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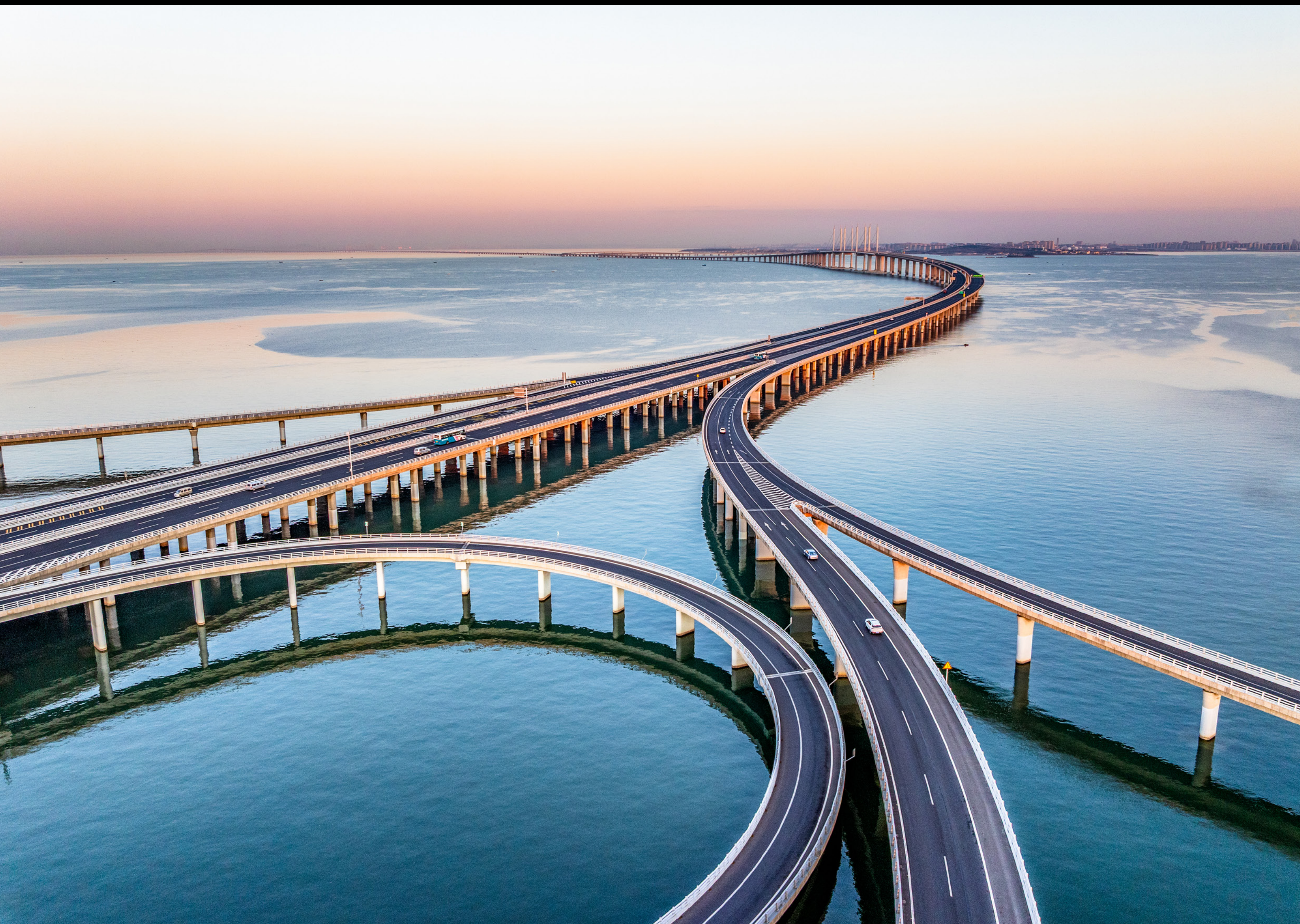
Investing in the United States through cross-border M&A: an overview of key considerations for non-US acquirors



Investing in the United States through cross-border M&A:
an overview of key considerations for non-US acquirors

Cross-border M&A transactions can be far more complex than domestic transactions. But with advance planning and careful consideration of the relevant issues, it is possible to successfully navigate the complexities and achieve the parties' commercial objectives. This briefing presents a high-level overview of certain key US issues that should be considered by non-US acquirors contemplating acquisitions or other strategic investments in the United States.

Further details regarding the key issues summarized in this overview can be found in our longer form article, *Investing in the United States through cross-border M&A: Key considerations for non-US acquirors.*

Acquisition structures, acquisition finance, and other structuring considerations

Acquisition structures

The choice of acquisition structure in M&A is driven by the characteristics of the parties and businesses involved – such as entity type, tax classification, jurisdiction, and the businesses' assets and liabilities – as well as the related tax implications for and the commercial objectives of the parties. Acquisitions of US public companies are invariably structured as statutory mergers or tender offers followed by second-step squeeze-out mergers, each subject to significant regulatory and US Securities and Exchange Commission (SEC) oversight. By contrast, acquisitions of US private companies – whether by way of an acquisition of stock or assets, or by way of merger or other structure – offer greater flexibility because they are generally not subject to the same regulatory and SEC oversight.

Acquisition finance

In many non-US jurisdictions, sellers require acquirors to demonstrate complete financing certainty at signing - an approach known as "certain funds" financing. In the US, an acquiror need only show that it has sufficient funds to complete the acquisition, or that it has entered into commitment letters with one or more lenders, to provide the financing necessary to close the deal. It is rare for a buyer's obligation to close to be conditional on its obtaining financing for the transaction. And as is almost always the case, cash is the preferred form of consideration.

Other structuring considerations

If the contemplated transaction is potentially politically sensitive or likely to face regulatory resistance, alternative structural considerations could help facilitate a deal. These may include one or more of the following:

- minority or other non-controlling investments;
- joint ventures;
- contractual partnerships with a US company or management team or partnering with a US source of financing or co-investor (such as a private equity firm);
- utilizing a controlled or partly controlled US acquisition vehicle, including a board of directors largely comprised of US citizens; or
- implementing bespoke governance structures (such as a US proxy board) with respect to specific sensitive subsidiaries or businesses of the target company.

CFIUS, merger control, and regulated industries

CFIUS

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee authorized to review certain transactions involving non-US investment in the United States and certain real estate transactions in the United States involving non-US persons to determine their effect on US national security interests. In contrast to US merger control, in which filings are generally triggered based on transaction values and the parties' financial attributes, CFIUS jurisdiction and filing considerations are generally driven by the nature of the assets and rights proposed to be acquired.

CFIUS filings are mandatory only in limited prescribed circumstances, whereas voluntary filings are often advisable more generally where national security considerations may be implicated. CFIUS clearance, if obtained, generally provides a "safe harbor" against later challenges on national security grounds, subject to the accuracy of the filing and compliance with any mitigation measures. Careful advance planning of a legal and a political strategy in relation to CFIUS greatly enhances the likelihood of a successful outcome.

Merger control

The Antitrust Division of the US Department of Justice (DOJ) and the US Federal Trade Commission (FTC) have the power to review the competitive aspects of proposed transactions – even transactions that do not result in changes of control or involve US companies – pursuant to mandatory pre-merger notification requirements under the US Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act). These notification requirements are commonly referred to as "HSR filings" and, subject to certain exceptions, are triggered if the transaction value and certain financial attributes of the parties exceed certain statutory thresholds. In contrast to the "safe harbor" obtained as a result of a CFIUS clearance, the DOJ and FTC can still challenge a transaction at any time after the closing (though these types of challenges are uncommon). Similar to CFIUS, careful advance planning of a substantive strategy in relation to US merger control greatly enhances the likelihood of a successful outcome.

Regulated industries

Various US federal and state regulatory requirements (including filings and consents) may apply to acquisitions of companies operating in particular sectors (for example, registered investment funds/advisers, banking/financial institutions, energy, power, natural resources, maritime, utilities, communications, aviation, transportation, gaming, defense, healthcare, and insurance). Complying with such requirements, including obtaining any related approvals, should be factored into transaction timelines.

Securities laws

Non-US acquirors that intend to offer and sell securities in the United States in connection with a US investment may become subject to SEC registration and ongoing periodic reporting requirements, and registration requirements under the securities laws of each state (known as "blue sky" laws), unless the securities being offered and sold, or the related transaction, are specifically exempted. Non-US acquirors seeking to use their stock as consideration in an acquisition of a private company (although probably not a US public company) may qualify for "private placement" exemptions, which eliminate the time and expense associated with an SEC-registered transaction.

Non-US acquirors seeking to purchase stakes in US public companies must take into account restrictions on insider trading, the potential requirement to publicly report beneficial ownership of shares (and other information about the acquiror and its intentions with respect to the target company) in excess of 5%, and "short-swing profits" rules (which potentially can require disgorgement of profits from trading after the acquiror's holding in the target company's shares exceeds 10%).

Corrupt business practices and economic sanctions

First-time investors in the United States should be cognizant that their exposure to risk under the US Foreign Corrupt Practices Act (FCPA) could increase significantly if they acquire a US business. Generally, the FCPA's anti-bribery provisions apply to US persons and businesses, companies listed on US stock exchanges or that are required to file periodic reports with the SEC, and certain foreign persons and businesses while acting in the United States. A non-US acquiror may become subject to the FCPA's anti-bribery provisions depending on the levels of entanglement between the US target company and its affiliates, and the nature of the non-US acquiror's business and geographic exposure.

In addition, US businesses must comply with US economic sanctions, which can extend to non-US acquirors if their activities involve US businesses or they have certain requisite touchpoints with the United States.

The role of a target company's board of directors

While M&A transactions are often initiated by management, the board of directors of a US target company – as a fiduciary charged with acting in the best interest of the target's stockholders – plays a central gatekeeping role and must determine whether a proposed transaction should proceed. Directors are generally expected to make informed, deliberate decisions based on all material information reasonably available to them and to act independently, in good faith, and in the best interests of the corporation and its stockholders.

Board decisions are typically reviewed under the business judgment rule, which affords directors a rebuttable presumption of proper conduct and limits judicial second-guessing of rational business decisions. Courts may subject these decisions to greater scrutiny, however, in certain M&A contexts. For example, in transactions involving a change of control, Delaware courts apply enhanced scrutiny, subjecting in which directors may be subject to so-called "Revlon duties" which require requiring them to become "auctioneers" and seek the best price reasonably available for stockholders. These fiduciary principles apply to both public and private companies.

Litigation

Non-US acquirors conducting business in the United States must be prepared to operate within a robust litigation environment and to defend themselves within the US system against a wide range of potential complaints. This can sometimes be the case with respect to M&A activity, particularly in uncertain economic times, as market volatility tends to embolden activist shareholders.

While litigation related to takeovers of US private companies is rare, litigation related to takeovers of US public companies is common, though generally not a cause for concern. Nuisance claims, in which shareholders seek to delay or prevent the transaction, and related damages, are usually easily resolved.

Human resources

Navigating US labor and employment-related considerations can sometimes be a challenge for non-US acquirors, particularly in cases where human capital represents a large percentage of transaction value. In addition to legal (including federal, state, and local laws) and regulatory compliance (such as in relation to benefit plans, deferred compensation, and labor unions), and integration of employees following the transaction, one of the most significant employment considerations is how to compensate and retain key employees of the target company. This issue is particularly acute when ultimate ownership changes from a US to a non-US owner. Developing solid people-management, incentive, and retention plans that are put into effect at the outset of the transaction and carried out through closing and into the post-closing integration phase can be critically important.

Intellectual property and data protection

Intellectual property

Intellectual property (IP) is protected in the United States by a well-developed body of statutory and common law that is designed to protect the owner's right to use IP and to prevent the unauthorized exploitation of IP by others. The scope and strength of the protection differ depending on the nature of the IP right and the industry in which the IP owner operates, so legal due diligence should be calibrated accordingly.

Because the default laws designed to allocate IP ownership rights are not harmonized across jurisdictions or different types of IP, the processes for conferring valid ownership of IP in the United States do not necessarily ensure that the target company will enjoy valid ownership outside of the United States. Consequently, if a non-US acquiror's business plan depends on certain IP rights conferring protection over a particular technology, the acquiror should carefully consider how that technology can be protected both within and outside of the United States.

Data protection

In contrast to some non-US jurisdictions, the United States does not have a single comprehensive federal data privacy and data security law. Instead, there is a fragmented and dynamic patchwork of federal and state laws and regulations (including sector-specific requirements), industry standards, and "best practices" that apply differently across jurisdictions, industries, and data subjects.

Since the EU's General Data Protection Regulation (GDPR) took effect in 2018, however, the data regulatory landscape in the United States has begun to shift significantly towards a more comprehensive regulatory regime. Certain states have adopted data privacy laws, which follow a framework similar to the GDPR, but each law has unique nuances that can make compliance challenging, particularly since companies must maintain compliance with existing sector-specific federal privacy requirements, such as for children's data or financial information. Cybersecurity protections are more common, but similarly fragmented.

Transactional risk insurance

Representation and warranty insurance (RWI) is increasingly popular in the United States, and obtaining an RWI policy is now standard market practice for private M&A transactions. With the growth in the market and increased competition among underwriters, RWI policies are more affordable and prevalent, and can be implemented on an expedited basis in parallel with the primary deal negotiations.

Distressed acquisitions

A financially distressed US target company may present opportunities for non-US acquirors to invest in the United States on financially attractive terms, particularly in the current environment of elevated interest rates, constrained liquidity, and increasing refinancing pressure on leveraged borrowers.

However, transactions with distressed parties can also present significant risks that require careful navigation. An acquiror seeking to purchase assets from a financially distressed company, for example, should be aware that the transaction may be subject to unwinding in the two to four years following the transaction (depending on applicable state law) if the seller files for bankruptcy after the sale and the seller (i) sold the assets with the actual intent to hinder, delay, or defraud creditors, or (ii) received less than the reasonably equivalent value in exchange for its assets and was insolvent at the time or became insolvent as a result of the sale.

Conclusion

Non-US acquirors seeking to invest in the United States can successfully navigate the related legal, jurisdictional, procedural, commercial, and market practice complexities with proper planning and consideration of the relevant issues.

While non-US acquirors often prefer to engage advisers with whom they have worked in the past in their home markets, it is also advisable to engage local US advisers who are familiar with US concepts and market practice.

While each cross-border M&A transaction will present a set of unique considerations, an awareness of, and flexible and creative approach to, the most common issues that accompany US M&A transactions will help secure a successful outcome, put a non-US acquiror on equal footing with US competition, and help the non-US acquiror achieve its commercial and financial objectives.

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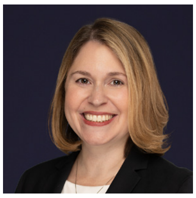

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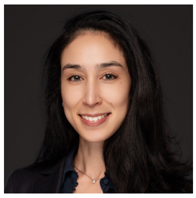

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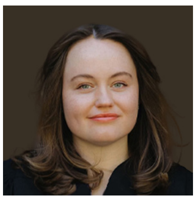

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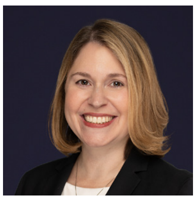

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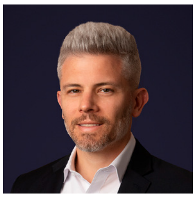

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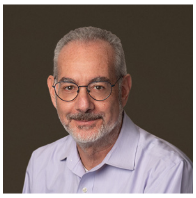

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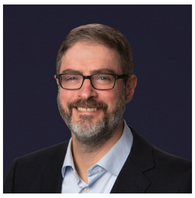

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