

KIRKLAND M&A UPDATE

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Divorce, Wall Street Style

Most of the recent terminated M&A transactions can be traced to a few macro trends — changes in tax law, increased antitrust enforcement and developing economic conditions.

Taking a page from the Hollywood tabloids, recent deal press has been overtaken by a stream of reported breakups, real or speculated. With *The Wall Street Journal* recently citing broken deal values in excess of \$300 billion so far in 2016, we take a closer look at the M&A environment to look for any macro trends that may be contributing to these record numbers.

Before identifying any trends, it is worth pausing to note that deals with a range of very different fact patterns are being grouped under the broad heading of “broken” deals. Many of the “busted” transactions featured in the headlines are either unsolicited offers that are subsequently withdrawn or deals or offers that are withdrawn due to a topping bid. These “withdrawn” deals are part of the ordinary churn of the M&A market, particularly one that may have hit peak activity and value levels.

Our focus instead is on deals with a signed definitive agreement that are later terminated for reasons other than a superior offer. Even within this narrower category, the trend of broken deals in 2016 stands out. Looking at selected signed transactions that have been terminated since June 2015 (see our [chart](#)), three secular trends emerge as key drivers of the increase in breakups:

Changes in Tax Law. In reaction to the spate of so-called inversion transactions over the last few years, the IRS and Treasury have released a series of rules and regulations intended to deter, or at least make less appealing, these moves by U.S. companies. The most recent tax release in early April included new rules seemingly targeted at one high-profile deal — Pfizer/Allergan. The tactic worked, with the parties terminating their planned merger just two days later under the terms of their agreement which had anticipated, and included a framework, to unwind the deal if tax laws were changed and impacted certain anticipated tax benefits. Recent tax pronouncements also included proposed regulations addressing intercompany debt that would impact common tax planning generally applicable to U.S. and non-U.S. multinationals and that can be expected to reduce certain of the tax benefits of inversion transactions. These modifications seem to have caught up with the CF Industries/OCI transaction and the Terex/Konecranes combination, a transaction that was also complicated by a post-announcement topping bid for Terex. In the Terex deal the merger agreement did not include a pre-wired framework to terminate the transaction in the event of a change in tax law, leaving the parties to negotiate a bespoke mutual separation whereby Konecranes would instead acquire Terex’s material handling and port solutions unit.

More Aggressive Antitrust Reviews. The termination of a number of other transactions is attributable to a more robust review of deals by antitrust authorities, reflected in the recent increase in litigated merger challenges. In the past 17 months, the Federal Trade Commission and the Department of Justice have sued to prevent eight mergers, with success in blocking some high-profile transactions including the Office Depot/Staples and US Foods/Sysco mergers and GE’s sale of its appliance business to Electrolux. In addition, the review of more controversial combinations by the antitrust authorities is taking longer, often with more extensive remedies being sought. This more aggressive posture on remedies ultimately doomed the Baker Hughes/Halliburton and Bumble Bee/Chicken of the Sea mergers. While it is difficult to generalize to all situations, factors cited as driving this more robust regulatory posture include beefed-up litigation resources at the antitrust agencies, authorities being emboldened by this being the last year of the current Administration, and the reality that many of the blocked deals represented attempts at further consolidation in already concentrated industries.

Economic Conditions. A number of transactions appear to have fallen victim to the economic slowdown, particularly in corners of the energy industry that have been especially hard hit (e.g., Kayne Anderson/Ares Management), and others may be on a similar path (e.g., Energy Transfer Equity/Williams). While the impact has not been as widespread as the 2007 credit crisis which impacted a broader cross-section of deals, especially those involving leverage, these troubled energy deals highlight the potential risks when deals are struck at particular points in the commodity/industry cycle.

Although outside the focus of this article, the above trends may also explain some of the withdrawn unsolicited offers for reasons other than competing offers

(we summarize a selection of these withdrawn unsolicited offers in this [chart](#)). For example, Canadian Pacific's unsolicited offer for Norfolk Southern was met with negative commentary from regulators and industry participants, ultimately resulting in its withdrawal. Similarly, Honeywell withdrew its unsolicited offer for United Technologies in the face of skepticism by the target on the prospects for antitrust approval.

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For reference, a high-level chart (which will be updated on a rolling basis) summarizing selected signed transactions that have been terminated since June 2015 can be found [here](#).

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