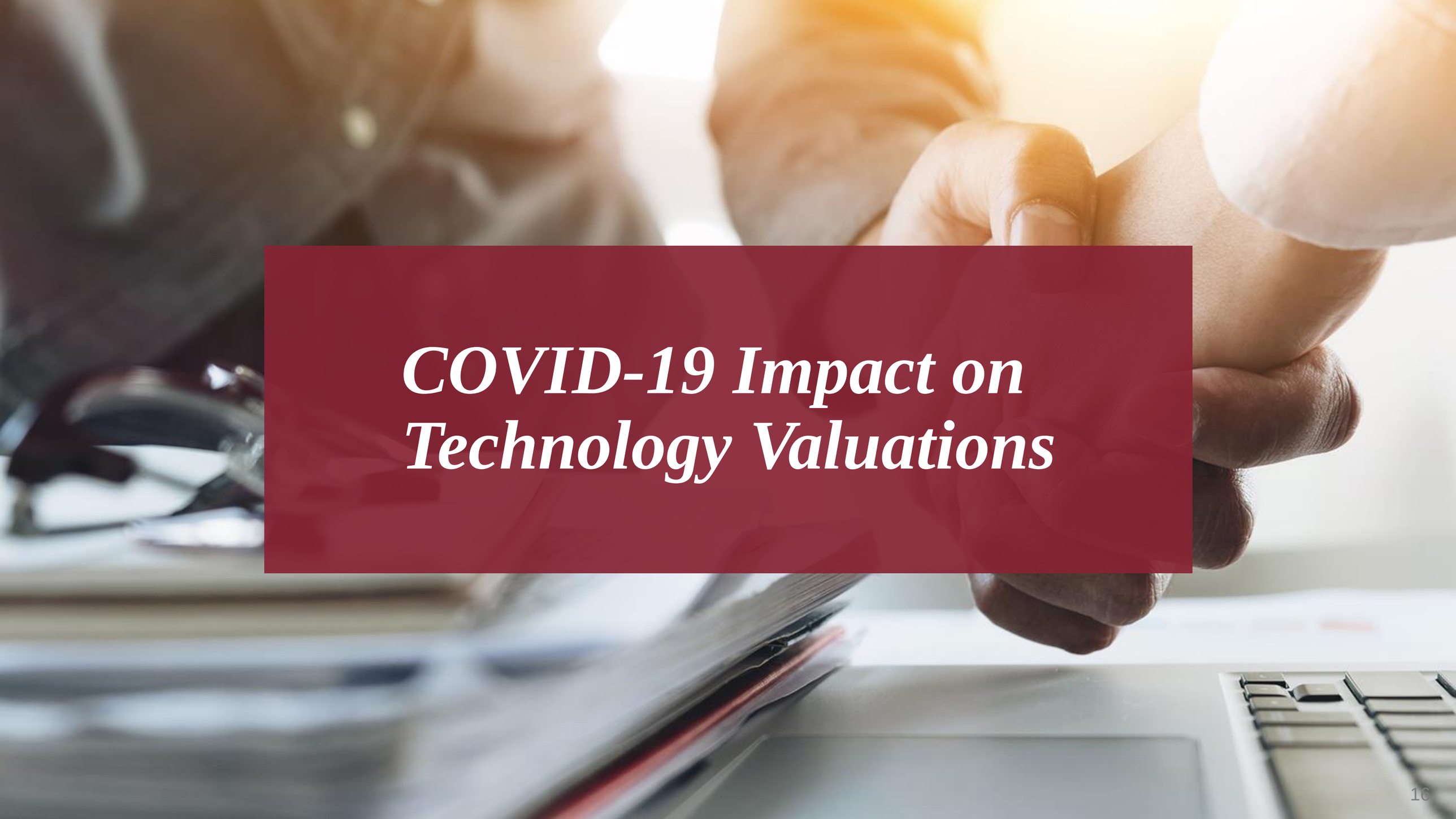
> Private equity firms have been sitting on $2.5 trillion of investor cash, while dominant technology firms have over $570 billion in cash and investments ... Industry analysts are already beginning to forecast an acceleration of deal-making that may hasten economic concentration ...
>
> Mega-mergers and corporate takeovers that were permitted during the last economic crisis led to the firing of millions of workers, the slowing of investment and innovation, and huge increases in executive compensation. As we respond to the current crisis — with millions of Americans facing unemployment and millions of businesses in severe economic distress — we cannot afford to repeat this mistake.

REP. DAVID CICILLINE (D-RI) – APRIL 23, 2020

Commentary

- Technology companies specifically targeted as potential consolidators during the pandemic. Expectation of increased public and regulatory scrutiny of any potential transaction
- Private Equity, which has played an increasingly active role in the software market, was a frequent target of public criticism prior to the pandemic and that criticism will continue
- Any proposed regulation restricting merger activity in technology or other sectors would face a difficult path to passage with a republican executive and majority in the senate
- Market participants see a minimal risk of passage at this time
- Legislation aimed at providing greater oversight of Chinese business practices has tended to gain more bipartisan support, though the bill has only been recently introduced and still has a considerable way to go

Source: Axios, Bloomberg and Senate.gov as of 05/05/20.



COVID-19 Impact on Technology Valuations

COVID-19 Impact on the Stock Market

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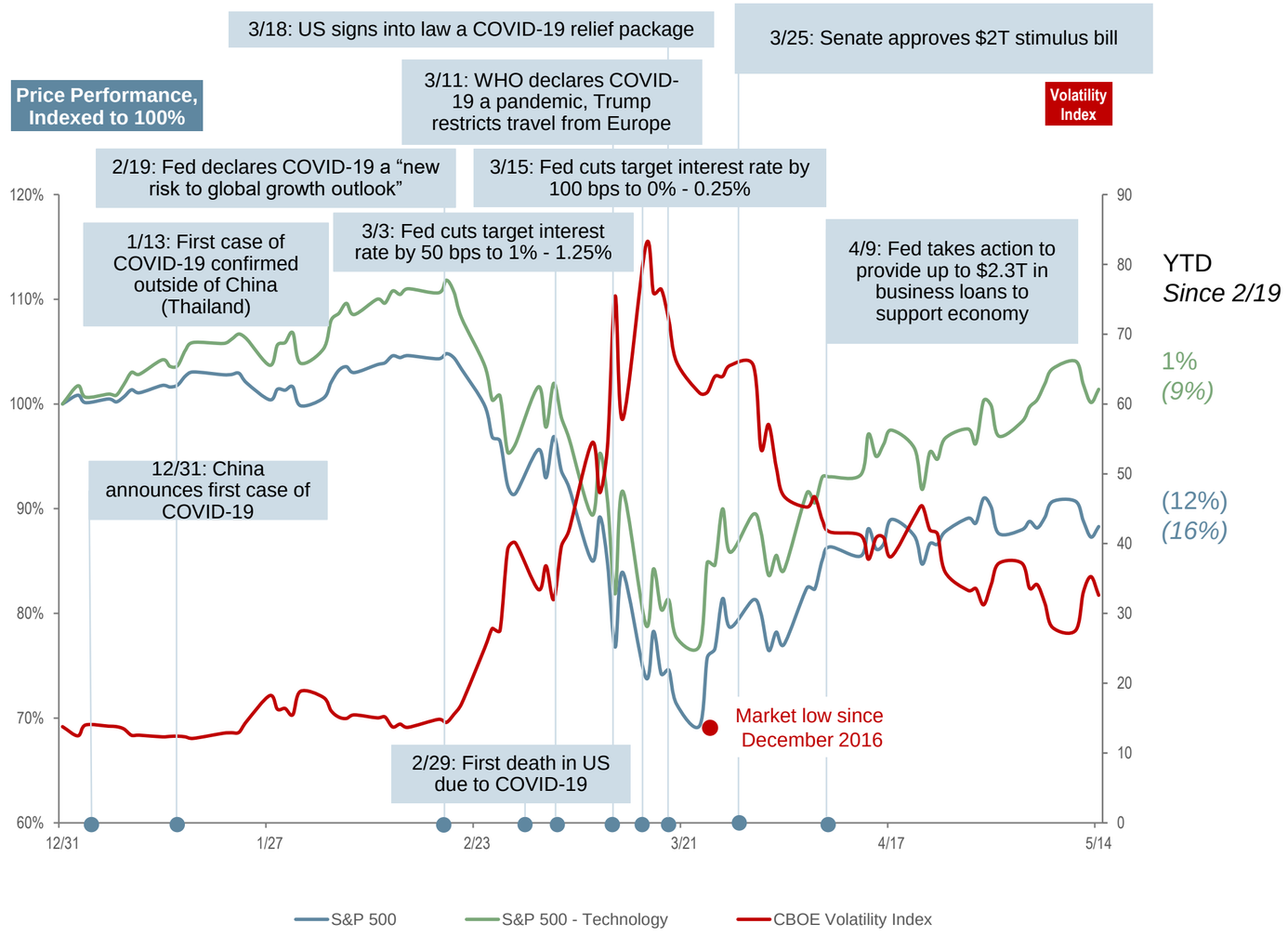
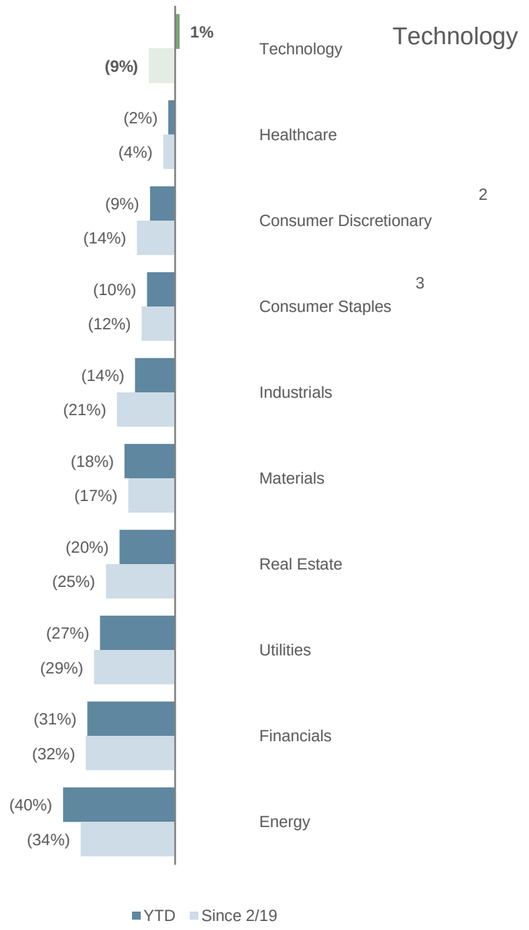
Since the first confirmed case of COVID-19 in China, the S&P 500 has declined by 12% while market volatility has increased. Since the market hit its trough on March 23rd, however, the S&P 500 is up by 27% and market volatility has gradually decreased

YTD Indexed Price Performance



Sector Performance[1]



Source: FactSet as of 5/14/20.

1 Represent S&P 500 sector indices.

2 Consumer Discretionary comprises companies that develop non-essential products and those industries that tend to be the most sensitive to economic cycles. Its manufacturing segment includes automotive, household durable goods, textiles & apparel and leisure equipment. The services segment includes hotels, restaurants and other leisure facilities, media production and services, and consumer retailing and services.

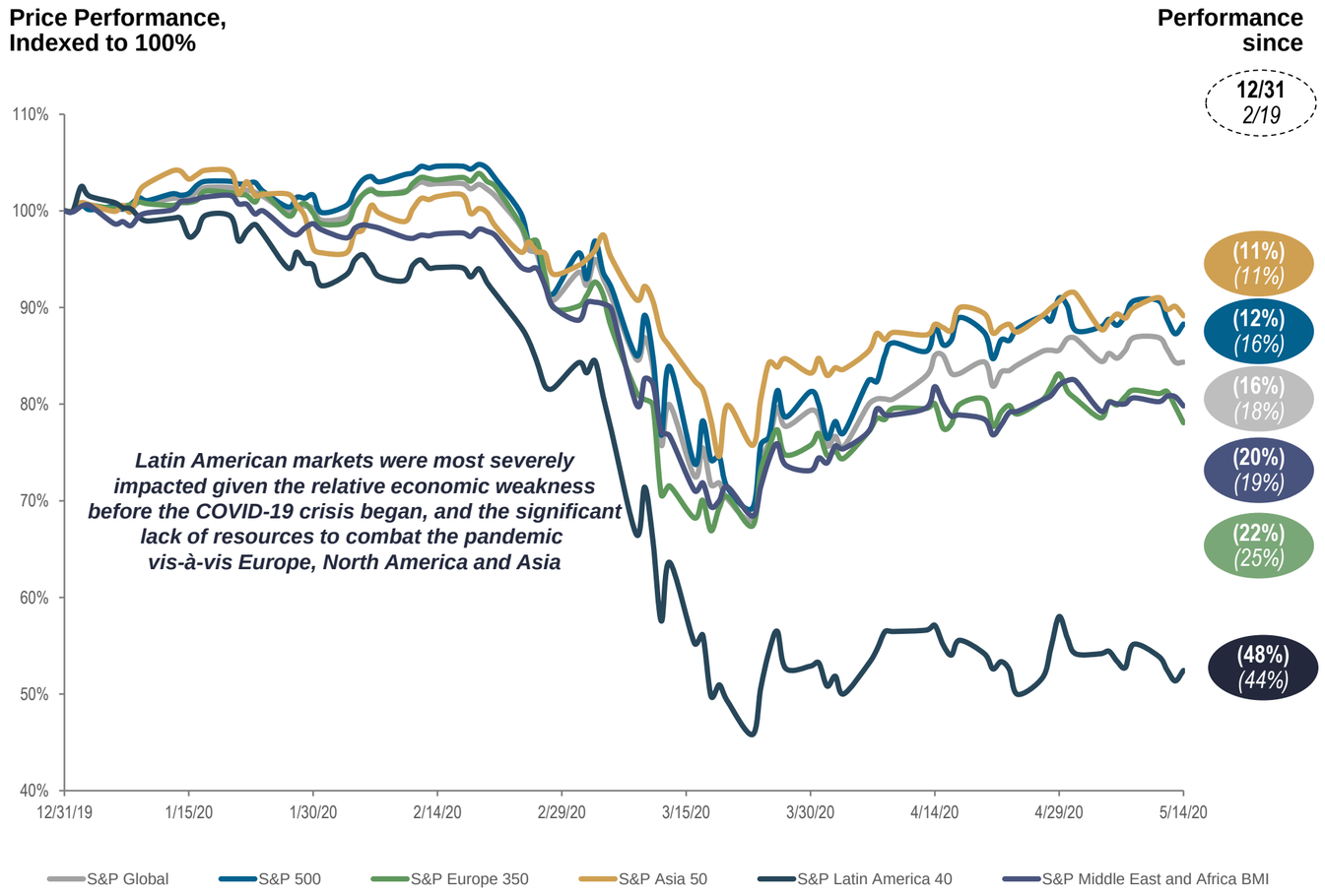
3 Consumer Staples comprises companies that develop essential products and whose businesses are less sensitive to economic cycles. It includes manufacturers and distributors of food, beverages and tobacco and producers of non-durable household goods and personal products. It also includes food & drug retailing companies.

Equity Market Performance by Region

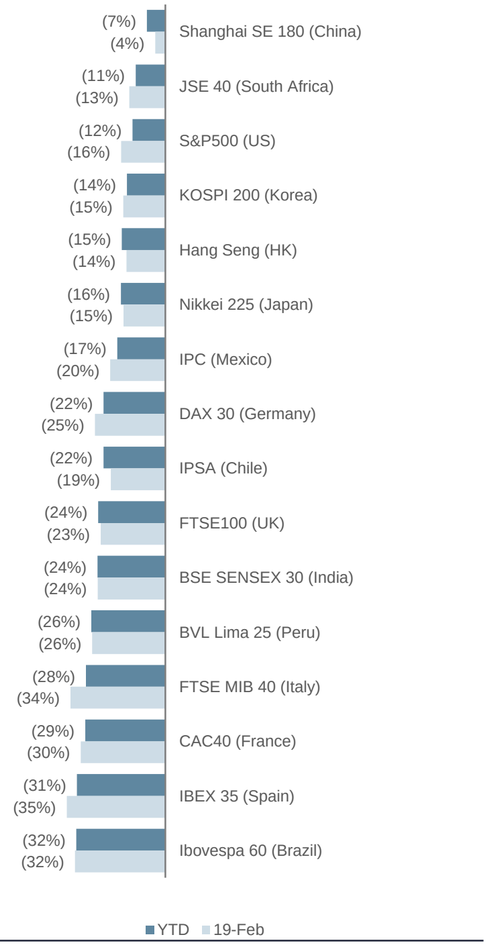
The stock market has declined 16% globally YTD with notable differences between geographic regions:

- Asian equity market indices have performed relatively well with Chinese, Japanese and Korean indices showing relatively modest declines
- The S&P500 declined 16% since its 19-Feb peak, following a notable recovery as a result of the announced $2 trillion stimulus package
- Severe COVID-19 outbreaks and large capital outflows have resulted in significant declines in several European and emerging markets

YTD Indexed Price Performance



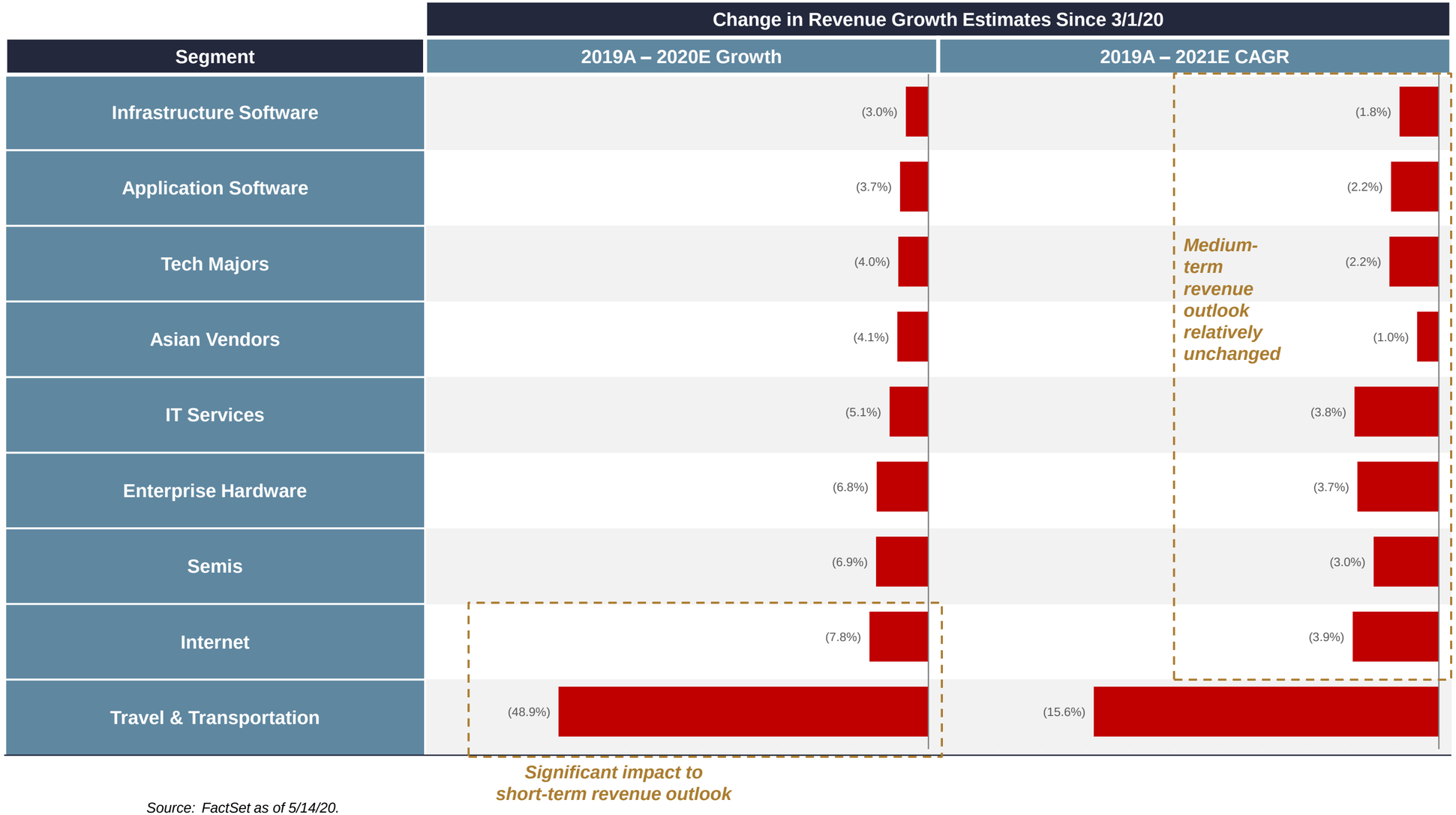
Regional Leading Indices Performance



Source: FactSet as of 5/14/2020.

Medium Term Revenue Outlook for Technology Sectors Relatively Unchanged

Apart from industries directly impacted by globally enforced quarantines like travel and transportation, the medium term revenue outlook for technology sectors was not materially impacted



Source: FactSet as of 5/14/20.
Note: Segment revenue growth metrics reflect medians. Pre-COVID-19 metrics reflect broker forecasts as of 3/1/20. Post-COVID-19 metrics reflect broker forecasts released since 3/1/20.

Price Performance by Technology Segment

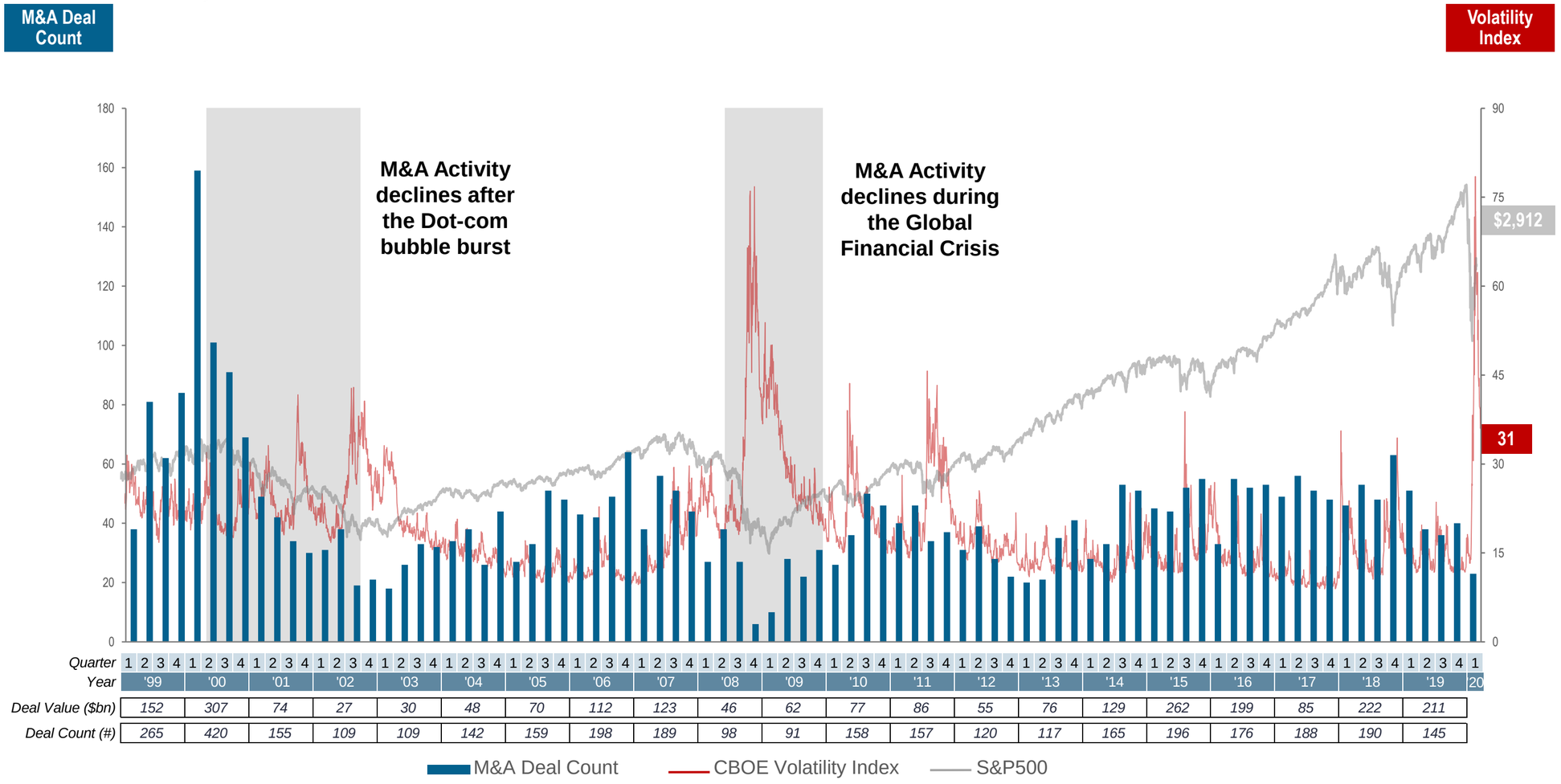
Segment	Return Since Crisis Onset: Absolute Return	Return Since Crisis Onset: Excess Return vs. Market	EV / '21E Revenue: 2/19/2020	EV / '21E Revenue: Current	EV / '21E Revenue: Change
Fitness	16%	30%	2.7x	2.8x	5%
Collaboration	7%	21%	11.0x	11.8x	8%
Ed-Tech	3%	17%	4.1x	4.2x	1%
Gaming	1%	15%	4.3x	4.3x	1%
CDN	1%	15%	6.0x	6.5x	8%
Tech Majors	(7%)	7%	5.5x	5.3x	(3%)
E-Commerce	(8%)	6%	3.4x	3.5x	3%
Asian Internet[1]	(9%)	6% [1]	2.3x	2.2x	(5%)
Hardware	(9%)	5%	2.7x	2.8x	1%
Security	(9%)	5%	7.6x	7.3x	(4%)
Semiconductors	(12%)	2%	4.7x	4.6x	(3%)
Healthcare IT	(13%)	1%	5.1x	5.0x	(2%)
Asian Hardware / Software[1]	(14%)	1% [1]	2.0x	1.8x	(11%)
Digital Media	(15%)	(1%)	3.8x	3.7x	(3%)
Application Software	(15%)	(1%)	7.5x	6.8x	(9%)
ITOM	(16%)	(2%)	7.8x	6.9x	(12%)
Developer Tools and Platforms	(18%)	(4%)	9.2x	7.5x	(18%)
Data Management	(18%)	(5%)	7.1x	6.1x	(14%)
Ad-Tech	(19%)	(5%)	5.8x	5.6x	(4%)
IT Services	(20%)	(6%)	2.2x	2.0x	(8%)
Fintech	(21%)	(7%)	13.9x	14.1x	2%
Online Travel	(41%)	(27%)	2.6x	2.3x	(14%)

Source: FactSet as of 4/30/20.
Note: Excess return defined as the incremental stock price return over the S&P 500 between 2/19/20 and 4/30/20 (14%). Metrics represent the average performance within each segment.
1 Excess return for Asia-based companies calculated as the incremental stock price return over the Hong Kong Hang Seng Index (HIS) between 1/13/20 and 4/30/20 (15%).

Tech M&A Activity Highly Correlated to Overall Market Sentiment and Negatively Correlated to Volatility

($ in billions)

It remains unclear what the economic impact and duration of the COVID-19 pandemic will be. However, if the impact mirrors that of prior U.S. recessions, it will likely take several quarters for M&A activity to rebound



Year	'99	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12	'13	'14	'15	'16	'17	'18	'19	20
Deal Value ($bn)	152	307	74	27	30	48	70	112	123	46	62	77	86	55	76	129	262	199	85	222	211	
Deal Count (#)	265	420	155	109	109	142	159	198	189	98	91	158	157	120	117	165	196	176	188	190	145	

Source: FactSet as of 4/30/2020.
Note: Analysis based on U.S. technology transactions with deal value of >$50m.

Notable Recent M&A

($ in millions)

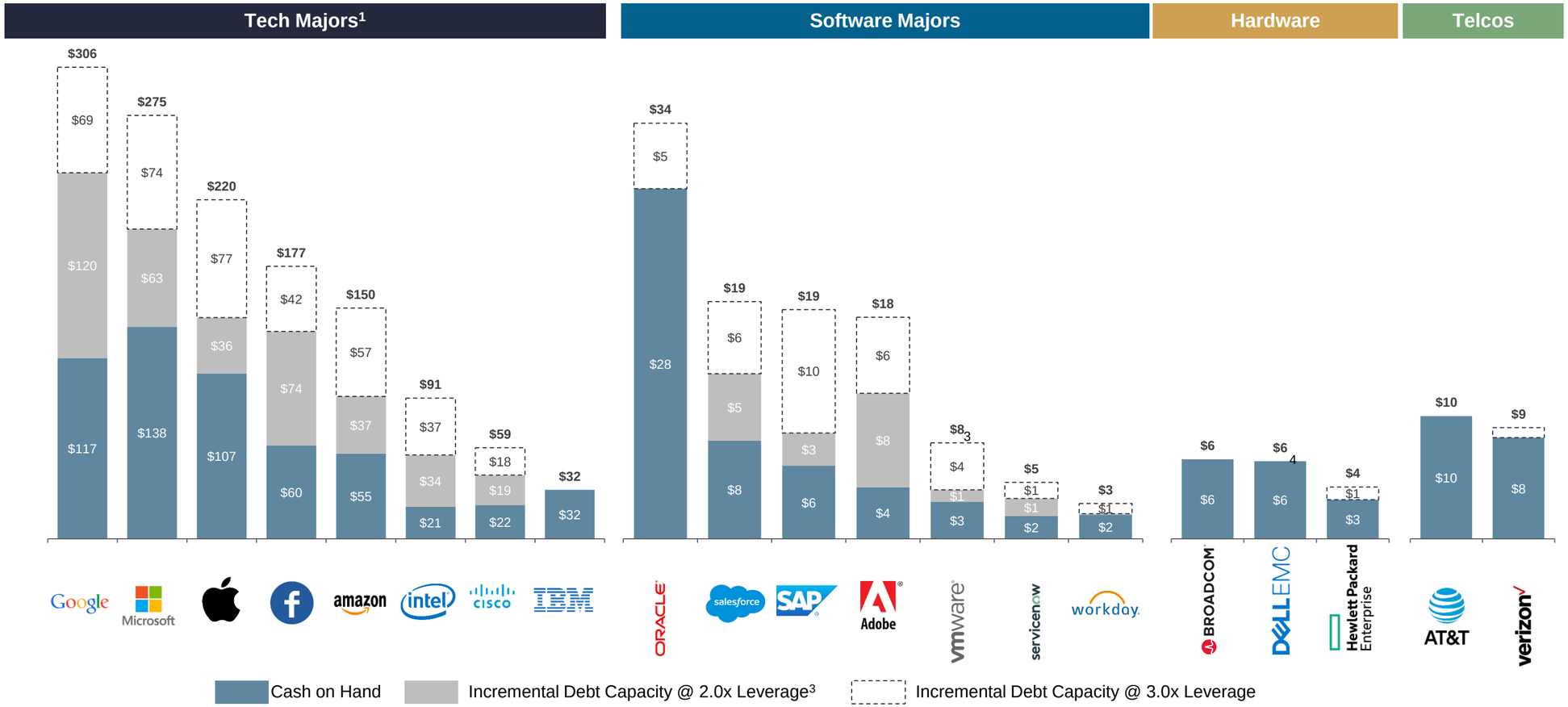
U.S. tech M&A deal volume YTD is down 45% compared to the same period one-year ago

Sector	Ann. Date	Acquirer	Target	Target Description	EV	EV / Revenue
Application Software	24-Feb-2020	Cornerstone	SABA	Enterprise Learning Management Software	$1,394	--
	25-Feb-2020	salesforce	Vlocity	Industry-Cloud Software (TMT, Energy, Insurance, Etc.)	1,330	--
Digital Media	05-Mar-2020	General Atlantic	The Meet Group	Mobile Dating App Portfolio	462	2.18x
E-Commerce	11-Feb-2020	CoStar Group	RentPath	Residential Rental Apartment Listing	795	--
Fintech	07-Apr-2020	SoFi	Galileo	Financial Services API & Payments Platform	1,200	--
	24-Feb-2020	Intuit	credit karma	Credit Score Monitoring / Financial Product Advisory	7,100	7.10x
Gaming	19-Feb-2020	Embracer Group	Saber Interactive	Video Game Developer (World War Z)	532	5.07x
Hardware	04-May-2020	NVIDIA	Cumulus	Linux Distribution for Network / Data Center Switches	Undisclosed	--
Infrastructure Software	31-Mar-2020	paloalto	CLOUDGENIX	Software-Defined Wide Area Networking	420	--
	27-Mar-2020	Microsoft	affirmed	5G Software for Building Virtual Telecom Networks	1,350	--
	06-Apr-2020	cisco	Fluidmesh Networks	Industrial IoT Wireless Solutions	Undisclosed	--
IT Services	13-Feb-2020	First American	docutech	Cloud Computing and Data Hosting Services	350	--
	06-Feb-2020	SAIC	UNISYS	Federal Government IT Modernization & Managed Service	1,200	1.74x
Smart Mobility	04-May-2020	intel	moovit	Urban Transit Data Geared Toward Autonomous Driving	900	--
Security	03-Feb-2020	LexisNexis	emailage	Fraud Prevention and Risk Management Solutions	480	--
	06-Feb-2020	Advent International	FORESCOUT	Device Visibility & Control / IoT Cybersecurity	1,565	4.65x
	16-Mar-2020	H&F	Checkmarx	Integrated Software Security During Development	1,150	--
Semiconductors	20-Feb-2020	dialog Semiconductor	Adesto	Semiconductors and Embedded Systems for IoT	$428	3.62x

Source: Company website, press releases and FactSet.
Note: U.S. tech M&A deal volume YTD is based on majority transactions >$100m, as of 5/07/2020

Illustrative Purchasing Power of Notable Technology Interlopers (Current)

($ in billions)



Current Gross Leverage[2]	0.2x	1.1x	1.5x	0.2x	1.4x	1.1x	0.9x	3.4x	2.7x	1.1x	1.7x	0.8x	1.7x	0.9x	1.9x	3.5x	5.3x	2.8x	3.3x	3.0x

Source: FactSet as of 5/04/20.

1 Chart not to scale.

2 Calculated as debt / CY'20E EBITDA (Pre-SBC).

3 Leverage capacity does not take into account the impact to Dell's leverage.

4 Excludes cash held by VMware but consolidated by Dell Technologies.

The Lawyer's Perspective

Lawyer's Perspective–Agenda

Key roles of lawyers in M&A

- Identification of COVID-19-Related Risks
- Allocation of Those Risks in the Definitive Agreement

Due Diligence and Impact on Representations and Warranties

Due Diligence and Impact on Representations and Warranties

Due diligence remains **critical**. Heightened areas of focus include:

- Customers / Revenue
- Supply Chain
- Cybersecurity / Privacy
- Health and Safety
- Regulatory Risk
- Financing Risk (from seller's perspective)

Due diligence drives representations and warranties → Same areas of focus in representations and warranties as in due diligence.

Due Diligence and Impact on Representations and Warranties

KEY DRAFTING CONSIDERATIONS	
Date Limitations	The Company has not received **[in the two years immediately preceding the date of this Agreement]** any written notice from any supplier of the Company indicating that such supplier will terminate (or reduce) the supply of goods or services to the Company.
Materiality or MAE Qualifications	The Company has not received in the two years immediately preceding the date of this Agreement any written notice from any **[sole-source]** supplier of any goods or services **[that are material to the business of the Company]** indicating that such supplier will terminate (or reduce) the supply of goods or services to the Company, **[except for any such termination or reduction that has not had a Material Adverse Effect]**.
Knowledge Qualifications	**[To the Company's knowledge,]** the Company has not received in the two years immediately preceding the date of this Agreement any written notice from any supplier of any goods or services that are material to the business of the Company indicating that such supplier will cease (or reduce) the supply of goods or services to the Company.

Due Diligence and Impact on Representations and Warranties

KEY DRAFTING CONSIDERATIONS	
Bring-Down Standard for Closing Condition	The representations and warranties of the Company in this Agreement shall be true and correct **[in all material respects]** as of the date of this Agreement and as of the Closing Date as though made as of the Closing (unless any such representation or warranty is made as of a specific date, in which case such representation and warranty shall be true and correct as of such date)**[, except for any failures to be true and correct that have not had a Material Adverse Effect]**.
Disclosure Schedule Updates	The Company shall from time to time prior to the Closing supplement the Disclosure Schedule to disclose events, facts or circumstances **[first occurring or discovered after the date of this Agreement]** that constitute a breach of any representation or warranty of the Company in this Agreement **[that would result in the failure of any condition set forth in Article [X]**] promptly after becoming aware of any such event, fact or circumstance **[; provided, however, that any such supplement shall be deemed to constitute part of the Disclosure Schedule for all purposes of this Agreement only if (1) such supplement discloses events, facts or circumstances [first occurring or discovered after the date of this Agreement] that constitute a Material Adverse Effect, (2) the Company acknowledges in writing that such event, fact or circumstance constitutes a Material Adverse Effect and (3) the Buyer does not elect to terminate the Agreement pursuant to [Buyer's MAE Termination Right] within 10 business days after receiving such supplement].**

Bridging Valuation Gaps

Bridging Valuation Gaps

- What is an earnout?
  - A mechanism where a portion of the purchase price is contingent and calculated based on the performance of the target business over a specific period of time after the closing
- Why use an earnout?
  - Allows parties to bridge a valuation gap, particularly where future results are uncertain
- How prevalent are earnouts in Tech M&A?
  - Included in only 15% of Tech deals according to SRS MarketStandard
  - Compared to 73% of Life Sciences deals

Bridging Valuation Gaps

Key Drafting Considerations	
Potential Metrics	▪ Revenue ▪ Net Sales ▪ EBITDA ▪ Customers/Subscribers
Buyer's Efforts	▪ Best / reasonable best / commercially reasonable efforts ➢ What factors can buyer consider? ▪ Disclaimer of obligations (subject to commitment not to take actions for the primary purpose of frustrating earnout achievement)
Operational Considerations	▪ Ring-fencing business ▪ Operational commitments ➢ Capex ➢ FTEs ➢ Operating plan
Information and Audit Rights	▪ Reporting ▪ Inspection of Records
Dispute Resolution	▪ Litigation vs. ADR
Consequences of Sale or Change in Control	▪ Acceleration vs. continuation

Pre-Closing Covenants

Pre-Closing Covenants

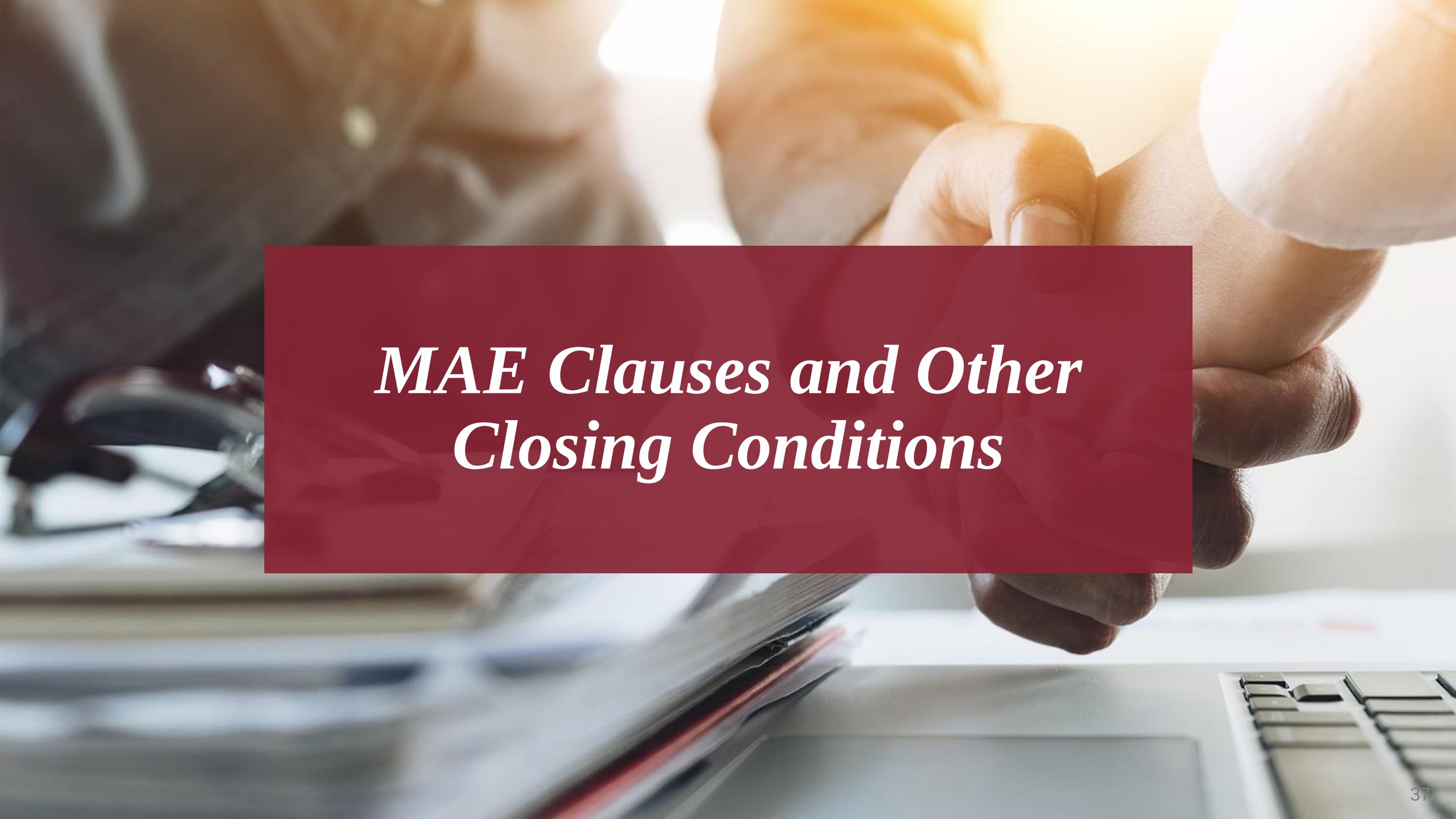
- Interim operating covenants
  - A typical formulation is for the target to covenant/agree that it will “conduct its business in the ordinary course of business consistent with past practice”
  - A target’s responses to COVID-19 may be inconsistent with “past practice,” and case law continues to develop in this regard
  - To account for COVID-19’s impact on interim operations, parties may seek to modify the default language in a number of ways:
    - Carve out actions required or requested by a government authority
    - Apply a "commercially reasonable efforts" standard and/or require compliance "in all material respects"
    - Apply a standard that compares the target's actions to the actions of other similarly situated companies
    - Proceed with the default language and negotiate specific exceptions to set out the permissible actions the target can take in light of COVID-19
      - These become more difficult to negotiate in the face of longer pre-closing periods and COVID-19 uncertainty
      - Consider addressing the target’s ability to participate in government relief programs
    - Require the target to consult with the buyer before taking measures in response to COVID-19

Pre-Closing Covenants

- Governmental Approvals (antitrust, foreign investment, other)
  - Generally, parties should expect some degree of regulatory delay as a result of COVID-19
  - FTC has implemented a temporary e-filing program for HSR notification and, effective March 30, 2020, resumed the practice of granting early termination of the HSR Act's waiting periods when both the FTC and DOJ have determined that no enforcement action will be taken during the waiting period
  - CFIUS is moving more slowly as a result of COVID-19, but no significant change in review process
    - CFIUS has new authorities to conduct reviews and has a growing enforcement unit designed to look for transactions of interest
    - In the short- and medium-term, CFIUS is particularly focused on Chinese investment in the U.S. and supply chain concerns
    - COVID-19 likely to increase CFIUS attention to life science deals as well
  - Liberal and progressive groups have begun pushing for the passage of a planned bill that would ban most M&A subject to HSR review until the FTC "unanimously determines that small businesses, workers and consumers are no longer under severe financial distress"

Pre-Closing Covenants

- Outside date
  - COVID-19 has prompted parties to temper expectations regarding deal timing
  - Choose an “outside date” that provides sufficient time for unexpected delays, such as automatic extensions for areas particularly likely to affect overall timing (e.g., regulatory approvals)
  - Termination and/or ticking fees may be one way to bridge gaps in allocating timing risks associated with timely regulatory approvals or the availability of financing



MAE Clauses and Other Closing Conditions

MAE Clauses and other Closing Conditions

Element 1:
 	
What is an MAE?
	An event that has had [or [would/could] reasonably be expected to have] a material adverse effect on:
	• Business-related items:
	  • Business
	  • Financial condition
	  • Results of operations
	  • Others?
	• Ability of target to [perform its obligations / complete the transaction]

Element 2: ***Exclusions*** ***Caution: Exclusions generally apply only to business-related items***	• Changes in economy • Changes in industry • Acts of war or terrorism • Natural disasters / acts of god / pandemics • Changes in law • Changes in GAAP • Failure to meet projections • Credit rating downgrade • Declines in stock price • Pendency of transaction • Actions taken at request of buyer **Systematic risks (disregarded [unless / except to the extent of] a [materially] disproportionate effect on target)** **Indicator risks (but underlying facts can constitute an MAE)** **Agreement risks**

MAE Clauses and other Closing Conditions

What does it mean?

A <u>very</u> high bar:	• Substantial threat to overall earnings potential • Durational significance

A first in Delaware: Akorn, Inc. v. Fresenius Kabi AG

Key Takeaway: A buyer desiring to allocate COVID-19 risk to the target should consider seeking other closing conditions (such as absence of disruptions to supply chain and/or loss of key customers, absence of governmental orders adversely affecting the target's business, etc.)

Availability of Representation and Warranty Insurance

Availability of Representation and Warranty Insurance

- R&W insurance continues to be a popular means of post-closing coverage for strategic and PE buyers to manage risks
- Anticipate that insurers will seek exclusions for losses related to the COVID-19 pandemic and expand other policy exclusions
  - Insureds should seek to define these exclusions as narrowly as possible
- The typical gap in R&W insurance coverage for events arising between signing and closing is exacerbated by longer closing periods and increased risks related to COVID-19
- To better manage risk, buyers may prefer the combination of a more traditional, negotiated escrow and R&W insurance arrangement

Financing Risk

Financing Risk

In financed deals, two predominant models for allocating financing risk exist:

Strategic Model	▪ Buyer accepts all financing risk ▪ If conditions are satisfied, seller has the right to seek specific performance ▪ If funds are unavailable, the results can be catastrophic for the buyer
Private Equity Model	▪ Buyer agrees to use a specified level of efforts (often reasonable best efforts) to obtain financing ▪ Buyer agrees to pay reverse termination fee (generally 3% to 7% of deal value) in the event the deal fails to close because of a financing failure ▪ Reverse termination fee is the target's sole remedy in circumstances in which the RTF is payable, except in cases of fraud [or willful breach] ▪ Target can seek specific performance only if financing proceeds are available

Questions

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