

MERGERS & ACQUISITIONS

# Dealmaker's Digest

A Top 10 Bulletin

November 2023

ROPES & GRAY



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

GLOBAL M&A ACTIVITY

BLOCKBUSTER DEALS

LEGAL DEVELOPMENTS

ACTIVE INDUSTRIES

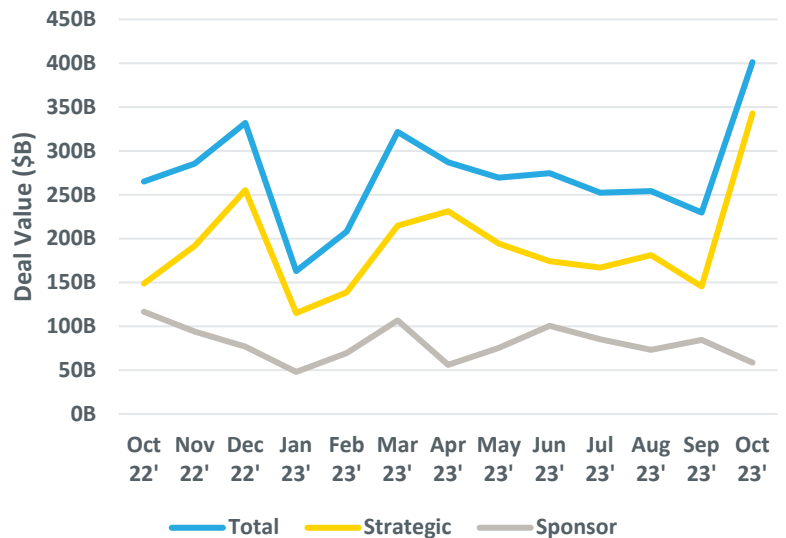
U.S. CROSSBORDER UPDATE

JUDICIAL DECISIONS

## GLOBAL M&A ACTIVITY UPDATE

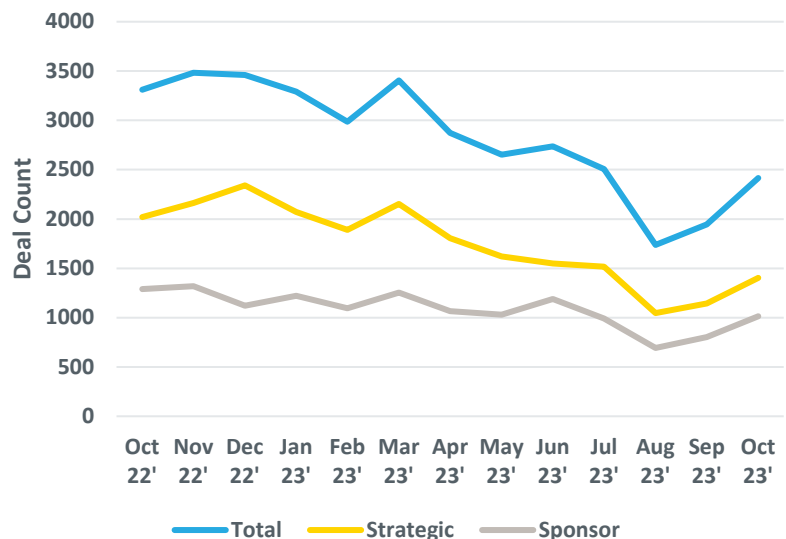
### 1 Deal Value Trends

- ↑ Aggregate value of global transactions<sup>1</sup> increased sharply in October 2023, rising 75%<sup>2</sup> from September 2023 and marking a 40% rise over October 2022.
- ↑ Aggregate value of transactions with strategic buyers surged 136% from September 2023, ending October with more than \$300 billion of strategic transactions (a 130% increase year-over-year).
- ↓ The aggregate value of financial buyer transactions ("sponsor" deals) fell to \$58 billion, decreasing 31% month-over-month and representing a 50% drop from October 2022.



### 2 Deal Count Trends

- ↑ Aggregate global M&A activity by deal count increased from September 2023 levels by 24%. Year-over-year volume dropped by 27%.
- ↑ Strategic buyer deal count in October increased 23% from September 2023 while remaining below 2022 levels.
- ↑ Sponsor buyer deal count increased by 27% month-over-month but is still 21% below October 2022 levels.



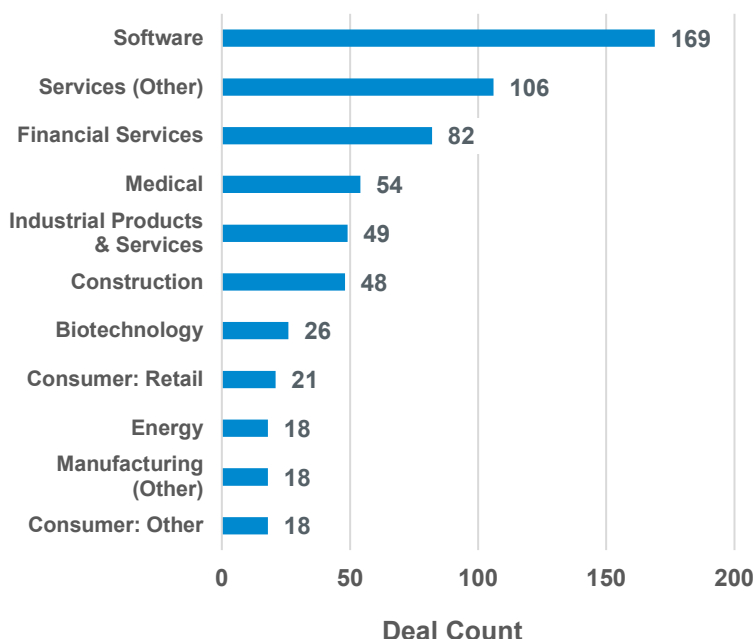
<sup>1</sup> Charts compiled using Mergermarket data for October 2023 as of November 3, 2023. Aggregate deal values by dollar amount are calculated from the subset of deals with disclosed values.

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

## Active M&A Industries (U.S. Targets)<sup>3</sup>

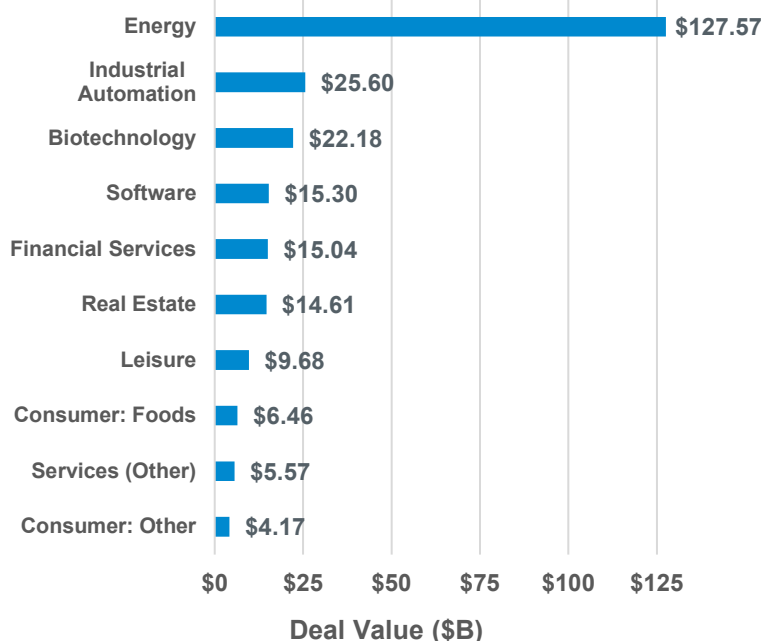
- The software industry topped the list of U.S. M&A activity by deal count in October 2023, continuing a monthslong streak as the most active sector.
- Financial and other professional services round out the top three sectors by deal count.

### 3 Top 10 Industries (by deal count)



- Buoyed by two \$50 billion+ transactions, the energy sector represented nearly half (49%) of the total value of U.S.-target deals in October 2023.
- The industrial automation and biotechnology sectors follow as the most active sectors by deal value, each representing more than \$20 billion for the month.
- In the U.S. biotechnology sector, October 2023 deal value more than tripled year-over-year, landing at \$22.18 billion compared with \$6.4 billion in October 2022.

### 4 Top 10 Industries (by deal value)



## 5 Select Blockbusters<sup>3</sup>

Largest  
U.S.  
**Strategic**  
Deal

**ExxonMobil** agreed to  
acquire **PIONEER**  
NATURAL RESOURCES  
in an all-stock transaction  
valued at **\$65.26 billion**.

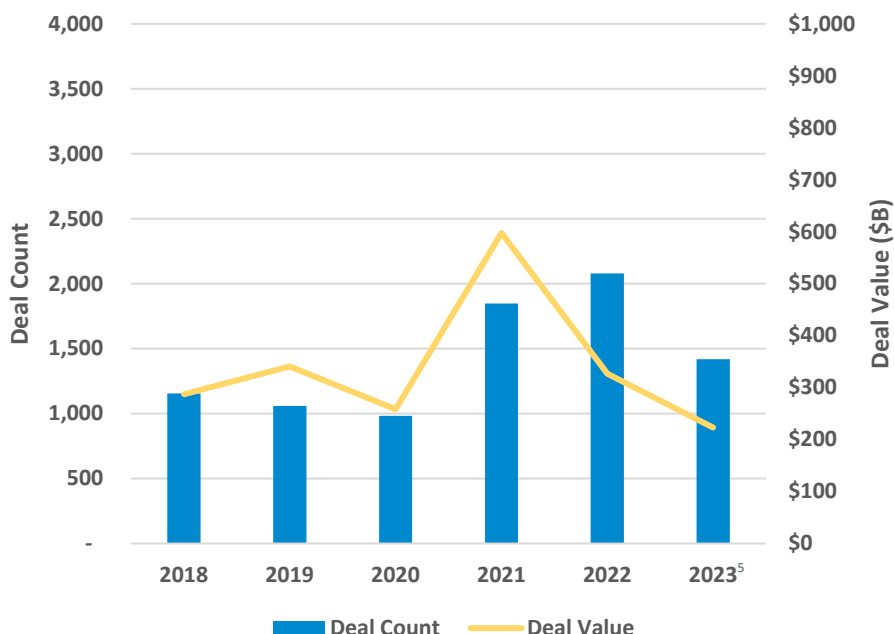
**STONEPEAK** agreed  
to acquire **Textainer**  
GROUP HOLDINGS LIMITED  
in an all-cash take-private  
transaction valued at **\$7.32**  
**billion**.

Largest  
U.S.  
**Sponsor**  
Deal

<sup>3</sup> Rankings compiled using Mergermarket data for October 2023 as of November 3, 2023. Deal values based on Mergermarket reporting of transaction enterprise values.

SPOTLIGHT ON CROSSBORDER M&A – UNITED STATES

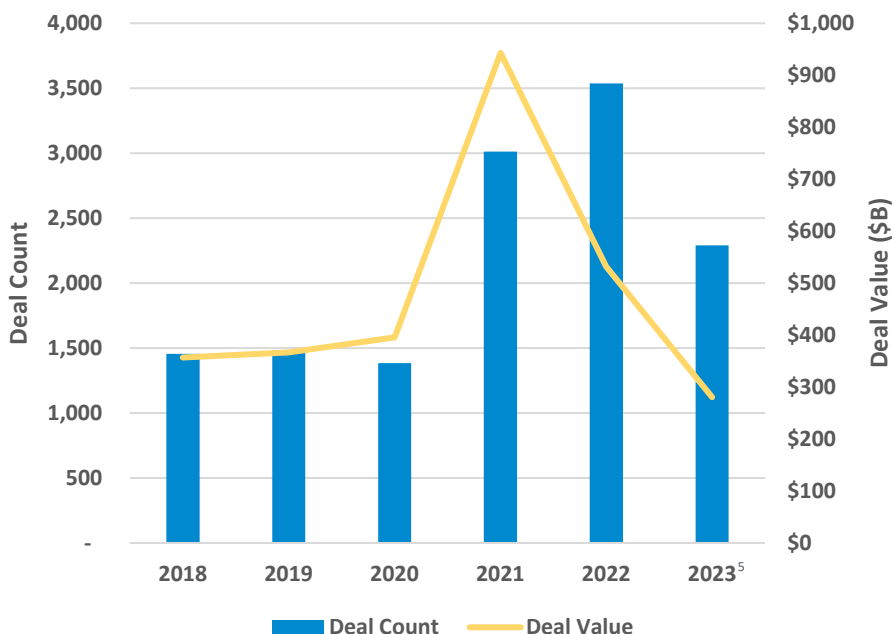
6 Inbound U.S. Activity<sup>4</sup>



- Acquisitions of U.S. targets by non-U.S. acquirers have slowed in 2023, year-to-date.
- Inbound activity this year has declined by 23% from 2022 by deal count, and 24% by deal value, during the respective year-to-date periods.
- While falling short of recent peaks in 2021-2022, crossborder activity levels in the U.S. generally remain consistent with (or surpass) pre-pandemic levels.
- U.K.-based acquirers drove the most inbound deals in October 2023 (with 24 transactions), followed by Canada (19) and Japan (11).

7 Outbound U.S. Activity<sup>4</sup>

- Acquisitions of foreign targets by U.S. buyers have declined meaningfully this year.
- Outbound activity in 2023 falls short of 2022 deal values by 43% year-to-date. By deal count, outbound transactions have declined by 28% from 2022 levels.
- U.S. acquirers most frequently looked to targets in the U.K. during October 2023 (representing 36 transactions), with Canada (24) and Germany (18) rounding out the top three ex-U.S. target countries.



<sup>4</sup> Charts compiled using MergerMarket data as of November 9, 2023.

<sup>5</sup> Data through November 9, 2023



SELECT LEGAL DEVELOPMENTS

8

Delaware Court of  
Chancery Update

***Crispo v. Musk et al.***, C.A. No. 2022-0666-KSJM (Del. Ch. Oct. 11, 2023)

- A recent opinion from Chancellor McCormick significantly limits targets' ability to deploy "lost-premium provisions" ("LPPs"), which specify that a breaching buyer's liability includes the premium that would have been paid by the buyer had the deal closed. The decision came as a surprise to many practitioners.
- The *Crispo* decision stemmed from a stockholder's claim for mootness fees and grappled with questions not previously answered by a Delaware court. Particularly relevant for M&A practitioners and deal parties, the court determined that:
  - (i) a stockholder must be considered a third-party beneficiary for purposes of the LPP for the provision to be enforceable in Delaware, and
  - (ii) even if a stockholder is considered a third-party beneficiary under the LPP, the stockholder is precluded from pursuing a claim for lost-premium damages while the target seeks specific performance.
- Given the reluctance of practitioners to designate stockholders as third-party beneficiaries under merger agreements, the court effectively rendered LPPs – as typically structured – toothless.
- Any adoption by the market of a workaround following *Crispo* remains to be seen. Despite the uncertainty raised by the decision, we believe that, whether through practitioner creativity, Delaware legislative response, or further judicial shaping – or likely, a combination thereof – some variation of the LPP will remain part of dealmakers' toolkits.

9

Artificial Intelligence  
Executive Order

- President Biden recently issued an executive order ("EO") regarding the development and deployment of artificial intelligence ("AI"). The EO requires certain federal agencies to issue standards and guidance and to use their existing authorities to police the use of AI in ways that will impact business for years to come. It also devotes federal resources toward AI-related education, training and research.
- Although the EO and required federal agency guidelines will not directly apply to private industry in many cases, they are likely to have a significant impact through their incorporation into federal contracts. Similar agency standards have previously driven substantial industry impacts through voluntary adoption (which, in turn, have set industry expectations); it would not be surprising to see a similar effect here.
- Ropes & Gray recently published an alert detailing the EO. To read the full alert, click [here](#).

10

DOJ M&A  
Safe Harbor Policy

- The U.S. Department of Justice ("DOJ") recently announced a new M&A Safe Harbor policy to encourage timely disclosure and remediation of misconduct.
- The policy provides that acquirers that promptly disclose and remediate criminal conduct of a newly acquired business are eligible to receive a "presumption of declination," or a determination by DOJ not to bring charges.
- DOJ's transcript of the announcement is available [here](#).

## 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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