



Paul Castor
Sunny Chang
Rowook Park

M&A Developments in a Demanding Market

April 2024



M&A Market Environment

M&A Market Environment

- Global M&A deal volume through Q1 2024 totaled \$797.6 billion (up 38% from Q1 2023, but down 10% from Q4 2023), as challenging macro environment continues
 - By number of worldwide deals, over 10,700 deals were announced during the first quarter of 2024, a decrease of 31% compared to year ago levels and a nine-year low
- Fourteen deals greater US\$10 billion totaled US\$278.0 billion during the first quarter of 2024, more than doubling 2023 levels and marking the strongest opening period for mega deals, by value, since 2019.
- Technology deal-making accounted for 16% of Q1 activity, up 37% y-o-y
- Heightened regulatory scrutiny complicating transactions for many strategic buyers
 - Despite aggressive posture from FTC and DOJ, US courts continue to resist novel antitrust theories (e.g., injunction denied in Microsoft/Activision; clearance obtained in Amgen/Horizon), which may embolden dealmakers to push forward with large transactions
- PE-backed buyouts accounted for 19% of M&A activity during Q1 2024, down 24% during Q4 2023
 - Overall value reached US\$154.2 billion, an increase of 13% y-o-y and the strongest first quarter for PE deal-making in two years
- Macro trends (deglobalization; growth of AI, cloud and cybersecurity; energy transition; patent cliffs in large cap healthcare) are key drivers of M&A

Transaction Highlights

The logo for ABSOLUTE, featuring the word "ABSOLUTE" in a bold, black, sans-serif font with a green diagonal line through the letter "A".The logo for AMOLYT PHARMA, with "AMOLYT" in a purple, sans-serif font and "PHARMA" in a smaller, black, sans-serif font below it. A stylized orange and purple circular graphic is positioned between the two words.The logo for CARMOT THERAPEUTICS, with "CARMOT" in a bold, black, sans-serif font and "THERAPEUTICS" in a smaller, black, sans-serif font below it. A blue hexagonal graphic is positioned between the two words.The logo for everbridge, with "everbridge" in a lowercase, black, sans-serif font. A blue checkmark-like graphic is positioned to the left of the word.The logo for GRACELL, with "GRACELL" in a black, sans-serif font. A circular graphic containing a stylized orange and red figure is positioned to the left of the word.The logo for ProfoundBio, with "ProfoundBio" in a black, sans-serif font. The word "Bio" is in a green color.The logo for RayzeBio, with "RayzeBio" in a black, sans-serif font. A green starburst graphic is positioned above the letter "z".The logo for Uber, with the word "Uber" in a black, sans-serif font.The logo for Zillow, with "Zillow" in a blue, sans-serif font. A blue house icon is positioned to the left of the word.The logo for zoom, with the word "zoom" in a blue, sans-serif font.

Corporate Strategy and M&A

Why Do Acquisitions Fail to Live up to Expectations?

Poor Strategy / Investment Thesis

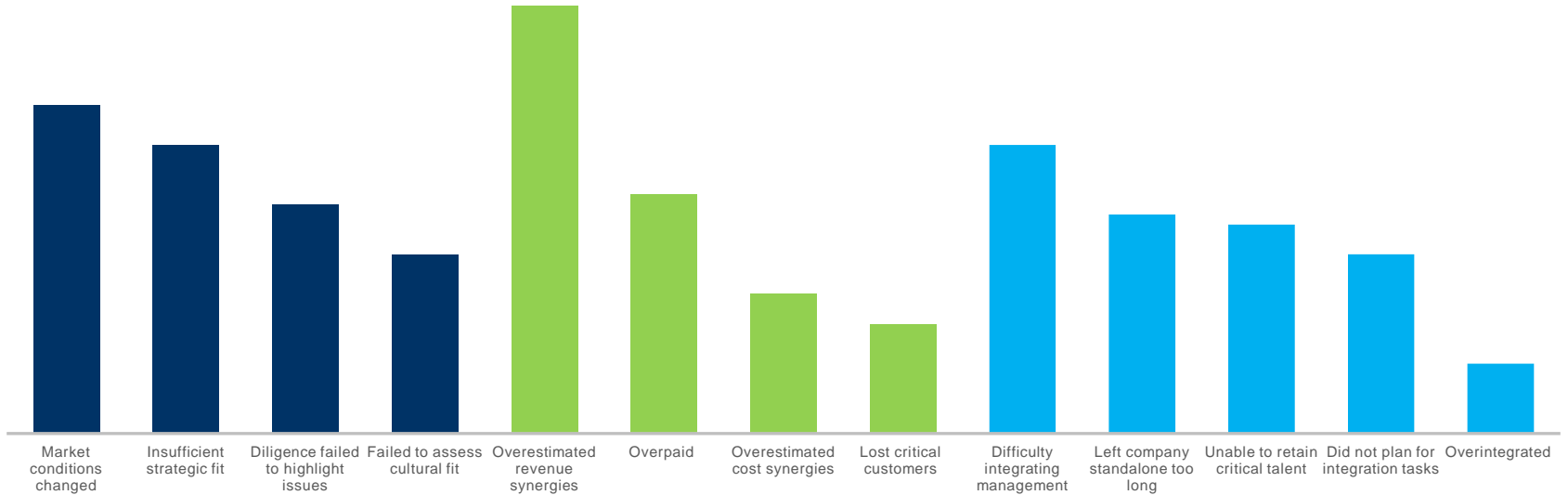
- 1 Link corporate strategy to target selection via deal thesis

Overpaid / Overestimated Synergies

- 2 Triangulate standalone value
- 3 Probability weight synergy estimates
- 4 Mitigate common biases in decision making

Integration Execution

- 5 Goal: deliver the baseline projections and synergies promised in the deal
- 6 Track to deliver – you get what you measure
- 7 Assign “A” players to lead integration



Corporate Strategy. When there is no clear connection between M&A and corporate strategy, deals may falter.

Connecting the Dots From Strategy to Pipeline and Targets



Strategy Development
(build Cupid's hunting instructions)



Pipeline Sourcing & Screening
(go hunt)

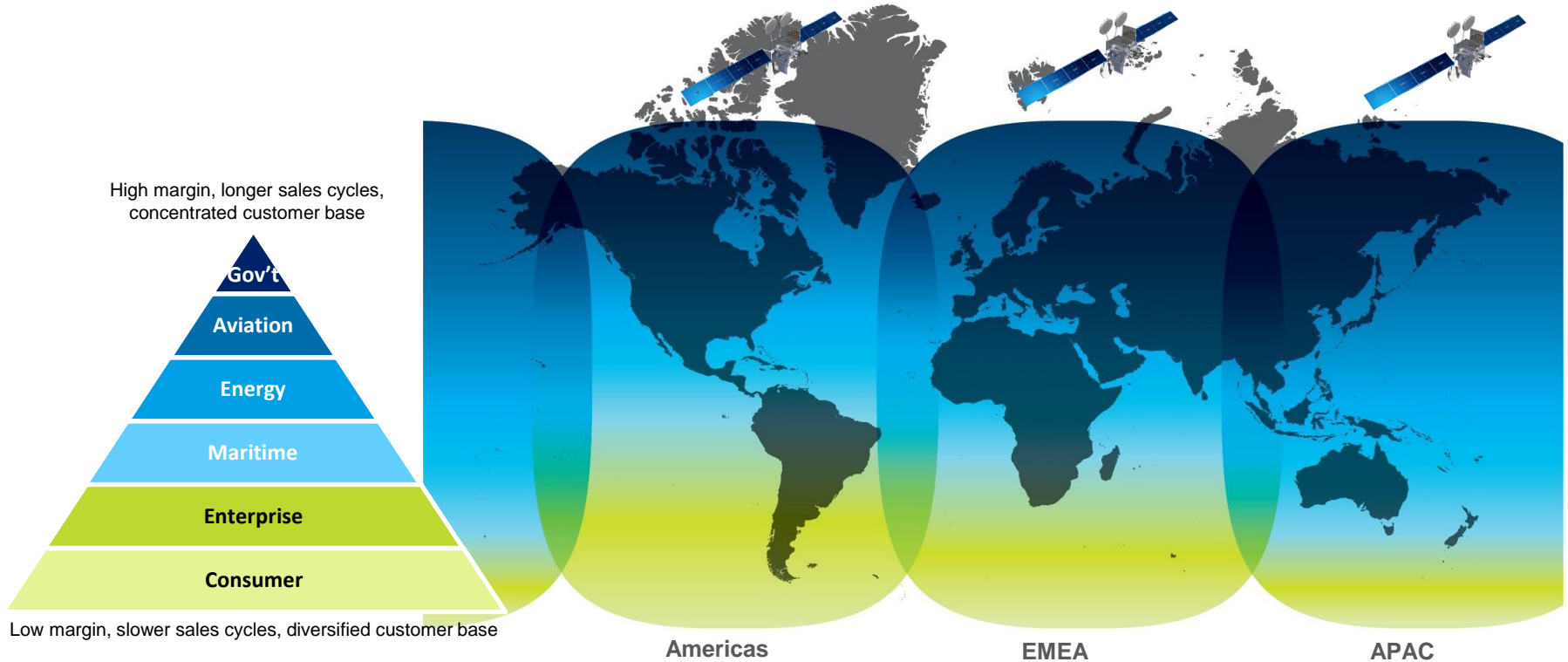


Target Selection & Investment Thesis
(flirting, dating)



Corporate Strategy

Drive bandwidth usage by expanding diversity of applications across the globe





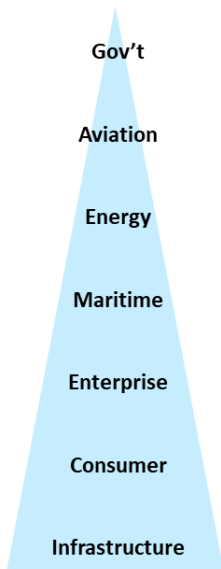
Translating Strategy into Hunting Instructions

Fill gaps with targets that:

1 Accelerate strategy
(e.g., faster fill rate)

2 Reduce execution risk
(e.g., redundancy backup)

2 Increase IRR
(e.g., from low yielding verticals)



Americas		EMEA		APAC	
North America	Lat Am	Europe	ME & Africa	Australia	Asia
Gov't	✓	inmarsat			
Aviation	✓	inmarsat	Euro Broadband inmarsat	inmarsat	inmarsat
Energy	RigNet	RigNet	RigNet	RigNet	RigNet
Maritime	inmarsat	inmarsat	inmarsat	inmarsat	inmarsat
Enterprise					
Consumer	WILDBLUE COMMUNICATIONS		Euro Broadband		
Infrastructure	engreen arconics Scientific Atlanta inmarsat	engreen arconics Scientific Atlanta inmarsat	Euro Broadband engreen Scientific Atlanta arconics inmarsat	engreen arconics Scientific Atlanta inmarsat	engreen arconics Scientific Atlanta inmarsat

Robust, Strategy-Focused Candidate Screening Criteria

Wide Aperture Search

- Broaden the base of individuals involved in search process
- **Internal Sourcing.** Business unit, sales force, databases, trade association meetings, conferences, roundtable groups, market research, competitors, suppliers, partners
- **External Sourcing.** Industry analysts, investment banks, consultants, incubators, VC firms

Filter & Prioritize Based on

1. **Strategic fit**, and
2. **Actionability / Feasibility** (target openness, funding constraints)

Split Pipeline into 2 Lists

1. **Watch List** (high strategic fit & high actionability)
2. **Action List** (high fit but low actionability)

Proactive & Ongoing Iterative Process

- Continuous monitoring, reassessment, reprioritization.
- Not just reactive when banker calls

	Company	Deal Description	LTM Revenue	LTM EBITDA	Net Debt and LTM Leverage Ratio	Enterprise Value and LTM EBITDA Multiple	Potential Synergies	Assigned Bankers	Investment Thesis & Comments
Actionable	[redacted]	Sale of company, preemptive outbound process	\$242M	\$33M	\$117M 3.5x	\$288M 8.7x	[redacted]	[redacted]	[redacted]
	[redacted]	Distressed, potentially pre-BK	\$836M	\$100M	\$931M 9.3x	\$1,052 10.5x	[redacted]	[redacted]	[redacted]
	[redacted]	Distressed, potentially pre-BK	\$657M	\$91M	\$749 8.2x	\$758M 8.3x	[redacted]	[redacted]	[redacted]
	[redacted]	BK proceedings, potential for company or asset sale	\$722M	\$68M	\$645M 9.5x	\$400-500M 5.9-7.4x	[redacted]	[redacted]	[redacted]
Monitoring	[redacted]	Potential purchase or merger	\$1,974M	\$716M	\$791M 1.1x	\$3,714 5.2x	[redacted]	[redacted]	[redacted]
	[redacted]	BK proceedings, asset sale	NA	NA	\$1,811M	NA NA	[redacted]	[redacted]	[redacted]
	[redacted]	Potential purchase of [business unit] or whole company	\$2,244M	\$1,390M	\$3,665M 2.6x	\$6,927 5.0x	[redacted]	[redacted]	[redacted]



“Actionable” from Perspective of Target and Acquiror

What does “actionable” mean?

- **Availability / Immediate Window of Opportunity**
 - Target openness to exploring sale
 - Officially on the market or rumors about a possible sale
 - Financial investor with exit needs, aging management / shareholder base with no clear succession plan
 - Business is non-core and parent company has history of divestitures
- **Acquiror Funding Constraints**
 - Acquiror access to capital markets
 - Dilution (non-accretive) to acquiror common stock
 - Leverage / debt

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Sample Target Profile (Redacted)

Company Overview

- **Description:** [Redacted]
- **Website:** [Redacted]
- **HQ:** [Redacted]
- **Revenue:** \$30M (est.)
- **Employees:** 120 (est.)
- **Ownership:** [Redacted]

	Markets	Products / Technology
Strategic Rationale		• Edge networking solutions
Drives / De-risks VS3	• TBD	• TBD
Actionability	• [Redacted]	
Challenges and Risks	• [Redacted]	

Solution Offerings		
Products		
• [Redacted]		
Services		
• Software development	• Modeling and testing	
• Network engineering	• Flight testing	
• Prototyping		
Customers		
• U.S. Army	• U.S. Coast Guard	• University
• U.S. Air Force	• MDA	• CALTRANS
• U.S. Navy	• EPA	• Oregon Law Enforcement
• U.S. Marine Corps	• George Mason	
Active Contracts		
• NAVSEA SeaPort NxG	• NIWC Pacific IDIQ (SDVOSB set-aside)	
• U.S. Air Force ABMS IDIQ	• NAVWAR IDIQ	
• NAVAIR BOA		
Partners		
• [Redacted]		

Connecting the Last Dot



**Strategy
Development**
(build Cupid's
hunting instructions)



**Pipeline
Sourcing &
Screening**
(go hunt)

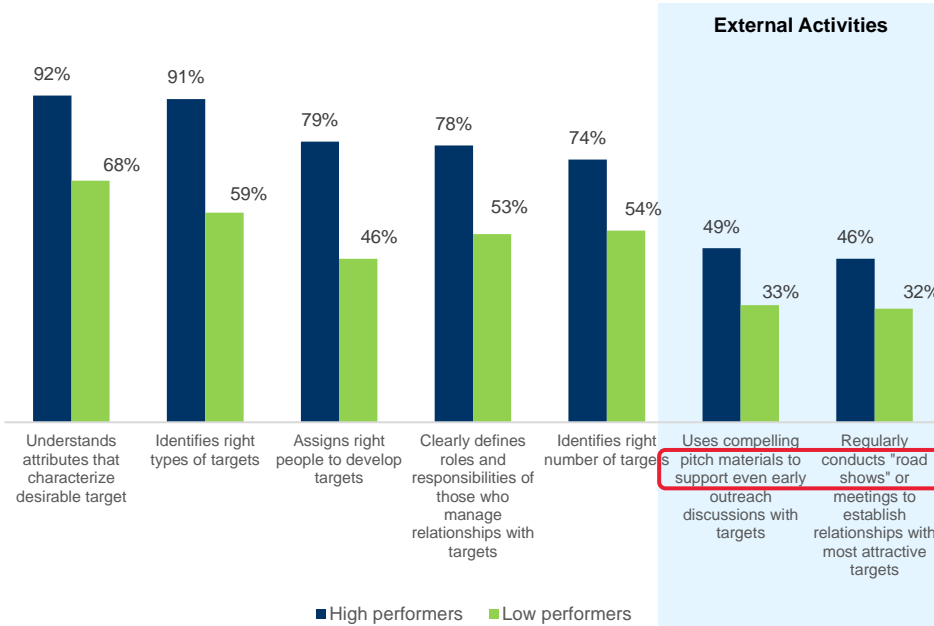


**Target Selection &
Investment Thesis**
(flirting, dating)



When it Comes to Developing the Pipeline, Many Acquirors Fall Behind on External Outreach

McKinsey Survey: To what extent do you agree that each of the following statements describes your company's M&A target sourcing?



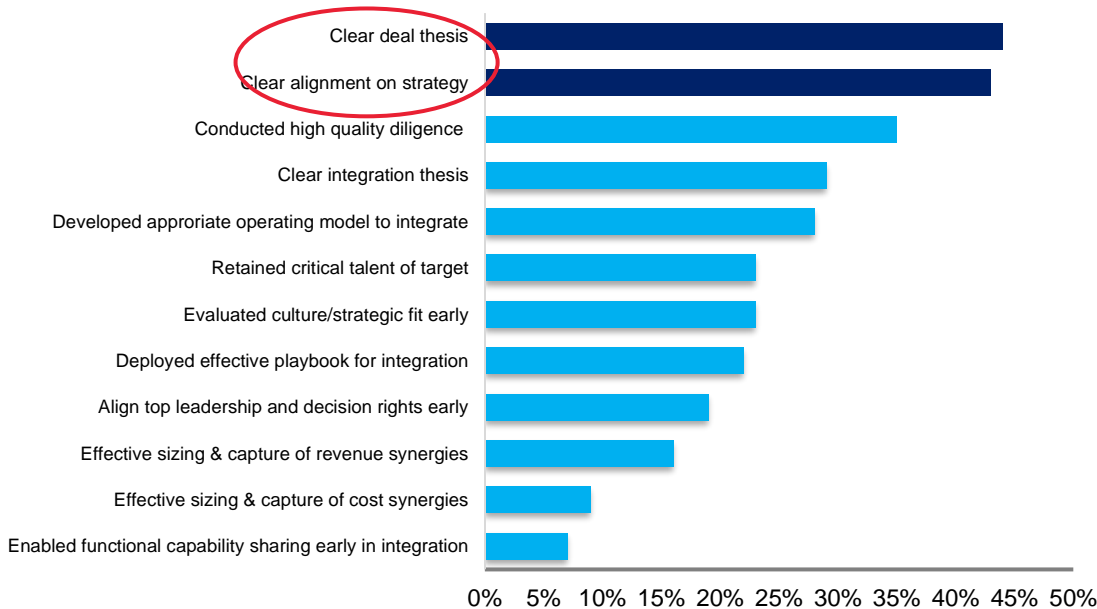
High Performing Acquirors Systematically Cultivate Relationships. Nurture relationships with potential targets over years - not just track a database waiting for someone to call. E.g., pitch deck, road shows, look for opportunities to work together.





A Clear Deal Thesis (Short, Concrete Benefit in Writing) is The Top Contributor To Successful Acquisitions

Bain Survey: Considering all of the targets that your company has acquired over the past three years, for any deals that **exceeded expectations and created value**, what were the main reasons?



Source: Bain M&A Practitioners 2023 Outlook Survey

Vague / Weak Thesis Examples

“Allow us to cross-sell to each other’s customers”

“Combine the best of two great companies”

“The synergies of our two companies make us a perfect fit”

“Make us the market leader”

“If you don’t buy it, your competitors will”

“The best offense is a good defense”

“Strategic reasons”

“It was for sale”

Review of Regulatory Trends & M&A

Review of Regulatory Trends:
Merger Control Process

HSR Filing Requirement Basics

Size-of-Person Test



- Applies to the “ultimate parent entity” (UPE)
- Total assets worldwide or annual revenues, if engaged in manufacturing

Size-of-Transaction Test



- Includes securities held and assets recently acquired; debt assumed in an asset acquisition; may reach IP licenses, executive compensation
- If > \$478.0m, reportable regardless of size-of-person test

Transaction Size Determines Filing Fee: Ranges from \$30,000 - \$2,335,000

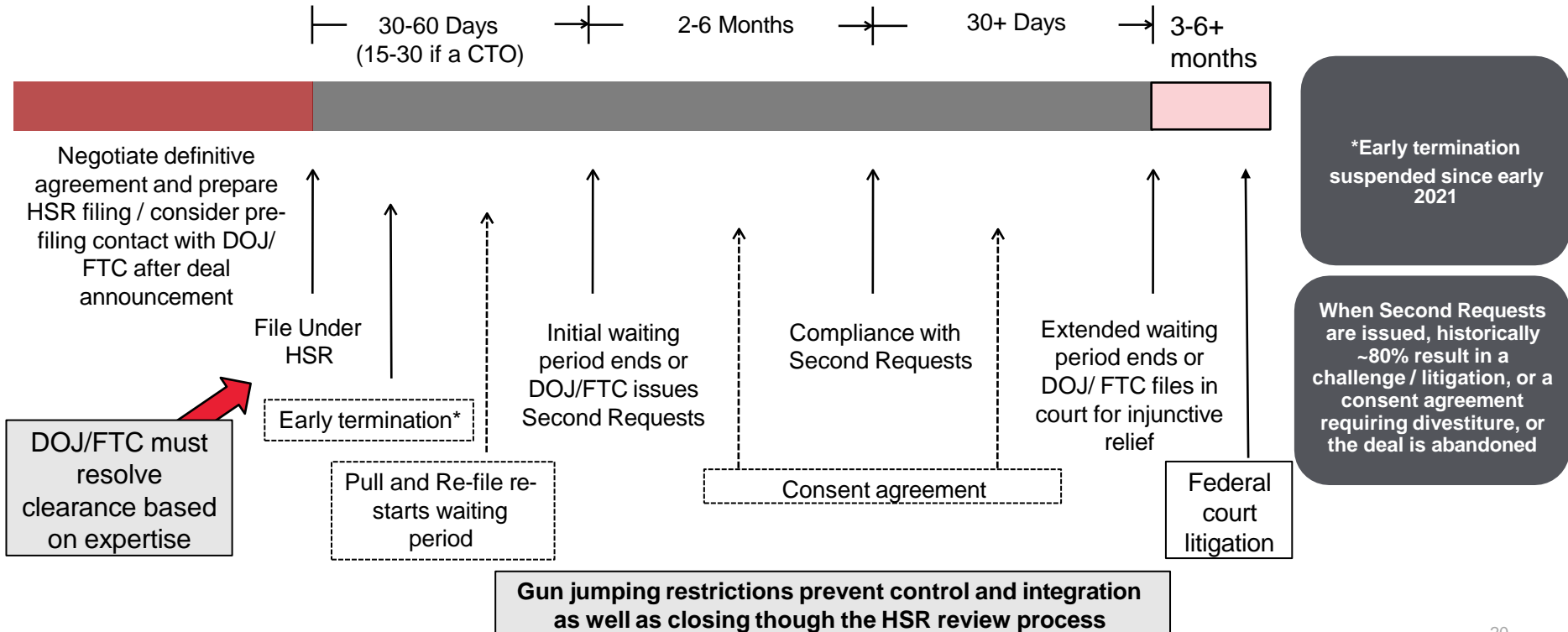
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HSR Can Apply Outside of Traditional M&A

- HSR can apply to corporate activities, when thresholds exceeded, not just M&A, including:
 - joint ventures
 - IP licenses
 - minority investments (financings, secondaries, etc.)
 - executive / board compensation
- Even if an acquisition meets thresholds, exemptions may apply (e.g., acquisitions “solely for the purpose of investment,” acquisitions of a foreign issuer)



HSR and Merger Review Timeline



Large Transactions More Frequently Attract Second Requests

Second Requests Issued by Transaction Size

FY2021

Transaction Range	HSR Transactions	Second Request Investigations	% of Second Requests	% of Transactions
\$50-200 million	1019	8	12.3%	0.79%
\$200-300 million	373	4	6.2%	1.07%
\$300-500 million	458	8	12.3%	1.75%
\$500 million - \$1 billion	985	18	27.7%	1.83%
Over \$1 billion	578	27	41.5%	4.67%
All Transactions	3,413	65	100.0%	1.90%

Second Requests have historically been issued for ~2-3% of transactions, but ~5% for deals valued above \$1 billion

Second Request = burdensome subpoena for data/documents

- ▶ 40+ topics, including business plans, competition, and the transaction
- ▶ Includes all documents, including emails, texts, notes and vm's from on average 26 custodians
- ▶ Typically 2-4 months to respond
- ▶ Depositions of executives, meetings with DOJ/FTC require senior management attention
- ▶ DOJ/FTC will also contact customers, competitors, suppliers, others in industry

Ex-U.S. Competition Filings



120+ countries have antitrust laws, many with merger control laws

- Canada, EU + member states, UK, Mexico, BRIC countries
- Most “active” regulators in EU, UK, China, and Australia
- Many smaller jurisdictions have competition filing requirements, e.g., Barbados, Jordan, Malta, Saudi Arabia
- Some, e.g., UK are “voluntary” but “briefing paper” advisable if certain thresholds met

Requirements vary widely

- Approval required, waiting period, post-consummation filing
- Thresholds based on sales, assets, and market shares, on local or global operations, value of transaction
- Timing for filing, length of review, potential to extend
- Penalties for failure to file, sometimes criminal
- Detail required in notification, generally one filing unlike U.S.

There is often close coordination between U.S. enforcers and competition authorities around the world

Review of Regulatory Trends:
Antitrust Risk & Negotiating the Deal

Buy-Side and Sell-Side Perspectives

What does the seller want?

- Value – certainty on price
- No orphans – certainty on deal perimeter
- No delay – certainty on timing

What should the seller do?

- Understand buyer/bidders' antitrust issues early
- Push for certainty on filings – mandatory and suspensory only
- Pressure on buyer to file notifications quickly
- Contract for antitrust risk-shifting protection (see next slide)

What does the buyer want?

- Value – a 'good deal'
- No 'lost causes' – certainty on deal perimeter
- Pre-closing integration planning

What should the buyer do?

- Upfront antitrust analysis – engage with seller
- Present a clear path to closing
- Understand risk profile and tolerance threshold (also rival bidders)
- Be in position to start merger control quickly
- Be prepared to allocate antitrust risks when appropriate

Antitrust Considerations During Negotiations

Antitrust considerations can be critical on both buy and sell side:

- Timing to submit HSR or other filings
- Control of HSR process or strategy
- Efforts required to obtain HSR / ex-US clearance
- Divestiture requirements or limitations
- “Hell or high water” provisions
- Obligation to reimburse legal fees/expenses
- Obligations to litigate
- Time before termination provisions
- Break-up & reverse break-up fees
- Ticking fees
- Conditions to close (US + ex-US consents, “threatened” litigation or ongoing investigation)
- Efforts required to develop asset

Ancillary provisions can implicate antitrust

- Non-compete agreements
- Scope of exclusivity
- Interim operating covenants

In deals that raise antitrust risk, these provisions are often the most contentious part of negotiations; engage with us early to assess risk and develop strategy to protect the client



Strategic Antitrust Considerations: Risk Allocation

- If a potential transaction raises antitrust issues, risk-allocation critical:
 - **Identifying condition precedent jurisdictions** → where merger control filings/approvals are required as a condition to close; sellers typically want certainty as to requirements
 - **Pending investigation or litigation vs closing prohibited by injunction** → sellers more likely to insist on actual prohibition on closing
 - **“Hell or high water”** → meaning not always well defined; if intent is unqualified remedy obligation, remains subject to DOJ/FTC approval; buyers often reluctant to agree to do “whatever is required”
 - **Divestiture commitments** → commit buyer to take specific steps (e.g., divest overlap, license technology), but remains subject to finding divestiture buyer that DOJ/FTC concludes will preserve competition, and parties often don’t want to provide the government with a roadmap, agree to divestiture if no MAE or up to specified sales or profits
 - **Reverse Termination Fee** → historically 4-7% of deal price (but seeing increased trend); to both (a) incent buyer to take steps to get approval (e.g., divestiture), and (b) compensate seller for harm if deal is not consummated
 - **Ticking Fee** → increase purchase price or reverse termination fee with delayed closing / termination of agreement

Strategic Antitrust Considerations: Timing & Process

- Process considerations on timing, fees, and costs also important:
 - **Filing Timing** → obligations to file HSR and ex-U.S. filings (e.g., parties to cause HSR filing to be made within 10 business days of signing), usually longer period required for ex-U.S. filings
 - **Outside Date** → end date + extension(s) if only regulatory conditions outstanding
 - **Fees and Costs** → may agree to shift or split filing fees or fees associated with a lengthy regulatory review
 - **Other** →
 - Cooperation / control of antitrust process
 - Restrictions during pendency of proposed transaction on other acquisitions / conduct that could raise antitrust risk
 - Ancillary provisions can implicate antitrust such as interim operating covenants, non- competes, and exclusivity provisions

Prepping for Extended HSR Review Timelines

- In current environment, increasingly common for Cooley sell-side clients to have capital needs in the event of a 1+ year review
- Interim financing / credit facility from Buyer to Seller is one way to solve issue
- Potential complexities in private M&A structured on a cash free and debt free basis

From the commercial perspective:

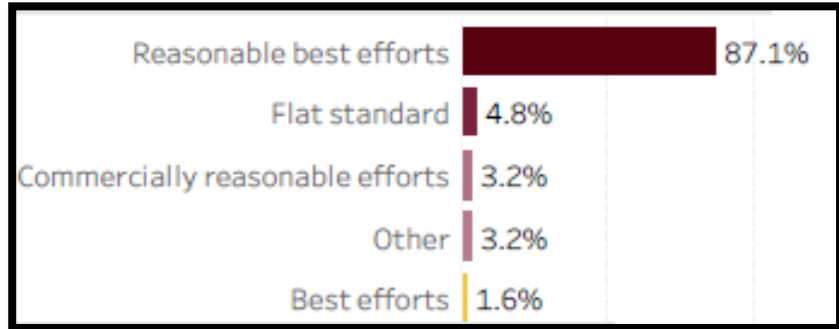
- Critical to ensure sufficient funding
- Consider impact on business of announcement (e.g., customer loss)
- Consider covenants based on other financial arrangements

From the antitrust perspective:

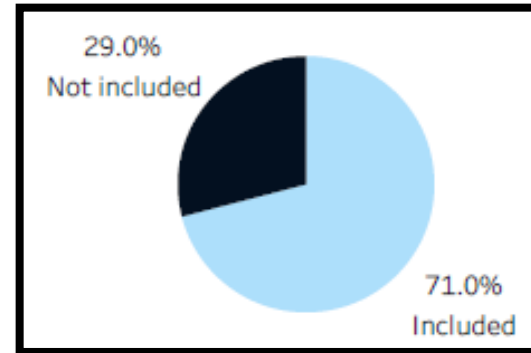
- Cannot confer Buyer with control over or “beneficial ownership” in target
- Must be passive – e.g., no rights to control or influence day-to-day operations
- Should be made with expectation of repayment; preferably unsecured

Antitrust Deal Term Trends – Antitrust Covenants

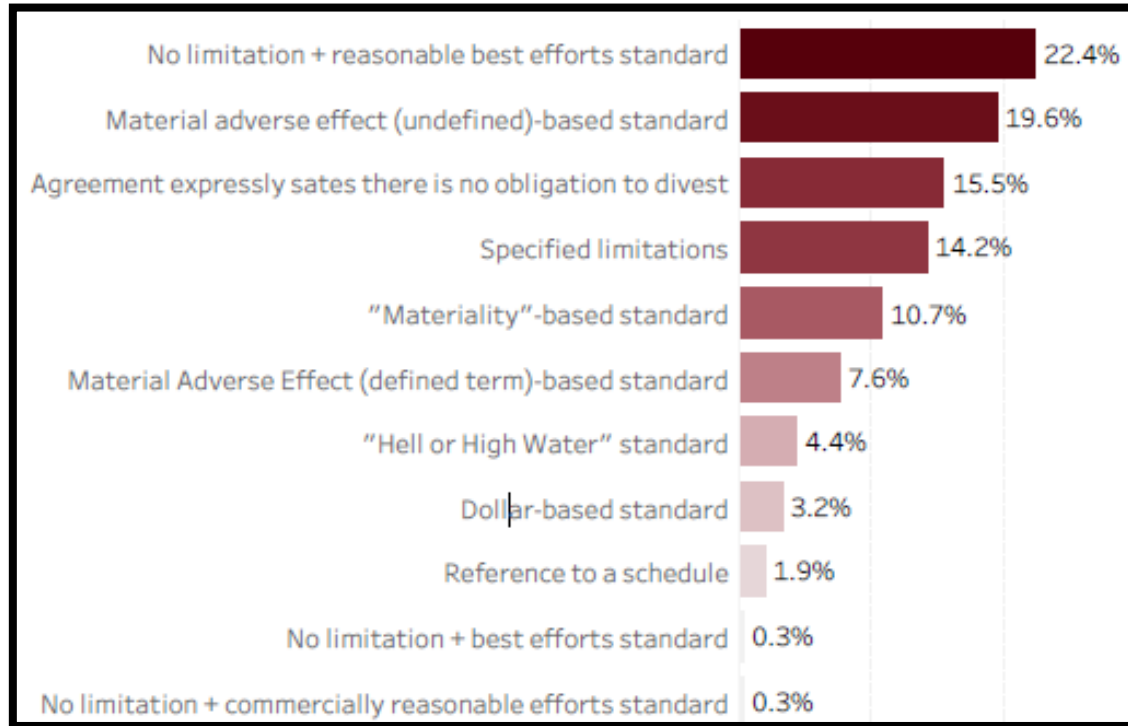
- *General Efforts Covenant*



- *Express Requirement to Litigate*



Antitrust Deal Term Trends – Limitation on Efforts Requirements



Antitrust Deal Term Trends – Reverse Termination Fees

- **Slight increase in overall popularity** in last two years
- **Large deals:** Most common in deals valued at \$1 billion or more
- **Particularly popular in life sciences:** The arrangements are particularly popular in the life sciences—more than one-third of deals with antitrust breakup fees last year came from the sector

All Deals:

Announced	# Deals with Fee	% Total Deals with Fee
2019	16	10.3
2020	13	9.7
2021	31	14.9
2022	28	15.2
2023	32	17.6
2024	14	28.6

Deals > \$1B:

Announced	# Deals with Fee	% Total Deals with Fee
2019	11	14.3
2020	11	15.5
2021	27	22.0
2022	23	24.0
2023	27	29.7
2024	13	40.6

Antitrust Deal Term Trends – Reverse Termination Fees

- **Typical range:** Fees typically range 4–7% of the deal value and are part of a larger package of other antitrust risk-shifting provisions. They can also be tiered, with certain fees triggered under specified circumstances, but this structure is rare
- Fees (as a percentage of equity value) remain relatively consistent

Announced	Antitrust Termination Fee as % of Equity Value					
	Average	25th Percentile	Median	75th Percentile	Min	Max
2019	6.1	4.3	5.7	6.3	3.4	13.2
2020	4.3	3.3	4.0	5.6	0.8	8.0
2021	5.4	3.9	5.3	6.8	2.3	11.5
2022	6.5	4.0	6.2	8.0	2.6	13.3
2023	5.6	4.6	5.2	6.3	3.2	10.9
2024	5.3	4.3	5.1	5.9	3.1	9.2

Guide for Unsolicited Approach

Shareholder Activism Market Environment

2024 Q1 Recap

- 63 campaigns launched through Q1, down 19% versus the 78 launched y-o-y in 2023
- More dispersed activity among activists, with the top 10 busiest activists accounting for 33% of campaigns in Q1 2024 vs. 46% in 2023
- Board change has been the most common demand, appearing in 49% of campaigns
- M&A demands have appeared in 29% of campaigns YTD, well below last year's rate of 49%

Looking Ahead

- Continued softness in public market equity valuations, particularly for high-growth companies and “pandemic plays”, should continue to drive significant activism activity
- As M&A activity rebounds, “sell the company” and “scuttle the deal” campaigns should increase
- Mega-caps (e.g., Meta, Alphabet, Salesforce) are increasingly in activist crosshairs as campaigns seek to reign in costs and improve capital allocation policies
- Board/management change campaigns pose a heightened threat for companies unable to demonstrate they are prepared to adapt
- Proactive Board refreshment is advisable to combat “weak link” focused proxy contests facilitated by new universal proxy rules

Additional Key Trends in Activism

1

2023 Proxy Contests

- Globally, 229 campaigns launched in 2023, just under 2022 campaign levels, ushering in the most active two-year period on record
- Activists won 134 board seats globally in 2023, a 30% increase from 2022.
- As in past years, most of the activist-won board seats were gained at the settlement table rather than at the ballot box (98 in total). Only 17 proxy contests for US-listed companies went to a vote in 2023, with the company prevailing (no activist nominees elected) in eight contests and activists winning at least one seat in nine contests (with multiple activist candidates elected in six of those contests)

2

New Legal Development in Activist Landscape

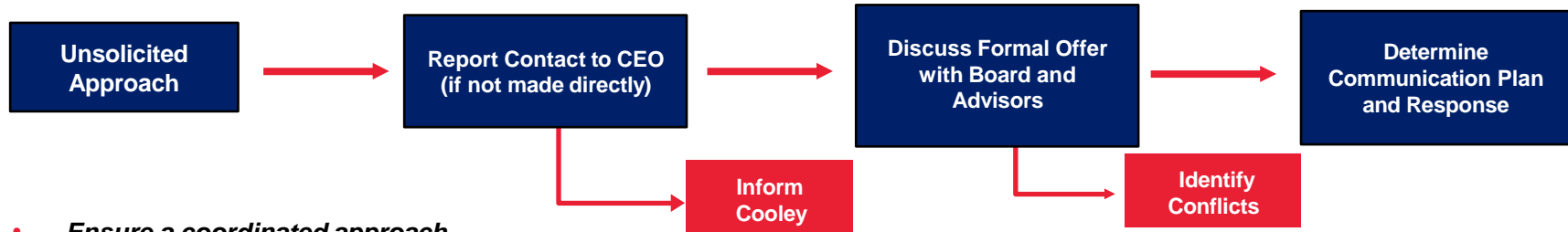
- The *Miller and Moelis* Delaware court cases have disrupted long-held practices around stockholder and settlement agreements. Activists including Elliott and Third Point have adjusted language in recent settlement agreements, subjecting the Board's recommendation to shareholders of a settlement-related Director nominee to the "good faith exercise" of the Board's fiduciary duty
- Section 122(18) of the General Corporation Law of the State of Delaware is expected to be enacted to resolve uncertainty caused by the *Moelis* decision, enabling shareholder agreements
- Companies and shareholders continue to litigate advanced notice deadline changes adopted in response to the UPC
- The SEC's long-awaited 13D/G rule amendments and climate change disclosure rules respectively went into effect and were adopted

3

Activist Target Profile

- Recent IPO and de-SPAC companies with underperforming share prices and strategies based on growth over profitability
- Large and mega cap tech companies seen as lacking cost discipline or failing drive sustained earnings growth
- **Note**, in each of these cases structural defenses such as classified boards and high-vote stock do not provide complete insulation from activist campaigns in the face of sustained and effective public pressure and/or share price underperformance

Key Actions Following a Credible Unsolicited Approach



- **Ensure a coordinated approach**
 - All directors and executives should inform the CEO of any approaches, inquiries and conversations involving a potential buyer where interest is expressed in potentially taking steps to evaluate an acquisition of the Company, even high-level discussions
- **Speak with one voice**
 - The CEO and the Board can then determine how best to respond, if at all – leverage is created by “speaking with one voice”
- **Assume any response, even if private, may be made public**
 - As a result, it is better to be in “listen-only” mode and only provide responses to important matters after careful consideration with management team and advisors to the extent possible
- **Review any formal offer with Board**
 - Identify potential board conflicts with potential buyer
 - Review proposal terms in detail
 - Obtain tactical advice from seasoned advisors – legal, financial, PR consultants, proxy solicitors, or others as appropriate
 - After review and discussion, the Board will direct next steps

Management Protocol and Script—Unexpected Unsolicited Proposal

Standard Protocol

1. Thank bidder for his/her interest.
2. Remain in “listen mode” and take careful notes on any proposals made by bidder.
3. Do not offer a response regarding the validity of the bidder’s proposals, or a timeline for any response.
4. Convey that you are unavailable to discuss the matter at this time, but confirm that you will share the proposal or the bidder’s interest.
5. If overture is not made to CEO, immediately notify the CEO.
6. CEO to promptly notify members of the board and Cooley of bidder’s interest and, if applicable, schedule a meeting to discuss the proposal or the bidder’s interest.

Illustrative Script

- **Illustrative Bidder Overture:**

- “I think there is a significant value creation opportunity for our respective stockholders and each company’s broader constituents. We are standing by and ready to engage with you to discuss our proposal, which we will confirm in writing. We look forward to hearing back from you as soon as possible.”

- **Illustrative Responses:**

- “Thank you for your interest. Our board takes its fiduciary responsibility seriously and if there is an offer presented, they would evaluate it.”
- “Thank you for your interest in the Company. I will need to share your proposal with our board and cannot provide any feedback or respond to your proposal at this time.”

Note: While the above script is intended to be a useful tool, each bidder interaction will be different, and may require a more bespoke approach, while still staying within the parameters of the “standard protocol.”

Board Role – Responding to Unsolicited Approaches

Duty of Care – Process is Important

- Focus on active, informed, deliberative decision-making process
- Establish adequate record of the decision-making process
- Directors must inform themselves of all material information reasonably available to them and act with due deliberation and requisite care in discharging their duties

Duty of Loyalty – Must Act in Good Faith

- Directors must act in good faith and with the reasonable belief that their actions are in the best interests of the Company and its stockholders
- Directors may not engage in self-dealing or act for a personal or non-corporate purpose
- Directors must timely disclose to the Board any personal interests in a transaction, such as:
 - Interests in, or relationships with, the possible buyer or any of its affiliates; and/or
 - Employment or change-in-control benefit discussions or arrangements
- Where directors consciously ignore their duties and act with indifference with respect to material issues facing the corporation, their conduct does not satisfy this good faith requirement

No Duty To Sell

There is no duty to sell the Company; however, it is important to demonstrate appropriate consideration of acquisition proposals

How a Court Will Review the Board's Response to Unsolicited Proposal

Unocal Review

- “Enhanced scrutiny” under *Unocal* applies to defensive conduct in response to takeover “threats”
 - Defense measure (1) must not be coercive or preclusive and (2) must fall within a range of reasonableness
- No duty to sell company even if premium bid made
- Board cannot be forced into *Revlon* (i.e., sale) mode if it determines bid is inadequate – even if majority of the outstanding voting power would accept the bid
- Vigorous takeover defense is legal, although effectiveness depends on structural defenses and company's credibility
- No need for special committee absent a conflict transaction (such as a management buyout or majority stockholder buyout)

Business Judgement Rule
Applies to most board actions taken in response to an unsolicited bid, including declining an invitation to engage in discussions or negotiations

What Happens if the Board Decides to Sell

Revlon Duties

- Applies only if *the board* decides to sell the Company for cash (or mostly cash)
 - Also applies when stockholders would end up stockholders of a controlled (as opposed to widely held) company
- *Revlon* requires that directors act reasonably to seek the transaction offering the best value reasonably available to stockholders
- *Revlon* does *not* require an auction of the Company to the highest bidder
- Best value may be determined by using various methods other than an auction or broad canvas
- In addition to price, there are a number of other bases on which board may reject bid:
 - Nature and timing of offer, including other strategic alternatives available to the Company
 - Risk of non-consummation (including regulatory concerns)
 - Quality of securities being offered (if not all-cash)

Key Takeaway

“Revlon” duties apply only if *the board* determines to abandon the Company’s long-term strategy and sell the Company for cash (or mostly cash) or to a controlled company

Deal Process – Board Involvement and Oversight

- **Identify and assess potential and actual conflicts**
 - Particular scrutiny by courts of conflicts involving dual-fiduciaries and constituent directors
 - If a majority of the board is conflicted, the “entire fairness” standard of review will apply in post-closing litigation (unless the transaction was approved by a majority of the disinterested stockholders)
- **Oversee the deal negotiations**
 - The Board should be informed of all material developments with respect to a buyer’s proposal (sometimes informally through management and other times more formally at a Board meeting)
 - While the Board will oversee the process, it’s also typical for the Board to delegate to management the responsibility of negotiating the terms of the proposal
- **The Board will retain authority over approving the entry into any transaction with a buyer**

Deal Process – Company Protocol

- Once due diligence begins in earnest, the amount of contact between the Company and the buyer will increase significantly. At this stage, it's not feasible to run all communications through the CEO
- Make the Company's financial advisor the main point of contact for any buyer, so that it can handle due diligence requests and logistics of meetings
- Discussions between the teams should be limited to due diligence matters. Management should discuss potential deal terms with any buyer if, and only to the extent, previously authorized by the Board
- Take good notes! If the Company executes a transaction with a buyer, it will need to describe significant interactions between the buyers and the Company that take place
- Confidentiality is key—employees must take care to maintain the confidentiality of the deal during the due diligence period. The Company should also be prepared to handle potential leaks
- Management should not discuss potential employment arrangements with any buyer until such time, if ever, that key deal terms have been negotiated and finalized (and there will be heightened attention to this by plaintiffs' attorneys)

Key Takeaways:

- Make financial advisor main point of contact
- Maintain confidentiality
- Keep a record of communications with potential buyers for future disclosure and potential litigation
- Key deal terms of the transaction must be negotiated and final before management negotiates any individual arrangements

Q&A