

MERGERS & ACQUISITIONS

Dealmaker's Digest

A Top **10** Bulletin

October 2023

ROPES & GRAY



In this (inaugural) edition of *Dealmaker's Digest*, we bring you the latest transactional developments to keep you in the know.

GLOBAL M&A ACTIVITY

BLOCKBUSTER DEALS

REGULATORY DEVELOPMENTS

ACTIVE INDUSTRIES

MERGER TRENDS

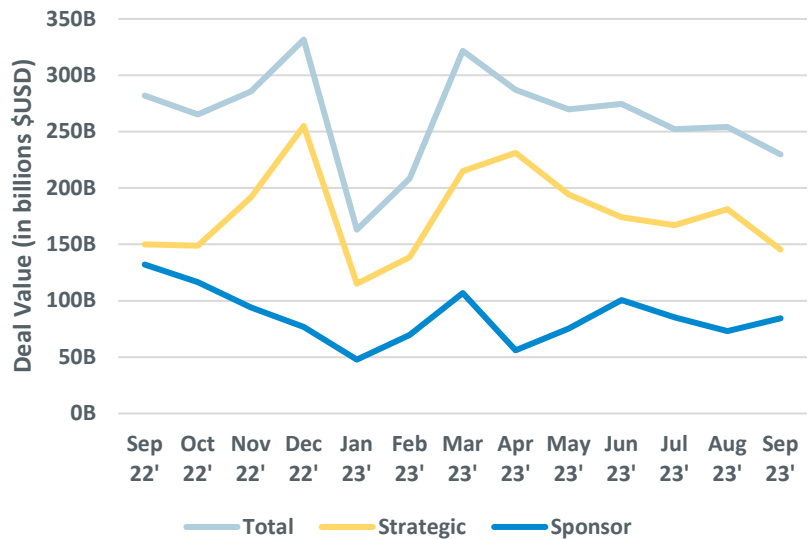
ACTIVISM UPDATE

JUDICIAL DECISIONS

GLOBAL M&A ACTIVITY UPDATE

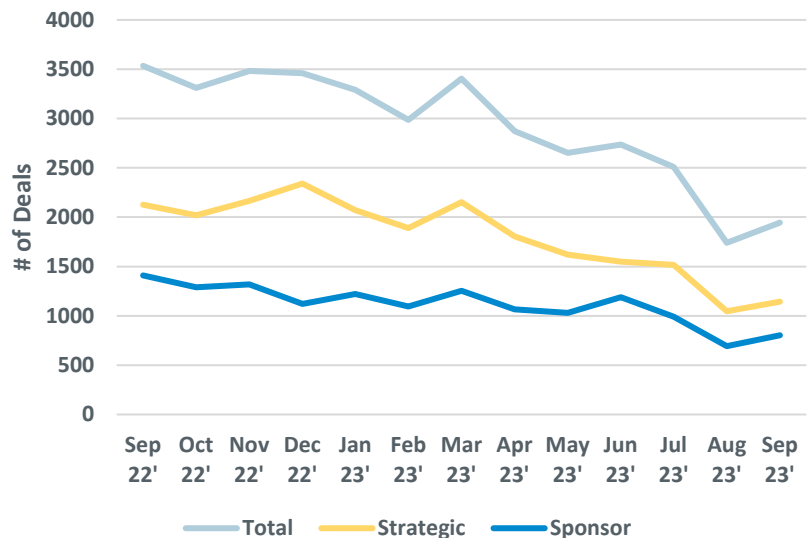
1 Deal Value Trends

- ▼ Aggregate global transaction values¹ declined by 10%² from August to September 2023 across all sectors and buyer types.
- ▼ Strategic buyer values in September 2023 decreased 20% from August 2023 and remained consistent year-over-year (representing a modest 3% decrease from September 2022 deal values).
- ▲ The value of financial buyer transactions (“sponsor” deals) increased by 15% month-over-month and represent a 36% drop from September 2022.



2 Deal Count Trends

- ▲ Aggregate global M&A activity levels by deal count¹ in September 2023 increased from August 2023 levels by 12%. Year-over-year volumes dropped by 45%.
- ▲ Strategic buyer volumes in September increased 9% from July 2023 and represent a 46% decline year-over-year.
- ▲ Sponsor buyer volumes increased by 16% month-over-month and represent a 43% decline from September 2022 levels.



¹ Charts compiled using Mergermarket data for the month of September 2023 as of October 5, 2023. Aggregate deal values by dollar amount are calculated from the subset of deals with disclosed values.

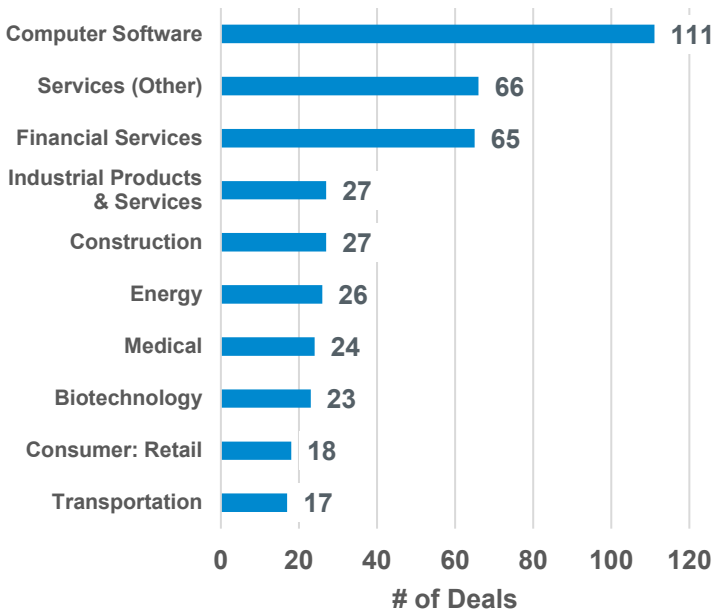
² Unless otherwise indicated, percentage figures have been rounded to the nearest whole percentage point.

3 Active M&A Industries (U.S. Targets)³

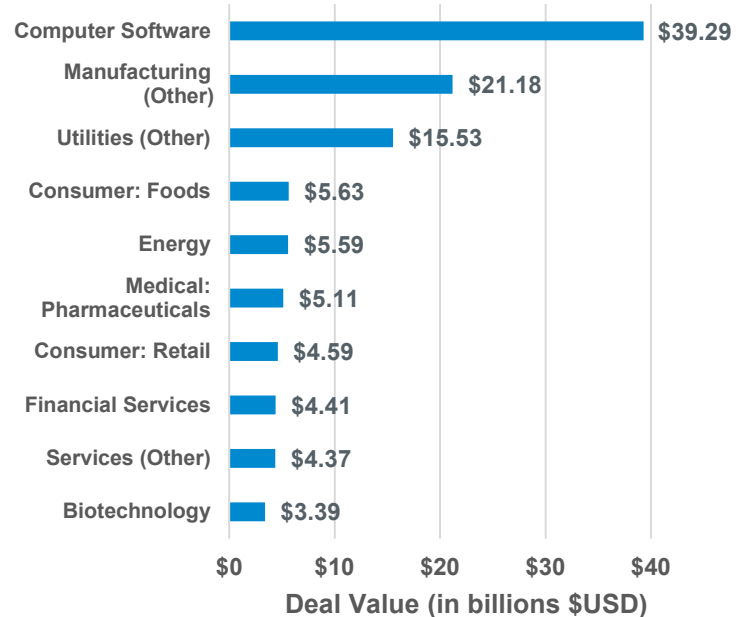
- The computer software sector topped the list of U.S. M&A activities by deal count in September 2023.
- Financial and other professional services round out the top three sectors by volume.

- The computer software sector also dominated the charts in September 2023 by deal values, followed by manufacturing and utilities industries.
- Computer software consolidation has surged as strategic buyers pursue synergistic targets and sponsors look to gain a foothold in the market.

Top 10 Industries (by deal count)






Top 10 Industries (by deal value)



4 Select Blockbusters³

Largest U.S. Strategic Deal

 agreed to acquire  for \$157 per share in cash, representing **\$28.12 billion** in equity value.

 agreed to acquire  for \$23.95 per share, representing **\$1.71 billion** in equity value.

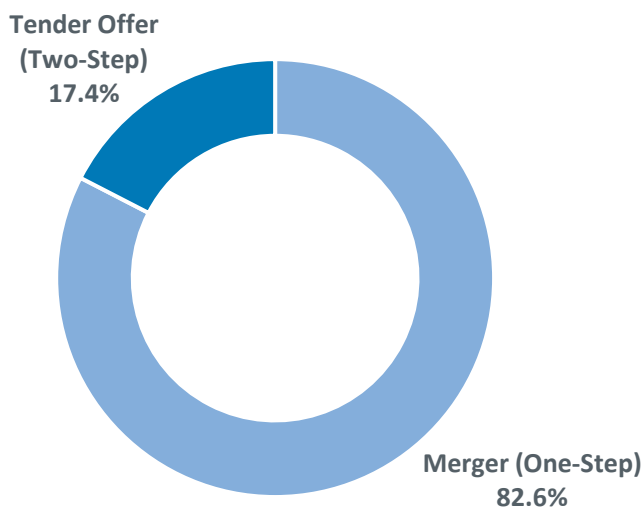
Largest U.S. Sponsor Deal

³ Rankings compiled using Mergermarket data for the month of September 2023 as of October 5, 2023.

DEAL MECHANICS

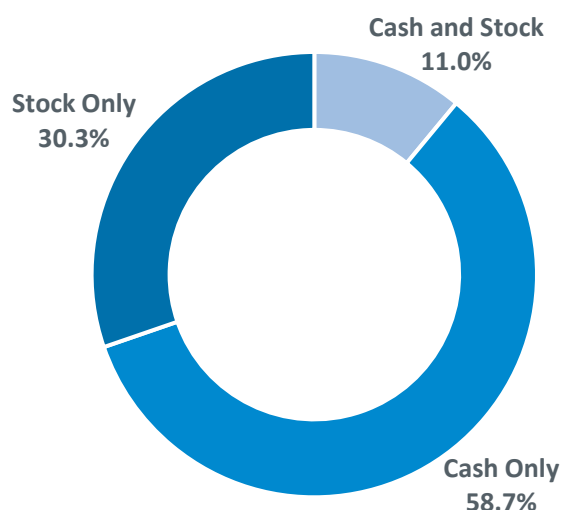
5 Deal Structure⁴

- U.S. public target transactions were structured as one-step mergers more than four times as often as tender offers in the six-month period ending September 30, 2023.
- Use of tender offers has increased modestly from calendar year 2022, when two-step deals represented only 14% of U.S. public target deals.



6 Consideration Type⁴

- Cash-only deals represent a majority of public U.S. mergers over the past six months.
- Consideration types have shifted slightly compared to calendar year 2022 breakdowns, when cash-only deals represented 71% of U.S. public target transactions.



7 Delaware Court of Chancery Update

***Colon v. Bumble, Inc.*, C.A. No. 2022-0824-JTL (Del. Ch. Sept. 12, 2023)**

- Delaware Chancery Court held that the charter of Bumble, Inc. – which provided for a dual-class voting structure to preserve the voting control of the company’s founder and a key investor (the “Principal Stockholders”) following the company’s “Up-C” public listing – was valid under the Delaware General Corporation Law (“DGCL”).
- Bumble’s IPO charter provided that “[e]ach holder of record of Class A Common Stock. . . shall be entitled to one vote for each share. . . provided however, that. . . each Principal Stockholder shall be entitled to ten votes for each share,” cross-referencing to a publicly disclosed stockholders agreement for purposes of determining a Principal Stockholder.
- Bumble stockholders challenged the “identity-based” voting structure, arguing that it violates Section 212(a) and 151(a) of the DGCL.
- In his decision, Vice Chancellor Laster noted that “the [challenged provisions] add flexibility by linking the identity of the Principal Stockholders to the parties to the stockholders agreement [which] may frustrate the plaintiff, but it falls within the authority” of the corporation.
- The court compared identity-based charter designations, such as the one implemented by Bumble, with the implementation of shareholder rights plans: “There is nothing wrong with that either; it makes poison pills work.”

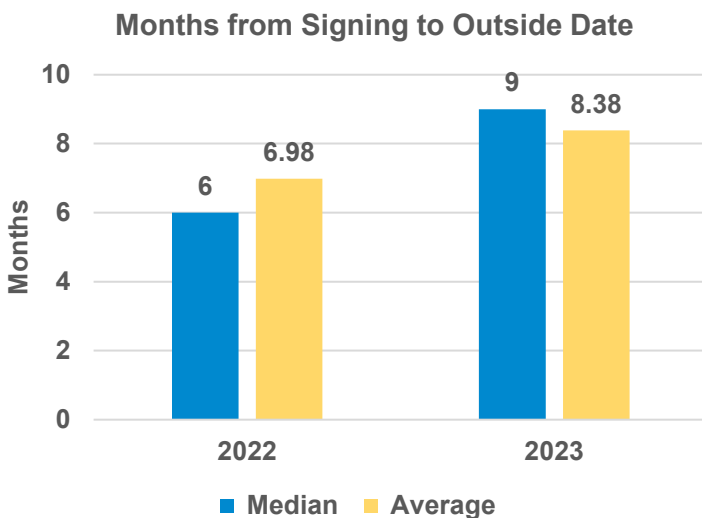
⁴ Charts compiled using Deal Point Data metrics as of October 10, 2023.

8 Regulatory Developments

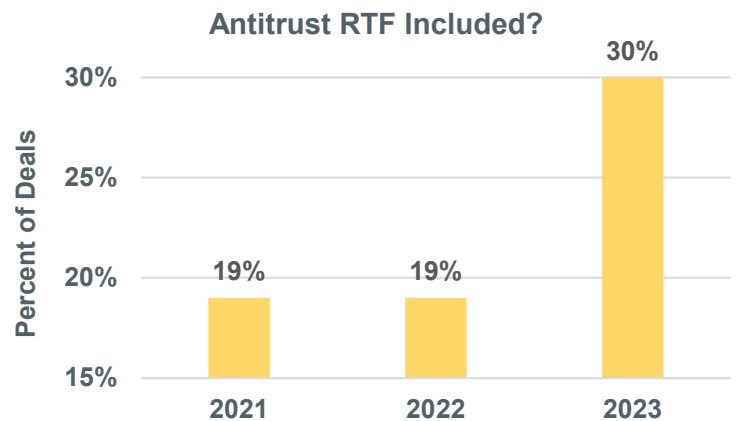
- On June 29, 2023 the Federal Trade Commission, in collaboration with the Antitrust Division of the U.S. Department of Justice, published a notice of proposed rulemaking that would overhaul merger reporting obligations in the U.S.
- Although the changes would not increase the range of reportable deals, they would dramatically increase the amount and type of information required for all filers, demanding substantially more documents, information and narrative responses than are required currently.
- These proposed changes, which are emblematic of the most aggressive antitrust environment in recent history (with strong anti-merger bias), are driving changes to deal terms and transaction management strategies.
- Ropes & Gray recently published an alert detailing the proposed changes and offering additional regulatory insight. To read the full alert regarding the dramatic overhaul, click [here](#).

Impact on Select Deal Terms

- Analysis of select HSR-related provisions in recent U.S. public deals underscore several trends.⁵
- Periods between signing and outside dates are increasing in recent months

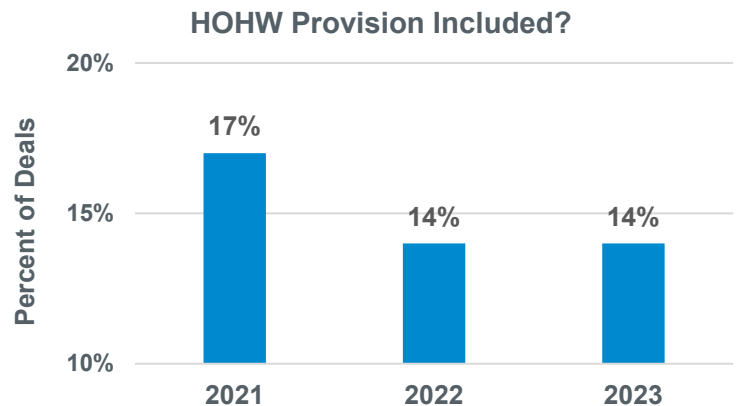
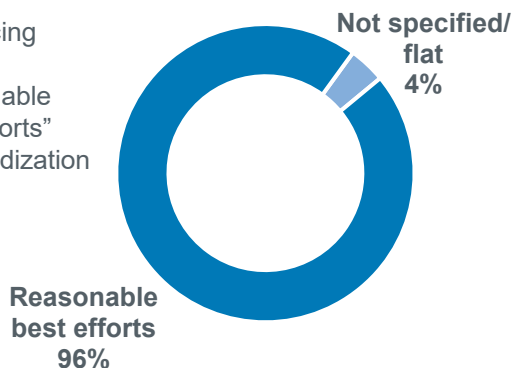


- There has been a significant increase in antitrust-specific reverse termination fees (“RTFs”) over the past year, while sizes of antitrust RTFs (as % of target equity value) have declined modestly from 2022 figures⁶
 - 2023 year-to-date averaging 5.38%, median 5.2%
 - 2022 averaged 6.5%, median 6.2%



2023 Efforts Standards

- Market coalescing around “reasonable best efforts” standardization



- “Hell or high water” (“HOWW”) commitments have trended downward in recent years

⁵ Charts compiled using Thomson Reuters database (\$100m+ U.S. public target deals), six month period ending September 1, 2023.

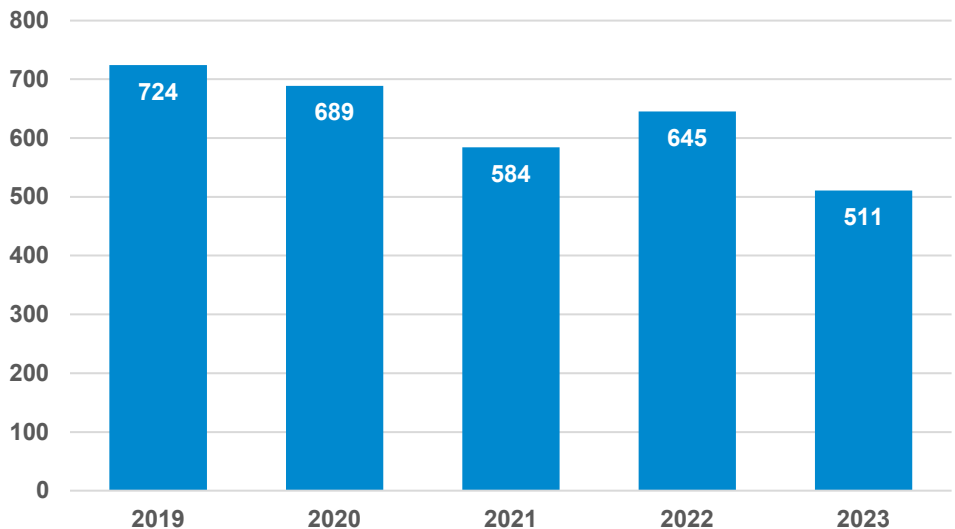
⁶ Deal Point Data public target metrics as of September 28, 2023.

SPOTLIGHT ON SHAREHOLDER ACTIVISM

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Prevalence of Campaigns

High Impact Campaigns⁷



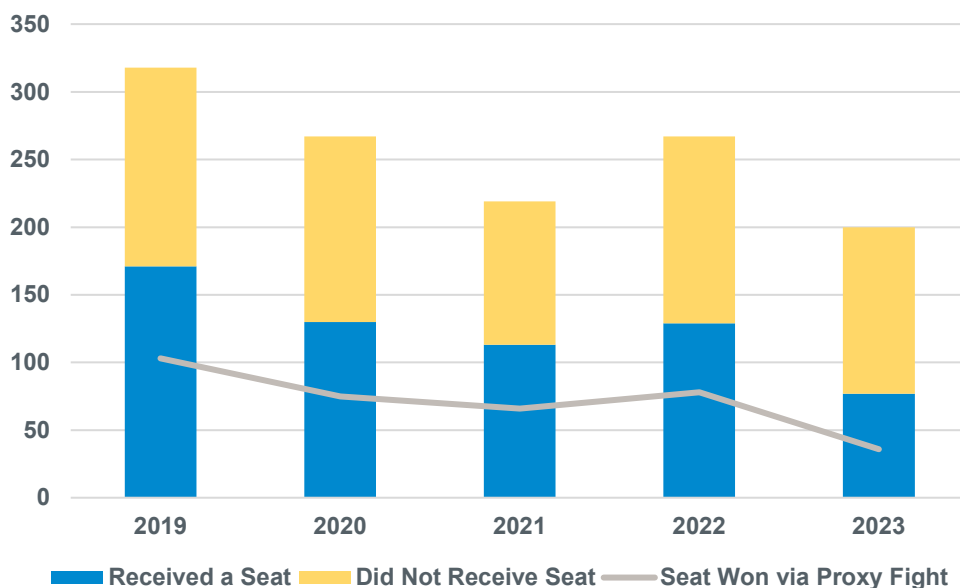
- After steadily increasing in the five years prior to 2019, the number of activist campaigns involving objectives such as board control or director removal have generally declined in recent years.
- The 2023 proxy season was the first following the effectiveness of the SEC's mandate that universal proxy cards be used in contested director elections. Despite many predictions to the contrary, the new universal proxy card rules did not appear to result in an uptick in activism.
- Companies in the financial services sector received the most proposals (17%), followed by retail (15%) and technology (13%).⁸

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Obtaining Board Representation

- Data from the 2023 proxy season reflects a decrease in both the total number of campaigns seeking board representation as well as the success rate thereof.
- In 2023, 39% of activist attempts to gain board representation have been successful. Of the successful campaigns, 47% of board seat wins resulted from a proxy fight.
- Results from the 2022 season reflect a 48% total success rate for board seats, with 60% of wins via proxy fight.
- Activist campaigns continue to result in activists gaining board seats via settlements, although less frequently and on longer timelines than in recent periods.

Results of Activists Seeking Board Seats⁷



⁷ Charts compiled using FactSet data as of October 10, 2023.

⁸ Deal Point Data metrics as of September 21, 2023.

About our M&A Practice

Ropes & Gray's award-winning M&A practice is regularly ranked among the world's leading practices by *Chambers*, *The Legal 500* and *U.S. News*, among others. With over 250 M&A attorneys located in the United States, Europe and Asia, our practice offers global scope and on-the-ground service where and when needed. In 2021-2022, Ropes & Gray navigated more than 470 M&A transactions with an aggregate deal value of \$390+ billion.

RECENT RECOGNITION

THE
AMERICAN LAWYER

The American Lawyer
"Law Firm of the Year" (2022)



U.S. News and World Report
"Law Firm of the Year" for private funds, leveraged buyouts and private equity (2023)



Law360
Seven-time winner of "Private Equity Group of the Year"

Chambers
AND PARTNERS

Chambers USA 2023
Nationwide Band 1 Private Equity Buyouts, Mid-Market Ranking
New York Band 1 Corporate / M&A Highly Regarded Ranking
Massachusetts Band 1 Corporate / M&A Ranking



LMG Life Sciences
2022 Impact Deal of the Year (Pfizer's \$11.6b acquisition of Biohaven Pharmaceuticals)
2022 M&A Firm of the Year

DEPTH OF EXPERIENCE

470+

Signed transactions in 2021-2022

\$390b+

in total transaction deal value in 2021-2022

80+

Industries and sectors

Our Commitment

350+
Specialty-support lawyers

250+
M&A lawyers

150+
Years of practice history

13
Offices to support deals

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