

Forum for Financial Institution Directors

# The Current M&A Environment: Transactional and Litigation Perspectives

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May 19, 2017

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# Forum for Financial Institution Directors

- Winston & Strawn conducts an annual webinar series to assist Financial Institution directors in understanding issues, regulatory requirements, investor priorities and market realities.
- This series complements our weekly Financial Services Update, which is designed to provide quick, readable, and ongoing information about what Congress, regulators, courts and competitors are doing.
- You can access the PowerPoint and audio for our past presentations by clicking on the links on the next slide.
- If you wish to sign up to receive the Update, please visit [winston.com/subscribe](http://winston.com/subscribe).

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## MARK YOUR CALENDARS!

### Past Webinars

- **March 24<sup>th</sup>:** "2017 Proxy Season Preparations," available [here](#).
- **April 28<sup>th</sup>:** "A View from Washington: Trump Administration's Impact on Financial Institution Governance and Board Responsibilities," available [here](#).

### Two more 75-minute Webinars:

- **Today** – The Current M&A Environment: Transactional and Litigation Perspectives
- **June (Date TBD)** – The Directors' Perspective: Financial Institution Directors discuss their challenges

At the conclusion of the course, we will provide each participant in these webinars with a Certificate of Completion, certifying the Director has participated in Continuing Director Education courses.

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The Current M&A Environment: D&O, Transactional and Litigation Perspectives



## Chris Edwards

- Chair of Winston & Strawn's bank regulatory practice
- Nationally recognized expert on corporate governance
- Over 30 years of experience, including as Former EVP and Chief Legal Officer, of Bank One and of Morgan Stanley



## Jerry Loeser

- Partner in Winston & Strawn's bank regulatory practice
- 45 years of bank regulatory experience
- Former Federal Reserve Board lawyer, chief regulatory counsel at Wells Fargo & Co., and Deputy General Counsel at Comerica Bank

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## John Schreiber

- Recognized as a "Rising Star" in the area of securities litigation
- Frequently represents public and private companies and/or their boards of directors in federal securities class actions, pre- and post-closing M&A disputes, shareholder derivative actions and internal investigations



## Scott DeVries

- Chair of Winston & Strawn's insurance recovery practice
- Over 30 years of experience, including trial and appeal of landmark cases in field of insurance recovery
- Nationally recognized expert on insurance recovery, frequent speaker and writer

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## Jim Junewicz

- Partner in Winston & Strawn's corporate practice
- Regularly handles major merger and acquisition transactions and corporate restructurings, and advises boards of directors and executive management teams on fiduciary issues under Delaware law
- Previously served with the SEC for five years

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The Current M&A Environment: D&O, Transactional and Litigation Perspectives

## Agenda

- Current M&A Environment Overview
- Director and Officer Liability and Coverage Issues
- Transactional Perspective
- Litigation Perspective

# Overview

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The Current M&A Environment: D&O, Transactional and Litigation Perspectives

## M&A Environment: 2016 Highlights

- M&A volume was down.
  - 242 deals
- More exits and restructurings.
  - Private equity investments matured
  - Activist investors pressured sales

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## M&A Environment: Improving Regulatory Front May Encourage M&A

- Likely new appointees to Department of Justice Antitrust Division and to Federal Trade Commission Bureau of Competition.
- New appointments to Bank Regulatory Agencies.
- New SEC Chair Clayton confirmed.
  - Evaluating access to capital and public company issues.

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## M&A Environment: Strong Economy to Encourage M&A

- Federal Reserve Board Federal Open Market Committee and Council of Economic Advisors focused on economic policy rather than monetary policy.
- Consideration of corporate tax reform and rate cuts.
- Banks are generally in strong financial shape.
  - Highest levels of capital and relatively low delinquencies, bad debt/write-offs
  - High levels of liquidity
  - Interest rate increase should help with profitability

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## Effect of Stock Market: Improving Currency for Deal-Making

- Between Nov. 8, 2016 and January 31, 2017, stocks of banks with more than \$250 million in assets increased 24.8 percent.
- Many banks are trading at 20 times earnings or more.
- One financial institution transaction in the Midwest that was announced pre-election was forced to raise offer price due to target stock valuation increase.

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## March 2017 Prices

- 18 bank and thrift deals
  - Only three were solely cash deals
- Median seller total assets: \$200.1 million
- Median seller's equity to assets ratio: 11.72%
- Median seller's NPAs to assets: 0.70%
- Median seller's ROAA: 0.74%
- Median seller's number of branches: 3
- Median price to book: 1.30
- Median price to earnings: 22.90
- Median price to assets: 17.49%
- Median price to deposits: 21.41%

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## Current M&A Considerations: Preparations to Buy

- Develop strategic plan
- Unite board members and key shareholders behind plan
- Consider alternatives
- Assess how you stack up in the area of regulatory concerns
  - Community Reinvestment Act
  - Asset quality
  - Anti-money laundering compliance
  - Vendor management
  - Incentive compensation
  - Concentration risk
- Assess how you stack up in the area of regulatory concerns (continued)
  - Cybersecurity
  - Capital
  - Management depth
  - Scalable compliance management and enterprise risk management
- Stock as consideration
- Management retention
- Social issues
  - Board representation
  - Headquarters location
  - Name

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## Current M&A Environment: Reasons to Sell

- Regulatory burdens
- Excess capital in the markets to invest; may yield higher price for sellers
- Availability of favorable cash-out event for owners
- Limited growth opportunities
- PE 10-year investment time horizon approaching

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## Financial institution M&A Pros and Cons

### Pros

- Increase market share
- Cost take-outs
- Further build client list and customer base
- Increase real estate holdings
- Strengthen intellectual property
- Increased lending limit
- Bigger franchise
- New sources of fee income
- Complementary products
- Increased management depth

### Cons

- Employee disengagement
- Long period of employee uncertainty pending regulatory approval
- Unwanted employee turnover



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## M&A Values

- Value Detractors:

- Weak internal controls
- Regulatory problems
- Large unfunded pension liabilities
- BSA/AML compliance problems

- Value Creators:

- Strong core deposits
  - But rising interest rates may show that some core deposits will run.
- Strong profitability
- Experienced management
- Deep client relationships

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## Financial Institution Regulatory Application Considerations

- Banks:
  - Interstate banking permissibility
  - National and state deposit caps
- CRA
- Compliance
- Public comments

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## Acquisitions of Bank Branches: M&A with no Change of Control Implications

- Shift toward digital distribution may have weakened value of branch network.
  - Branches have been closing.
    - 7,000 branches were closed over the last five years.
  - Branch traffic is dropping.
  - Branches on long-term leases may be considered a liability by a buyer.
  - Branch closures will be an attractive cost take-out benefit of a merger.
  - Compare retail store closings
  - Not as many buyers

# Liability and D&O Insurance Coverage Issues

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## Overview of D&O Insurance Coverage Issues

- What does Directors and Officers Insurance cover?
- How much coverage is enough?
- Is dedicated coverage available just for the directors and officers?
- When does the insurance policy start paying?
- Coverage issues associated with transaction (e.g., reps and warranties coverage, tail coverage)

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## Who is Insured?

- **Individual Directors and Officers - Side A**

- May cover shareholder derivative suits for breach of fiduciary duty (e.g., wasting corporate assets, usurping corporate opportunity).
- Only applicable if corporate entity unable to indemnify (by insolvency or operation of law such as shareholder derivative action).
- Additional (and broader) Side A coverage can be purchased: Side A "DIC" coverage.

- **Corporation for reimbursement of indemnity paid on behalf of officers and directors - Side B**

- Insures corporate indemnification obligation for directors and officers.
- Does not cover claims against company.

- **Entity Coverage - Side C**

- Created because courts had required insurer to bear full expense where claims made against individuals and corporate entity.
- Covers joint liability of individuals and corporation for securities claims.
- Potential issues if corporate insolvency (assets of the estate?) or limits unavailable to cover all obligations (potentially avoided with priority of payments endorsement).

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## What is Insured?

- "Loss" arising out of a "claim" made against the insured based on any "wrongful act" by an insured officer or director acting in their respective capacities.

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"Loss" arising out of "claim" based on "wrongful act" by insured officer or director

- **Defined to include damages, judgments, settlements, and defense costs.**
  - Insurers may argue that disgorgement is not a covered "loss." See *Ryerson Inc. v. Fed. Ins. Co.*, 676 F.3d 610, 612-13 (7th Cir. 2012); *Bank of the West v. Sup. Ct.*, 2 Cal. 4th 1254 (1992).
    - Policyholder response: Not seeking restitution or value at time of purchase, or amounts that insured wrongfully acquired from plaintiff; instead, seeking damages in form of difference between value at time purchased and time of trial. See *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 336 (2013) (coverage not barred where "the disgorgement payment was (at least in large part) linked to gains that went to others").
  - Typically exempts civil or criminal fines or penalties.
    - But some policies permit recovery in some states where, for example, punitives are triggered by finding of gross negligence.



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"Loss" arising out of "claim" based on "wrongful act" by insured officer or director

- Definition may include any/all of the following:
  - written demand for monetary or non-monetary relief
  - "civil, criminal, administrative, regulatory or arbitration proceeding for monetary or non-monetary relief"
  - regulatory investigations against individual insureds
    - May be important if claim by SEC, Justice, NASD, IRS, etc.
  - Nature of proceeding may affect availability of coverage. For example, what if board is asked to investigate? What if individuals are fact witnesses? Is a document subpoena enough to trigger coverage?

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## "Loss" arising out of "claim" based on "wrongful act" by insured officer or director

- "Wrongful act" frequently defined as "any actual or alleged error, misstatement, misleading statement, act, omission, neglect or breach of duty" committed or attempted in capacity as a director or officer.
  - Insurer might argue that allegations involve individual acting to advance interest as a shareholder, or that not acting in capacity of D/O of insured entity (e.g., acting in capacity of more junior employee, or in capacity of D/O of uninsured entity.) *But see Raychem Corp. v. Fed. Ins. Co.*, 853 F. Supp. 1170, 1184 (N.D. Cal. 1994) (definition of wrongful act not limited to misleading statements made "solely" in the capacity as D/O).
- Some recent policies use term "negligence." Issue whether only modifies "acts and omissions" or entire provision. *Forest Meadows Owners Ass'n v. State Farm Gen. Ins. Co.*, 2012 WL 1205204, at \*6 (E.D. Cal. Apr. 11, 2012) (finding latter). One court applied this language to bar coverage for intentional options backdating. *Oak Park Calabasas Condominium Ass'n v. State Farm*, 137 Cal. App. 4th 557, 563-564 (2006). Even then, may be differential application to officer who allegedly acted intentionally, and to board which allegedly violated standard of care.

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## Claims Made Against Insured During Policy Period

- Policy requires "claim" made against insured during policy period.
- "Wrongful act" must occur after "retroactive date" specified in policy.
- Issues:
  - Does it apply to particular claims or to facts/circumstances, whether or not subject of this particular claim. Broad language may be enforced to encompass both. See, e.g., *ML Direct, Inc. v. TIG Specialty Ins. Co.*, 79 Cal. App. 4th 137, 142-6 (2000).
  - What is the applicable "incident"
- All related later claims covered under initial policy period —viz., coverage under multiple policies typically not available where claims involve related wrongful acts.
- Also can give notice of potential claim (a "circumstance") which locks in coverage under that policy if claim later arises.

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## Submission of Claim to Insurer ("Notice")

- Some policies provide firm time period (e.g., 15 days) for providing notice after receipt of claim. Some courts strictly enforce; others apply prejudice standard.
- In absence of firm time period, insured should promptly report claim to insurer.
- Notice should be provided during policy period or, where permitted by policy, within specified time thereafter. Courts will strictly construe.

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## Personal Profit Exclusion

- **Typically exclude coverage for claims of "gaining of any profit or advantage to which the insured was not legally entitled." *TIG Specialty Ins. Co. v. PinkMonkey.com, Inc.*, 375 F.3d 365, 371 (5th Cir. 2004).**
  - Not render coverage illusory as may cover other claims against Ds and Os as well as the company (in theory).
  - There, because of policy wording, improper conduct by any insured defeated coverage for all.
- **Key issue may be whether exclusion requires "final adjudication" or "wrongdoing in fact."**
  - "Final adjudication" requires judicial determination.
  - "Wrongdoing in fact" can be something short of this. See, e.g., *Nicholls v. Zurich Am. Ins. Group*, 244 F. Supp. 2d 1144, 1160 (D. Colo. 2003) where court weighed evidence. Insurers may argue that any allegation suffices. *Wintermute v. Kansas Bankers Sur. Co.*, 630 F.3d 1063, 1071-2 (8th Cir. 2011) (noting split of authority).
  - Some policies contain compromise language (e.g., nolo claim)
- **Insurers also argue that return of these benefits constitutes disgorgement, which is uninsurable as matter of law.**

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## Fraud/Dishonesty Exclusion

- Typical policy language provides: "arising out of, based upon, or attributable to the committing . . . of any deliberate criminal or deliberately fraudulent act by the insured."
- Some policies extend to monies paid without requisite approvals.
- Barred coverage in *Serio v. Nat'l Union Fire Ins. Co.*, 795 N.Y.S.2d 529, 530 (N.Y. App. Div. 2005); *Unencumbered Assets, Trust v. Great Am. Ins. Co.*, 817 F. Supp. 2d 1014, 1032-34 (S.D. Ohio 2011).
- Key issue may be whether exclusion requires final adjudication or "wrongdoing in fact." *Nat'l Bank of Cal. v. Progressive Cas. Ins. Co.*, 938 F. Supp. 2d 919, 932 (C.D. Cal. 2013). If former, settlement at any time before final appellate determinator may preserve coverage.

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## Insured v. Insured Exclusion

- Most policies exclude coverage for claims asserted by insureds against other insureds, including claims brought by or against the company.
- Insurers may argue that excludes coverage where companies sue officers/directors for recovery of profits.
- Exceptions to insured v. insured exclusion typically made for derivative actions.
- Wording is critical—Does it bar claims brought "on behalf of" insured as well as claims "brought by" insured?

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## Misrepresentation and Rescission

- What is the application? Just the present one or prior ones too? SEC application? Submissions to regulators? Financial statements?
  - Some courts hold misstatements concerning financial condition are material as a matter of law. *Shapiro v. Am. Home Assurance Co.*, 584 F. Supp. 1245, 1249 (D. Mass. 1984); *Unencumbered Assets*, *supra* at 1025.
  - Others hold policy language controls. *Nat'l Union Fire Ins. Co. v. Cont'l Illinois Corp.*, 658 F. Supp. 775, 779 (N.D. Ill. 1987).
- States vary on whether misstatements must be intentional. Some specify in statutes like *Cal. Ins. Code* § 359. Others in cases: Illinois requires knowing/intentional false statement (*Nat'l Union v. Cont'l Illinois Corp*, *supra* at 778, 779) while California does not (*Superior Dispatch, Inc. v. Ins. Corp. of New York*, 181 Cal. App. 4th 175, 191 (2010)).



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## Misrepresentation and Rescission (cont'd)

- Materiality - "whether the information would have caused the underwriter to reject the application, charge a higher premium, or amend the policy terms." A subjective test. See, e.g., *West Coast Life Ins., Mitchell v. United Nat'l Ins. Co., and Superior Dispatch, Inc. v. Ins. Corp. of New York, supra*.
  - After submitting application, best practice is to ask insurer in writing to advise in writing whether it needs any additional information.
- Duty to defend continues until determination that insurer has right to rescind. See, e.g., *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 465 (S.D.N.Y. 2005); *Fed. Ins. Co. v. Kozlowski*, 792 N.Y.S.2d 397, 402 (N.Y. App. Div. 2005); *Cont'l Cas. Co. v. Marshall Granger & Co., LLP*, 921 F. Supp. 2d 111, 130 n. 22 (S.D.N.Y. 2013).

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## Severability

- Does wrongdoing by one director/officer affect coverage for others?
- Depends on whether policy contains "severability" provision and if so, scope of provision.
  - Full severability – Separate application for each individual
  - Limited severability – Knowledge of the signer or of specified executive is imputed to all.
- Where severability provision present, wrongdoing of one does not affect coverage for others. *Wedtech Corp. v. Fed. Ins. Co.*, 740 F. Supp. 214, 218 (S.D.N.Y. 1990).
- But where no severability provision, can bar coverage for all. *TIG, supra at 371*; *Cont'l Cas. Co. v. Marshall Granger & Co., LLP*, 921 F. Supp. 2d 111, 121-22 (S.D.N.Y. 2013).

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## Allocation

- Insurer may seek to limit coverage by seeking apportionment between covered loss and non-covered loss – as when individuals are covered but the entity is not, or as between covered and non-covered claims.
- Policies are often ambiguous as to how allocation should be made and policyholders can often negotiate a better percentage share.

# Transactional Perspective

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# Part I – M&A Market Overview

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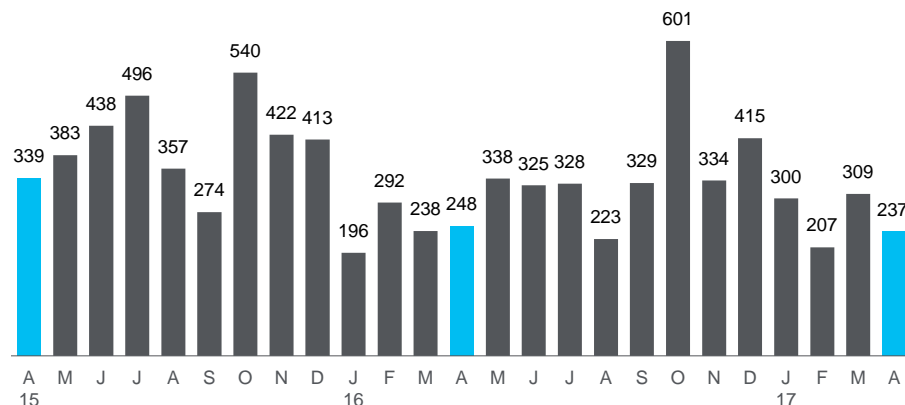
## The Current M&A Environment: D&O, Transactional and Litigation Perspectives

### Global M&A Overview

- After more than \$300B of announced volume in March, the global M&A market slowed in April with less than \$240B. North America was once again the main driver of M&A activity, accounting for 46% of total volume.
- Global announced M&A volume is up 8% year-to-date compared to the first four months of 2016. At its current pace, 2017 is on track to finish roughly 20% lower than last year and nearly 30% lower than 2015, which was one of the strongest years ever. Of all deal size segments, larger deals (\$5B+) are up the most year-to-date.

### Global M&A Volume by Month

(US\$B)



### Top 10 M&A Deals in April 2017

Acquiror / Target	Industry	Value (US\$B)
Becton Dickinson & Co / CR Bard Inc	Healthcare	24.4
Groupe Arnault SAS / Christian Dior SE (Stake 26.0%)	Consumer	13.1
JAB Holding Co SARL / Panera Bread Co	Consumer	7.5
LVMH Moët Hennessy Louis Vuitton / Christian Dior Couture	Consumer	7.1
Cardinal Health / Medtronic (Medical Supplies Business)	Healthcare	6.1
Investor Group / Belle International Holdings Ltd (Stake 87.9%)	Consumer	5.8
Fresenius SE & Co KGaA / Akorn Inc	Healthcare	4.9
Tyson Foods Inc / AdvancePierre Foods Holdings Inc	Consumer	4.3
Knight Transportation Inc / Swift Transportation Co	Industrials	4.0
PetSmart Inc / Chewy.com	Technology	3.4

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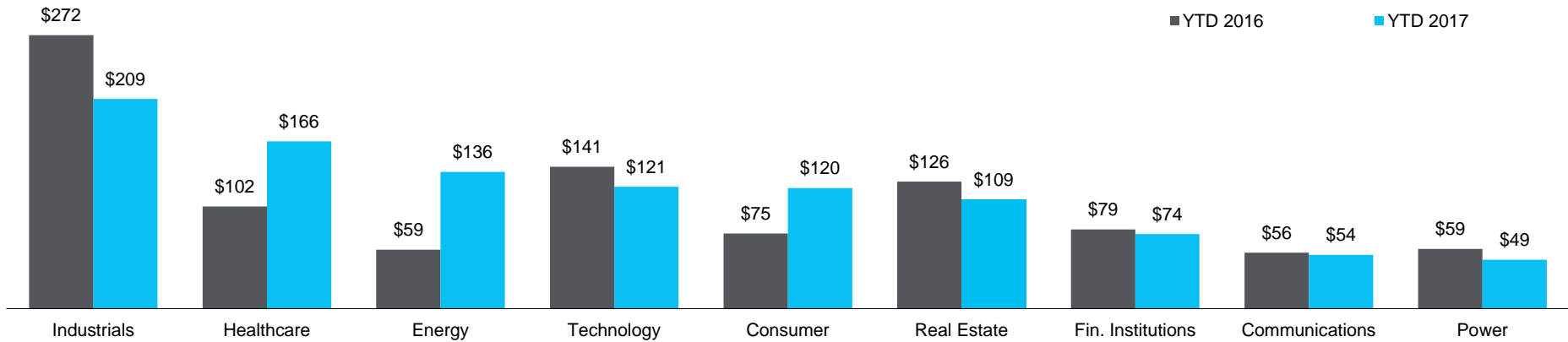
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### Global Industry Activity: Volume

- Year-over-year deal volume in the Financial Institutions industry is down 6% as of April 2017.
- In North America, Financial Institutions M&A constitutes approx. 7% of total year-to-date M&A activity.

### Global M&A Volume by Industry

(US\$B)



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## Current M&A Market Trends

- Cross-Border Activity - While cross-border M&A volume is on pace to be down 18% from 2016, its share of overall M&A volume (37%) is nearly as high as the peak in 2007 (39%).
  - Cross-border M&A volume between North America and Western Europe is at its highest share ever (34%) as a percent of total cross-border volume.
- Private Equity - Private equity-led M&A volume is on pace to be down over 20% from 2016, but still represents about 20% of the global M&A market.
  - PE firms continue to monetize assets, with over 60% of deals coming from sales to corporates and other sponsors, with the latter representing the largest share of sell-side activity since 2007.



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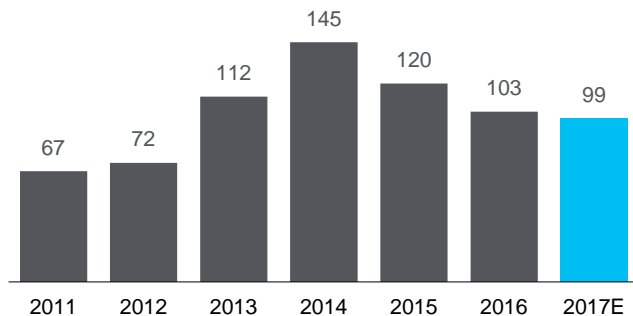
## The Current M&A Environment: D&O, Transactional and Litigation Perspectives

### Current M&A Market Trends – Shareholder Activism

- 2017 is on pace for a slightly slower year for shareholder activists, with an estimated 99 campaigns focused on companies with a market cap larger than \$1 billion.
- Since 2011, activists have reportedly secured "successful" outcomes in over 50% of the campaigns they launch, with another 14% having some of their demands met.

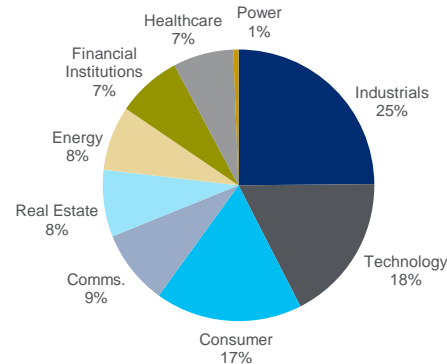
#### Number of Campaigns

# of \$1B+ Situations; Average Market Cap (US\$B)



#### Campaigns By Industry

% of \$1B+ Situations; 2011 – YTD 2017



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## Shareholder Activism – Top Campaigns April 2017

Target	Activist	Market Cap (\$B)	Industry	Initial Stake (%)	Tactics	Objectives	Outcome
BHP Billiton Limited	Elliott	\$131	Energy	4.1	Issued Press Release, Letter to Board	Increase Capital Distribution, Monetize/Separate Assets, Governance	Ongoing
Honeywell International Inc	Third Point	\$105	Industrials	N/A	Using the Media	Maximize Shareholder Value, Monetize/Separate Assets	Ongoing
Whole Foods Market Inc	JANA Partners	\$10	Consumer	8.3	13D	Board Representation, Management Change, Operational Changes, Review Strategic Alternatives, Governance	Ongoing

# Part II – General Legal Considerations in M&A

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## Two Kinds of M&A Transactions

- Acquisition of publicly-held company
- Acquisition of privately-held company
- Unique set of "key issues" for each

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## Preliminary Issues – Applicable to Public and Private Deals

- Duties of Target Board of Directors
  - Duty of Care
  - Duty of Loyalty
  - Heightened obligation for public deals (as noted in public company section)
  - Less legal risk in private deals because shareholders tend to be represented on board
- Hart-Scott-Rodino
  - Typically an issue if target company enterprise value exceeds \$80.8 million, however
  - Review by bank regulators replaces HSR for bank deals
  - As an aside, Winston has not seen a "Trump Effect" of relaxed HSR review policies (as expected by some commentators)
- Due Diligence
  - Buyer's first and best line of defense against unintended liabilities and adverse consequences of acquisition

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## Key Issues in Private M&A

- Letters of Intent
  - Can have profound effect on negotiations and ultimate agreement
- Indemnification
  - Caps, deductibles, etc.
- Representation and Warranty Insurance
  - Gaining prominence in private M&A market
  - In seller-controlled auctions, buyers are increasingly required to obtain R&W insurance and forgo traditional indemnity package
- "Bring-Down" of Representations and Warranties
  - When should the business risk transfer – signing or closing?
  - How to resolve? Approaches include giving buyer (1) right to seek indemnity, (2) a walk right with no indemnification or (3) no rights to indemnity (U.K. approach).

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## Key Issues in Public M&A

- Indemnification is not available due to publicly held stock
  - Underscores importance of pre-signing due diligence
- Key issues for board of directors:
  - *Revlon* duty: get the best price "reasonably available"
  - Ways to satisfy include public auctions, "controlled" auctions, "go shop" procedures, or calls to parties known or likely to be interested.
  - Business judgment rule generally applies provided:
    1. bidder not affiliated with directors and
    2. financial advisors to board have no conflict of interest.
  - Recent Delaware cases focus extensively on prior connections (e.g., new business pitches, financing) and relationships between financial advisor to target board and the bidder.
  - In public deals, target boards generally receive "fairness opinion" from financial advisor.

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## Key Issues in Public M&A (continued)

- Deal protection is a key issue for bidders
  - Bidders naturally want to ensure that their deal closes
  - May conflict with *Revlon* duties discussed above
  - Bidders typically want "no shop" provisions that provide that target board can't commence discussions with other bidders after deal signed
  - Target boards generally insist on "fiduciary out" that permits them to have discussions with other bidders that make unsolicited bids after deal signed and to terminate agreement if fiduciary duties require them to do so.
  - In return, bidders ask for
    - "matching rights" if new bidder makes a higher bid; and
    - "break up fees" if target board terminates; usually about 3% of deal amount.



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## Key Issues in Public M&A (continued)

- Material Adverse Effect
  - If an MAE occurs, Buyer may walk from deal.
  - Otherwise, Buyer must close even if reps and warranties are inaccurate (with no indemnity)
- Delaware cases make it difficult for Buyers to prove that an MAE has occurred:
  - must be unforeseeable to Buyer and "durationally significant"
  - a change that is merely "material," even if it has an effect on valuation, may not be enough to let buyer walk

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The Current M&A Environment: D&O, Transactional and Litigation Perspectives

## Financing in M&A

- Buyer's covenants regarding financing can be a key deal point
- Private equity model necessitates financing
- Pure financing "outs" are rare in seller-friendly market (i.e., Buyer can walk without cost if financing does not come together)
- More common:
  - Best efforts to obtain the financing on terms of commitment letters agreed at signing.
  - Reverse termination fees if financing is not obtained.

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## M&A Considerations for Banks, Brokerage Firms and Insurance Companies

- All bank acquisitions subject to review of Bank Regulators
  - Key issue is whether the acquisition may adversely affect its financial condition
- Acquisitions of brokerage firms
  - Subject to more streamlined regulatory review
- Acquisitions of insurance companies
  - Subject to 50-state review and approval (or the number of states where doing business)
  - Most cumbersome

# Litigation Perspective

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## Shareholder Litigation Challenging M&A Transactions

- Director's Fiduciary Duties

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## Recent changes in composition of Delaware Courts

- Supreme Court of Delaware – soon all 5 justices will have joined the court in the past 3 years
- Delaware Court of Chancery – 3 of 5 members have joined the court in past 3 years

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## Changes in the "disclosure-only" settlement landscape

- *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016) – signaled to plaintiffs' bar that disclosure-only settlements (and corresponding easy paydays) would be a rare occurrence going forward
- Implications

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## Reaffirmation of Shareholder Ratification

- Having a transaction approved by a fully-informed, uncoerced stockholder vote cures (nearly) all alleged evils
  - Same goes for tender offers
- Different rules for controlling stockholder transactions



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Determining "fair value" in appraisal proceedings: deal price or DCF?

- Recent decisions split