

2022

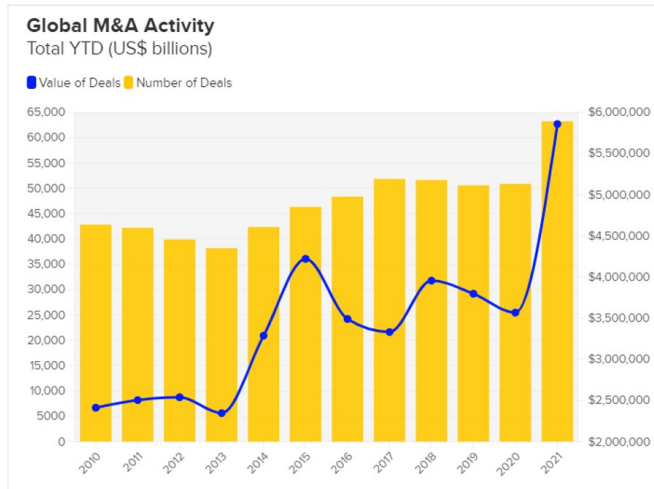
M&A REPORTER: Q1



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2022 M&A Activity

M&A in the beginning of 2022 has remained strong following a record year of dealmaking in 2021. Strategic and financial buyers have continued to pursue transactions across numerous industries.



Source: Refinitiv

Looking forward, factors likely to affect the M&A market through the remainder of 2022 include:

- The war in Ukraine, including broad effects on financial markets and company-specific issues that may result from sanctions or Russian touch points in their businesses.
- Macroeconomic conditions, including inflation and consumer confidence, as well as the potential for a resurgence in COVID-19 cases.
- Ongoing regulatory scrutiny from antitrust enforcers under the Biden Administration as well as slower deal reviews.
- Rising interest rates and recent stock market volatility.
- ESG factors, which continue to evolve in M&A due diligence and strategy.
- Availability of private equity “dry powder” and the corresponding need to invest capital combined with increased competition among financial sponsors for “hot assets.”
- Cash on balance sheets, whether accumulated from earnings or through financings, will provide currency for many strategic buyers.
- Technology and energy deals will continue to drive M&A. This includes transactions driven by energy transition

and industrial transformation as well as remote-working technologies to deal with the “new normal.” “Big tech,” however, will continue to face regulatory headwinds domestically and abroad.

- SPACs, which drove IPOs in 2020 and M&A in 2021, continue to have significant capital to be deployed in acquisitions, but their ability to pursue deals may be shaped by increasing judicial, regulatory, and investor scrutiny.
- Shareholder activism, which will prompt some M&A activity but may also involve challenges to announced deals.

From a legal perspective, due diligence will continue to focus on privacy/cyber risks and #MeToo issues along with traditional areas of review. Representation and warranty insurance should continue to permeate middle-market transactions. Of note, we saw the transaction insurance market tighten at the end of 2021. We will probably continue to see strategic bidders resist structuring many acquisitions as tender offers due to the risk of a prolonged antitrust review, which typically means a one-step merger agreement more desirable to the buyer.

Lastly, we note that the D&O insurance market remains tight with a significant rise in premiums compared to prior years. Delaware recently amended its statutes to allow corporations to self-insure D&O risks, although this will likely be appealing only to very large companies.

INSIGHT

SEC Proposes Cybersecurity Rules for Public Companies

March 11, 2022



Is Delaware About to Flex on SPACs?

by Steve Haas

The Delaware Court of Chancery recently denied a motion to stay a lawsuit challenging a de-SPAC transaction where the defendants asked the court to wait for the outcome in a related federal securities action. Although the decision to allow state law claims to proceed alongside a related federal action is not itself extraordinary, the court's commentary signals the Delaware judiciary's desire to weigh in on SPACs. Among the factors negating a stay, according to the court, were the "emerging" and "novel issues of Delaware law" implicated by SPAC transactions.

In *In re Lordstown Motors Corp. S'holders Litig.*, C.A. No. 2021-1066-LWW (Del. Ch. Mar. 7, 2022), the state law plaintiffs purportedly represent the SPAC stockholders who did not exercise their redemption rights in the de-SPAC transaction. They alleged injury from inadequate disclosures and conflicts of interest driving the transaction. In contrast, the federal securities action involves a broader class of securities holders spanning before and after the de-SPAC transaction and alleging that the company artificially inflated its stock price through misleading disclosures about the acquired company's electric vehicle business. While acknowledging some overlap, the court held that the actions involved different plaintiffs, defendants, and remedies. But more importantly, the court focused on Delaware's need to address SPACs, stating that "[t]his court's essential role of

providing guidance in developing areas of our law would be impaired if the court were to denude its jurisdiction because a federal securities action resting on similar facts was filed first."

Although the SPAC boom started in earnest in 2020 with a record number of de-SPACs in 2021, only one substantive ruling has been rendered by a Delaware court, which came in January 2022 (see *In re MultiPlan S'holders Litig.*, 2022 WL 24060 (Del. Ch. Jan. 3, 2022)). Since the SPAC boom, numerous legal issues have been raised with respect to SPACs, including allegations relating to the integrity of projections and other disclosures, sponsor conflicts of interest, director independence and compensation, and the availability of a stockholder ratification defense in de-SPAC transactions. Several academics and a former SEC official have also voiced various concerns. The plaintiffs' bar has also become increasingly focused on SPACs.

Thus, many observers have been surprised that Delaware has not offered more definitive guidance to SPACs. That is why Vice Chancellor Will's opinion in *Lordstown* is notable – indicating that "Delaware has a substantial interest in addressing the issues presented" and that the "court's interest in resolving corporate governance issues under Delaware law prevails over considerations of comity and practicality."



2021 Retail M&A Year in Review

by Steve Patterson and Austin Maloney

2021 represented progress in a return to “normal” after a bumpy year for retailers in 2020. Increased consumer spending in the US retail sector dovetailed with a flurry of M&A activity in the sector and the broader marketplace. Dealmakers, continuing the momentum of the second half of 2020, moved at a record pace in 2021. Global M&A activity totaled \$4.4 trillion in the first three quarters of 2021. This torrid pace represented close to twice the amount of deal volume in the first three quarters of 2020 (\$2.3 trillion) and the strongest M&A market by volume since recordkeeping began in 1980.¹

Unlike 2020 when the uncertainty resulting from the onset of the pandemic slowed deal volume across the board in the first half of the year, M&A markets were undeterred by sporadic shutdowns and the emergence of new COVID-19 variants in 2021. The strong M&A volume was driven by an increase in average deal value (\$83 million) and the continued increase of private equity activity. Deals worth greater than \$5 billion also significantly increased, with 99 deals valued more than \$5 billion reported as of November 15, 2021, compared with only 54 deals of comparable size during all of 2020.²

In the retail sector, M&A activity was driven by private equity investors, shifting consumer preferences due to more time spent at home and a growing preference for health and sustainability-focused products. According to a report published by KPMG, through Q3 2021, there were 469 M&A deals in the consumer and retail space involving private equity. While strategic buyers still represent a larger share of the consumer and retail M&A market, private equity deal-making increased by nearly 45% in the space as compared with the first three quarters of 2020.³

The acquisition of Stamps.com for approximately \$6.6 billion by Thoma Bravo, a US-based private equity firm, was a high-profile example of private equity acquirers finding value in legacy e-commerce brands. The deal closed in October 2021.⁴

1 <https://www.spglobal.com/marketintelligence/en/news-insights/blog/global-ma-infographic-q3-2021>

2 <https://www.refinitiv.com/perspectives/market-insights/global-ma-soars-as-acquirers-make-up-for-lost-time/>

3 <https://advisory.kpmg.us/articles/2021/consumer-retail-ma-trends-q3-21.html>

4 <https://www.thomabravo.com/press-releases/thoma-bravo-completes-acquisition-of-stamps.com>



Despite the increasing focus on e-commerce from strategic and private equity investors, brick-and-mortar retailers were not left out of the deal-making frenzy in 2021. One of the largest international M&A deals in 2021 was the acquisition of UK-based grocer Morrisons, by Clayton, Dubilier & Rice, a US-based private equity firm.⁵ Another legacy, traditional retail brand, Michaels, the arts and crafts retailer, was acquired by Apollo Global Management in a deal worth approximately US \$3.3 billion. Apollo’s acquisition took Michaels private at a 47% premium per share against its stock price prior to the deal’s announcement.⁶

Looking Ahead to 2022

Despite a record year of M&A in 2021, the year ahead may prove to be just as active. Aggressive valuations, low interest rates and a surplus of dry powder at private equity firms provide reason to believe that 2022 will come close to matching, or exceeding, 2021 in M&A activity. 80% of executives surveyed by KPMG said they expect target

5 <https://www.nasdaq.com/articles/cdr-wins-auction-to-take-over-wm-morrison-supermarkets-2021-10-04>

6 <https://www.nytimes.com/2021/03/03/business/michaels-will-be-acquired-by-a-private-equity-firm-in-a-5-billion-deal.html>

valuations to continue to rise in 2022. In the same survey, only 7% of executives felt that there would be a decrease in M&A activity in their industry sector in 2022.⁷

We expect private equity to continue to play a leading role in driving M&A volume both generally and in the retail space. As of November 2021, private equity funds had raised \$714 billion in committed capital in 2021 alone.⁸ These funds will likely continue the trend of go private deals by acquiring publicly traded, legacy brands or seek to bolster prior acquisitions with complementary add-on acquisitions.

E-commerce and digital platforms will also remain a significant area of focus for strategic and private equity acquirers in 2022. The prevalence of WFH employees and continued threats from COVID-19 variants have sustained and increased the attractiveness of retailers who have thrived in a digital, stay-at-home environment. Fitness companies, healthier food brands and pet supply businesses have all been newsmakers in the past year, and further interest in these sectors is to be expected.

Despite minor headwinds such as potential interest rate rises and continued uncertainty around the pandemic's conclusion, we expect deal-making activity to remain strong in 2022, led by e-commerce and investors seeking to unlock value in legacy brands.

7 <https://advisory.kpmg.us/articles/2021/blowout-year-global-ma.html>

8 <https://www.fn.london.com/articles/private-equity-firms-714bn-in-dry-powder-set-to-surge-even-higher-in-2022-20211123>

Largest deal in 2021:
AT&T reached a definitive agreement to sell the company through an all-stock transaction to Discovery for \$43 billion on May 17, 2021

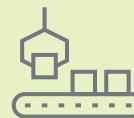
Top 5 Industries for number of M&A deals closed in Q4:



SUPPLY CHAIN TECHNOLOGY



TMT



MANUFACTURING



INDUSTRIALS



SaaS

INSIGHT

New HSR Thresholds for 2022

February 4, 2022



Status of the Federal Leasing Moratorium

By Jason Hill, Harve Truskett, and Garrett Korbitz

Within hours of the Biden Administration assuming office, the new Acting Secretary of the Department of the Interior (DOI) issued Secretary's Order (S.O.) 3395, which immediately removed the ability of all Offices and Bureaus in the Department to "issue any onshore or offshore fossil fuel authorization including, but not limited to, a lease, amendment to a lease, affirmative extension of a lease, contract, or other agreement, or permit to drill."¹ A week later, President Joe Biden signed Executive Order (E.O.) 14008, part of his plan to combat climate change.² Section 208 of E.O. 14008 established a moratorium on new oil and gas leasing of public lands and offshore waters pending the completion of a comprehensive review and reconsideration of federal oil and gas permitting and leasing practices.³ Below we discuss the cases contesting the validity of these actions and how the federal government and oil and gas industry have responded.

OCS and Onshore Lease Sales

The Bureau of Ocean Energy Management (BOEM) published the record of decision (ROD) for Lease Sale 257 on January 21, 2021.⁴ However, without any analysis, it rescinded the ROD on February 18, 2021 under the stated rationale of complying with E.O. 14008.⁵ In the wake of an August 9, 2021 motion for order to show cause and compel compliance with the preliminary injunction filed by the plaintiff states in *Louisiana v. Biden*,⁶ BOEM finally posted an updated ROD for Lease Sale 257 on August 31, 2021, and held Lease Sale 257⁷ on November 17, 2021, which elicited 317 bids from 33 companies and resulted in \$191.7 million in high bids.⁸

1 <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3395-signed.pdf>.

2 <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

3 To be completed by the Secretary of the Interior in consultation with other governmental departments.

4 86 Fed. Reg. 6365 (Jan. 21, 2021).

5 86 Fed. Reg. 10,132 (Feb. 18, 2021).

6 *Louisiana v. Biden*, 2:21-CV-00778, 2021 WL 2446010 (W.D. La. June 15, 2021). In addition, North Dakota, in a separate lawsuit, filed a Motion for Immediate Mandamus Relief seeking an order compelling compliance with the preliminary injunction issued in *Louisiana v. Biden*, requiring the DOI to hold previously cancelled onshore quarterly lease sales on August 23, 2021. *North Dakota v. DOI*, 1:21-cv-00148-DMT-CRH, District of North Dakota.

7 OCS sale totaling 80.8 million acres in the Gulf of Mexico.

8 <https://www.ogj.com/general-interest/government/article/14214188/firms-submit-191-million-in-high-bids-in-lease-sale-257>.

6 HuntonAK.com



Prior to the issuance of the underlying leases, the United States District Court in the District of Columbia, vacated Lease Sale 257 in *Friends of the Earth, et al. vs. Haaland, et al.*,⁹ ruling that BOEM and the DOI acted arbitrarily and capriciously in excluding the impact on foreign greenhouse gas emissions in its "No Action Alternative"¹⁰ analysis of the lease sale.

BOEM also cancelled Lease Sale 258 in February 2021. However, it appears to now be slowly moving forward in light of the injunction and motions to compel, and recently concluded the comment period as to the draft Environmental Impact Statement for Lease Sale 258.¹¹ The proposed sale includes 224 OCS blocks (approximately 1.09 million acres) in the Alaska OCS (Cook Inlet).

With respect to onshore leasing, the Bureau of Land Management (BLM) cancelled all lease sales scheduled for the first quarter of 2021 and halted environmental review on all planned lease sales within the first month of the Biden administration. Since the injunction in *Louisiana v. Biden*,

9 <https://int.nyt.com/data/documenttools/78-memorandum-opinion-1-27/b0903c94e57b0cb5/full.pdf>.

10 A part of the environmental impact analysis of the lease sale required under the National Environmental Policy Act (NEPA) in which BOEM considers what would happen if BOEM did not authorize leasing. See 43 C.F.R. § 46.30.

11 <https://www.boem.gov/oil-gas-energy/leasing/lease-sale-258>.

however, the BLM does appear to be moving forward with lease sales tentatively scheduled in the first quarter of 2022.¹²

Louisiana v. Biden

Thirteen states¹³ brought suit seeking a preliminary injunction against the federal leasing moratorium required by Section 208 of E.O. 14008. On June 15, 2021, the United States District Court for the Western District of Louisiana found the plaintiffs had established a likelihood of success on the merits, and enjoined the defendants from implementing the moratorium. The defendants filed an appeal on August 17, 2021 to the United States Court of Appeals for the Fifth Circuit, while neither seeking a stay of the injunction, nor immediately complying with it.¹⁴ As of January 2022, the parties have nearly completed merits briefing on the appeal.

Western Energy Alliance v. Biden

On January 27, 2021, the Western Energy Alliance challenged S.O. 3395, claiming the DOI's suspension of federal oil and gas leasing violated federal law. On March 24, 2021, the State of Wyoming filed a suit making similar claims. On June, 20, 2021, finding these cases involved common questions of law and fact, the US District Court for Wyoming consolidated these cases.¹⁵

On June 30, 2021, the court, in light of the nationwide preliminary injunction granted in *Louisiana v. Biden*, dismissed pending motions for preliminary injunction as moot. Noting the order does not provide all the relief requested, the court allowed the case to proceed on the merits as to the other claims. The parties completed merits briefing in October 2021, and are awaiting a ruling from the court.

Department of the Interior Report

In accordance with the portion of Section 208 of E.O. 14008 that was not subject to the preliminary injunction, the DOI, tasked with reviewing federal oil and gas leasing and permitting practices in E.O. 14008, published its report in November 2021.¹⁶ The report received criticism from all sides, and broadly set forth “recommended reforms aimed

¹² <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing>. See also <https://www.blm.gov/policy/im-2021-027>.

¹³ Alabama, Alaska, Arkansas, Georgia, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, Texas, Utah, and West Virginia.

¹⁴ Brief for Appellant, *Louisiana v. Biden*, No. 21-30505 (5th Cir. Nov. 16, 2021).

¹⁵ <https://www.lawweekcolorado.com/article/federal-court-fights-over-fossil-fuel-leasing-pause-near-crescendo/>.

¹⁶ <https://www.doi.gov/pressreleases/interior-department-report-finds-significant-shortcomings-oil-and-gas-leasing-programs>.

INSIGHT

DE Court Addresses Contractual Waiver of Stockholder Claims in a Sale

February 22, 2022



\$367.64 billion
in announced/in-progress
deals in Q4

INSIGHT

Advance Notice Bylaw Precludes Hostile Bidder's Slate of Director Nominees

February 23, 2022



at modernizing Federal land management.”¹⁷ These reforms would serve three main purposes:

1. Increasing the costs of producing oil and gas from federal leases, which would be accomplished by:
 - Raising: royalty rates, bonus bids,¹⁸ rental rates, and bonding requirements
 - Requiring greater financial assurances from offshore operators
 - Instituting “Fitness to Operate” standards for offshore operators
2. Prioritizing areas that are most suitable for development and ensure lessees and operators have the financial and technical capacity to comply with all applicable laws and regulations.
3. Imposing additional requirements for public engagement and Tribal consultation in leasing and permitting decisions.

¹⁷ Several of the recommendations echoed a report from the Government Accountability Office published on November 6, 2021, and publicly released on December 9, 2021. <https://www.gao.gov/assets/gao-22-103968.pdf>.

¹⁸ The price paid at a lease sale for an oil and gas lease.

INSIGHT

How To Negotiate Better D&O Coverage For Antitrust Matters

March 3, 2022



Build Back Better Bill

Although the DOI’s report made few substantive recommendations, several of these recommendations appeared in the Build Back Better Bill¹⁹ which the Senate recently voted down.²⁰ Despite the bill’s uncertain future, the Biden Administration may attempt to enact many of the recommendations in the bill through administrative action.²¹

What to Watch in 2022

In addition to monitoring how the courts rule on the merits of the pending cases discussed above, interested stakeholders will want to be aware of, and continue to participate in, several other actions being taken by the DOI this year.

BOEM continues to operate under the 2017-2022 National Program, which has three remaining lease sales scheduled through the end of 2022. While the last administration started the process with a request for information and draft proposed program, BOEM has been remarkably silent under the current administration on taking any further action with respect to putting out a new program that will govern the schedule for future OCS lease sales. As BOEM endeavors to comply with its statutory obligations in light of the injunction, interested parties should continue to watch for developments and participate in on this issue. As it becomes increasingly likely that BOEM will be unable to complete the process by the end of the year, it remains to be seen whether this will spark a new round of motions to compel under the injunction or new litigation.

The new administration has staked out an ambitious 2022 regulatory agenda, which includes rulemakings for high-pressure, high-temperature drilling offshore, and decommissioning standards for offshore infrastructure. In addition, given the emphasis on royalty rates in the November report on federal oil and gas leasing, parties should expect the administration to revisit the Office of Natural Resource Revenue’s Valuation Rule, which will likely result in continued uncertainty for an issue that has been in constant flux in recent years. Many of these rulemakings will likely result in new legal challenges that should be monitored.

¹⁹ <https://www.congress.gov/bill/117th-congress/house-bill/5376/text>.

²⁰ Some of the proposals include: raising royalty rates, raising bonus bids, raising rental rates, reducing lease term lengths, etc.

²¹ <https://www.eenews.net/articles/with-bill-sidelined-whats-next-for-oil-and-gas-overhaul/>.

Finally, interested parties should also continue to monitor changes to DOI policies that do not go through normal notice and comment rulemaking and that may slow down the process of approving oil and gas activities. For instance, the BLM has recently relied upon an Instruction Memorandum (IM) to impose additional, extra-legal public notice and comment procedures under the NEPA upon oil and gas activities.²² In addition, the BLM recently announced its changes in its approach to analyzing greenhouse gas emissions as part of the NEPA process, which has been standard practice for over a decade, by conducting analysis at a national level and also considering the social cost of greenhouse gases (GHGs) in the analysis, when it has long been the government’s position—under both the Obama and Trump administrations—that social costs of GHGs are not required.²³

22 E.g., <https://www.blm.gov/policy/im-2021-027>.

23 <https://www.blm.gov/press-release/bureau-land-management-announces-next-steps-new-analyses-upcoming-oil-and-gas-lease>.

*A version of this article appeared in *Offshore Magazine* on February 5, 2022.



INSIGHTS



New US Sanctions Target Russian Economy with Prohibitions on Imports, Exports, and New Investments

March 14, 2022



US Sanctions Target Russia’s Energy Sector and Ban Imports of Russian Oil, LNG, and Coal as Enforcement Efforts Increase and Agencies Consider Cryptocurrency and Other Digital Assets

March 9, 2022



US Sanctions Tighten on Russia’s Financial Sector and Technology Imports

March 1, 2022

Key M&A Contacts



Steven M. Haas

Partner and Co-Head of the M&A Team
Richmond and Washington, DC
shaas@HuntonAK.com
+1 804 788 7217 (Richmond)
+1 202 778 2220 (Washington, DC)



James A. Kennedy, II

Partner and Editor of the M&A Reporter
Richmond
jkennedy@HuntonAK.com
+1 804 788 7302



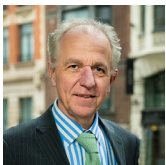
J. Steven Patterson

Partner and Co-Head of the M&A Team
Washington, DC
spatterson@HuntonAK.com
+1 202 419 2101



Fernando C. Alonso

Partner, Miami and New York
falonso@HuntonAK.com
+1 305 810 2570 (Miami)
+1 212 309 1075 (New York)



Hervé Cogels

Partner, Brussels
hcogels@HuntonAK.com
+32 2 643 58 26



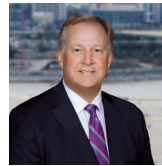
Kevin M. Georgerian

Partner, Richmond
kgeorgerian@HuntonAK.com
+1 804 787 8960



Michael P. Goldman

Partner, Richmond
mgoldman@HuntonAK.com
+1 804 788 8404



Douglas S. Granger

Partner, Richmond
dgranger@HuntonAK.com
+1 804 788 7274



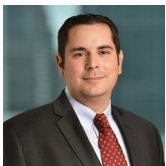
Fernando Margarit

Partner, Miami
fmargarit@HuntonAK.com
+1 305 810 2583



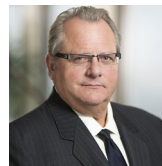
Eric R. Markus

Partner, Washington, DC
emarkus@HuntonAK.com
+1 202 662 2780



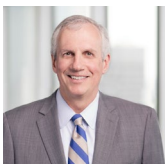
Uriel A. Mendieta

Partner, Miami
umendieta@HuntonAK.com
+1 305 536 2729



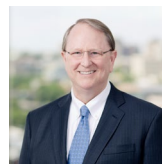
John T. O'Connor

Partner, New York
joconner@HuntonAK.com
+1 212 309 1137



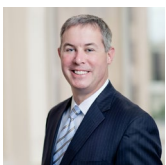
Daryl B. Robertson

Partner, Dallas
drobertson@HuntonAK.com
+1 214 468 3371



Gary E. Thompson

Partner, Richmond
gthompson@HuntonAK.com
+1 804 788 8787



Richard Warren

Partner, Richmond
rwarren@HuntonAK.com
+1 804 788 8428

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