CROSS-BORDER M&A: WHAT NON-US INVESTORS SHOULD KNOW

In contemplating a potential acquisition in the United States, there are multiple considerations that require significant analysis to achieve the strategic goals of such acquisition.

It is paramount to consider the applicable US political and regulatory implications before acquiring businesses or assets. Additionally, federal, state and local laws, especially in sensitive industries or in industries with foreign government involvement, need to be considered. We also recommend planning how to navigate securities, antitrust regulations and potential review by the Committee on Foreign Investment in the United States (CFIUS). Mergers and acquisitions (M&A) strategy is unique and often different than in the home jurisdiction of non-US acquirors and, therefore, we believe it is important to become familiar with strategies utilized in US M&A transactions. For example, acquirors need to understand deal protections, pricing protections and defensive strategies available to US targets.

Throughout this article, we discuss important considerations to consummate a successful acquisition in the US and provide summaries of the more significant subjects to be considered when purchasing businesses or assets in the US.

TRANSACTION STRUCTURES AND ACQUISITION CURRENCY

Non-US acquirors should consider a diverse transaction structure for sensitive transactions, such as minority positions, joint ventures and partnerships with US entities. In this context, an important distinction is whether the company's common shares are registered under Section 12 of the Securities Exchange Act of 1934 (Exchange Act). Companies are required to register their common shares under Section 12(b) of the Exchange Act if they are listed on US securities exchanges.

Acquiring a private US company, a company without securities registered under Section 12(b) or 12(g) of the Exchange Act, is generally simpler from a US securities law perspective compared to acquiring a public US company. Because these companies are private, they are not subject to the detailed process and disclosure requirements of federal proxy rules. Instead, shareholder approval processes for mergers are governed by state law, typically involving minimal procedural requirements outlined in the company's state corporate law and governing documents. Disclosure obligations are limited to basic principles of fraud prevention and fiduciary duties.

Additionally, we recommend an analysis of transaction currencies in US acquisitions, noting that the trend is moving away from all-cash transactions. Moreover, non-US acquirers should consider innovative approaches to potentially offer US target shareholders securities that allow participation in the global enterprise resulting from the acquisition. Employing creative structures, such as issuing non-voting shares or special securities of the non-US acquirer, could help mitigate concerns related to US corporate governance.

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CFIUS	Regulatory scrutiny of foreign investments in the US by CFIUS has significantly increased. CFIUS has the authority to review transactions that could potentially affect national security. Additionally, investments in US companies that involve critical technology, certain roles related to critical infrastructure, or management of sensitive personal data may also fall under CFIUS scrutiny if they grant significant governance rights to foreign investors. CFIUS is interested in "covered transactions," which generally encompasses any transaction resembling an equity investment. Therefore, parties involved must assess whether their transactions, including debt or hybrid investments, possess characteristics equivalent to equity investments. While notification of most transactions remains voluntary, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) introduced mandatory notification requirements for certain transactions involving critical technologies, infrastructure or sensitive data. The applicable regulations impose a mandatory filing obligation. "Critical technology" encompasses traditional defense-related items; technologies subject to export controls; and "emerging and foundational technologies" vital to sectors like computer storage, semiconductors, and telecommunications equipment on specific investments in which foreign-government-controlled entities acquire 25% or more of the voting shares in a US business dealing with critical technology, infrastructure or sensitive personal data.
TAX CONSIDERATIONS	Because of the complexity of federal and state tax regulations, it is important to understand US and non-US tax implications for target shareholders. We recommend an analysis of the pro forma combined group or utilizing a controlled or partly controlled US acquisition vehicle. We recommend detailed tax modeling for anticipating combined business tax rates, as well as the consequences of owning non-US subsidiaries through an intermediate US entity. We generally review applicable changes in US tax laws, including corporate tax rate adjustments. Furthermore, cross-border transactions often bring about substantial challenges in terms of structuring and tax implications. Apart from navigating the standard tax regulations of the US and other relevant jurisdictions, these transactions may also trigger special tax regimes and rules that operate differently compared to domestic transactions.
CORPORATE GOVERNANCE AND SECURITIES LAW, US BOARD PRACTICE AND SHAREHOLDERS APPROVAL	From our experience, non-US acquirors that intend to use securities that will become publicly traded in the US often find applicable US securities laws and the rules and regulations of the US Securities and Exchange Commission as impediments to consummating a transaction. Non-US acquirors need to consider the Sarbanes-Oxley and Dodd-Frank Wall Street Reform and Consumer Protection Acts and stock exchange requirements to confirm that the regulations are compatible with the applicable rules of the acquiror's home country. Furthermore, securing public shareholder approval in US transactions is crucial, especially in instances involving companies without controlling shareholders.
ANTITRUST ISSUES	Recently, we have witnessed aggressive enforcement and focus on competitive overlaps involving non-US acquirors. Understanding these regulations ensures compliance and mitigates potential risks associated with foreign investors, especially with effective remedies and strategies for businesses aiming to maintain fair competition and market integrity. Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) parties are required to file notifications with the Federal Trade Commission (FTC) and the US Department of Justice (DOJ) for specific transactions. The primary goal of the HSR Act is to allow the FTC and DOJ to investigate whether proposed transactions would significantly reduce competition. If deemed harmful, they may challenge transactions in federal court. Transactions covered by the HSR Act include acquisitions of voting securities or assets that meet both the "size-of-transaction" threshold, currently set at $111.4 million (typically the higher of the purchase price or fair market value), and the "size-of-person" threshold. The latter is satisfied when one party to the transaction has assets or revenues of at least $222.7 million and the other party has assets or revenues of at least

	$22.3 million. There are exceptions to these thresholds: transactions exceeding $445.5 million disregard the “size-of-person” threshold, requiring filing unless an exemption applies.
EMPLOYEE COMPENSATION	Employee compensation and benefits is often a critical role in negotiations related to a deal. Existing compensation plans and new arrangements that the target company intends to introduce in connection with a transaction can significantly impact the retention of key employees after the deal is completed and involve substantial costs. Equity-based incentive compensation is widely employed in US corporate settings and may result in the need for significant negotiations in the context of an acquisition. While practices vary between publicly traded and privately held companies, it is not uncommon for equity awards to represent a considerable portion (10% or more) of a company’s fully diluted equity value and to be held by a significant proportion of its workforce. In this context, it is important to carefully evaluate compensation and benefits arrangements in US acquisitions, with particular attention on the management of equity awards throughout the stages of valuation, negotiations and integration.

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