2018 GLOBAL TECHNOLOGY SUMMIT
AT THE INTERSECTION OF BUSINESS, LAW AND TECHNOLOGY

INORGANIC GROWTH:
Hot Topics in M&A: The Buyer’s Perspective
October 10, 2018
TechLaw

*This presentation is offered for informational purposes only, and the content should not be construed as legal advice on any matter.
Agenda

- Introduction
- M&A trends
- CFIUS / FIRRMA
- Hypothetic scenarios
- Takeaways
- Questions
1

Introduction
## Speakers

<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
<th>Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stephen Ballas</td>
<td>EVP, General Counsel and Secretary</td>
<td>Global Eagle</td>
</tr>
<tr>
<td>Dena Acevedo</td>
<td>Senior Counsel</td>
<td>Juniper Networks</td>
</tr>
<tr>
<td>Brandee Diamond</td>
<td>Partner</td>
<td>DLA Piper</td>
</tr>
<tr>
<td>Wei Chen</td>
<td>Associate General Counsel</td>
<td>Salesforce</td>
</tr>
<tr>
<td>Erin Rinn</td>
<td>Corporate Counsel</td>
<td>VMware, Inc.</td>
</tr>
<tr>
<td>Dan Vaughn</td>
<td>Associate General Counsel</td>
<td>Intel</td>
</tr>
<tr>
<td>Vanina Guerrero</td>
<td>Partner</td>
<td>DLA Piper</td>
</tr>
</tbody>
</table>
M&A trends – 2018

- Legal trends
  - Pro-sandbagging – DE law
    - Traditionally viewed as a pro-sandbagging jurisdiction
    - *Eagle Force Holdings v. Campbell (2018)* - footnote
  - Increase in auctions
  - Increase in busted deals
  - Use of R&W insurance policy (discussed in hypo)
  - CFIUS / FIRRMA and other regulatory matters
M&A trends – 2018 (Mergermarket report)

**Global**

<table>
<thead>
<tr>
<th>Value (US$bn)</th>
<th>Deal details</th>
<th>Target company</th>
<th>Target geography</th>
<th>Target sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>79.7</td>
<td>8-May-18</td>
<td>Takeda Pharmaceutical Company Limited</td>
<td>Republic of Ireland</td>
<td>Pharma, Medical &amp; Biotech</td>
</tr>
<tr>
<td>676</td>
<td>8-Mar-18</td>
<td>Cigna Corporation</td>
<td></td>
<td>USA</td>
</tr>
<tr>
<td>60.9</td>
<td>29-Apr-18</td>
<td>T-Mobile USA Inc</td>
<td>Sprint Corporation</td>
<td>USA</td>
</tr>
<tr>
<td>59.6</td>
<td>01-Aug-18</td>
<td>Energy Transfer Equity LP</td>
<td>Energy Transfer Partners LP (97.64% Stake)</td>
<td>USA</td>
</tr>
<tr>
<td>51.5</td>
<td>25-Apr-18</td>
<td>Comcast Corporation</td>
<td>Sky Plc</td>
<td>United Kingdom</td>
</tr>
</tbody>
</table>

**US$ 2.72tn**

Value of M&A in Q1-Q3 2018, 22.3% ahead of YTD 2017

**-35.4%**

Value decrease from Q2 2018 to Q3 2018

**32**

Number of megadeals (> US$ 10bn) announced this year, two more than the 2017 total
# M&A trends – 2018 (Mergermarket report)

**US$ 703.2bn**

Q3 2018 value, the lowest Q3 figure since 2013 (US$ 656.9bn)

<table>
<thead>
<tr>
<th>14.6%</th>
<th>2.4x</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industrials &amp; Chemicals (US$ 365bn) value increase compared to YTD 2017 (US$ 309.7bn)</td>
<td>Media M&amp;A (US$ 111.2bn) increase vs YTD 2017 (US$ 46.6bn)</td>
</tr>
</tbody>
</table>

**US$ 541.5bn**

Value of Energy, Mining & Utilities M&A, already 1.8% higher than the full-year 2017 value

**38.6%**

Cross-border share of global M&A, four percentage points lower than in YTD 2017

**30.6%**

Domestic M&A value (US$ 167bn) increase vs YTD 2017, reaching its highest YTD value on record
M&A trends – 2018 (Mergermarket report)
M&A trends – 2018 (Mergermarket report)

**US**

<table>
<thead>
<tr>
<th>Value (US$bn)</th>
<th>Deal details</th>
<th>Bidder company</th>
<th>Target company</th>
<th>Target geography</th>
<th>Target sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>876</td>
<td>8-Mar-18</td>
<td>Cigna Corporation</td>
<td>Express Scripts Holding Company</td>
<td>USA</td>
<td>Business Services</td>
</tr>
<tr>
<td>60.1</td>
<td>29-Apr-18</td>
<td>T-Mobile USA Inc</td>
<td>Sprint Corporation</td>
<td>USA</td>
<td>Telecom</td>
</tr>
<tr>
<td>59.6</td>
<td>1-Aug-18</td>
<td>Energy Transfer Equity LP</td>
<td>Energy Transfer Partners LP (97.64% Stake)</td>
<td>USA</td>
<td>Energy, Mining &amp; Utilities</td>
</tr>
<tr>
<td>31.2</td>
<td>30-Apr-18</td>
<td>Marathon Petroleum Corporation</td>
<td>Andeavor Corporation</td>
<td>USA</td>
<td>Industrials &amp; Chemicals</td>
</tr>
<tr>
<td>28.7</td>
<td>26-Mar-18</td>
<td>Brookfield Property Partners LP</td>
<td>General Growth Properties Inc (65.56% Stake)</td>
<td>USA</td>
<td>Real Estate</td>
</tr>
</tbody>
</table>

**US$ 1.1tn**

Second-highest Q1-Q3 value on Mergermarket record

- **25.7%**
- **4,100**

US value increase over Q1-Q3 2017 (US$ 910.4bn)

Second-highest Q1-Q3 deal count since 2017 (4,367)
M&A trends – 2018 (Mergermarket report)

US

- Q3 2018 marked the 10th anniversary of the start of the Great Recession, which left its mark on not only the business world but also on global society at large. In the decade since, the US saw the collapse of Lehman Brothers, bailed out other entities, cut interest rates to near-zero for more than seven years, and introduced the Dodd-Frank banking rules and quantitative easing, etc. Such structural efforts to prevent another global depression now face dismantling in the recovery era, while new pressures have emerged in the form of political and economic nationalism. With protectionism gaining a foothold, dealmakers appear stuck between the need to consolidate in an increasingly technological world and the uncertainty of making deals in an environment of trade wars and tariffs. For now, the need to consolidate has continued. US M&A reached its second-highest total by both deal value and count for the Q1-Q3 period on Mergermarket record with US$ 11bn and 4,100 transactions tallied. Average deal size increased 33.9% to US$ 279.1m in the year to date compared to US$ 206.8m in Q1-Q3 2017. Meanwhile, over the same period, deal count fell by 267 transactions.
- Q3 paid witness to several high-profile deals. After Singapore-based (now US-based) Broadcom’s bid for US semiconductors firm Qualcomm was blocked by the White House earlier this year, the former pursued an US$ 18bn deal with B2B software company CA Technologies in a move that left many perplexed in terms of strategy. Meanwhile, Japanese semiconductors firm Renesas announced that it was buying US-based Integrated Device Technology for US$ 7bn. Given Broadcom’s failed attempt to takeover Qualcomm, Renesas’ bid has some wondering how the Committee on Foreign Investment in the US (CFIUS) will view the deal, given that relations with Japan have been relatively smoother than those with China in recent years. In other deal announcements, Brookfield continued its investment streak with a US$ 5.5bn purchase of Forest City Realty Trust.
- Energy, Mining & Utilities (EMU) was the most valuable sector in the US, setting a record US$ 268bn as firms continued to consolidate in a rising oil price environment, and was further boosted by the sector’s largest deal on record. Energy Transfer Equity’s US$ 58.5bn bid for a 97.6% stake in Energy Transfer Partners, Q3 also saw several other sectors hitting record values, such as Business Services, home to Cigna’s defensive US$ 67.0bn bid for Express Scripts against Amazon’s oncroach on the pharmacy benefit management space. Real Estate emerged as a sector to watch, hitting a record US$ 74.1bn; reeled in, the Construction sector also broke a new value record with US$ 25.4bn. By deal count, Industrials & Chemicals set a new record with 717 transactions.
- Cross-border trends saw a shift this year, as inbound M&A fell from Canada and China, key bidder regions in recent years. Though the former was still the top acquirer of US companies in Q1-Q3 2018 with US$ 49.7bn, and with total values rising 15.5% over Q1-Q3 2017 (US$ 43bn), activity was down 52.9% from a peak of US$ 106.6bn in Q1-Q3 2016 as the US and Canada struggled to reach an agreement on NAFTA for most of the period. Inbound M&A from China followed a similar pattern, falling 64.7% to US$ 2.7bn this year compared to Q1-Q3 2017 (US$ 9.9bn) and 92.2% from a peak of US$ 34.4bn in Q1-Q3 2016. Meanwhile, since the Brexit referendum in 2016, US investment into the UK has steadily risen, hitting a record high of US$ 99.2bn, with Q1-Q3 2018 already surpassing all previous full years. However, 51.9% of this was due to Comcast’s US$ 51.5bn acquisition of Sky following a battle with Disney/Fox.

“Though the economy remains relatively strong at the moment, uncertainty over global trade agreements and tariffs, particularly with China, have left dealmakers wondering if it would be better to wait or to strike deals now while one can.”

Elizabeth Lim, Research Editor (Americas)
M&A trends – 2018 (*Mergermarket* report)

<table>
<thead>
<tr>
<th>42%</th>
<th>-19.5%</th>
<th>-54.7%</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>US share of Global M&amp;A in Q1-Q3 2018, up from 40.9% in Q1-Q3 2017</strong></td>
<td><strong>US inbound M&amp;A value decrease from Q1-Q3 2017 (US$ 247.8bn) to Q1-Q3 2018 (US$ 199.4bn)</strong></td>
<td><strong>Fall in Chinese investment into the US from Q1-Q3 2017 (US$ 6bn) to Q1-Q3 2018 (US$ 2.7bn)</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>789</th>
<th>14</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>US Tech M&amp;A deal count in Q1-Q3 2018, the second-largest on record</strong></td>
<td><strong>Number of megadeals (≥ US$ 10bn), three more than in Q1-Q3 2017</strong></td>
</tr>
</tbody>
</table>

**US$ 59.6bn**

**Value of Energy Transfer Equity/Energy Transfer Partners (97.64% stake) deal, the largest in the US for Q1-Q3 2018**
M&A trends – 2018 (Mergermarket report)
Other M&A trends – 2018

- **Technology convergence**
  - Technology acquisition is the new No. 1 driver of M&A pursuits - top driver for M&A activity in 2017 was the acquisition of technology assets
  - Key sectors: big data, blockchain, fintech technology - driven companies and e-commerce
Other M&A trends – 2018

- **Rise of inter-regional activity**: Asia-Pacific and Europe inorganic growth is driving strategic dialogue
  - Companies branching into different continents to expand their revenue base
  - Despite CFIUS concerns, the US market remains attractive to overseas investors
- **Investments in Latin America**: Energy, oil and gas and Industrials are driving the markets (*Mergermarket*)
- **Rise of public company merger activity**: strategic partnerships and industry consolidation
Other M&A trends – 2018

- Rise in private equity deals (global trend, especially US and APAC)
- Heightened regulatory scrutiny — national regulators being willing to prosecute anti-transparent business practices (e.g., UK FCA’s enforcement action against “closet trackers”) Sandbagging in M&A transactions: default rules in Delaware (pro-sandbagging) Cobalt Operating, LLC v. James Crystal Enters., LLC.
- M&A litigation moves from Delaware
  - As of October 2017, only 9 percent of the 108 lawsuits that had been brought to challenge public company mergers had been filed in Delaware
  - Trend following Corwin and Trulia
Other M&A trends – 2018

- **Rep and warranty insurance**
  - Protects the insured against unintentional and unknown breaches of a seller’s representations and warranties
  - Can extend or back-stock an indemnification package or serve as buyer’s sole source of recovery
  - Shifts potential liability to insurers for a fixed cost

- **Cybersecurity, data and privacy**
  - Increased Awareness due to data breaches and cyberattacks
  - Continued regulator/court focus on the ability to sell customer databases as an asset
  - FTC consent decree and court decisions on the automatic collection of data and the use of such data
  - Increased US focus on global privacy
CFIUS / FIRRMMA
CFIUS – introduction

- The Committee on Foreign Investment in the United States (CFIUS) is an inter-agency committee of the US government consisting of 9 cabinet-level Executive Branch agencies and offices, and various other non-voting offices with national security responsibilities.

- CFIUS has jurisdiction to evaluate covered transactions in order to determine the effect of such transactions on the national security of the United States. Based on this review, CFIUS advises the President of the United States on national security matters in connection with the foreign investment.

- US law authorizes the President to suspend, prohibit or unwind a covered transaction if, in the President's judgment, there is credible evidence that the foreign person exercising control over a US business might take action that threatens to impair US national security.
CFIUS – impact

- Investment/acquisition transactions involving the following industries have triggered a CFIUS review:
  - Defense contractors
  - Information and communications technology
  - Semiconductor manufacturers
  - Transportation
  - Infrastructure
  - Energy assets (including wind farms)
  - Biotechnology/health
  - Chemical facilities
  - Real estate
  - Companies that have access to personal data of US persons
The United States recently enacted the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) into law which strengthens CFIUS. Among other matters, FIRRMA:

- Expands the types of transactions that are subject to CFIUS’s jurisdiction.
- Contemplates enhanced US export controls (subject to new regulations that have yet to be issued) with respect to “critical technology” that will impact the CFIUS review.
- Extends the period of time that CFIUS may take with respect to reviewing an investment or acquisition deal within CFIUS jurisdiction.
- Requires the filing of mandatory declarations with CFIUS in certain circumstances (subject to new regulations that have yet to be issued).
- Instructs CFIUS to establish a process to identify relevant transactions even if the parties do not inform CFIUS.
- Allows CFIUS to suspend a transaction raising national security risks while that transaction is being reviewed/investigated by CFIUS.
- Increases funding for CFIUS.
- Permits CFIUS to issue regulations allowing CFIUS to charge parties filing fees which shall not exceed the lesser of 1% of the value of the transaction or $300,000 (adjusted for inflation).
CFIUS – covered transactions

- CFIUS has jurisdiction to review "covered transactions" to assess national security concerns.
  - "Covered transaction": A proposed or pending "transaction" with any "foreign person" which could result in "control" of a "US business" by a foreign person.
  - "Transaction": Broadly defined to include mergers, acquisitions, joint ventures, leases, and other investments.
  - "Foreign Person": A foreign national, foreign government, or foreign entity, including a partnership, corporation, trust, or other entity organized abroad.
  - "US Business": Any entity engaged in interstate commerce in the United States.
  - "Control": Defined broadly as the power—whether or not exercised—to directly or indirectly determine, direct, decide, or take, reach, or cause decisions regarding, important matters affecting a US business.
CFIUS — how does FIRRMA impact CFIUS’s jurisdiction?

- FIRRMA expands CFIUS’s jurisdiction (in the prior slide) by adding the following matters to the scope of **covered transactions**:
  - Certain types of real estate transactions
  - any “other investment” (discussed in the next slide) by a foreign person in any US business that is involved with critical infrastructure, critical technology, or sensitive personal data
  - any **change in a foreign investor’s existing rights** with respect to a U.S. business if that change could result in the foreign control of the US business or an “other investment” (again discussed next slide) and
  - any other transaction or agreement designed to **circumvent or evade** CFIUS
CFIUS - what is an “other investment” for purposes of FIRRMA?

- Under FIRRMA, “other investments” include an investment that affords a foreign person the following abilities with respect to a US business involved with critical infrastructure, critical technologies, or sensitive personal data of US citizens:
  - access to any material non-public technical information in the possession of the US business
  - membership or observer rights on the board of directors or equivalent governing body of the US business
  - the right to nominate an individual to a position on the board of directors or equivalent governing body of the US business or
  - any involvement, other than through voting of shares, in substantive decision making of the US business regarding critical infrastructure, critical technologies, or sensitive personal data of US citizens.
CFIUS – addressing concerns

- Assess whether a particular investment, acquisition, or other transaction could be a **covered transaction** subject to CFIUS review
- Non-US parties should conduct **CFIUS-specific due diligence** on the US business which will be the target of the investment or acquisition
- Depending on the results of the covered transaction analysis and CFIUS due diligence, the parties should assess whether to **voluntarily submit a joint notification** to CFIUS seeking its approval
  - Benefits and downsides
CFIUS – timeline

- **Pre-notice consultation**: Before a notice is filed, CFIUS recommends that parties consult or submit a draft notice to CFIUS before filing a voluntary notice.

- **Standard review**: After a voluntary notice is filed by the parties, CFIUS initiates a 45-day review to prepare a threat assessment and identify national security concerns. (Initially, this review period was 30 days, but FIRRMA increased it to 45 days)

- **Investigations**: If CFIUS identifies concerns during the initial review period, it may launch a 45-day investigation. This investigation is mandatory if the investor is owned by a foreign government (incl. sovereign wealth funds)
  - FIRRMA allows CFIUS to extend the above investigation period by 15 days in extraordinary circumstances

- **Presidential Action**: After CFIUS’s investigation is complete, the President will approve, disapprove, or approve with conditions the transaction within 15 days

- In practice, CFIUS has ways to extend its review period
4 Hypothetical Scenarios
Hypothetical scenario #1 – the buyer’s perspective

- Dealmakers across all industries are looking to secure US tech assets in order to keep up with the technological changes disrupting their industries
- Data is at a premium and it’s a sellers market
- Cutting-edge technology and data privacy regulations, which define what a business can and can’t do with its data, have changed the M&A landscape and how buyer’s approach deals
- US strategic buyer, headquartered in Silicon Valley, comes into an auction for a tech/data driven M&A and is competing with PE buyers
- Target stockholders are not willing to bear indemnification risks and request that the Buyer procure R&W insurance
- Target further asks for a release from all post-closing indemnification obligations
- How do you:
  - Make yourself the most attractive buyer to the target?
  - Approach due diligence given GDPR?
  - Manage timing and transactions costs while you are competing for the target and are unsure of the outcome?
  - Approach indemnities/liability?
Hypothetical scenario #2 – structure

- Buyer, a Delaware corp. headquartered in Silicon Valley, is a leading global provider of telecommunications equipment and trades on the NYSE.
- Buyer is a US government contractor.
- Buyer plans to acquire the target group (also a leading provider of telecommunication equipment) that is a private VC-backed Delaware corp. headquartered in Silicon Valley and has operations in the US, Europe and China. Target does not have entities in every jurisdiction in which it operates.
- Buyer cannot decide whether to purchase stock or assets of target and how to structure the deal (in cash or in stock).
Hypothetical scenario #2 – key issues

**Structure**
- Transaction structure: stock deal vs asset deal
- Foreign entities structure (subsidiary, sister co., branch, etc.)
- Financing of the transaction (currency, risks, cash availability)
- Applicability of WARN Act or similar non-US laws
- Deferred or contingent consideration

**Approvals**
- Foreign investment control / governmental approval
- Antitrust/competition authorities (EU, MOFCOM, national regulation, etc.)
- Registration/license to do business in a foreign country

**Diligence**
Hypothetical scenario #2 – CFIUS / 100% acquisition

- Buyer is a US-based fund, with Chinese LPs
- Buyer wishes to acquire a US-based medical device target
- Buyer is also exploring forming a syndicate with one of its Chinese LPs for liquidity
- Buyer is concerned about CFIUS approval process
Hypothetical scenario #2 – key issues

- **CFIUS approval**
  - Is the Buyer considered a “foreign person”?  
  - Is the transaction a “covered transaction”? FIRRMA expanded scope!  
  - Is med dev a targeted industry? 
  - Filing – mandatory? voluntary? 
  - How does the CFIUS timeline affect the transaction timeline?  
  - China vs. other foreign buyers – is there a difference?

- **Other Government approvals**
  - China MOFCOM / SAFE approval to wire money outside of China – is that a concern?  
  - Is the target company subject to other regulatory frameworks, eg, the Nuclear Regulatory Commission?
Hypothetical scenario #3 – CFIUS / minority investment

- Investor is a Korea-based fund
- A substantial investment of investor is in China
- Investor is looking into making a minority investment in a US-based AI company
- Let’s assume that the transaction is a covered transaction
Hypothetical scenario #3 – key issues

- **Investor seen as connected to China?**
  - Even if the fund is based in Korea and has no investors from China, it may still be seen as connected to China based on its investment portfolio

- **Assuming CFIUS raises concerns, how can we address these concerns?**
  - Reducing voting interest to 10% or less while CIFIUS considers notice
  - Ensuring that US persons are board members of the Company
  - Creating a US person-controlled security “ring fence”
  - Restricting non-US persons from accessing sensitive facilities
  - Ensuring that the company’s products and technology are subjected to formal export control classification
  - Effective export control and sanctions compliance program
  - Implement an effective cybersecurity plan (especially, sensitive data)
Takeaways
Takeaways

- GDPR – how it is impacting due diligence and deals
- CFIUS – start considering implications at the outset
- Regulatory challenges for trade between the US, China and Europe
- R&W insurance policy as a bargaining chip
- Busted deal – considerations when thinking of restarting
- M&A values are soaring in the US market
- Data privacy and technology – importance on valuation
- New regulatory-friendly deal structures
- Management of cybersecurity and regulatory risks
Questions?