

Key insights and perspectives from DLA Piper's

M&A SUMMIT

TRANSACTING IN TIMES OF UNREST,
UNCERTAINTY, AND AN ELECTION

#1

Global M&A by deal
count for the last
fourteen years

Mergermarket, 2010-2023



Introduction

Welcome to the first edition of the DLA Piper M&A Summit Recap, a summary of the themes and topics discussed at our inaugural event held in New York on April 30, 2024. The summit brought together over 160 attendees to explore the state of the market and provide valuable insights on executing transactions in uncertain market conditions during an election year.

The Summit featured four panels, each focusing on a different aspect of the M&A landscape, including cyber risks, issues facing leveraged buyers in the current financing environment, shareholder activism, and current trends in public M&A. The event also featured a presentation on the antitrust merger review process and a conversation on the challenges and opportunities of transacting globally amid macropolitical events and US market conditions.

This publication aims to capture the key takeaways from each panel and conversation, as well as highlight the best practices and practical tips for dealmakers in the current environment. We hope that you will find this summary informative and useful, and that it will spark further dialogue and collaboration among the M&A community.

We would like to thank our DLA Piper contributors, panelists, and attendees for making the inaugural event a success. We are grateful for your participation, engagement, and feedback, and we look forward to seeing you at our next M&A Summit.



Understanding and mitigating current cyber risk in mergers and acquisitions

Cybersecurity incidents and other issues can **have a material impact on M&A transactions**, including resulting in purchase price adjustments and abandoned transactions. During this session panelists discussed how cybersecurity incidents affect M&A transactions and outlined practices for performing due diligence on data privacy and information security issues.

MODERATOR

Andy Serwin, Partner, DLA Piper

SPEAKERS

Kelly Harris, Managing Director
Global Head of Cyber Legal, UBS

Carmen Oveissi Field, Principal,
Cyber and Strategic Risk,
Deloitte

James Perry, Senior Director,
Consulting Services,
CrowdStrike Services

Samantha Vaughan, Chief
Privacy Officer, Verisk

Takeaways

- Cybersecurity incidents pose material risks in M&A transactions, including the slowing or halting of operations. They can also result in the theft of valuable data, including IP, which can undermine the value of a target.
- Companies are encouraged to pay attention to security incidents affecting their industry even if the company is not directly subject to the incident.
- A target's policies are important, but the target's practices are even more significant.
- When it comes to M&A transactions, companies are encouraged to involve individuals who know what questions to ask in order to identify cybersecurity issues and assess materiality.

Data privacy and cybersecurity are two different things.



Data privacy

is what a company does with what data it lawfully has about an individual.



Cybersecurity

is how a company protects itself from an attack on its data or infrastructure technology by a third party.



“Cyber is a resiliency problem, not a legal compliance problem.”

— Andy Serwin, Partner,
DLA Piper

How are leveraged buyers closing deals in the current financing environment?

Panelists discussed the current state of debt finance markets in the US, focusing on syndicated loan markets and availability of debt financing from private credit funds. They further explored how these factors **impact the ability of corporate borrowers to raise new debt financing** to help fund acquisitions of new businesses or refinancing existing debt that is maturing.

MODERATOR

James Kelly, Partner, DLA Piper

SPEAKERS

Dan Alster, Managing Director,
J. Wood Capital Advisors

Rob Callaghan, Associate
Director, Capital Markets,
Deerpath Capital

Michael Najjar, Managing
Partner, Cortec Group

Alan Rockwell, Partner,
DLA Piper

The speakers offered views from the perspective of lenders, borrowers, debt advisors and counsel, taking into account recent market activity and the current regulatory and macro-economic environment. They compared market trends between 2023 and Q1 2024 and looked ahead to what is in store for the remainder of 2024 and 2025.

Takeaways

- Last year, when the syndicated markets had the hardest year in a while, it gave private credit and direct lending a real opportunity to win market share.
- Stubborn inflation will likely continue to drive the decision regarding interest rate reduction.
- While high interest rates continue, lenders will likely regard certain sectors with cyclical risk and cyclical exposure more cautiously, and lenders will likely remain hesitant to overleverage a business susceptible to such risk/exposure. Companies that have a more predictable revenue stream will likely continue to demand attractive pricing.
- Spreads will likely tighten due to the amount of capital coming into private credit and senior debt markets. With abundant capital, there will be a need to deploy it, and spreads will likely start to tighten to the benefit of borrowers due to the increase in competition.
- With ever-increasing antitrust and regulatory efforts, in order for banks to underwrite a potentially long-term commitment, they are looking for more incentives to provide financing (eg, more flex, step-ups, ability to have ticking fees).



“Deal flow has picked up significantly in the first quarter of this year, on a year-over-year basis, and our outlook is that it will continue to pick up throughout the course of the year.”

— Michael Najjar, Managing Partner, Cortec Group

Activism in the current environment

Shareholder activism in M&A has become a pivotal force in shaping corporate strategies with **activists leveraging their equity stakes to influence M&A outcomes and unlock shareholder value**. In the current landscape activists are increasingly sophisticated, utilizing a variety of tactics ranging from public campaigns to proxy fights to affect both the negotiation and execution of M&A deals. This panel explored the evolving dynamics of shareholder activism in M&A, examining its impact on deal structures, corporate governance and market perceptions, as well as the implications for boards, management teams and investors.

MODERATOR

Sanjay Shirodkar, Partner,
DLA Piper

SPEAKERS

Paul Schulman, Senior
Managing Partner – M&A and
Activism Advisory, Sodali & Co

Greg Taxin, Managing Member,
Spotlight Advisors

Craig Wadler, Director, Moelis
Managing

Takeaways

- Deal opposition campaigns may be easier than ever to launch and often do not require a great outlay of resources or funds. Many of these campaigns involve “bumpitragage” where the activist is seeking a higher price per share.
- Activist campaigns and, in particular, campaigns opposing M&A transactions, may increase significantly. Increased activity in the small and mid-cap space may be expected.
- Companies that have undertaken a de-SPAC transaction are facing significant headwinds and are prime targets for activists.
- We will likely see an uptick in the number of going-private transactions, both with and without management’s support.
- Underperformance can lead to an activist campaign focused on CEO replacement or a push to sell all or part of the company. Sometimes the former is really aimed at the latter, and the settlements in these situations tend to follow a pattern.



“Every company is a potential target of shareholder activism, and every shareholder today is the potential wielder of these strategies and tactics.”

— Greg Taxin, Managing Member, Spotlight Advisors

Current trends in public M&A

MODERATOR

Jon Venick, Partner, DLA Piper

SPEAKERS

Denise Faltischek, Chief Strategy Officer and Head of International, Tilray Brands

Anton Sahazizian, Managing Director Global Head of Mergers & Acquisitions, Moelis

Stephanie Wang, Chief Legal Officer and Secretary, Progress Software

While global M&A activity has generally declined over the past two years when compared to historical levels, there has been elevated M&A activity in the US so far in 2024. With companies holding record levels of cash coupled with unsold portfolio companies acquired pre-2020, the trends indicate a potential resurgence for sponsor-related M&A activity in 2024.

However, market volatility and interest rate uncertainty continue to loom over the market. In addition – and arguably more now than ever before – public companies are facing tremendous uncertainty on a global scale. Among their concerns are the tensions of a coming election year and the exposure to various conflicts in Ukraine and

Eastern Europe. During this session, panelists expressed their views on the current outlook for public M&A and approaches to acquisitions in this volatile environment, while encouraging companies to consult experienced advisors in order to navigate the current market.

Takeaways



The uncertain global landscape is creating deal hesitancy among public companies.



Geopolitical concerns will likely remain a focus in financing and overall M&A activity.



Pressure to meet certain return on investment expectations on older sponsor acquisitions are leading to concessions on valuations, which will likely directly result in increased activity among strategics.



FDI and US antitrust regulatory regimes are expanding, which has directly resulted in an increase in transaction costs and adverse deal timing considerations.



Given the landscape of today's M&A activity, engaging counsel with a global reach may help minimize deal disruption and post-closing regulatory regime liability.

“Historical levels of surplus capital coupled with interest rate uncertainty, persistent geopolitical tensions and the U.S. presidential election, have created a market paralysis and “wait and see” approach never before witnessed in prior deal cycles.”

— Christopher Giordano,
Chair – U.S. M&A Practice,
Co-Chair – Global M&A Practice,
DLA Piper



Beyond the rhetoric:

What's really happening in antitrust merger review?

Under the Biden Administration, the Federal Trade Commission (FTC) and Department of Justice's Antitrust Division (DOJ) have introduced and proposed amendments to numerous antitrust policies and guidelines used to determine whether deals violate competition law. During this session, DLA Piper Partner Amanda Wait discussed the challenges the new policies pose to dealmaking and how a proactive antitrust strategy is key to getting deals done.

SPEAKER

Amanda Wait, Partner,
DLA Piper

Takeaways

On April 23, 2024, the FTC announced a rule banning worker noncompetes. The new rule extends beyond noncompete agreements and includes any policy, enforcement, or agreement that would have the effect of prohibiting any workers from working for a competitor. The rule applies to all companies with employees in the US, regardless of whether the company is based in the US.

How is M&A affected by the Noncompete Rule?

1. The rule contains an exception for noncompetes in connection with a bona fide sale of a business.
2. The rule is a prime example of the increased interest from the FTC and DOJ on labor and employment issues.
3. Companies considering M&A transactions should carefully consider the impact of the proposed deal on employees and proactively prepare to respond to antitrust agency questions on that topic in any potential merger review.



The 2023 Merger Guidelines, jointly published by the FTC and the DOJ, outlines for parties the potential theories of harm that the reviewing agency will consider in evaluating whether a transaction likely will result in anticompetitive effects.

These guidelines received its first major overhaul since 2010 in December 2023. The new guidelines highlight new theories of harm relating to broader competition concerns, including concerns about rollup strategies, labor markets, and industry consolidation.

The DOJ and FTC are particularly focused on the following transactions:

- So-called “killer” acquisitions
- Vertical integration
- Platform deals
- Roll-up strategies

- Acquisitions of minority interests
- Mergers impacting labor markets, and
- Transactions in the healthcare and technology industries

For transactions that meet certain size thresholds, parties must notify the transaction to the FTC and DOJ Antitrust Division on the Hart-Scott-Rodino Notification and Report Form. This report provides the FTC and DOJ Antitrust Division the opportunity to review a transaction for potential anticompetitive effects prior to the transaction closing.

The FTC and DOJ are undertaking the first comprehensive revision of the form and have proposed a draft new form that, if codified in the FTC regulations, would take transaction parties months to complete and have a major impact on deal timing.

“My key takeaway for today is: Don’t believe the rhetoric. Look at the numbers, look at the data, your deals can get done. It just takes some advanced planning. It takes being thoughtful. It takes being very careful about what you write in your documents. Early antitrust strategy is key.”

— Amanda Wait, Partner, DLA Piper



A conversation with

Doug Philippone

Doug Philippone, co-founder of Snowpoint Ventures and head of Global Defense at Palantir, discussed transacting globally amid issues and concerns arising from macropolitical events and the current state of the US markets.

SPEAKERS

Doug Philippone, Co-Founder & General Partner of Snowpoint Ventures and Head of Global Defense at Palantir Technologies

Richard Hans, Managing Partner, Verticals, DLA Piper

Takeaways

- Entrepreneurs should have a sell point. Entrepreneurs looking to work with the government are encouraged to have both a government and commercial use case. Products that both satisfy a government need and can also provide for the wider, greater good of society are those worthy of consideration and investment.
- Working with the government can be challenging due to constant change of administration, often making it essential to work with someone experienced in navigating these complexities.
- There is new government program at the Office of Strategic Capital (OSC) for venture-backed firms for which the government serves as a limited partner. The OSC issues government-backed loans to venture firms that invest in their 14 critical technology areas.
- Not all AI is functional AI. Functional AI companies should be able to articulate what they do and what problem they are attempting to solve.
- Among the greatest threats to the US, both economically and otherwise, is the risk and impact of violence and war arising from global instability. The cost of war is exponential, causing stress on departmental budgets. The US is encouraged to embrace large-scale reform and innovation, helping to improve upon existing systems and adoption of new technology, ultimately leading to impactful results.
- Life experience can help inform entrepreneurs who want to innovate and improve the country's safety.



“I believe our best engineers, our best scientists, our best computer programmers should work towards something that benefits society.”

— Doug Philippone

About us

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help companies with their legal needs around the world.

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