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M&A/PE QUARTERLY

A quarterly round-up of key M&A/PE developments

Winter 2019

Where Things Stand at Year-End 2019

- *Corporate Focus on the "Social Good"*
- *Increase in Bidder-Initiated M&A and Change in Sale Process Mechanics*
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Corporate Focus on the "Social Good"

Importantly, the Business Roundtable (an influential group of almost 200 CEOs of America's most influential companies) issued a "Statement on the Purpose of a Corporation," which has intensified a developing focus on the social impact of corporate decisions. The BRT Statement contains no specific commitments or directives and does not represent a change in law, but reflects a view that there is a social responsibility component to corporate decision-making. The Statement emphasizes that directors should not be single-focused on the maximization of profits for shareholders and should weigh heavily the interests of the *other* stakeholders of the corporation (*i.e.*, customers, employees, suppliers, and the community). Under Delaware law, a board has fiduciary duties to act in the best interest of the shareholders, but has wide leeway to act in the interests of other stakeholders *so long as* there is any rational basis to conclude that those actions will ultimately redound to the benefit of the shareholders. It remains to be seen to what extent and how the BRT Statement's objectives may be incorporated into corporate decision-making.

The BRT Statement has received a considerable amount of attention and has stimulated widespread discussion within the corporate community and beyond. The Statement's principles reflect the current view of many key institutional investors, as well as the "Millennial Generation" of job-seekers. At the same time, we note that the pressures (for example, the prospect of a takeover or shareholder activist attack) that in recent years have driven an emphasis on short-term returns to shareholders (and accompanying

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corporate governance changes, such as the dismantling of classified boards, which make companies more vulnerable to those pressures) continue in full force. It is uncertain what the result of the intersection of these competing trends will be, and what the impact of wider economic, social and political developments will have, as boards consider the objectives of the BRT Statement.

At a minimum, the ongoing debate suggests that boards should be sensitive to social impact issues, understand the views of their key shareholders in the debate, and anticipate what areas of the company's business or their own decision-making are most likely to raise social impact issues, and be proactive in being prepared to respond to challenges in those areas.

Increase in Bidder-Initiated M&A and Change in Sale Process Mechanics

A significant number (by one report, a majority) of public M&A transactions are now initiated in some form by a bidder rather than by a target company's decision to initiate a sale process. This trend has arisen in the context of the dismantling over recent years of takeover defense structures (most importantly, the classified board). At the same time, there has been a transformation in Delaware jurisprudence over recent years toward a narrowing of the more exacting standards of judicial review in M&A matters. As the courts have steadily eroded the potency of the *Revlon* doctrine (which requires that, in a "sale" of the company transaction—*i.e*., a sale for cash or to a new control person—the target board must seek to obtain the best price reasonably available), directors now have even broader latitude than before in crafting a sale process. Reflecting this development, few sale processes now are conducted as public auctions. Moreover, many do not include a pre-signing market check and/or are subject to a "passive"-only post-signing market check *(i.e*., the deal terms prohibit post-signing solicitation of competition but permit competition if it should emerge on an unsolicited basis and the deal terms provide for a not unreasonable termination fee).

Possible Retrenchment of the *Corwin* Doctrine

Since its issuance in 2015, *Corwin* has been a potent force for obtaining early dismissal of fiduciary duty claims in M&A actions. (*Corwin* provides for deferential business judgment review of a challenged transaction in a post-closing action not involving a conflicted controller—regardless of the standard of review that applied pre-closing—*if* the transaction was approved by the target stockholders in a fully informed, uncoerced vote.) Initially there was a steady stream of cases in which the Delaware courts amplified a broad view of *Corwin's* applicability, readily found *Corwin* governed the case at issue (even in the face of non-trivial disclosure issues and/or a board that was largely not independent and disinterested), and dismissed the case at the early pleading stage of litigation (even in factual contexts involving apparent serious sale process flaws). By contrast, in 2018 and 2019, there have been only a very few cases involving *Corwin* and, among these, the court has found *Corwin* applicable and dismissed the case in only a small number of instances.

In the decisions in which the court has found *Corwin* inapplicable, the focus has been primarily on disclosure—that is, were the stockholders truly "fully informed" when they approved the transaction? Notably, plaintiffs have been more successful in defeating application of the *Corwin* doctrine at the pleading stage through the use of documents obtained under the DGCL Section 220 stockholder right to inspect books and records of the corporation. In one case (*Morrison v. Berry*), the court found that the disclosure to stockholders was materially incomplete and misleading (and *Corwin* therefore did not apply) based on the plaintiff's line-by-line comparison of the information in board materials and emails he obtained under a Section 220 demand with the information stated in the proxy statement relating to the transaction. The case highlights the obvious importance of a company's ensuring that its public disclosures accurately and fully reflect the information contained in corporate documents that may be obtained under a Section 220 demand.

In addition, in our view, the apparently somewhat more restrictive standard for "materiality" of disclosure applied at the beginning of the *Corwin* era has now subsided—and this (together with findings of coercion of the stockholder vote in a small number of cases) appears to suggest something of a retrenchment in the *Corwin* doctrine, broadly speaking. *Corwin* was a reaction to the phenomenon of virtually every public M&A transaction being challenged in litigation. It appears that the pendulum may be in the process of moving gently back—possibly reflecting concerns that *Corwin* may provide the potential for even serious misconduct by directors to be insulated and thus may have been an *over*-correction of the problems associated with M&A litigation. While we

expect that *Corwin* will continue to be a powerful defense tool, it will perhaps be utilized with less blunt force so as to permit judicial consideration where, in egregious factual contexts, viable fiduciary duty claims are made.

Conflicted Controlling Stockholder Transactions

The Delaware courts have long expressed concern about the potential for "coercive influence" by controllers—"800-pound gorillas," as Chief Justice Strine has characterized them—over directors (who the controller typically can remove or not reappoint) and unaffiliated stockholders (who the controller potentially may harm through retributive acts such as a squeeze-out merger or the cutting of dividends). The 2019 Delaware decisions clarify that the courts' "reflexive skepticism" of conflicted controller transactions applies even when the controller has no intention to be coercive, the transaction is negotiated by "outside" putatively independent directors, and/or the transaction is stockholder-approved.

In one case (*Tornetta v.Musk*), the Court of Chancery applied an "entire fairness" standard of review to a board's decision on executive compensation for a controlling stockholder and stated that business judgment review would have applied if the *MFW* prerequisites had been satisfied. (*MFW* provides for business judgment, rather than entire fairness, review of a conflicted controller transaction *if*, from the outset, the transaction was irrevocably conditioned on approval by both an effectively-functioning special committee of independent directors and by a majority of the minority stockholders in a fully-informed, non-coerced vote.) Previously, business judgment deference generally has been accorded to executive compensation decisions made by an "independent" compensation committee or board and *MFW* compliance has been required for business judgment review of conflicted controller transactions only in the context of transactions that were "transformational" for the corporation (such as a merger). *Tornetta* suggests the possibility for further expansion of the *MFW* doctrine outside the M&A context to a board's day-to-day decisions that involve or affect a controller.

In another case (*Olenik v. Lodzinski*), the Delaware Supreme Court undercut the notion that there could be considerable leeway for controllers in the extent to which deal discussions could occur between the parties to a transaction before the controller had to make a determination whether or not to structure the transaction to be *MFW*-compliant. The Supreme Court confirmed that, in order to satisfy the requirement that the *MFW*-prescribed conditions be imposed "from the outset" (the "*ab initio* requirement"), those conditions must be imposed before "economic horse trading"—but, further, the Supreme Court indicated that it is not only specific price discussions that would cross the "economic horse trading" line and suggested that *MFW* conditions should be imposed "early" in the process. In *Olenik*, the controller and the company engaged in eight months of what they contended were "preliminary" and "exploratory" discussions before a formal offer (which included the *MFW* dual conditions) was made. The Supreme Court viewed the "preliminary discussions" as having crossed the line to "substantive economic negotiations" when the parties engaged in a joint exercise to value the target and the acquirer (which, in the court's view, set the stage for the future price negotiations). The Supreme Court stated that its analysis was "informed" by its 2018 *Synutra* decision, in which it found compliance with *MFW* where the *MFW* conditions were imposed "at the germination stage of the Special Committee process, when [the controller was] selecting its advisors, established its method of proceeding, [and] began its due diligence…."

Diminished Importance of Appraisal

The Delaware courts now emphasize a deal-price-less-synergies approach to determining "fair value" in the appraisal context (*e.g., Aruba*)—other than where the court views the deal price as "unreliable" because a conflicted controller is involved or there were serious flaws in the sale process, in which case the court relies on the traditional discounted cash flow methodology to determine fair value. Notably, because the court generally has applied a low bar to a finding that a sale process was sufficient for primary reliance on the deal price, the appraisal result can be (and in several cases has been) below the merger price even in cases in which the court has viewed the sale process as having been flawed. The appraisal determination has in some cases been *well* below the merger price in cases involving significant expected synergies or a merger price that reflected a premium well above the market price. Unsurprisingly, there has been a marked decline in the filing of appraisal petitions—and a significant lessening of appraisal risk in most deals.

Merger Agreement Developments

- ***Numerous contract interpretation cases.*** With the decline in M&A fiduciary litigation, the focus of Delaware decisions in the past couple of years has turned to contract interpretation. There is continued judicial emphasis on the "plain language" of agreements and the "plain meaning" of words (often, as determined by reliance on dictionary definitions). In addition, in these cases, "technical" failures to comply with the specific language has had far-reaching consequences in terms of, for example, termination and indemnification rights. The 2019 examples include the Court of Chancery's decisions in *Vintage Rodeo v. Rent-a-Center* (where the court held that the seller had the right to terminate a $1.57 billion merger after the parties had discussed, and their conduct reflected that they had assumed, that an extension would be made, but the buyer "simply forgot" to formally provide the written notice for the extension that was required under the merger agreement); *Absalom v. Saint Gervais* (where the court held—based on its interpretation of the word "voidable" rather than "void"—that no equitable defenses were available with respect to the transfer of an LLC interest that was prohibited under the LLC agreement); and *NASDI v. North American Leasing* (where the court's interpretation of a right to indemnification depended on its view of the meaning of the word "but").

- ***Regulatory***. We have seen more emphasis in merger agreement negotiations on regulatory risk. Regulatory provisions are now more often tailored to the specific circumstances of a given deal. Where there are significant regulatory issues, the regulatory commitment is typically strong and can be far-reaching. Moreover, often, very significant reverse termination fees are tied specifically to termination for regulatory reasons.

- ***MeToo and cybersecurity.*** There has been an increased focus on seeking to secure disclosure in due diligence of MeToo issues (including current complaints and history) and cybersecurity issues. Where there are significant concerns relating to these topics, they now are sometimes specifically addressed in the merger agreement (*i.e.,* with tailored representations and warranties, covenants and/or indemnification provisions rather than a reliance on the general provisions).

- ***"Material adverse change."*** Last year, the Court of Chancery, for the first time that we are aware of, found that a "material adverse change" sufficient to trigger a right of termination of a merger agreement had occurred (*Akorn v. Fresenius*). It is to be noted that, in *Akorn*, the changes that occurred were dramatic; the changes affected the long-term value of the company; and the overall factual context was egregious. *Akorn* serves as a strong reminder that careful consideration should be given to the drafting of a MAC clause. All reasonably anticipatable developments of possible significance—given the specific industry, business, company and transaction at issue—should be considered. Where there are specific concerns—for example, because there is a high degree of likelihood of a certain important development occurring or not occurring, or a certain development could have a significant impact—consideration should be given to drafting the MAC clause to cover these specific developments explicitly. Furthermore, the agreement could provide hypothetical examples for added clarity as to what would or would not constitute a MAC.

- ***Earnouts.*** Earnouts, while often used to bridge valuation differences between parties to an agreement to acquire a private company, frequently lead to post-closing disputes. A common disagreement relates to a seller's contentions that, during the earnout period, the buyer did not take appropriate actions to support the realization and maximization of the earnout. The courts have consistently endorsed a very limited approach to application of the implied covenant of good faith and fair dealing (which adheres to every contract) and have found that a buyer did not meet its obligations only when the buyer did not satisfy its express contractual commitments or acted purposefully to frustrate realization of the earnout (such as by artificially moving revenues to a period outside the earnout period). The 2019 decisions on earnouts (*e.g., Glidepath v. Beumer*) reaffirm that, during an earnout period, a buyer has no obligation to seek to maximize the amount of earnout consideration that will be triggered, absent an express contractual commitment to the contrary.

Maturing of Shareholder Activism

Shareholder activism has evolved to be a prominent, and almost certainly permanent, feature of the corporate landscape. At the same time, in our view, the "success" of activists has been overstated—both in terms of board seats won at target companies (most of which have been gained by a handful of key activists in a limited number of campaigns or have involved obtaining only one or

two seats on a large board) and in terms of overall investment returns for the class (given that, but for a small number of activists, the returns have been both volatile and lackluster). At the start of 2019, activism in the U.S. already exhibited the hallmarks of a mature market; there was a dearth of companies targeted that had not previously been targeted by activists; a handful of activists in campaigns at companies of scale dominated the space; a nascent trend emerged of standstill restrictions not being imposed on activists in settlement agreements; and, in an effort to avoid activism, boards were increasingly focused on proactively addressing potential catalysts. The maturity of the activism market in the U.S. at year-end 2019 is reflected not only in overall activity levels, which are essentially unchanged relative to a year ago, but also in the infrequency of protracted public campaigns. New themes—including more aggressive tactics by activists, heightened scrutiny of workplace conduct, and changing market conditions—may create opportunities for activists going forward; but potential challenges for activists abound, particularly in the event of a market downturn.

M&A is still a primary focus of activists. An M&A-related objective was the key stated objective in almost half of the newly announced public activist campaigns in 2019 (up from about one-third of campaigns in 2017 and 2018). We expect that M&A-related activism may become more aggressive, with activists more often stimulating the sale of independent companies, including by themselves identifying and contacting particular potential buyers (likely after acquiring a toehold equity stake in the company) or by themselves submitting bids for companies. M&A deal planning must proactively take into account the possibility of an activist response. The actions of Carl Icahn-affiliated entities in this year's ongoing Occidental-Anadarko situation underscore that, even when a merger is structured so that acquirer stockholder approval is *not* required, an activist may nonetheless surface to advocate against the deal, to criticize the lack of a stockholder vote and the more expensive financing typically required for deals so structured, and, post-closing, to seek to replace directors.

Increase in Section 220 Demands

There has been a significant increase in stockholder efforts, through DGCL Section 220 demands, to obtain access to the corporate books and records. These demands are made most often in the context of seeking information to support post-closing damages claims and/or to establish that *Corwin* is inapplicable as a defense in M&A litigation (based on deficient disclosure to or coercion of the stockholders). A stockholder must have a "proper purpose" for the inspection and access will be granted only to books and records that are "necessary or essential" to that purpose. However, given the current regime under which it is more difficult for a plaintiff to succeed in avoiding dismissal at the pleading stage in both pre-closing and post-closing M&A litigation (as noted, due to an erosion of *Revlon* and the advent of *Corwin*), the courts now encourage these demands and are increasingly willing to permit stockholders to gain access to board documents.

- ***Need for more attention to emails.*** Importantly, the Court of Chancery has indicated a new willingness to permit access to directors' and managers' emails under Section 220 demands—even emails on their *personal* email accounts and texts on their *personal* cellphones—at least when key discussions were conducted or decisions were made through emails or texts and were not formally reflected in board minutes or other corporate documents (*Schnatter v. Papa John's* and *K24 v. Palantir*). Also of note, where there were credible allegations of wrongdoing by the controlling stockholder (Redstone) and directors of CBS in connection with a specific board committee meeting, even though the plaintiff did not explicitly ask for texts or emails in its Section 220 demand, the court granted access to all of the electronic communications between Redstone and the committee members for the 14 days before and after the date of the meeting because it was "satisfied that Redstone, the Viacom board and the CBS board communicated by means of text messages and emails" (*Bucks County v. CBS*). Accordingly, it cannot be emphasized enough that directors and managers should be made aware, and periodically reminded, of the need for extreme care with respect to the content of emails. Further, a board generally should memorialize discussions and decisions in formal minutes and should consider adopting a policy prohibiting directors from conducting corporate business through personal email accounts or texts.

- ***Section 220 demands in the context of proxy contests.*** In one 2019 case of note (*High River v. Occidental*), the Court of Chancery rejected the Section 220 demand made by entities affiliated with shareholder activist Carl Icahn in connection with their upcoming proxy contest to take control of the Occidental Petroleum Corp. board due to their displeasure with the company's acquisition of Anadarko Inc. The court held that facilitating the prosecution of a proxy contest is not a "proper purpose" for a Section 220 demand when the stockholder seeks to obtain information about decisions made by the board as to

which it simply "disagreed" but is not alleging that the board may have engaged in legally actionable misconduct. Based on *High River*, shareholder activists cannot expect unconstrained access to a company's books and records to help them prosecute proxy contests in the M&A context.

Corporate Governance Developments

- ***Continued increased importance of shareholder engagement and communications efforts.*** Institutional investors continue to be more involved and vocal, making thoughtful and effective outreach to them critical. Shareholder engagement efforts now do not occur only during proxy season and are more substantive and far-reaching than historically. Also, they often involve one or more directors of the company. According to a recent report, in 2019 a majority of Fortune 100 companies (up from just 29% in 2016) disclosed that board members were involved in at least some shareholder engagement discussions. Scheduling regular-course engagement with key institutional investors has become a challenge (especially for companies of less scale). It is critical that a board proactively develops a clear, persuasive, effective communications plan that delivers the company's essential "message." As part of this effort, there is a need for ongoing monitoring of concerns relating to the company and its industry (*i.e.*, the issues being focused on in media and by analysts); development of compelling, targeted responses; and a strategy for effectively communicating these responses.

- ***Continued increased focus on environmental/social issues.*** In 2019, for the third proxy season in a row, there were more shareholder proposals on environmental and "social" issues than on governance issues. For the past several years these proposals have been, and they are likely to continue to be, made under initiatives led by large asset managers. The Business Roundtable Statement (discussed above), and the ongoing debate it stimulates, will further increase the visibility of and pressure with respect to these issues. Notably, in 2019, there were more (but still only a few) shareholder proposals that, in response to the increasing focus on ESG and other politically progressive initiatives, advocated *against* the consideration of ESG factors in corporate decision-making. These proposals, while not significant in and of themselves, appear to reflect the divisions of the current national political mood and signal the possibility of new challenges for boards as they operate in the context of more deeply polarized and intense political views among the corporate stakeholders.

- ***Broader readership of proxy statements.*** With increased general interest in ESG (environmental/social/governance) issues, proxy statements are now more often read by non-shareholder stakeholders and the media.

- ***Continuing focus on board composition.*** Institutional investors have continued their focus on directors' qualifications, diversity, over-boarding, tenure and retirement age.

  Diversity. The following developments in 2019 followed on the heels of the 2018 California law requiring public companies headquartered in that state to have at least one woman on the board by the end of 2019 (with the number increasing in future years depending on the size of the board): (i) ISS adopted a new policy (for the 2020 proxy season) to recommend voting against or withholding votes from the chair of the nominating committee (or other directors on a case-by-case basis) at companies with no women on the board; (ii) New York City Comptroller Scott Stringer sent letters to 56 S&P 500 companies urging that they adopt policies that require that the initial lists for interviews of new director nominees and CEOs include qualified "female and racially-ethnically diverse candidates"—and also announced that he intends to submit shareholder proposals at companies "with lack of apparent racial diversity at the highest levels"; (iii) the New York City Retirement Systems announced that they will vote against members of a nominating committee if the board lacks gender and racial/ethnic diversity, including any board on which more than 80% of the members are the same gender; and (iv) we note that the board nominees of shareholder activists now routinely include women and people of color.

  Over-boarding. Vanguard recently adopted an over-boarding policy that goes further than the ISS and Glass Lewis policies. The ISS and Glass Lewis policies are to vote against directors who sit on more than five boards or, in the case of a director who is the CEO (or holds certain other executive offices), more than two boards. Vanguard's new policy is to vote against directors who sit on more

than one board at which they are an executive officer; and to vote against non-executive directors who sit on more than four boards. A large majority of public companies have adopted an over-boarding policy and, among almost all of them, the policy prohibits non-CEO directors from serving on more than four and CEO-directors from serving on more than three.

Financial Advisors

The Delaware courts have long emphasized that, given the "central role" played by investment banks in "the evaluation, exploration, selection, and implementation" of a company's strategic alternatives, there is a need for full disclosure of their compensation and potential conflicts of interest. In recent years, with the transformation in Delaware law that has made it generally more difficult for plaintiffs to succeed in M&A litigation against directors for alleged fiduciary breaches, plaintiffs have more often made claims against financial advisors that they aided and abetted director fiduciary breaches. The focus in these cases has been on purported conflicts of the adviser, especially when they were not disclosed to the board or stockholders approving a transaction. The courts have issued decisions in recent years which establish that directors have a responsibility to seek to determine whether a banker has a material conflict (even, at least in some contexts, to investigate a banker's representation that it has none) and that a banker can have aiding and abetting liability for directors' breaches even if the directors have no liability (due to, for example, exculpation or settlement). At the same time, the Delaware Supreme Court has confirmed, and it bears emphasis, that aiding and abetting liability for bankers continues to be rare—particularly given that a plaintiff must establish the element of "scienter" (*i.e.*, that the advisor acted with *knowledge* and *intent* to aid and abet the board's fiduciary breach). Moreover, to the extent that (as discussed above) the pendulum may be swinging back toward making it somewhat less difficult to bring fiduciary claims against directors, there is a correlative effect on bankers, as an aiding and abetting claim against a banker is generally only validly pled when the plaintiff validly pleads a predicate underlying fiduciary breach by directors.

- ***Aiding and abetting.*** In one key 2019 case (*Chester County v. KCG*), the Court of Chancery, at the pleading stage, found *Corwin* inapplicable and refused to dismiss both fiduciary claims against the board (for failing to maximize value for the stockholders in negotiating and approving a merger) and aiding and abetting and civil conspiracy claims against the banker. The court found that the plaintiff sufficiently alleged that the banker had misled the board, created an informational vacuum, and "worked with" the acquirer to "pressure" the board to approve the merger. Among the allegations were that, in the months leading up to the acquisition, without timely (or in some cases any) disclosure to the target board, the banker, who was the target's largest stockholder and longtime financial advisor, secretly met with the acquirer to discuss a potential sale of the target; provided the acquirer with confidential information about a key asset of the target; and agreed with the acquirer that it would support the acquirer's offer price and, after the closing, the acquirer would sell the key asset using the advisor as its financial advisor for that deal. The case serves as a reminder that, where a plaintiff validly pleads egregious facts relating to a banker's active participation in board fiduciary breaches, an advisor may not achieve early dismissal of (and ultimately could have liability for) aiding and abetting claims.

- ***Fairness Opinions.*** One recent case (*Regency v. Dieckman*) highlights that a special committee or board, and its financial advisor, should ensure that a fairness opinion is updated to reflect the final terms of the transaction being opined on. Updating typically should occur even if the change in terms is arguably immaterial. For example, in *Dieckman*, the court stated that it was an open issue of fact (requiring a determination at trial) whether the change in terms was or was not material given that the value of the merger consideration could fluctuate because there was no collar on the exchange ratio.

Board Oversight ("*Caremark* Claims")

Two recent Delaware cases (*Marchand v. Barnhill* and *In re Clovis Oncology*) highlight that, while it is still extremely difficult for plaintiffs to successfully plead *Caremark* claims, there *are* circumstances under which they may prevail. Both cases involved (i) an "utter failure" by the board to implement and monitor a reasonable information and reporting system to identify risks, and/or (ii) the board's consciously choosing not to address "red flags" or known risks. Both cases involved noncompliance by the company with regulatory requirements that were the "central issue" and "mission critical" to the business—in *Marchand*, food safety regulations

for a company whose only business was making ice cream; and, in *Clovis*, clinical drug trial regulations for a company whose only business consisted of developing a single drug.

These cases underscore that a board should consider on a regular basis whether compliance (or other) risks exist and take steps to address them. In this regard, the following should be kept in mind: (i) A board should establish *board-level* systems for oversight and monitoring of the issues central to the company's operations—and not rely only on non-board-level mechanisms such as the oversight provided by the regulators themselves, or reports from management on the company's operations *generally*. (ii) The audit committee, the outside auditors, and management should keep the board focused on, and apprised of key developments with respect to, issues and risks that are central to the business. There should be regular processes and protocols requiring management to keep the board apprised of key compliance and other practices, risks or reports—and when management learns of "yellow flags" or "red flags" (including complaints or reports from regulators), the board should be told. (iii) One or more board committees should oversee and address the company's compliance with regulations and other matters central to its business. (iv) Board minutes should reflect the board's monitoring and oversight efforts. (v) As was articulated in another Delaware decision issued this year (*In re Facebook Section 220 Litigation*), there is heightened risk under *Caremark* where a board fails to oversee the company's obligations to comply with "positive law" (including regulatory mandates) as opposed to the company's efforts generally to avoid business risk; and there appears to be heightened risk when human life or health is involved.

M&A/PE Roundup

Important First Circuit Ruling Makes "Controlled-Group" Pension Liability Less Likely For Private Equity Funds—But Uncertainty Remains—Sun Capital

In *Sun Capital Partners v. New England Teamsters & Trucking Industry Pension Fund* (Nov. 22, 2019), the U.S. Court of Appeals for the First Circuit reversed the decision of the U.S. District Court for the District of Massachusetts in a long-running dispute over whether the multiemployer pension fund to which a struggling company contributes can look to private equity fund owners to satisfy the company's withdrawal liability under ERISA. Although this decision does not address one of the core conclusions of the First Circuit Court's earlier decisions in the litigation (that the private equity fund was a "trade or business" for ERISA purposes), it reduces the likelihood of a finding of a constructive partnership among private equity funds that may, from time to time, make investments side by side with unaffiliated funds or with non-parallel funds (such as predecessor/successor funds) that are sponsored by the same sponsor or affiliated sponsors—thereby reducing the likelihood of a finding of "common control" and potential "controlled group" liability under ERISA.

The District Court, in finding a partnership-in-fact, had focused on the facts that the same two individuals controlled the general partner of both funds and that the funds pooled resources to identify, acquire and manage portfolio companies and to structure their investments. The Circuit Court, reversing that finding, emphasized instead that the funds did not intend to form a partnership, expressly disclaimed in their fund documents that they were a partnership, had a majority of limited partners who did not overlap, did not always invest in parallel, and maintained separate books and records and bank accounts and filed separate tax returns. The Circuit Court expressed reluctance to impose liability on Sun Capital given a lack of clear Congressional intent or formal regulatory guidance on the issue. The decision underscores that potential liability for portfolio companies' controlled-group liabilities under ERISA will depend on the court's view of the specific facts and circumstances. It remains to be seen how other courts will approach these issues and whether clarifying guidance will be provided through new legislation or Pension Benefit Guaranty Corporation rules. These uncertainties should be taken into account when funds structure their investments in portfolio companies that may have pension liabilities.

(See the link on page 15 to our Briefing on this topic.)

When Relying on a Fairness Opinion, Really Rely—and Other Lessons from the Court of Chancery's Dieckman *Decision*

***Dieckman v. Regency* (Nov. 3, 2019) reflects that, although general partners of master limited partnerships are accustomed to operating with wide discretion (including with respect to transactions as to which they have a conflict of interest), there is the potential for them to be subject to scrutiny and possible liability when approving conflicted transactions.** More broadly, the decision underscores the critical importance of clarity in drafting and compliance with the precise terms of agreements—in this case, relating to the independence of members of a conflicts committee and reliance by the committee on a fairness opinion. Further, based on the decision, a general partner, when seeking to satisfy a safe harbor for conflicted transactions based on unitholders' approval, should consider disclosing in the proxy statement any issues of which it is aware relating to the satisfaction of alternate safe harbors (for example, if the general partner believes that a safe harbor based on approval by a conflicts committee was satisfied, any issues relating to whether the members of the committee actually met the requirements set forth in the partnership agreement for independence of the committee members). (See the link on page 15 to our Briefing on this topic.)

Shareholder Activists Cannot Count on Unfettered Access to Books and Records for the Purpose of Communicating With the Other Shareholders in a Proxy Contest—High River

In *High River v. Occidental* (Nov. 14, 2019), the latest ruling in longstanding litigation relating to the acquisition of Anadarko by Occidental, the Court of Chancery rejected the demand made under DGCL Section 220, by entities affiliated with shareholder activist Carl Icahn, who had opposed the merger, to obtain access to Occidental's books and records relating to the merger and its financing. This appears to be the first case in which the court has explicitly focused on whether a stockholder's communicating with other stockholders in a proxy contest about board decisions with which the stockholder disagrees, but as to which it does not allege legally actionable board misconduct, is a "proper purpose" for a demand to inspect the corporation's books and records under DGCL Section 220. (See below the link to our Briefing on this topic, which also discusses the factors that led to activist involvement in this case.)

Court of Chancery Drafting Points on a Material Contracts Representation and Warranty—Accurus

In *Julius v. Accurus Aerospace* (Oct. 31, 2019), the court reviewed the Asset Purchase Agreement, pursuant to which ZTM, Inc. (now known as Accurus Aerospace) (the "Company") was sold to affiliates of private equity firm Liberty Hall Capital Partners, L.P, to determine whether the risk of the lost opportunity for the target company to bid to renew certain material contracts had been allocated to the Seller based on its representations and warranties relating to no disputes or issues with customers, no material reduction by a customer of its business with the Company, and no Material Adverse Effect (none of which representations was made subject to the Seller's knowledge). When they entered into the APA, both the Seller and the Buyer knew that certain contracts pursuant to which the Company manufactured and sold parts to The Boeing Company (the Company's key customer) would be expiring soon after the closing of the APA. However, based on Boeing's past practices, both the Seller and the Buyer believed that the Company would have the opportunity to bid to continue to manufacture and sell

the parts to Boeing after the contracts expired. After the closing of the APA, that assumption proved to be wrong as it turned out that (although unbeknownst to the Seller, the Company and the Buyer until after the closing) Boeing already had awarded contracts for the parts to other suppliers a couple of years earlier. Vice Chancellor Zurn granted summary judgment that the Seller had *not* breached these representations and warranties—a conclusion that, in the Vice Chancellor's words, reflects "an important lesson about the benefits of allocating risk among contracting parties and [the] detriments of imprecise drafting."

Accurus underscores that drafters of acquisition agreements should:

- **Consider including specific, *tailored* provisions relating to matters that are particularly material and/or unusual.** In *Accurus*, given the importance of the contracts with Boeing, the impending expiration of the contracts, and the expectation that there would continue to be an opportunity to bid based on Boeing's past practice, the buyer should have considered seeking a representation and warranty relating specifically to the continuation of the opportunity to bid under those particular contracts—rather than relying on the generic representations that there were no "issues" with customers, no reduction in business by customers, and no Material Adverse Effect. Moreover, when a buyer discovers in a due diligence review of the target company that a material contract may be expiring before or soon after closing, or that an opportunity to continue under a contract is based on past practice rather than the enforceable terms of a contract, the buyer should take steps to confirm the likelihood of continuation of the contract. In *Accurus*, clearly, the Buyer was seriously disadvantaged by having relied simply on an assumption that Boeing had been, and would continue to be, operating in accordance with its past practice with respect to its contracts with the Company.

- **Keep in mind that the court may interpret generic terms narrowly.** In *Accurus*, in interpreting the Seller's representation and warranty that there were no "complaints, disputes or issues" with customers, the court interpreted the word "issues" to mean "the equivalent of 'disputes' or 'complaints,'" rather than ascribing to it a separate, broader meaning (such as, say, a "problem" or a "matter of concern"), which would have expanded the representation and warranty and potentially covered the risk of loss of the opportunity to bid on the parts sold under the expired contracts.

- **Carefully consider whether to seek to include a knowledge qualifier in a representation and warranty.** In *Accurus*, if the representation and warranty relating to customer disputes and issues had been subject "to the knowledge of the Seller," then, irrespective of the definition of "issues," it would have been indisputable that the Seller would not have had liability for the loss of opportunity to bid, given that the parties both acknowledged that the loss was not known until after closing. (Of course, a buyer typically would resist the inclusion of a knowledge qualifier on the seller's representations and warranties, on the basis that the economic burden should fall on the seller to the extent that there are facts unknown to both parties that render a seller's representation untrue.)

- **Carefully consider the effect of a date qualifier in a representation and warranty.** In *Accurus*, the court held that because the Seller's representations and warranties stated (without a knowledge qualifier) that "*since* the Balance Sheet Date" (emphasis added) there had been no material reduction in business and no Material Adverse Effect, the Seller would have no liability for losses "triggered" by events that occurred *before* the Balance Sheet Date—even if the *loss* became known only after the Balance Sheet Date.

Court of Chancery Refuses to Dismiss Claims that a Milestone Payment is Payable and that Damages are Owed for Failure to Use Commercially Reasonable Efforts to Obtain the Relevant Regulatory Approval—Allergan

***Fortis Advisors LLC v. Allergan W.C. Holding Inc.* (Oct. 30, 2019) involved a dispute between an affiliate of pharmaceutical company Allergan plc ("Allergan") and start-up company Oculeve, Inc. as to whether, under the merger agreement pursuant to which Allergan acquired Oculeve, Allergan owes the former venture capital owners of Oculeve a post-closing milestone payment based on Oculeve having obtained authorization from the Federal Drug Administration (FDA) for use of a drug for dry-eye disease. The Court of Chancery, at the pleading stage of the litigation, declined Allergan'ss motion to dismiss**

the plaintiff's claims that (i) the milestone payment was due (even though the FDA authorization obtained was, allegedly, too limited to permit the drug to be successfully commercialized) and (ii) Allergan should pay damages based on its alleged failure to use commercially reasonable efforts to seek the FDA authorization on a timely basis (which reduced the milestone amount potentially payable). (A "milestone payment" is payment of a contingent portion of a purchase price based on the achievement of a specified goal or "milestone" after closing.)

Allergan highlights the following key points:

- **Precise drafting of milestone "trigger" provisions is critical.** The court's ruling was based on its interpretation of the "plain language" of the merger agreement. Vice Chancellor Zurn relied primarily on dictionary definitions to determine the "usual and ordinary meaning" of the words used in the agreement (as, we note, was also the case in the court's interpretation of the merger agreement at issue in the recent *Accurus* decision, discussed above).

- **Milestone payment provisions should be contextualized to the specific product and regulatory regime at issue.** Lawyers should draft milestone provisions together with business people who have an in-depth understanding of the specific product and regulatory regime involved. The provisions should be as clear and specific as possible. It is surprising that, time and again, there are cases (like *Allergan*) where a milestone provision with a trigger event based on receipt of an FDA authorization for a drug does not specify, for example, whether the authorization must be for use by an entire patient population with a certain disease or can be for just certain patient subgroups.

- **Although the merger agreement required Allergan to use "commercially reasonable efforts" to obtain the FDA authorization that would trigger the milestone payment and defined the phrase by reference to Allergan's previous level of efforts in similar circumstances, the court rejected Allergan's contention that the Plaintiff failed to adequately plead what Allergan's previous efforts in similar circumstances were.** The Plaintiff made *no* allegations with respect to Allergan's previous efforts to obtain FDA authorizations in similar circumstances. The court simply accepted (at the pleading stage) that Allergan's several alleged delays in seeking the FDA authorization likely were inconsistent with how it had acted previously with respect to similar products at a similar stage.

- **No duty in Delaware to ensure or maximize milestone payments.** While not an issue in *Allergan*, the buyer's post-closing efforts in achieving a milestone are frequently the basis for post-closing dispute. Recent Delaware decisions have clarified that, under Delaware law, there is no duty on a buyer's part to ensure or to maximize a milestone (or earnout) payment and the implied covenant of good faith and fair dealing is not applied to read into an agreement covenants that would obligate a buyer to take, or to refrain from taking, actions to ensure or maximize a payment. At the same time, the Delaware courts have held that a buyer cannot take "affirmative steps" to frustrate a payment. In general, the factual context can be critical and there is often a high degree of uncertainty as to the result in these cases. The law in other jurisdictions varies, with some, such as California and Massachusetts, imposing an obligation on the buyer of a business to use "reasonable efforts" to achieve a milestone—at least in the absence of an express disclaimer to the contrary. Thus, it is critical to consider—and to draft clear and specific provisions that reflect the parties' intention with respect to—post-closing covenants relating to running the acquired business, seeking regulatory approvals, and/or using a specified level of efforts to meet the milestone triggers. (An alternative approach may be preferable when the parties cannot agree on more specific provisions and/or a party believes that ambiguity may lead to a more favorable result for it.)

ISS and Glass Lewis Release Updates to Their Proxy Voting Policies and Guidelines for the 2020 Proxy Season

Proxy advisory firms Institutional Shareholder Services Inc. (ISS) and Glass Lewis recently released updates to their respective proxy voting policies and guidelines. The ISS changes generally will apply to shareholder meetings held on or after February 1, 2020; and the Glass Lewis changes generally will apply to shareholder meetings on or after January 1, 2020. The following are of particular note:

- **Board gender diversity.** ISS will now generally recommend voting against or withholding votes from the chair of the nominating committee (or other directors on a case-by-case basis) at companies with no women on the board. A "firm commitment" by the company (that is, a plan with measurable goals) to appoint at least one woman to the board within a year will now only be a mitigating factor—and will be a mitigating factor only for 2020.

- **Multi-class structures.** ISS will now generally recommend voting against or withholding votes from the entire board of a newly public company if the company has implemented a multi-class structure with unequal voting rights among the classes. A sunset provision that ISS considers "reasonable" will be viewed as a mitigating factor. Reasonableness of a sunset provision will be based on a consideration of the company's lifespan, its post-IPO ownership structure and the board's disclosed rationale for the duration that was selected. However, no sunset period of more than seven years from the date of the company's IPO will be considered to be reasonable.

- **Shareholder proposals.** Glass Lewis's update reaffirms its belief that a company should exclude a shareholder proposal from its proxy filings under Rule 14a-8 of the Exchange Act only when the SEC has explicitly concurred with the company's argument that the proposal should be excluded. The update notes the SEC's September 2019 announcement that the SEC Staff now may respond orally (rather than in writing) to certain requests to exclude shareholder proposals or may decline to respond at all, without that indicating a view that the proposal should be included. In response, the update states that Glass Lewis generally will recommend voting against all members of the governance committee when (i) the company has excluded a shareholder proposal and the SEC declined to state a view as to the exclusion of the proposal or (ii) the SEC orally (*i.e.*, "with no written record") granted no-action relief permitting the exclusion and the company did not provide "some disclosure concerning this no-action relief." We note that the SEC Staff has indicated that it will be recording its oral decisions in some form on the SEC website; however, the update does not address whether Glass Lewis will consider that recording to be a "written record" for these purposes. (See below the link to our Briefing on this topic.)

SEC Proposes Rule Changes Relating to Proxy Advisory Firms and Shareholder Proposals

On November 5, 2019, a divided SEC (by a 3-to-2 vote, along party lines) issued proposed new rules. Most significantly, with respect to proxy advisory firms (such as ISS and Glass Lewis), the new rules would require that, before a firm issues voting advice to a company's investors, it must provide the advice to the company and permit the company to respond. Typically, proxy advisory firms have limited their engagement with issuers because of the concern that expanded engagement would impede the firm's objectivity and interfere with its being able to make voting decisions on the tight timeline that investment advisers' clients require. In October 2019, ISS filed a lawsuit against the SEC challenging recent guidance by the SEC that is now reflected in the new proposed rules. ISS is claiming that the SEC's regulation of proxy voting advice as a proxy "solicitation" is contrary to law and exceeds the SEC's statutory authority under the Exchange Act. The lawsuit may affect the timing and substance of the SEC's final rulemaking.

Proxy Advisory Firms. The proposed rules relating to proxy advisory firms come against the backdrop of debate in recent years within the corporate community about the expanded use, influence and power of these firms. Many issuers have taken the position that the proxy advisory firms have implicit conflicts of interest, generally take a one-size-fits-all approach to their voting policies, do not obtain sufficient input from the issuer when making voting recommendations, and do not have effective processes for identifying or correcting errors in the data they use to make their determinations. However, many investment advisers, who are the actual customers of the proxy advisory firms, are of the view that the proxy advisory firms perform their services reasonably well.

In addressing the ongoing debate between issuers and proxy advisory firms with respect to proxy advisory firms' accountability and transparency, the proposed rules tilt favorably toward issuers. If adopted, they may lead to significant changes in the way that investment advisers utilize the recommendations of proxy advisory firms. For example, investment advisers may expand their in-house function for making proxy voting assessments or may increase the frequency with which they vote automatically based on the issuer's recommendation or abstain from voting.

The key aspects of the proposed rules are as follows:

- ***New requirements for proxy advisory advice to be exempt from the proxy rules.*** The proposed rules codify the view that proxy advisory firms' advice and voting recommendations are "proxy solicitations" subject to the proxy rules. Notwithstanding current guidance to this effect, generally, proxy advisory firms have been exempt from the requirement of filing a proxy statement with respect to their advice and recommendations. Under the new rules, this exemption would be available to proxy advisory firms only *if* the following procedural requirements are met:

  - ***Disclosure of conflicts.*** The proxy advisory firm must disclose conflicts of interest relating to its proxy voting advice (including any material transaction or relationship with the issuer).

  - ***Issuer opportunity to review and comment.*** So long as the issuer files its proxy statement at least 25 days before the date of its shareholder meeting, the proxy advisory firm must provide the issuer with an opportunity to review and comment on its advice before it is issued. The time for the review would be at least three business days, or, if the issuer files its proxy statement more than 45 days before the date of its shareholder meeting, then at least five business days. (Currently, while both ISS and Glass Lewis permit issuers in some cases to review draft reports *for errors*, they generally have limited issuers' ability to more generally review or comment on the firms' methodologies or analyses, and the time allotted typically has been limited to a 24-48 hour window.)

  - ***Issuer statement in response.*** So long as the issuer filed its proxy statement at least 25 days before the date of its shareholder meeting, then, upon request of the issuer, the proxy voting advice must include a hyperlink to a statement by the issuer regarding he proxy voting advice. The Release states that the issuer's statement would constitute a "solicitation" under the proxy rules and would be subject to the antifraud prohibitions of the proxy rules, as well as the filing requirements that would necessitate that it be filed as supplemental proxy materials.

- ***Disclosure under the antifraud rules.*** The antifraud rules under Rule 14a-9 apply to proxy voting advice even when it is exempt from the proxy statement filing requirement. The proposed amendments would modify Rule 14a-9 to include examples of when the failure to disclose certain information in the proxy voting advice could, depending upon the particular facts and circumstances, be considered misleading within the meaning of the rule. The amended rule would list failure to disclose information such as the proxy advice firm's methodology, sources of information, conflicts of interest and use of standards that materially differ from relevant standards or requirements that the SEC sets or approves, as examples of what may render proxy advice misleading within the meaning of the rule.

Shareholder Proposals. The proposed rules relating to shareholder proposals come against a backdrop of corporations generally viewing the current rules as too permissive in that they allow even small shareholders, and even shareholders with agendas not closely related to shareholder value, access to the "valuable real estate" of management's proxy statement to press their causes. Shareholders, on the other hand, including many large institutional investors, generally stress the important corporate governance and other reforms that have been the result of shareholder proposal initiatives. The proposed amendments of Rule 14a-8 affect the eligibility requirements for a shareholder to submit a shareholder proposal, the use of representatives to administer and negotiate proposals made, the number of proposals that can be made, and the minimum thresholds for support of an unsuccessful proposal that must be achieved for it to be resubmitted.

- ***Ownership eligibility to submit a shareholder proposal.*** Under the current rules (Rule 14a-8(b)), to be eligible to submit a proposal, a shareholder must have held at least $2,000 worth or 1% of the outstanding shares for at least one year. Under the proposed amendments, (i) the 1% threshold would be eliminated and (ii) there would be tiered requirements for the initial and subsequent submissions of proposals. Under the tiered requirements, for a first submission, a shareholder would have to have continuously held at least $25,000 worth of shares for at least one year; for a second submission, $15,000 for at least two years; and, for a third submission, $2,000 for at least three years. A shareholder would not be permitted to aggregate its ownership with another shareholder to meet either the time or amount test, but shareholders would continue to be permitted to co-file or co-sponsor proposals if each proponent on its own meets the eligibility requirements. The Release encourages proposal proponents to be clear about the identity of co-filers and to identify a lead filer in its initial communications with the company.

- ***Use of representatives.*** The current rules do not address the common practice of a shareholder's use of a representative to administer and negotiate with the company with respect to its proposal. Companies have expressed concerns about potential abuse through the appointment of representatives who seek to advance their own agenda but do not meet the eligibility requirements for submitting proposals. Under the proposed amendments, the appointment of a representative would not be prohibited; however, to facilitate a company's evaluation of the shareholder-appointee arrangement, the shareholder would have to provide the company with certain written documentation relating to the appointment. The information required, which expands slightly on the information currently provided for under the guidance set forth in SLB 14I, includes the identity of the appointee, details about the proposal, and a shareholder statement in support of the proposal.

- ***One-proposal limit.*** Rule 14a-8(c) currently limits each "shareholder" to submitting no more than one proposal to a company for a particular shareholders' meeting. Under the proposed amendments, the rule would apply to each "person" rather than each "shareholder." Thus, the amended (unlike the current rule) would prevent a person from acting as a representative for more than one proposal (or from submitting a proposal and acting as a representative of other proposals). The Release makes clear that advisors can continue to provide assistance to multiple shareholders. The Release also seeks public comment as to whether shareholders' ability to appoint a representative should be eliminated altogether.

- ***Shareholder engagement.*** To encourage and facilitate shareholder engagement, a proposed rule would require that a shareholder proponent (and its representative, if any) provide a written statement to the company setting forth the shareholder's contact information and specific times (during the 10-30 days following the submission) that the shareholder would be available to meet with the company in person or via teleconference. The Release states the SEC's view that shareholder engagement is beneficial for all stakeholders and can reduce administrative burdens on the SEC Staff. (Of note, during the 2019 proxy season, over half of the shareholder proposals submitted on environmental and social issues were withdrawn following shareholder engagement.)

- ***Support thresholds for resubmission.*** Under current rules, a company is permitted to exclude a shareholder proposal that deals with substantially the same subject matter as a proposal that was voted on within the past five years *if*, the last time it was submitted, the proposal did not receive at least 3% support (if the proposal was submitted once before in the past five years), 6% (if submitted twice before in that period), or 10% (if submitted three or more times in that period). Under the proposed rules, those minimum support threshold requirements would be raised to 5%, 15% and 25%. In addition, if a proposal was submitted three or more times within the past five years and received more than 25% support, but that support declined by more than 10% between the votes, the company could exclude the proposal. Of note, the SEC found that, over a recent seven-year period, only about 6.5% of resubmitted proposals eventually received majority support and proposals that met the newly proposed thresholds were more likely to have eventually gained majority support.

CFIUS Releases 2016-2017 Annual Report, Showing Large Increase in Investigations and Abandoned Transactions

The Committee on Foreign Investment in the U.S. (CFIUS), a multi-agency U.S. regulatory body empowered to review transactions involving a foreign person and a U.S. business that may affect U.S. national security, recently delivered its unclassified Annual Report to Congress for the calendar years 2016 and 2017. The report confirms what was known anecdotally—that there has been a steady increase in the number of CFIUS filings, CFIUS is extending more cases into the investigation period, and more parties are abandoning transactions due to CFIUS objections. (See the link on page 15 to our Briefing on this topic.)

Fried Frank M&A/PE Briefings Issued This Quarter

(Please click on the title to see the Briefing)

- ***Sun Capital* Update: Successor Investment Funds Not Members of an ERISA Controlled Group**
- ***The Year in Review: The Maturing of the U.S. Market for Shareholder Activism*, published in the New York Law Journal (Dec. 6, 2019)**
- ***Occidental-Anadarko Update: Observations on Shareholder Activism—and Clarification on When a Proxy Contest Provides a "Proper Purpose" for a Books and Records Demand* (Dec. 9, 2019)**
- ***CFIUS Releases 2016-2017 Annual Report, Showing Large Increase in Investigations and Abandoned Transactions* (Nov. 25, 2019)**
- ***Summary of Changes in ISS and Glass Lewis Voting Policies for the 2020 Proxy Season* (Nov. 18, 2019)**
- ***When Relying on a Banker's Fairness Opinion, Really Rely—and Other Lessons from* Dieckman v. Regency (Nov. 14, 2019)**

Fried Frank M&A/PE *Round-Up*

Fried Frank's M&A practice advises clients on some of the largest and most complex US and global deals, providing counsel to a full spectrum of companies on sophisticated transactions that are often multi-jurisdictional and, in some cases, transformational. With over eighty attorneys in four offices, our team has deep experience advising public and private companies, special committees, audit committees, and boards of directors in complex negotiated and contested situations, including negotiated mergers, hostile takeovers and takeover defense, proxy contests, financial adviser representations, and restructuring transactions.

This quarter, recently promoted **M&A partner, Amber Banks (Meek),** was selected for inclusion in the ***Crain's* 2020 Notable Women in Law** list. This list annually recognizes 100 metro New York law firm leaders, partners, and corporate counsels for developing "distinguished careers," becoming "trailblazers who found multiple paths to excellence," and actively taking part in "civic and philanthropic activities."

Highlights of our 2019 fourth quarter work include representations of:

Permira and BFY Brands, Inc.

Counsel to **Permira and BFY Brands, Inc.** ("BFY"), the snack company which makes PopCorners® and other better-for-you snacks, in BFY's definitive agreement to be acquired by PepsiCo, Inc. from Permira.

Mayo Clinic

Counsel to **Mayo Clinic** on its joint venture with Abu Dhabi Health Services Company to operate Sheikh Shakhbout Medical City, one of the UAE's largest hospitals for patients with serious or complex medical conditions.

RedBird Capital Partners

Counsel to **RedBird Capital Partners** in collaboration with the National Football League and Major League Baseball players associations to form OneTeam Partners, a company centered around the management of players' portrayals. RedBird has made an initial investment of $125m and will own a roughly 40% stake in OneTeam. The players associations will own the rest.

Recent Fried Frank M&A/PE Quarterlies

▶ Fall 2019



▶ Summer 2019



▶ Spring 2019

