2009 M&A Report

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2008 Review

After several years of record growth in the mergers and acquisitions market, 2008 saw a steep decline in deal activity. Global M&A deal volume decreased dramatically, from 31,757 transactions in 2007 to 23,047 transactions in 2008. At the same time, global M&A deal value decreased by more than 41% to $1.56 trillion in 2008, down from a previous record $2.67 trillion in 2007.

Average deal size based on M&A transactions where the price was disclosed decreased to $174.1 million in 2008 from $205.9 million in 2007. Further demonstrating the deterioration of the M&A market, the number of deals dropped 21% from the first half to the second half of 2008. Despite a slowdown in deal volume, the average deal size in the second half of the year was largely consistent with that of the first half, increasing slightly to $174.3 million, up $0.3 million from the average of $174.0 million for the first six months of 2008. This shift was largely a result of the significant increase in deal value within the financial services sector, which saw average deal value increase 151% from the first half to the second half of 2008.

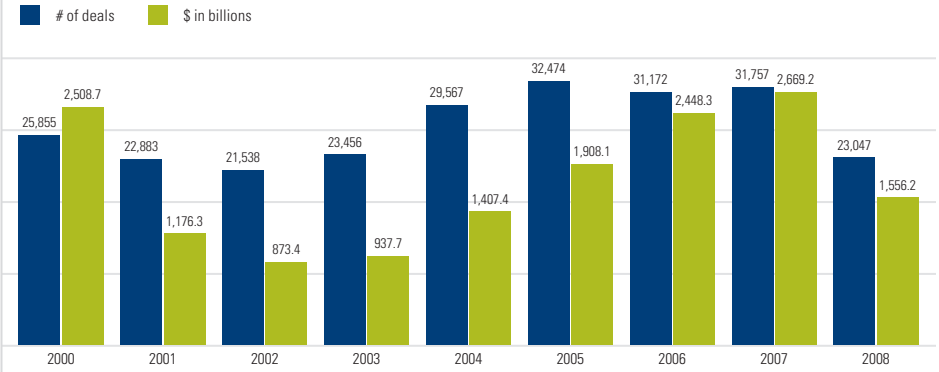
In the United States, the volume of M&A activity decreased significantly, from 12,830 transactions in 2007 to 9,132 in 2008. US deal value decreased by more than 42%, from $1.39 trillion in 2007 to $0.79 trillion in 2008.

In Europe, both deal volume and deal value decreased from 2007 levels. Deal volume decreased 26%, from 13,353 deals in 2007 to 9,936 in 2008. Total deal value decreased by more than 45%, from $1.40 trillion in 2007 to $0.77 trillion in 2008.

The Asia-Pacific region also experienced a decline in deal volume and value. The number of Asia-Pacific deals decreased 26%, from 9,649 transactions in 2007 to 7,172 in 2008, while aggregate deal value fell 29%, from $0.56 trillion in 2007 to $0.39 trillion in 2008.

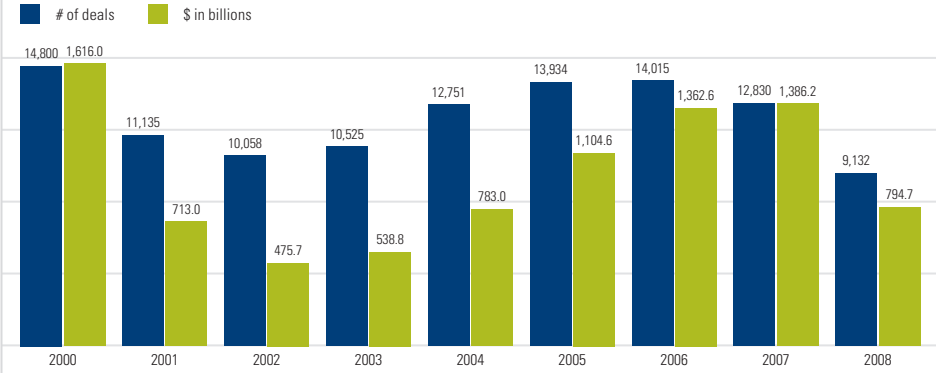
The decreases in average deal size were primarily due to the decline in the number of billion-dollar transactions worldwide.

M&A Activity – Worldwide



Source: MergerStat

M&A Activity – United States



Source: MergerStat

Globally, the number of billion-dollar transactions decreased 48%, from 500 in 2007 to 262 during 2008. Aggregate global billion-dollar deal value also decreased by 46%, from $1.8 trillion in 2007 to $1.0 trillion in 2008. Billion-dollar transactions involving US companies experienced the largest decline, with the number of transactions decreasing 58%, from 278 in 2007 to 118 in 2008. The aggregate value of billion-dollar US deals decreased 44%, from $0.98 trillion in 2007 (71% of total US deal value) to $0.55 trillion in 2008 (70% of total US deal value). Billion-dollar transactions involving European companies also fell, with the number of such transactions decreasing more than 43%, from 259 in 2007 to 148 in 2008, and aggregate deal value decreasing 53%, from $1.0 trillion in 2007 to $497.0 billion in 2008. Billion-dollar transactions involving Asia-Pacific companies fell more than 33%, from 101 deals in 2007 to 68 in 2008, and aggregate deal value decreased 31%, from $314.5 billion in 2007 to $215.6 billion in 2008.

Sector Analyses

Unlike previous years, 2008 did not produce a single strong sector that carried M&A growth. All areas experienced a decline in both deal volume and deal value.

The global financial services sector saw a 32% decrease in deal volume, from 1,653 transactions in 2007 to 1,123 in 2008. Aggregate global financial services sector deal value decreased 39%, from $398.1 billion in 2007 to $243.8 billion in 2008. In the United States, financial services sector deal volume decreased 41%, from 639 deals in 2007 to 374 deals in 2008, but aggregate

deal value decreased only slightly, from $141.5 billion in 2007 to $132.3 billion in 2008. The Bank of America acquisition of Merrill Lynch, valued at $48.8 billion, was the largest deal in the financial services sector during 2008.

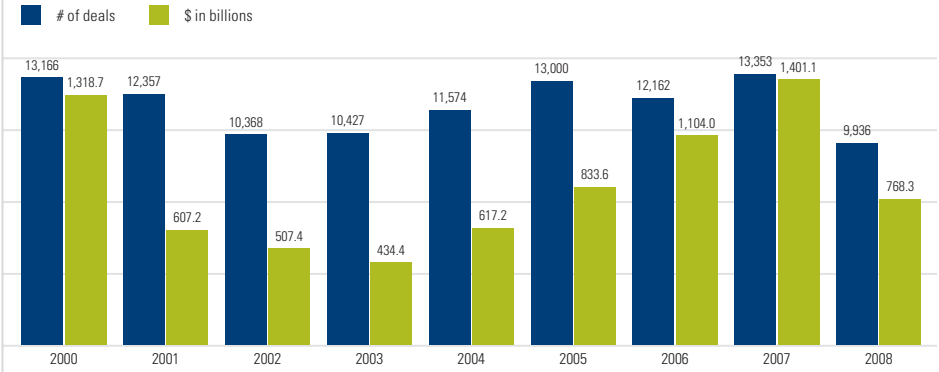
The technology sector also felt the impact of the global decline in deal activity, with the total number of IT deals decreasing 19%, from 4,128 in 2007 to 3,329 in 2008. Global IT deal value decreased still further, falling 45%, from $160.7 billion in 2007 to $88.0 billion in 2008. US IT deal volume decreased 18%, from 2,238 deals in 2007 to 1,831 in 2008. US aggregate IT deal value dropped by almost 42%, from $112.1 billion in 2007 to $64.7 billion in 2008. HP's $13.9 billion acquisition of EDS led all deal activity within this sector.

The telecommunications sector also experienced a decline in both deal volume and deal value. Global deal volume declined more than 37%, from 1,065 deals in 2007 to 673 in 2008. Global telecommunications deal value decreased over 26%, from $154.2 billion in 2007 to $113.7 billion in 2008. US deal volume fell by just over 5%, from 548 in 2007 to 518 in 2008. Despite this relatively modest decrease in deal volume, however, US aggregate telecommunications deal value experienced a whopping 39% decrease, from $118.3 billion in 2007 to $72.1 billion in 2008. Verizon's $28.1 billion acquisition of Alltel led all deal activity within this sector.

Relatively speaking, the life sciences sector fared better than most in 2008. Global M&A transaction activity in the life sciences sector decreased by 21%, from 1,078 deals in 2007 to 850 in 2008. Global life sciences deal value, however, saw only an 8% decrease, from $148.1 billion in 2007 to $135.7 billion in 2008. The US life sciences sector saw a 23% decrease in deal volume, from 553 transactions in 2007 to 424 in 2008. Aggregate US life sciences deal value decreased 9%, from $115.2 billion in 2007 to $105.2 billion in 2008. Genentech's acquisition by Roche Holdings, valued at $43.7 billion, led the life sciences sector.

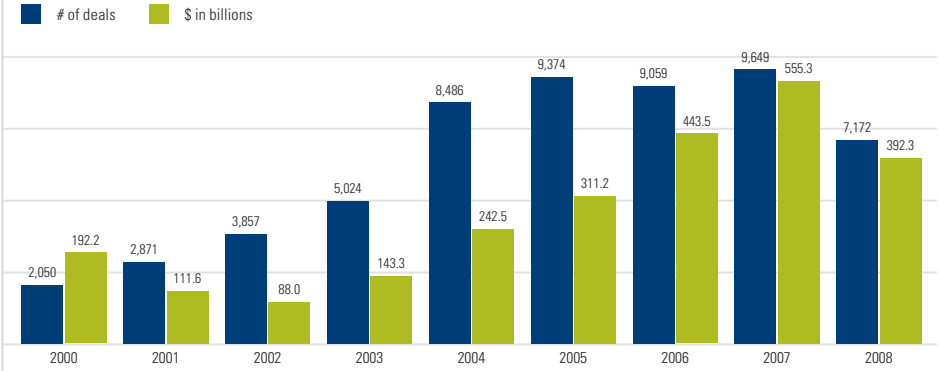
The M&A market for venture-backed companies saw a 29% decrease in deal volume, from 457 deals in 2007 to 325 deals in 2008. Total deal value plummeted 54%, from $50.9 billion in 2007 to $23.5 billion in 2008.

M&A Activity – Europe



Source: MergerStat

M&A Activity – Asia-Pacific



Source: MergerStat

2009 Outlook

With continued turmoil in the financial sector, tight capital markets and severe recessionary conditions, many organizations may choose to wait for a market bottom before engaging in any significant merger activity. Near-term deal activity will likely revolve around further capital restructurings and some divestiture and receivership transactions. That said, companies with strong balance sheets and cash available for M&A transactions may find attractive opportunities to acquire distressed companies that need capital but have no ready access to the capital markets. For example, large pharmaceutical companies may see the current market as a good time to acquire smaller companies with promising product candidates but insufficient capital to bring the drugs to market.

Overall, 2009 should see a decline from the already slowed level of activity in 2008. Preliminary reports show that the number of announced M&A transactions in the first half of 2009 was lower than in the first half of 2008, particularly private equity–sponsored deals. Some observers are holding out hope that the infusion of government funds into the economy in general, and financial institutions in particular, may boost the market later in 2009. The outlook beyond 2009 will depend on the health of the capital markets and the strength of the economy as a whole. ■

In recent years, the boards of directors of many public companies have dismantled a number of the corporate governance and anti-takeover provisions that previously were considered standard. They have often done so in response to direct pressure from stockholders, or on their own initiative in an attempt to conform to "best practices" advocated by influential stockholders and proxy advisory services.

A number of factors, however—among them the recessionary economy and its resulting impact on share prices; unsolicited takeover bids, including several by well-known, well-regarded companies; and the lingering threat of becoming the target of hedge funds and other activist investors—are causing boards to question whether the changes have gone too far.

Governance Provisions at Year-End

Board Declassification – According to data from RiskMetrics Group, at the end of 2008 only 36% of S&P 500 companies had classified boards, where directors are elected to serve staggered three-year terms so that only one-third of the board stands for re-election at each annual meeting. This figure is down from 60% in 2003. Looking more broadly at the S&P 1500, classified boards represent a bare majority at the end of 2008, down from 63% in 2003. Shareholder proposals submitted under SEC Rule 14a-8 demanding board declassification routinely win 65% or higher support based on votes cast. As fewer and fewer of the largest companies have staggered boards, the expectation is that investors will push mid- and small-cap companies to follow suit, even though the takeover risk at these companies is significantly greater due to their more digestible market capitalizations. Moreover, in May 2009 New York's Senator Charles Schumer introduced legislation that would mandate the annual election of directors for exchange-listed companies.

Majority Voting – The plurality voting standard for uncontested elections of directors has been under even greater, and more successful, attack. The majority vote movement, which has been championed by labor unions and other investors, is based on the premise that the plurality standard is fundamentally unfair in uncontested elections because nominees are assured election if they receive only a single vote. According to data from RiskMetrics Group, at the end of 2008, 70% of S&P 500 companies had adopted some form of majority voting for uncontested elections (generally either an actual majority vote standard in their bylaws (52%) or a plurality standard coupled with a resignation policy (18%)). Among members of the S&P 1500, the adoption rate of majority voting is much lower (33% among the S&P MidCap and 18% among the S&P SmallCap), but more and more of these companies are coming under pressure from investors to make a change.

The full ramifications of majority voting on the composition and functioning of boards are yet to be seen, as few companies with a majority vote standard have faced the failure of a director to receive a majority vote. It also remains to be seen how other potential regulatory changes may affect the way in which boards are elected, including:

- the proposed elimination of broker discretionary voting in uncontested elections, which would result in the loss of many automatic "for" votes that company nominees now receive (although the extent of this automatic "for" vote has already been reduced by the growing practice of brokers voting uninstructed shares on a proportionate basis to those shares where the broker has received instructions);
- potential SEC action to implement proxy access, whereby stockholders are authorized to name their own director nominees in the company's proxy statement (in May 2009, the SEC voted to propose new proxy access rules by a 3 to 2 vote);
- upcoming changes to Delaware corporate law that would explicitly permit proxy access bylaws and proxy solicitation expense reimbursement bylaws; and
- recent liberalizations in the use of electronic communications that could facilitate proxy contests by lowering insurgents' costs.

Senator Schumer's proposed legislation would also mandate majority voting for exchange-listed companies, and, in contrast to the policies adopted by most companies that have thus far acted on majority voting, would require that boards of directors accept the resignations tendered by directors who fail to obtain the requisite majority vote.

One of the most significant implications of the majority vote movement may be how it enhances the likelihood that boards will act upon other shareholder proposals that are submitted under Rule 14a-8. Rule 14a-8 creates a procedure by which a holder of $2,000 or more in market value of company stock can submit either binding or advisory proposals that must be included in the company's proxy statement. Under its policy, RiskMetrics Group will recommend withholding votes from a director if the board fails to act on a shareholder proposal that was approved by a majority of the votes cast for the previous two consecutive years, or a majority of the shares outstanding in the previous year.

A majority vote standard adds teeth to the threat of a withhold vote, thereby reducing the willingness of some directors to resist shareholder proposals that are approved, even if the wisdom of the proposal is uncertain or the vote in favor would not be sufficient to effect the requested change had the proposal been binding, and increasing the likelihood that corporate governance changes that are the subject of Rule 14a-8 proposals will be implemented.

Rights Plans – Because of changes to RiskMetrics Group's voting policy that now result in a withhold vote against directors at companies that adopt or renew rights plans without shareholder approval, and due to the success of shareholder proposals requesting that rights plans be eliminated, many companies have decided to terminate their rights plans early or allow them to expire without renewal. In most cases, companies have retained the ability to reinstate a rights plan in the future, but some companies have adopted policies committing to put any future rights plan to a stockholder vote within one year. According to data from SharkRepellent.net, the number of S&P 1500 companies with rights plans in effect at the end of 2008 was 446, down from a peak of 923 in 2002. Of the companies where rights plans were scheduled to expire in 2008, over 70% allowed their

plans to expire without renewal. However, the number of rights plans adopted in 2008 hit a six-year high, with many of the adoptions coming in the fourth quarter as markets experienced a significant downturn. The number of adoptions is somewhat skewed upwards by a trend that has seen companies adopting rights plans specifically designed to preserve net operating losses for tax purposes.

Supermajority Vote Requirements – Shareholder proposals seeking to eliminate supermajority vote provisions routinely win 65% or more support based on votes cast. RiskMetrics Group data indicates that, as of early 2009, nearly 80% of companies in a broad index of over 5,000 companies allowed a simple majority vote to approve mergers, and nearly half of those companies allowed a simple majority to amend the company's charter and bylaws.

Limitation on Stockholders' Calling Special Meetings – Shareholder proposals to allow shareholders to call special meetings won average support of 47% in 2008, including majority support at 10 companies. RiskMetrics Group data indicates that, as of early 2009, approximately 53% of companies in a broad index of over 5,000 companies allowed stockholders to call special meetings.

Limitation on Stockholders' Right to Act by Written Consent – RiskMetrics Group data indicates that, as of early 2009, approximately 72% of companies in a broad index of over 5,000 companies limited the right of stockholders to act by written consent in lieu of a stockholder meeting.

Have Things Gone Too Far?

Recent takeover activity highlights the continuing relevance of the provisions discussed above, and the importance of keeping in mind the underlying reasons why these provisions were historically put in place.

Staggered boards promote continuity and stability to help companies focus on long-term strategic planning and resist a short-term focus. This is especially important when companies confront proxy contests launched by short-term investors seeking to take advantage of temporary blips affecting a company's market valuation or seeking to impose financial engineering strategies, such as significantly increasing the company's leverage without regard to the long-term risks.

Staggered boards also enhance the knowledge, experience and expertise of the board, by ensuring that at any time a majority of the directors will have had prior experience and familiarity with the company's business.

Many of these provisions enhance the board's ability to negotiate favorable deal terms on behalf of all the stockholders and to protect minority stockholders from coercive or partial bids to acquire the company.

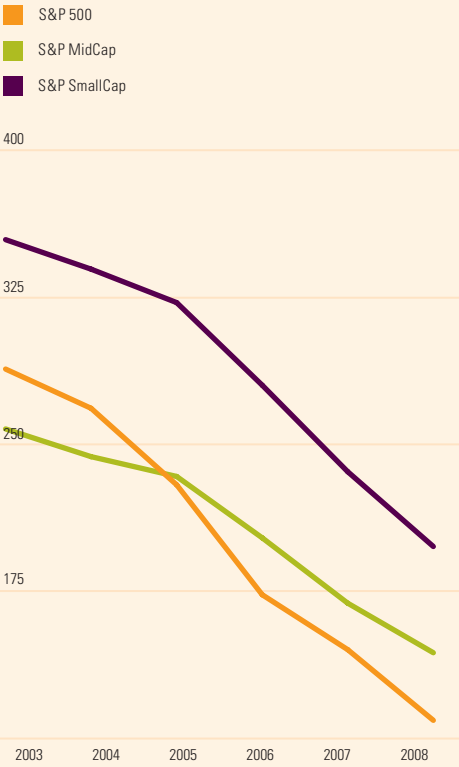
These provisions also provide time to evaluate the adequacy and fairness of takeover offers and to seek alternative transactions that may be more favorable to stockholders. This is especially important given the speed with which a tender offer can be consummated and the fact that depressed stock levels allow bidders to appear to offer a significant premium, when in fact the offer price is low when compared to trading prices over a longer period of time.

Supermajority provisions, in particular, are intended to help maximize the value of the company for all shareholders by ensuring that important protective provisions are only eliminated when it is the clear will of the stockholders.

Getting the Balance Right

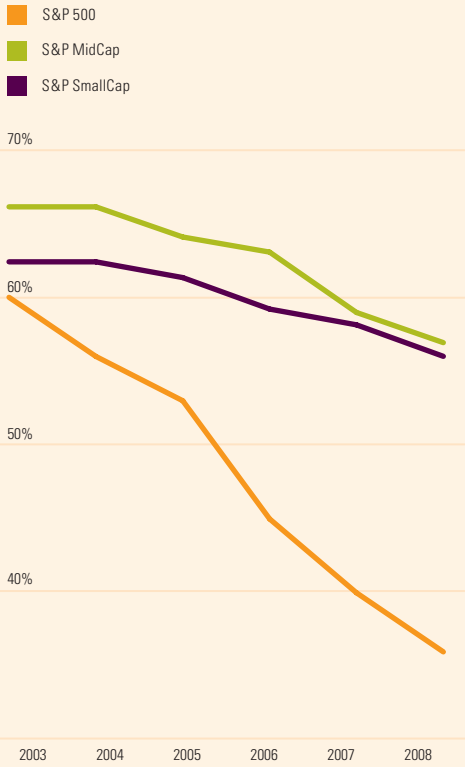
The almost automatic adoption of some corporate governance and anti-takeover provisions in the past suffered the same infirmity as what appears to be today's seemingly inevitable march to remove those provisions. In each case, what companies and their stockholders need and deserve, rather than adherence to a master checklist where provisions are viewed as either good or bad, is a more tailored, good-faith analysis of what makes sense given a particular company's business, stage of development, market capitalization and character. ■

Rights Plans in Effect – 2003 to 2008



Source: SharkRepellent.net

Companies with Classified Boards – 2003 to 2008



Source: RiskMetrics Group's Governance Institute

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SEPRACOR	STAPLES	ANALOG DEVICES	r
Acquisition by Dainippon Sumitomo Pharma **$2,600,000,000** **Pending***	*Acquisition of* Corporate Express **$4,400,000,000** **July 2008** (co-counsel)	*Sale of cellular handset radio and baseband chipset assets to* MediaTek **$350,000,000** **January 2008**	*Acquis* Qum **$107,0** **Septemb**
BROADCOM. Connecting everything®	CURAGEN	MIH GROUP	TERADYNE
Acquisition of digital TV business of AMD **$141,500,000** **October 2008**	*Acquisition by* Celldex Therapeutics **$94,500,000** **Pending***	*Sale of NetMed and Intervision to* Forthnet **€490,000,000** **August 2008**	*Acquisition of* Eagle Test Systems **$250,000,000** **November 2008**
Authoria	Nashua	GLONAV™	D In
Acquisition by Bedford Funding **$63,100,000** **September 2008**	*Acquisition by* Cenveo **$44,000,000** **Pending***	*Acquisition by* NXP Semiconductors **$85,000,000** **January 2008**	*Sale by Ci* Discover Fina **$165,0** **June**
ANALOGIC®	ING	NYFIX	CRITICAL Therapeutics
Acquisition of Copley Controls **$68,750,000** **April 2008**	*Acquisition of CitiStreet from* Citigroup and State Street **$900,000,000** **July 2008**	*Acquisition by* NYSE Euronext **$144,000,000** **Pending***	*Merger with* Cornerstone BioPharma **$90,000,000** **October 2008**

* as of September 15, 2009

Mergers and Acquisitions

EANTECH, FINANCIAL SERVICES, COMMUNICATIONS AND BEYOND

edhat. *ition of* ranet 00,000 ber 2008	EQUALLOGIC SIMPLIFYING NETWORKED STORAGE *Acquisition by* Dell **$1,400,000,000** **January 2008**	THE MEDICINES COMPANY *Acquisition of* Targanta Therapeutics **$137,000,000** **February 2009**	MILLENNIUM *Acquisition by* Takeda Pharmaceutical **$8,800,000,000** **May 2008**
ARLINGTON TANKERS LTD *Acquisition by* General Maritime **$1,100,000,000** **December 2008**	media *Acquisition of DTV Group from* Modern Times Group **$395,000,000** **April 2008**	HLTH *Sale of ViPS segment to* General Dynamics **$225,000,000** **July 2008**	Global BPO Services Corp. *Acquisition of* Stream Holdings **$225,800,000** **July 2008**
iners Club ternational tigroup to ncial Services 00,000 2008	Virtualiron *Acquisition by* Oracle **Undisclosed** **June 2009**	Discovery COMMUNICATIONS *Combination of ownership interests of Discovery Holding Company and Advance/Newhouse Programming Partnership* **$6,800,000,000** **September 2008** (counsel to Discovery Communications, Inc.)	LTXredence *Merger with* Credence Systems **$180,000,000** **August 2008**
TUI Aktiengesellschaft *Sale of Hapag-Lloyd to* Albert Ballin Konsortium **€4,450,000,000** **March 2009**	XANTHUS PHARMACEUTICALS *Acquisition by* Antisoma **$52,200,000** **June 2008**	Akamai *Acquisition of* acerno **$95,000,000** **November 2008**	BAE SYSTEMS *Sale of surveillance and attack business to* Cobham Defence Electronic Systems **$240,000,000** **February 2008**

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As president, I will direct my administration to reinvigorate antitrust enforcement. It will step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not.

—Statement of Senator Barack Obama for the American Antitrust Institute (2007)

Given the strong statements that President Obama has made about what he perceives as lax antitrust enforcement during the last administration, it seems likely that his administration will usher in changes in enforcement policy. The question for the M&A community is: How will those changes affect specific deals?

Significant changes in antitrust policy could disrupt expectations about timing, valuation and risk, and could create delays and costs for transactions that face intensive reviews. Although it is impossible to predict with any certainty how antitrust policy will develop, either in the near term or over the course of the Obama administration, signs suggest that more transactions are likely to face significant scrutiny, especially at the Department of Justice. We believe, however, that in general there will only be changes at the margins. While outcomes may be starkly different for a small percentage of deals, the agencies will, for the most part, continue their customary modus operandi—quickly clearing transactions that raise little or no concern and closely scrutinizing and sometimes challenging transactions that raise substantial issues on the merits.

Background

Most transactions over a specified size—$65.2 million as of February 12, 2009—must be reported to the Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ) pursuant to the Hart-Scott-Rodino Act (HSR Act). The parties cannot consummate reported transactions until HSR waiting periods have expired or been terminated. If either the FTC or the DOJ believes a reported transaction may raise competition concerns, it can open an investigation, and if it determines that the concerns are sufficiently serious or complex it will issue a so-called "Second Request" for information. A Second Request delays closing until the parties have responded to the request and the reviewing agency has had time to consider the materials submitted and determine whether to take action.

Although not an entirely reliable metric, at least one set of merger enforcement statistics—the annual percentage of filed transactions subject to Second Requests or challenges—indicates that enforcement levels remained essentially the same from the late 1980s into at least the early 2000s. And during the past few years there has been, at most, only a limited reduction in merger enforcement activity. Nonetheless, many people associated with the Obama campaign, including lawyers and economists, along with some members of Congress, publicly criticized the Bush administration for being lax antitrust enforcers. Most of this criticism was aimed at the DOJ (the FTC was more active during much of the Bush administration) and focused, fairly or unfairly, on its enforcement record on a few high-profile transactions in which the DOJ chose not to enforce—for example, the Whirlpool-Maytag, XM-Sirius and Delta-Northwest deals—and on a perception that other transactions were not receiving as much scrutiny as they might have received in previous administrations.

Likely Impacts

Whether or not this criticism was fair or accurate, it became orthodoxy for many advisers to the Obama campaign and transition team, was reflected in the campaign's position paper on antitrust enforcement, and has been repeated by key members of Congress. The criticism will therefore place enormous pressure on the new leadership of the DOJ's Antitrust Division to show that it will be more active under the Obama administration. There will be less pressure on the FTC because of its higher level of enforcement activity over the past two years, but it is likely to feel the need to demonstrate that it remains aggressive.

How will the FTC and the DOJ, under their new agency heads, demonstrate activism in merger investigations? In the near term, we believe the following is likely:

- The staff will receive implicit or explicit instructions to bring to the heads of the agencies more potential enforcement cases, resulting in the staff searching more aggressively for transactions that might warrant enforcement and being less willing to drop marginal cases quickly.
- Transactions that raise at least facial antitrust concerns—principally transactions between competitors where the market is moderately or significantly concentrated—will receive more intensive staff scrutiny during the early stages of the investigation.
- Initial investigations will likely result in the issuance of Second Requests in a higher percentage of cases than has been the norm in recent years, and the staff will feel pressure to recommend some form of enforcement action in most of the matters in which Second Requests are issued.
- The agencies may be more demanding in the scope of remedies they seek, accepting only those that they believe will fully restore competition.
- Vertical transactions—such as those between manufacturers and customers or suppliers—which have largely not been subject to enforcement over the past eight years, will receive more scrutiny. The agencies might even begin scrutinizing some "conglomerate" transactions, which involve neither horizontal nor vertical relationships.
- Particularly while the number of HSR filings remains low because of the economy, the agencies are likely to be more aggressive in investigating unreported transactions that raise antitrust issues than they have been historically. Even during the Bush administration, the agencies challenged several unreported transactions, a number of which had already closed by the time of the challenge.

Other Merger-Related Issues

Recent years have seen an increasing level of animosity between the FTC and the DOJ. The disputes have been most visible outside the merger enforcement area, where the agencies have filed dueling

briefs in the Supreme Court and have publicly disagreed about certain antitrust principles. Less visible to those outside the antitrust community, but equally vexing, have been disputes over which agency will review a particular transaction. In most cases, the agencies easily agree on which one will conduct a review, generally assessing jurisdiction based on historical patterns, with each agency reviewing transactions in a particular cluster of industries. When there is no such history or a transaction crosses industry boundaries, however, a fight for jurisdiction sometimes ensues. These "clearance fights" have been particularly common for high-profile transactions or deals that are likely to involve extended investigations. Any doctrinal or personal tensions between the agencies tend to complicate the clearance process further.

The effects of these disputes can be serious, resulting in deal closings being significantly delayed. There are many stories of transactions not receiving clearance until very late in the initial 30-day waiting period, simply because the agencies could not agree on which one would conduct the review. Recognizing that these turf battles are unacceptable, in 2001 the FTC and the DOJ attempted to make permanent assignments of particular industries to each agency and thereby resolve most clearance issues, but Congress scuttled those efforts. There has been no serious attempt to resolve the clearance problem since. And the growing differences between the agencies on other matters have made both the handling of particular clearance matters and the development of a longer-term solution to the problem more difficult.

The disagreements between the agencies have also contributed to the agencies' failure to make any serious effort to revisit the "Horizontal Merger Guidelines"—broad principles for analyzing transactions between competitors that were issued by the FTC and the DOJ in 1992 and revised slightly in 1997. The actual practice of merger review has drifted away from the Guidelines in recent years, creating a gap between what the Guidelines prescribe and what the agencies actually do. This discrepancy creates difficulties both for counsel and the agencies. Practitioners must explain that what clients read in the Guidelines is not necessarily what the agencies will do in practice. And the agencies have sometimes encountered judges who have found it difficult to square the agencies' theories in particular cases with those outlined in the Guidelines.

Useful revisions to the Guidelines will require careful drafting, extensive effort and close cooperation between the FTC and the DOJ to bridge their differences in antitrust philosophy. If the agencies do attempt to revise the Guidelines, it will be important for companies to follow the process closely, because it could signal shifts in merger enforcement philosophy, with significant ramifications for some types of transactions.

With the changes in agency leadership that accompany a new administration, improved relations between the FTC and the DOJ seem possible. Indeed, as of spring 2009, both the FTC and the DOJ had most of their new senior leaders in place, and the appointments are notable for some past working relationships that appear likely to foster better communication across the two agencies. New DOJ Antitrust Division head Christine Varney and new Chairman of the FTC Jon Leibowitz have spoken of their mutual close friendship, and other members of the leadership are veterans of both agencies. These factors suggest that the agencies may be able to reduce the tension between them and undertake and complete joint projects. Ms. Varney has indicated in her testimony and other comments that she expects the DOJ to be more closely aligned with the FTC on some key policy differences that have divided the agencies.

A thawing of relations could provide a meaningful increase in certainty around the timing of at least some merger reviews and avoid senseless delays and associated costs. In addition, appropriate revisions to the Guidelines would bring about more transparency for non-experts in the antitrust arena and cultivate a closer connection between what the Guidelines say and what the agencies actually do, thereby improving the merger review process.

The Economy

We do not believe that the state of the economy will have any material impact on US merger review—other than through an absence of transactions. The Guidelines and existing case law and practice have proven capable of accounting for the realities of distressed firms and industries in determining whether particular transactions create competitive concerns. For instance, if financial distress will impede one merging party's competitive effectiveness going forward, the agencies will consider that in assessing whether eliminating competition between the parties is likely to substantially reduce competition in the industry at large. This flexibility has been demonstrated in particular transactions—most notably Boeing/McDonnell Douglas—and in specific industries, such as military equipment manufacturing during the 1990s and the telecom and high-tech industries in the period from 1998 to 2002.

If past enforcement patterns prevail, there is no reason to believe that the FTC and the DOJ will suspend antitrust scrutiny in any way as a result of the economic meltdown. Nor is there any reason to believe that the agencies will fail to take into account the impact of the economy on particular companies and industries in reaching enforcement decisions on the merits.

Conclusion

The change in administrations is likely to bring some changes to merger review in the United States, though at least initially the impact of those changes will probably be marginal. There will be substantial pressure on both antitrust review agencies to show themselves to be enforcement oriented. To demonstrate their zeal, they may challenge transactions at a higher rate than their predecessors, be more interested in pursuing unreported transactions, and show more interest in non-horizontal transactions. All predictions will necessarily be uncertain until the agencies under their new leaders begin to bring cases and announce their views. Thus it is vital for M&A practitioners involved in transactions that could raise antitrust concerns to keep abreast of current developments so that their clients can better assess the antitrust risks when valuing transactions and negotiate appropriate contractual provisions in light of those risks. ■

We reviewed all merger transactions between 2004 and 2008 involving venture-backed targets (as reported in Dow Jones VentureOne) in which the merger documentation was publicly available and the deal value was $25 million or more. Based on this review, we have compiled the following deal data:

Characteristics of Deals Reviewed		2004	2005	2006	2007	2008
The number of deals we reviewed and the type of consideration paid in each	Sample Size	54	39	53	33	25
	Cash	43%	69%	68%	48%	76%
	Stock	41%	10%	8%	0%	4%
	Cash and Stock	17%	21%	24%	52%	20%
Deals with Earn-Out		**2004**	**2005**	**2006**	**2007**	**2008**
Deals that provided contingent consideration based upon post-closing performance of the target (other than balance sheet adjustments)	With Earn-Out	24%	15%	17%	39%	12%
	Without Earn-Out	76%	85%	83%	61%	88%
Deals with Indemnification		**2004**	**2005**	**2006**	**2007**	**2008**
Deals where the target's shareholders or the buyer indemnified the other post-closing for breaches of representations, warranties and covenants	With Indemnification					
	By Target's Shareholders	89%	100%	94%	100%	96%
	By Buyer[1]	37%	46%	38%	48%	48%
Survival of Representations and Warranties		**2004**	**2005**	**2006**	**2007**	**2008**
Length of time that representations and warranties survived the closing for indemnification purposes[2]	Shortest	6 Months	9 Months	12 Months	6 Months[3]	12 Months
	Longest	36 Months	24 Months	36 Months	36 Months	24 Months
	Most Frequent	12 Months	12 Months	12 Months	12 and 18 Months (tie)	12 Months
Caps on Indemnification Obligations		**2004**	**2005**	**2006**	**2007**	**2008**
Upper limits on indemnification obligations where representations and warranties survived the closing for indemnification purposes	With Cap	85%	100%	100%	97%	95%
	Limited to Escrow	72%	79%	84%	78%	81%
	Limited to Purchase Price	7%	5%	2%	9%	14%
	Exceptions to Limits[4]	74%	73%	84%	97%	62%
	Without Cap	15%	0%	0%	3%	5%

[1] The buyer provided indemnification in 48% of the 2004 transactions, 25% of the 2005 transactions, 41% of the 2006 transactions, 53% of the 2007 transactions and 50% of the 2008 transactions where buyer stock was used as consideration. In 65% of the 2004 transactions, 17% of the 2005 transactions, 35% of the 2006 transactions, 56% of the 2007 transactions and 25% of the 2008 transactions where the buyer provided indemnification, buyer stock was used as consideration.

[2] Measured for representations and warranties generally; specified representations and warranties may survive longer.

[3] In two cases representations and warranties did not survive, but in one such case there was indemnity for specified litigation, tax matters and appraisal claims.

[4] Generally, exceptions were for fraud and willful misrepresentation.

Escrows		2004	2005	2006	2007	2008
Deals having escrows securing indemnification obligations of the target's shareholders	With Escrow	83%	97%	96%	94%	96%
	% of Deal Value					
	Lowest	4%	2%	3%	3%	3%
	Highest	23%	20%	20%	43%	15%
	Most Frequent	10%–20%	10%	10%	10%	10%
	Length of Time					
	Shortest	6 Months	6 Months	12 Months	6 Months	12 Months
	Longest	36 Months	24 Months	36 Months	60 Months	36 Months
	Most Frequent	12 Months	12 Months	12 Months	12 and 18 Months (tie)	12 Months
	Exclusive Remedy	64%	84%	90%	73%	83%
	Exceptions to Escrow Limit Where Escrow Was Exclusive Remedy[5]	72%	66%	86%	100%	85%

Baskets for Indemnification		2004	2005	2006	2007	2008
Deals with indemnification where a specified "first dollar" amount did not count towards indemnification, expressed either as a "deductible" (where such amount can never be recovered) or as a "threshold" (where such dollar amount cannot be recovered below the threshold but once the threshold is met all such amounts may be recovered)	Deductible	39%	38%	48%	48%[6]	43%[7]
	Threshold	51%	62%	52%	39%[6]	48%[7]

MAE Closing Condition		2004	2005	2006	2007	2008
Deals where the buyer or the target had as a condition to its obligation to close the absence of a "material adverse effect" with respect to the other party or its business, either in condition explicitly or through representation brought down to closing	Condition in Favor of Buyer	81%	82%	98%	97%	88%
	Condition in Favor of Target[8]	30%	13%	23%	44%	21%

Exceptions to MAE		2004	2005	2006	2007	2008
Deals where definition of "material adverse effect" for the target contained specified exceptions	With Exception[9]	78%	79%	85%	91%	92%

[5] Generally, exceptions were for fraud, intentional misrepresentation and criminal activity.

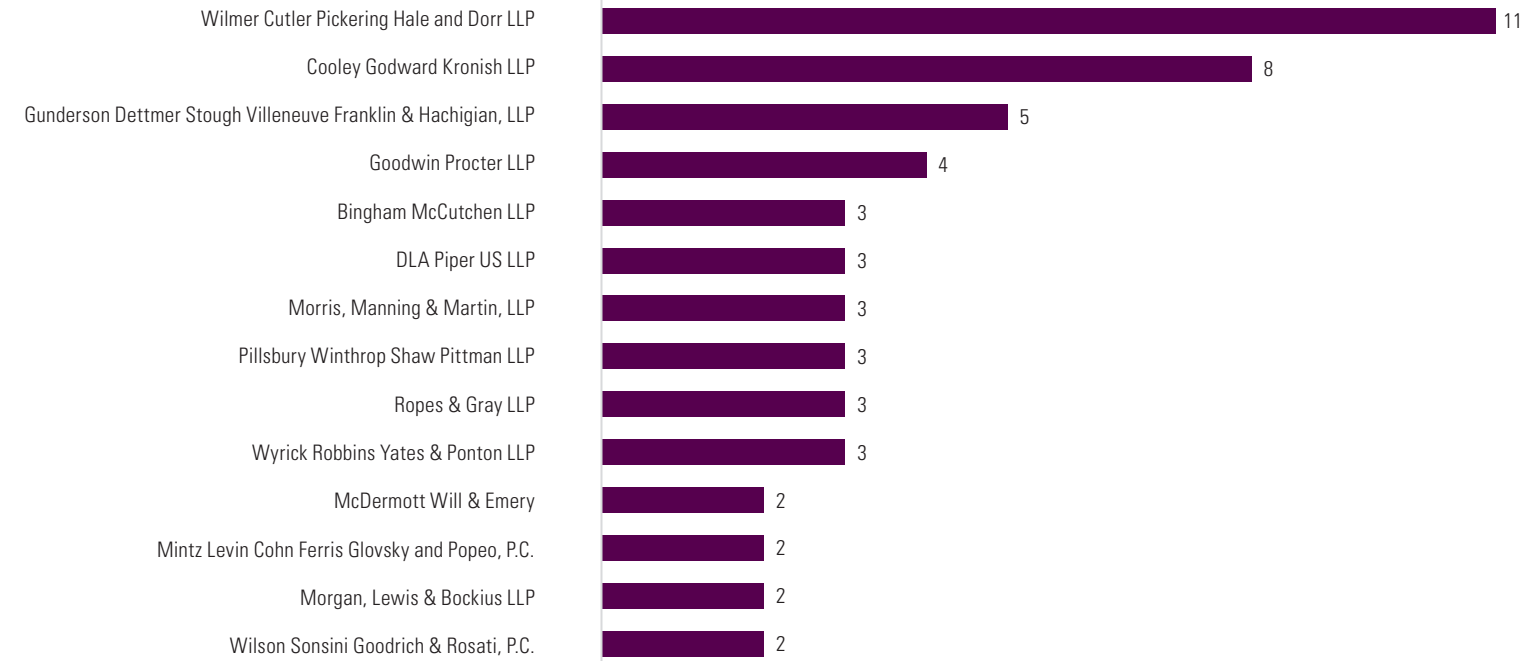
[6] Another 13% of these transactions used a "hybrid" approach with both a deductible and a threshold.

[7] Another 4% of these transactions used a "hybrid" approach with both a deductible and a threshold and another 4% had no deductible or threshold.

[8] In 50% of these transactions in 2004, in 80% of these transactions in 2005, in 83% of these transactions in 2006, in 86% of these transactions in 2007 and in 60% of these transactions in 2008, buyer stock was used as consideration.

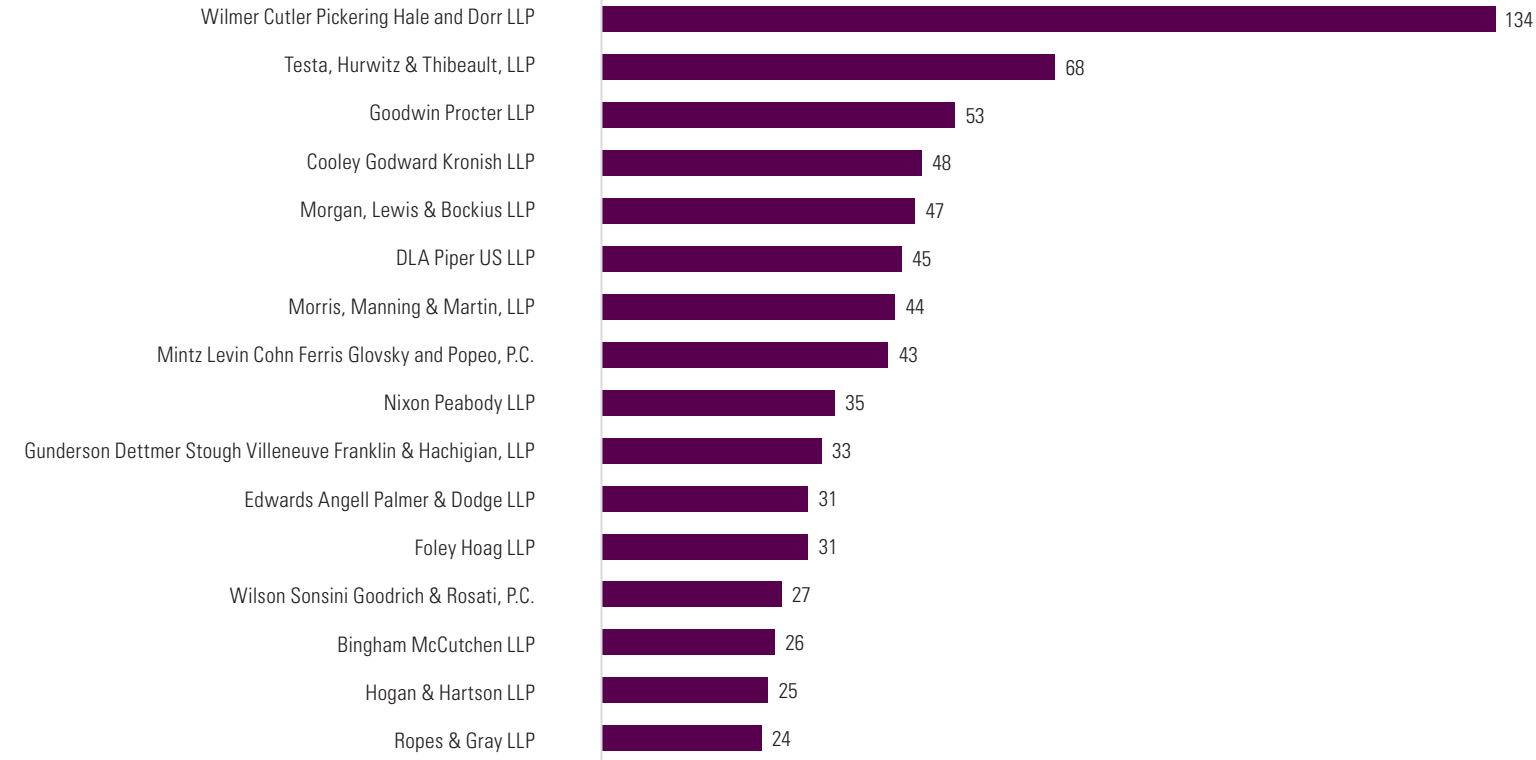
[9] Generally, exceptions were for general economic and industry conditions.

Company Counsel in Sales of Eastern US VC-Backed Companies in 2008



Source: Dow Jones VentureOne

Company Counsel in Sales of Eastern US VC-Backed Companies – 1996 to 2008



Source: Dow Jones VentureOne

The above charts are based on companies located east of the Mississippi River.

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Data Sources

M&A data is sourced from MergerStat. Data for sales of VC-backed companies is sourced from Dow Jones VentureOne. Private equity–backed M&A data is sourced from Thomson Reuters. For law firm rankings, sales of VC-backed companies are included under the current name of each law firm.

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