

Spring M&A and Governance Forum 2020

Key Takeaways

Means to address the challenges encountered in some recent IPO processes are evolving in real time

After a discussion, led by *Wall Street Journal* reporters Maureen Farrell and Eliot Brown and Professor Frank Partnoy, of the possible gatekeeper lapses, corporate governance hubris and business model issues that contributed to WeWork's IPO debacle, we were treated to lessons in the strengths and weaknesses of direct listings vs. IPOs by direct listing pioneer and former Spotify and Netflix CFO Barry McCarthy, Freshfields partner Pamela Marcogliese, who was the issuer's counsel for the Pinterest IPO, and two other IPO veterans, Lyft general counsel Kristin Svercek and Morgan Stanley TMT managing director, Rizvan Dhalla. The panel focused on the pitfalls of the IPO pricing process compared to the direct listing process, solutions to the securities law issues around inclusion of a primary offering alongside a direct listing, the significance of different approaches to dual class structures and sustainability issues, managing and attracting impact investors, the outlook for future IPOs by public benefit corporations, how to communicate with employees during the lead-up to an IPO when emerging from a start-up culture and how to transition this approach to communications as the demands of being a publicly traded company set in, and a series of innovative ideas for reforming lock-ups.

Innovation, efficiency and standardization are all coming to M&A whether outside counsel like it or not

An all-star panel, consisting of Wei Chen of Salesforce, Sergio Letelier of Hewlett Packard Enterprise, Wendra Liang of ASG Technologies, Tait Svenson of Square, and Professor Steven Davidoff Solomon walked



through how they are streamlining and improving the effectiveness of due diligence and negotiation processes through reform of their internal legal organizations and new uses of AI, including a new initiative among several in-house legal departments to collaborate on a project to take the abilities of AI in diligence to a new level far beyond existing product offerings. The panel further outlined the ways that representation and warranty insurance can make M&A processes more efficient and concurrently pointed to those scenarios where insurance is not a good choice due to the scope of the exclusions and costs. The limited use of insurance in tech M&A seems certain to change, but not overnight. In addition, while differing in their views on some of the substance of the “open source” term sheet published by Atlassian last year (where Wendra had been the chief M&A lawyer until year-end), there was a consensus that the term sheet represented a constructive move toward standardization in private M&A, which is long overdue. The pendulum is swinging strongly away from over reliance on huge teams of outside lawyers recreating wheels.

CFIUS is now broader than ever in scope and authority, but we can expect movement toward quicker, more transparent and more openness to dialogue in some reviews

The “new” CFIUS regime was scheduled to enter into effect the week after the conference. Against this backdrop, we were honored to witness a rare “fireside chat” between Freshfields Partner Aimen Mir – who led all the CFIUS reviews of transactions for several years until he entered private practice in 2019 – and his successor at CFIUS, Thomas Feddo. First, the pair walked us through the nuances around the new definitions of “non-controlling non-passive” investments that are subject to review and the categories of sub-industries that would be subject to mandatory review and eligible for expedited review, respectively. Then they talked process. The key take-aways from the discussion were about how merger parties can help shape the government’s understandings of the transaction’s subject matter early in the process and how now that CFIUS has broader



jurisdiction and authority than ever before, Thomas and his team are going to find ways to be more transparent, exchange in more constructive dialogue, and be more timely in many instances – a departure from some of the opaqueness and delays that have characterized CFIUS reviews in the past. The toughest cases may still meet with limits on transparency and dialogue due to the existence of classified information and delays due to the complexity of the risks in question, but an increase in internal resources and more nuanced approaches and processes that separate the harder from the easier cases are going to permit CFIUS to become less difficult for some of us to navigate for a number of less controversial transactions. The pace and results of CFIUS reviews will, however, depend as well on whether the parties self-assess where their transaction may raise national security issues – keeping in mind that the tough spots may not even relate to assets or operations that the parties perceive as material to the transaction – and work proactively with CFIUS from the outset of the process, not just in response to red flags raised by CFIUS well into the process.

Shareholders are continuing to find new ways to pressure directors

The fireside chat between Vice Chancellor Kathaleen S. McCormick of Delaware Court of Chancery, Professor Jill Fisch and Freshfields litigation partner Meredith Kotler focused on the increased use by shareholders of Section 220 to obtain nonpublic materials from companies, how detailed minutes may deter courts from granting access beyond the minutes (i.e., to the personal electronic communications of directors and officers) in response to Section 220 demands, the changing landscape of what objectives the courts will find justify a Section 220 demand and how plaintiffs are learning to manage this landscape, how overly aggressive and simplistic defenses against these demands are ineffective, and the way these demands are being used to build cases that directors had significant conflicts or breached their duties of care in connection with mergers, proxy contests and adverse developments. Additional topics included the dangers



of directors' lacking independence in the increasingly dynamic corporate world where companies are frequently finding themselves to unexpectedly be competitors as a result of new technology, M&A or shifts in strategy; the new line of claims that determinations of director compensation are made by conflicted directors and therefore must be subject to entire fairness review (and the limited fee awards to plaintiffs' counsel in these cases); and the risks of personal liability that officers face in connection with merger litigation as a result of the unavailability under Delaware law of the exculpation available to directors.

The approach to cybersecurity and data privacy thus far is actually making the situation worse

Alex Stamos, the outspoken former chief security officer at Facebook, Professor Catherine Crump and Freshfields partner Giles Pratt spoke about global oversight of cybersecurity and data privacy by boards and management. Alex outlined the flaws of the GDPR regime, the misplaced focus on protecting personally identifiable information to the exclusion of other sensitive information, and the disincentives to reporting or promotion of learning across the corporate spectrum from data breaches. He explained how these problems have led us to a world where hackers are taking advantage of the same vulnerabilities again and again because nobody is learning the lessons of past breaches. He led the conference through proposals for reform that included a regime analogous to that which applies to airlines where any vulnerability is immediately reported and studied and lessons learned are disseminated widely

Antitrust review is now about a lot more than just market concentration

A stellar discussion among Annemiek Wilpshaar of the European Commission - DG Competition, Scott Fitzgerald of the DOJ-Antitrust



Division, and Mary Lehner of Freshfields about antitrust review of mergers highlighted the execution risks that transactions face if they are perceived as adversely impacting innovation, resulting in “conglomerates” that are too powerful as a group (a concern specific to the EC), or giving rise to vertical dominance – all concerns that would not be caught by the traditional horizontal market assessment that is front of mind for most dealmakers considering antitrust risks arising from mergers.

Best regards,

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Steven Davidoff Solomon, Professor of Law and Faculty Co-Director at Berkeley Center for Law and Business

Co-Hosts of the 2020 Forum on M&A and Governance



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