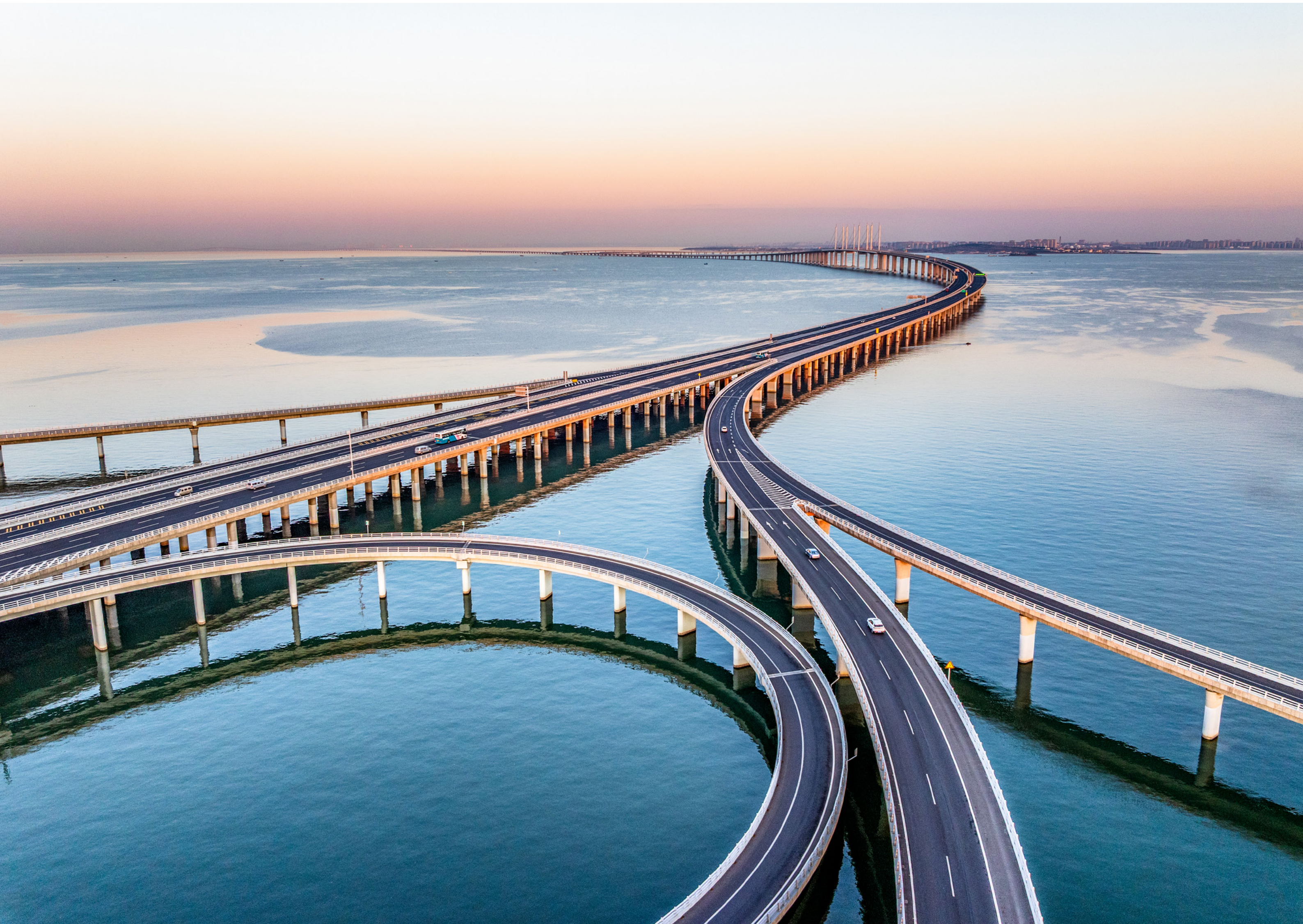
Clifford Chance

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



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Summary

In contrast to purely domestic M&A, cross-border M&A involves an array of additional legal, jurisdictional, cultural, and commercial nuances that must be navigated. To assist non-US acquirors who are interested in making strategic or other investments in the United States, this article provides an overview of select key considerations, including in relation to deal structuring, CFIUS, merger control, securities laws, human resources, intellectual property, and more. While each M&A transaction will present bespoke issues, some of which are likely to be unfamiliar to non-US acquirors, a foundational familiarity with the most common issues that underlie and accompany US M&A deals will help secure successful outcomes.

For a shorter form version of this article, please see our high-level summary, *Investing in the United States through cross-border M&A: An overview of key considerations for non-US acquirors.*

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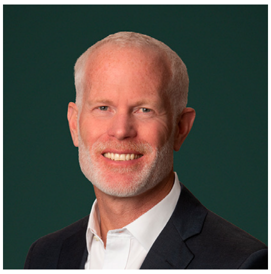

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Investing in the United States through cross-border M&A: key considerations for non-US acquirors

Cross-border M&A transactions can be far more complex than purely domestic transactions. But with advanced planning and careful consideration of relevant issues, it is possible to navigate this complexity successfully and achieve the parties' commercial objectives. This article outlines key US issues that should be considered by non-US acquirors contemplating acquisitions or other strategic investments in the United States.

1. Deal structure: acquisition structures, acquisition vehicles, effects of tax reform, acquisition finance, and other structuring considerations

1.1 Acquisition structures

The choice of acquisition structure in M&A is typically driven by the characteristics of entities and businesses involved in the transaction, including entity type (under local law), entity classification (for US tax purposes), applicable jurisdictions of organization and operations, and the nature of applicable assets, liabilities, capital structures, and shareholder base, together with the unique tax considerations of the deal and the parties' commercial and financial objectives.

Acquisitions of US public companies are invariably structured as either a statutory merger or a tender offer (which is followed by a second-step short-form statutory merger to "squeeze out" any remaining stockholders of the target company who do not participate in the first-step tender offer), both of which are subject to various regulatory requirements and review by the US Securities and Exchange Commission (SEC). Acquisitions of US private companies, by contrast, provide far greater structuring flexibility because they generally are not subject to the same regulatory requirements or SEC review that apply to takeovers of US public companies. Accordingly, while acquisitions of private companies can, and often do, take the form of a statutory merger (tender offers are rare), direct acquisitions of stock and assets are equally common.

Subject to certain exceptions, parties to a transaction that is structured as an acquisition of assets can select the assets and liabilities to be transferred to the acquiror and to be retained by the seller. An acquiror of assets generally does not inherit the US tax basis of the seller in the assets being sold. Accordingly, asset acquisitions are often thought to facilitate tax efficiencies for the acquiror because if the acquiror is able to obtain a "step-up" in the tax basis of the acquired assets, then the acquiror should be able to further depreciate those assets over time as well as reduce the acquiror's tax liability related to a future sale of those assets.

By contrast, parties to a transaction that is structured as a merger or an acquisition of stock do not have this flexibility because the company being acquired (which is the seller in an asset deal) continues to own the same assets and remain subject to the same liabilities after the closing. Accordingly, in deals structured as a merger or an acquisition of stock, the target company's historic liabilities, including liabilities for unpaid US taxes as well as its US federal income tax attributes (such as net operating losses), generally remain unchanged (although subject to certain requirements, certain tax elections may be made to treat the purchase of stock as a purchase of assets).

1.2 Acquisition vehicles

Non-US acquirors need to carefully consider their choice of acquisition vehicle, which will be based in part on the potential tax treatment of both the contemplated transaction and the combined business after the closing. Non-US acquirors typically use a US corporation as their acquisition vehicle for asset acquisitions of a US business because it allows them to avoid being treated for US tax purposes as directly engaged in a US trade or business (which can introduce significant tax complexities), and non-US acquirors can instead have the US corporation make all required US tax filings and payments. Non-US acquirors typically also use non-US corporations (or corporate or non-corporate US entities) as their acquisition vehicle for acquisitions of stock of a US target company. If a non-US acquiror acquires the stock of a US target company, and is eligible for the benefits of an applicable tax treaty with the United States, then dividends, interest, or royalties that the non-US acquiror receives from the US target company may be subject to reduced rates of US withholding taxes (or such taxes might be eliminated entirely).

Accordingly, tax planning in the context of determining a transaction structure should take into account not only the tax consequences of the transaction itself (for example, whether the transaction is intended to be taxable or tax-deferred), but also the tax implications of operating the newly-acquired US business after the closing (for example, cross-border flows of goods and services, the repatriation of cash and other distributions, the availability of US tax treaties, etc.). Careful tax structuring is important because the US Internal Revenue Service can challenge the parties' tax characterization of a transaction if it does not agree that it reflects the substance of the transaction.

1.3 Effects of tax reform

Recently enacted US tax laws, as well as current and potential future tax reform in the United States and other countries, have a profound effect on cross-border M&A tax planning.

In the United States, the One Big Beautiful Bill Act (OBBBA), which was enacted in 2025, has been at the forefront of cross-border M&A discussions due to the impact it has had on industries that historically have attracted non-US investment. Among other industries, it has significantly impacted the renewable energy industry through changes to clean energy tax credit eligibility. For example, on the one hand, the OBBBA accelerated phase outs for several credits, including wind and solar production and investment credits. On the other hand, a limited subset of clean energy credits, including the credit generated by sales of qualifying clean fuel, helpfully received extended availability deadlines. Such changes have at times, and may continue to, alter the types of US companies that are targeted for acquisition by non-US investors.

In addition, the OBBBA provides a 100% first-year "bonus depreciation" deduction for the cost of personal property purchased and used in US manufacturing, transportation, construction, and certain other businesses. Accordingly, non-US investors that acquire qualifying property can achieve accelerated US tax savings.

In addition to US reform, global international tax reform by the Organization for Economic Co-operation and Development, such as "Pillar 2," may impact acquisitions of US companies. The goal of Pillar 2 is to establish a coordinated system of taxation to ensure large multinational companies pay a minimum 15% tax in each country in which they conduct business. Under Pillar 2, if a large corporate group operates in a country that imposes tax at less than a 15% rate on profits earned in that country, the corporate group may be subject to a "top-up tax" in other countries equal to the shortfall below 15% paid in the low-tax country.

Many countries, including the United Kingdom and European Union member states, have adopted rules to comply with Pillar 2. The United States, however, has not. This means, for example, that a non-US acquiror of a US company may need to pay extra taxes in the acquiror's home country on the US company's profits post-acquisition if the acquiror's home country has enacted Pillar 2 rules and US tax is imposed on the US company's profits at an effective rate below 15%.

Notably, the G7 and some other countries have indicated they plan to adopt a special regime pursuant to which if a US parent company owns subsidiaries in countries that have adopted Pillar 2 top-up tax rules, the income of the US parent and its non-US subsidiaries will not be subject to any top-up tax. This means that a US-parented group may be exempted from tax and reporting burdens that apply to competitors headquartered in other countries.

1.4 Acquisition finance

Cash remains the preferred form of consideration in cross-border transactions in which the equity of non-US acquirors is generally viewed by US sellers as a far less attractive alternative (notwithstanding the potential upside). After a period of higher interest rates and constrained bank lending, debt markets have improved, banks are again competing to finance larger transactions, and private credit markets are fully established as a mainstream source of acquisition financing. Many acquirors now consider a broader mix of financing options, including partnering with direct lenders (including sovereign wealth funds and other institutional investors), accepting seller financing, or increasing equity financing. Private credit frequently comes with stronger lender protections and higher pricing as compared to more traditional broadly syndicated bank loans, but it is a particularly attractive option for sponsors and other borrowers looking for creative terms and structuring alternatives, such as more relaxed amortization, delayed-draw term loans, increased PIK interest, dividend recaps, portability, or automatic cures.

In the United Kingdom and many other non-US jurisdictions, sellers typically expect the acquiror to have "certain funds" in place at signing – that is, financing that is effectively fully committed and subject to limited conditions. This typically includes negotiating and putting in place an agreed or substantially agreed form of an interim facilities agreement that can be drawn on and funded if the parties fail to reach agreement on definitive credit agreement documentation before closing. The certain funds approach is designed to give sellers a high degree of certainty that the purchase price will be available at closing. In the United States, by contrast, there is no comparable "certain funds" market practice and sellers rarely, if ever, agree to condition the acquiror's obligation to close on obtaining financing. US sellers instead use a different structure to achieve a similar level of certainty by requiring the acquiror to have financing commitment letters in place at signing pursuant to which lenders agree to provide the funding at closing subject only to a limited set of conditions. These conditions are tightly aligned with the closing conditions in the acquisition agreement, so as to minimize any gap between when the acquiror is required to close under the acquisition agreement and when the lenders are required to fund under the commitment letters. The commitment letters also include detailed term sheets setting forth the terms of the definitive financing to be negotiated and put in place prior to closing. If the lenders fail to fund when required at the closing, the seller's remedies are typically indirect and subject to important limitations. While sellers are often granted limited third-party beneficiary rights that may permit them to seek specific performance of the financing commitments in certain circumstances, those rights generally apply only if all financing conditions are satisfied and the transaction is otherwise ready to close. In practice, sellers rely primarily on the acquiror's contractual obligation to close and, if the transaction fails due to financing, on recovery of a negotiated reverse termination fee.

Lenders may seek to include provisions in the commitment papers to reduce the risk that they will have to fund at closing, including market flex and securities demand provisions. Market flex provisions permit lenders to adjust financial terms of the commitment within a certain pre-agreed range in order for the committed lenders to achieve a successful syndication, which is defined as the lenders holding at closing no more than a certain negotiated amount of the commitment or loan. Securities demand provisions permit the lenders to compel the acquiror to issue debt securities to fund the acquisition or to replace a related bridge loan.

Tax considerations can also affect the acquisition financing used by a non-US acquiror. If debt is used, then debt placement within the capital structure of the acquiror and target group, and related collateral security, should be carefully planned, and limits on the deductibility of interest should be carefully considered, to fit the overall structure and related tax and financial return objectives of the acquiror. If intercompany debt is used or debt is "pushed down" from a non-US parent to a US subsidiary, then complex conduit financing rules, tax treaty considerations, and rules on recharacterization of debt will need to be taken into account. If the acquisition is funded by issuing common or preferred equity, then dividend withholding rates and tax treaties applicable to the non-US acquiror will need to be considered as well.

Additional considerations that apply to acquisitions being funded with equity or other securities are set out below in Section 5 *(Securities laws and mandatory offer requirements).*

1.5 Other structuring considerations

If the contemplated transaction is politically sensitive or likely to face regulatory resistance, or if it is helpful to achieve commercial or financial objectives, alternative structures 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.

There are pros and cons associated with each of these structures, but depending on the objectives of the parties, each could potentially help to facilitate a deal.

2. Committee on Foreign Investment in the United States[1]

2.1 CFIUS overview

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, including certain real estate transactions and transactions pursuant to which a non-US acquiror gains "control of a US business," to determine their effect on US national security interests. Industries that have historically drawn the greatest scrutiny from CFIUS include defense, aerospace, computers and electronics, heavy machinery, software publishing, utilities, and mining. Over time, however, as new asset classes and technologies have emerged, the list has expanded and transactions involving critical technology, critical infrastructure, and sensitive personal data of US persons (referred to as TID US businesses) are now of heightened interest to CFIUS, with AI, semiconductors, and data being leading examples. For CFIUS purposes, the concept of "national security" continues to be intentionally expansive and now includes a host of other sectors in addition to TID

[1] While beyond the scope of this article, the US Department of the Treasury's (Treasury Department) Outbound Investment Security Program is a new national security regime that restricts certain investments by US persons into companies linked to countries of concern – currently China (including Hong Kong and Macau) – that operate in sensitive technology sectors. Under final regulations effective January 2, 2025, some outbound investments must be notified to the Treasury Department, while others are outright prohibited, depending on the nature of the technology and the level of risk. The rules focus on semiconductors and microelectronics, quantum information technologies, and certain artificial intelligence systems, and apply to US investors as well as non-US entities they control. The program is intended to prevent US capital and expertise from supporting non-US technological capabilities that could be deemed to pose a threat to US national security.

US businesses that were not previously considered sensitive, such as telecommunications, gaming, cyber, robotics, advanced manufacturing, nanotech, biotech, pharmaceuticals, energy, finance, health, agriculture, social media, and real estate.

CFIUS filings are sometimes mandatory, but more often are made on a voluntary basis. If the parties make a voluntary CFIUS filing (which takes the form of a Joint Voluntary Notice) and CFIUS is satisfied that the filing contains all required information, then an initial review period of up to 45 days commences.[2] After the initial review period, CFIUS will either (1) clear the transaction if it concludes that it does not present any national security risks or (2) initiate a subsequent investigation that may last up to an additional 45 days.[3]

If CFIUS concludes that the transaction presents national security risks, then it may require the parties to agree to mitigation measures prior to closing, impose conditions on the post-closing operation of the acquired business or, in the most extreme cases, refuse to clear the transaction. The range of mitigation measures that CFIUS can impose is intentionally broad and the actual measures sought to be imposed by CFIUS depend on the risk profile of the transaction. If CFIUS and the parties agree to mitigate CFIUS's concerns, then CFIUS will clear the transaction. If not, or if in the view of CFIUS the identified national security risks cannot be mitigated, then CFIUS may refer the matter to the President of the United States (generally with a recommendation to block the transaction), and the President will have 15 days to act. Presidential action is rare, however, and CFIUS clears most transactions without mitigation.[4]

Subject to limited exceptions, if CFIUS clears a transaction there is a "safe harbor" that prevents it from future CFIUS review. Parties sometimes try to address the risk of failing to obtain CFIUS clearance through the use of termination fees payable by the non-US acquiror if clearance is not obtained.[5] Careful planning, which often includes designing both a legal and a political strategy (including notifying CFIUS well in advance of the completion of a given transaction), greatly enhances the likelihood of a successful outcome.

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[2] In lieu of a traditional filing, the parties may submit a short-form filing (in the form of a Declaration) pursuant to an abbreviated filing process. In those cases, the initial review period ends no later than 30 days after it has commenced. In contrast to Joint Voluntary Notifications (JVN), there is no secondary investigation period for Declarations.

[3] If parties submit a short-form Declaration (instead of a JVN), CFIUS will, at the end of the 30 day review period, issue a decision and choose to either: (i) clear the transaction; (ii) direct the parties to file a full JVN; or (iii) issue a "No Action" letter without clearing the transaction, thereby leaving the parties to decide whether to close the transaction without filing a JVN and without the formal "safe harbor" certainty of clearance.

[4] Nevertheless, throughout 2024 and 2025, the United States saw first-of-its-kind US presidential involvement in the CFIUS review of the proposed acquisition of US Steel by Nippon Steel, which became highly politicized and subject to intense CFIUS scrutiny, illustrating the potential for national security reviews to intersect with broader political and industrial policy considerations.

[5] Non-US acquirors based in countries that restrict or otherwise regulate the flow of capital in connection with outbound investments may be subject to requests from US sellers to secure the payment of these types of reverse termination fees through the use of US collateral structures, including US dollar denominated escrow accounts held in the United States by US banks.

2.2 US Foreign Investment Risk Review Modernization Act

The US Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) fully took effect on February 13, 2020. FIRRMA broadened CFIUS's jurisdiction to include certain non-controlling investments in TID US businesses, in addition to traditional control transactions. Under FIRRMA, mandatory filings with CFIUS are required for certain acquisitions of "control" or certain rights by a non-US acquiror of any nature in relation to a TID US business that engages in certain "critical technologies." By comparison, an acquisition of an interest in a TID US business that engages in "critical infrastructure" or "sensitive personal data" triggers a mandatory CFIUS filing only if a non-US government holds a "substantial interest" (typically 49% or more) in the non-US acquiror, and that acquiror is obtaining a "substantial interest" (25% or more voting interests) in the TID US business.

Pursuant to FIRRMA, the US Department of the Treasury (Treasury Department) also established the Office of Investment Security Monitoring and Enforcement (Non-Notified Team), which is responsible for identifying transactions not notified to CFIUS that may pose national security concerns. The Non-Notified Team uses various means to identify transactions, including tips from the public, interagency referrals, media reports, commercial databases, and congressional notifications. Accordingly, transactions that close without CFIUS clearance – even transactions that are not publicly announced – may still be discovered and become subject to CFIUS review.[6]

2.3 Recent CFIUS developments: known investor program

Following a confidential pilot program in 2025, the Treasury Department issued a formal Request for Information (RFI) in February 2026 to further develop the framework for its Known Investor Program (KIP). This voluntary program is intended to allow repeat non-US investors to provide significant organizational, governance, and compliance information to CFIUS outside the context of a specific transaction. By "pre-vetting" the investor's background, the program aims to introduce efficiencies and potentially expedite future transaction-specific reviews. Importantly, the KIP would not change the need for CFIUS to review each transaction involving a known investor entity on a case-by-case basis, including assessing the vulnerabilities associated with the US business and any national security risks related to the transaction. It remains to be seen whether the KIP will create greater efficiencies in the CFIUS review process.

3. Merger control

3.1 US federal merger control regulatory regime

The Antitrust Division of the US Department of Justice (DOJ) and the US Federal Trade Commission (FTC) have the authority to review the competitive aspects of proposed transactions, including transactions that do not result in changes of control, do not involve US companies, or are not subject to mandatory pre-merger filing notification requirements.

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[6] For example, in January 2026, President Trump issued an executive order that required HieFo Corporation, a California-based photonics company, to divest its ownership of EMCORE Corporation's digital chips business, citing concerns over Chinese control of HieFo. The parties did not file the transaction with CFIUS until after CFIUS's Non-Notified Team investigated the transaction.

Subject to certain exceptions, transactions that exceed certain reporting thresholds are subject to mandatory pre-merger notification requirements under the US Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act). If required, the acquiring person and the seller must each submit a premerger notification (HSR filing) to both the DOJ and the FTC and observe a statutory waiting period before consummating the transaction.[7] The initial waiting period is generally 30 days (15 days in the case of cash tender offers and certain bankruptcy transactions). The statutory waiting period may also be shortened in certain cases through an early termination procedure which, if granted, permits parties to close before the otherwise applicable statutory waiting period expires. The availability of early termination, however, has been limited or suspended at various times in recent years.

If a transaction raises substantive competition concerns, either the FTC or the DOJ may request additional information or documents from the parties to conduct a more detailed review (known as a "second request"). That request tolls the waiting period until both parties have substantially complied with the request.

The filing fees payable in connection with HSR notifications have increased significantly in recent years and continue to be adjusted annually. Under the current fee schedule, which became effective in February 2026, filing fees are assessed on a tiered basis based on the HSR size-of-transaction value, and range from US$35,000 for smaller transactions to US$2.46 million for larger transactions. The acquiring party is responsible for paying the HSR filing fee. In negotiated transactions, however, parties often allocate the economic burden of the fee by contract.

3.2 US state merger control regulatory regimes

In addition to federal review under the HSR Act, certain states impose separate pre-merger notification requirements. As of March 2026, Washington and Colorado have enacted state antitrust pre-merger notification laws. These laws require parties to transactions having a certain nexus to the state to submit their federal HSR filing forms to the state attorney general. There are no waiting periods or filing fees.

In addition, a number of states maintain sector-specific pre-merger notification regimes, primarily in the healthcare sector, which may apply regardless of whether an HSR filing is required. States with healthcare-specific notice or approval requirements include California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, among others. The filing requirements and review periods vary by state and transaction type. Generally in these cases, parties are only required to provide notice and are not separately required to obtain state approval to close the transaction. Some of the sector-specific state regimes, however, do go beyond notice requirements and grant state regulators the authority to require formal approval, impose operating conditions, or delay closing, separate from federal HSR review.

[7] In February 2025, the FTC substantially expanded the information required to be included in HSR filings. US courts invalidated that expansion in February 2026, which the FTC is currently appealing.

3.3 Other considerations

Coordinating antitrust and merger control filings and substantive strategies across multiple jurisdictions can be a substantial undertaking, with significant commercial and timing implications for the deal. Recent enforcement actions illustrate the US antitrust agencies' continued willingness to litigate and, where necessary, block transactions outright. For example, in early 2024, a federal court enjoined JetBlue's proposed US$3.8 billion acquisition of Spirit Airlines, leading the parties to abandon the transaction, and in late 2024, federal and state courts blocked Kroger's US$24.6 billion acquisition of Albertsons following parallel challenges by the FTC and multiple state attorneys general.

At the same time, recent developments confirm that structural remedies remain a viable path to clearance in appropriate cases. Notably, in December 2025, a federal court approved a DOJ settlement permitting UnitedHealth Group's US$3.3 billion acquisition of Amedisys to proceed following the divestiture of more than 160 home health and hospice facilities across 19 states. This settlement, which represents the largest divestiture of outpatient healthcare facilities by number ever required to resolve a merger challenge, demonstrates the DOJ's willingness to accept substantial structural remedies. Consistent with this approach, the DOJ and FTC have also cleared other transactions through divestitures, reinforcing that "fix-it-first"[8] and consent-decree remedies[9] remain available.

In light of these developments, parties – particularly non-US investors – should carefully assess substantive antitrust risk and likely remedy demands when negotiating "hell-or-high-water"[10] provisions, reverse termination fees, and other antitrust-related risk-allocation mechanisms. Ultimately, even where a transaction is not subject to HSR or state level merger control requirements, states may have the ability to block a transaction through litigation in state or federal court.

4. Regulated industries and additional regulatory considerations

In addition to CFIUS and merger control requirements, various US federal and state regulatory requirements (including regulatory filing and consent requirements) may apply to acquisitions of companies operating in particular sectors, including, for example, registered investment funds/advisers, banking/financial institutions, energy, power and natural resources, maritime, utilities, communications, aviation, transportation, gaming, defense, healthcare, and insurance. In such cases, complying with

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8 In a typical fix-it-first scenario, which is designed to avoid a protracted and expensive second request or related merger challenge litigation, the parties identify up front the substantive areas of concern that would likely cause the DOJ or FTC to challenge the deal, find an independent third party to buy the assets of concern, and sign a binding agreement to sell those assets (which is often contingent on the main deal closing). The filing (or refiling) of the HSR form for the main deal shows the agencies that the competitive problem already has been solved.

9 Consent decree remedies are formal, court-approved settlements between the parties and the DOJ/FTC that allow a transaction to close while simultaneously requiring parties to take specific actions required by the agencies that are thought to maintain competition such as, for example, a divestiture. These remedies can be useful tools to avoid litigation by the government seeking to block the transaction.

10 A "hell-or-high-water" provision shifts the risk related to obtaining antitrust clearance to the acquiror by obligating the acquiror to do whatever is required to obtain clearance, including by agreeing to any divestment or other remedy proposed by the DOJ or FTC.

these requirements, including seeking and obtaining any related approvals, can sometimes be cumbersome and time-consuming and accordingly should be factored into any related deal timelines.

5. Securities laws and mandatory offer requirements

5.1 General

Non-US acquirors that intend to offer and sell securities in the United States in connection with a US investment may become subject to the SEC's registration requirements – which is an expensive and time-consuming process – and consequently the SEC's ongoing periodic reporting requirements. Under the US Securities Act of 1933 (Securities Act), the offer and sale of securities must be registered with the SEC unless the securities being offered and sold, or the related transaction pursuant to which they are offered and sold, is specifically exempted. The most commonly used exemptions for acquisitions of privately held target companies are so-called "private placement" exemptions for transactions that do not involve a public offering of securities.[11] Non-US acquirors seeking to use their stock as consideration in an acquisition of a private US company may be able to qualify for a private placement exemption, which eliminates the time and expense associated with a registered transaction. Non-US acquirors seeking to use their stock as consideration in an acquisition of a US public company, however, are unlikely to be able to take advantage of a private placement exemption and therefore will be required to register with the SEC the offer and sale of their stock in the acquisition.

Additionally, registration requirements under the securities laws of each state (known as "blue sky" laws) involved in the particular transaction apply to the offer and sale of securities unless an exemption is available. Notably, securities offered and sold through certain private placements, and securities listed on a US stock exchange (for example, NASDAQ or NYSE), are exempt from state blue sky laws, though certain notice filings, consent to service of process, and payment of filing fees may apply.

5.2 Education, transparency, and liquidity

Non-US acquirors seeking to offer and sell securities in the United States as deal consideration should keep in mind that for some shareholders of US target companies, particularly shareholders of US public companies that are accustomed to US securities laws and stock exchange listing rules that are designed to promote transparency and disclosure, additional coordination and planning may be needed to help educate those shareholders in respect of the disclosure regime of the applicable jurisdiction of the non-US acquiror that would apply if the target company's shareholders were to accept the shares of the non-US acquiror. Even in the case of a non-US acquiror that is, or becomes, a so-called "foreign private issuer" for US securities law purposes, it is not required to comply with the US proxy rules, to file the same periodic reports with the SEC, or to have a majority of its directors be independent, all of which are required of US-domiciled, SEC-registered reporting companies. To help

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11 Section 4(a)(2) of the Securities Act exempts from registration transactions by an issuer that do not involve a public offering of securities. Most private placement offerings today are conducted pursuant to Regulation D of the Securities Act, which is considered a "safe harbor" under Section 4(a)(2) because it sets out certain standards that, if met, allow an issuer to satisfy the requirements of a Section 4(a)(2) exemption.

enhance the attractiveness to US sellers of non-US acquiror securities proposed to be received as deal consideration, non-US acquirors will also want to demonstrate a clear path to liquidity such that those US sellers can monetize the securities they receive in the transaction without undue risk, hardship, or expense.

5.3 Insider trading, stakebuilding, and disclosure requirements

Non-US acquirors seeking to purchase stakes in US public companies should, among other things, take into account the restrictions on insider trading imposed pursuant to Rule 10b-5 under the US Securities Exchange Act of 1934 (Exchange Act), 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% pursuant to section 13(d) of the Exchange Act and the "short-swing profits" rules imposed by section 16(b) of the Exchange Act (which potentially can require disgorgement of profits from trading after the acquiror's position in the target company's shares exceeds 10%). Moreover, US federal laws (such as the HSR Act), the laws of the state of the target company's domicile (such as "anti-takeover" laws) and the target company's governance documents may contain provisions that limit the number of shares that can be acquired without adverse outcomes, or require certain approvals to be obtained, in connection with such acquisitions.

5.4 Mandatory offer requirements

There are no mandatory offer requirements in the United States, but non-US acquirors should take care to ensure that any share purchases do not constitute a de facto or "creeping" tender offer that would be subject to US tender offer rules.

6. Corrupt business practices and economic sanctions

6.1 Corrupt business practices

Regulators around the world continue to focus on corrupt business practices. 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 speaking, the FCPA's anti-bribery provisions apply to US persons and businesses, public companies listed on stock exchanges in the United States or that are required to file periodic reports with the SEC, and certain foreign persons and businesses acting while in the territory of the United States. A non-US acquiror may itself 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 and its affiliates' businesses and geographic exposure.

Among other things, the FCPA makes it unlawful for subject persons and entities to make corrupt payments or provide anything else of value to a non-US government official for the purpose of obtaining or retaining business for or with, or directing business to, any other person. These provisions also apply to non-US companies and their representatives who take any action in furtherance of such corrupt conduct while in the United States. Importantly, the FCPA's application to non-US government officials is broadly interpreted by US authorities and can include officials and employees of state-owned enterprises.

6.2 Economic sanctions

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. US economic sanctions are primarily administered by the Office of Foreign Assets Control (OFAC) of the Treasury Department and are designed to further US foreign policy and its national security interests and objectives. Accordingly, economic sanctions are generally targeted at non-US countries and regimes, terrorists, narcotics traffickers, human rights violators, and those engaged in activities related to the proliferation of weapons of mass destruction and similar perceived threats to the national security, foreign policy, or economic interests of the United States.

Among other things, OFAC's sanctions make it unlawful for a non-US acquiror to involve US companies (and sometimes their non-US subsidiaries), individual US citizens and US green card-holder directors and employees, and anyone physically located in the United States, in business with OFAC-sanctioned countries or other OFAC-prohibited businesses, unless an OFAC license or exemption applies.

7. The role of a target company's board of directors

Although M&A deals are typically proposed by the senior executive team, the board of directors (or equivalent) of the US target company/seller must determine whether a potential transaction can proceed beyond an initial exploratory phase. In making their determination, directors of US corporations[12] generally are subject to, and guided by, two primary fiduciary duties: the duty of care and the duty of loyalty. The duty of care requires directors to engage in an informed and deliberate decision-making process based on all material information reasonably available to them. The duty of loyalty requires directors to act on a disinterested and independent basis, in good faith and with an honest belief that the action proposed to be taken is in the best interest of the corporation and its stockholders.

In general, under a standard of judicial review referred to as the "business judgment rule," directors are entitled to a rebuttable presumption that in making decisions, they acted in accordance with their fiduciary duties. If the business judgment rule is not rebutted by plaintiffs, it prevents a court from second-guessing board decisions on business matters as long as those decisions are attributed to any rational business purpose. In certain M&A transactions, however, courts may apply enhanced scrutiny to board decisions and examine the overall decision-making process, including the quality of information consulted, the procedures followed, and the reasonableness of a board's actions.[13] As a result, the board of directors of the US target company/US seller will not be entitled to the presumptions afforded to them by the business judgment rule in certain

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[12] While not always the case, it is common for US target companies/sellers to be corporations organized under the laws of the State of Delaware. Directors of US corporations that are organized under the laws of US states other than the State of Delaware will be subject to similar fiduciary duties if the state in which they are organized follows Delaware law in this area. If they do not, or if the applicable target company/seller is a non-corporate legal entity, then different considerations may apply.

[13] In certain circumstances that are beyond the scope of this article, directors may be subject to more demanding standards of judicial review when determining whether they discharged their fiduciary duties in the context of an M&A transaction.

situations, including when evaluating transactions that will result in a change of control of the corporation. [14]

While fiduciary duties apply to directors of both private and public corporations, if the target company is a public company (or a private company with a substantial number of stockholders), there are many formalities and procedural protections that guide a board of directors' participation in an M&A process. These include the use of outside legal counsel, one or more outside financial advisors, independent special and fully empowered committees, fairness opinions, and informed votes of minority shareholders. These formalities and procedures are designed to help directors satisfy their fiduciary duties as well as protect the transaction against heightened judicial scrutiny if it is ever challenged in court. It can sometimes be difficult for non-US acquirors to understand all of the nuanced requirements, and as a result, they need to be well-advised as to the role of the board of directors and the legal, regulatory, and litigation framework and risks that drive the board's actions.

8. Litigation

The United States is known to be one of the most litigious countries in the world. As a result, companies that are investing or otherwise conducting business in the United States must be prepared to defend themselves within that system against a wide range of potential complaints relating to their business operations and otherwise. This can also 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. Excluding situations involving competing bids, where litigation may play a direct role in the contest, and going-private or other "conflict" transactions initiated by controlling shareholders or management of the target company, there are very few examples of acquisitions of US public companies that have failed due to litigation, or of materially increased costs arising out of litigation being imposed on arm's-length acquirors. Nevertheless, most acquisitions of US public companies involve state law claims by shareholders of the public company related to alleged breaches of fiduciary duties by the public company's board of directors, though recent shifts in Delaware law have reduced the prevalence of "nuisance" fiduciary duty lawsuits that result in "disclosure-only" settlements.

These claims typically assert that the sales process undertaken by the board of directors and its advisers was insufficient or otherwise flawed, that the price was too low, and that deal protection measures to which the company agreed either discouraged or prevented third parties from making superior competing bids. These claims, together with claims under US federal securities laws, also typically assert that the disclosure made by the company regarding the transaction in documents used to

[14] Enhanced scrutiny under Delaware law applies, for example, when a company is up for sale or undergoing a transaction that results in a change of control. In these cases, Delaware courts do not defer to the board under the business judgment rule, but instead subject the board to so-called "Revlon duties." Once Revlon duties are triggered, the board's role shifts from long-term general corporate stewardship to a far more focused obligation, which is to become an "auctioneer" and seek a transaction that provides the best value reasonably available for the target corporation's stockholders.

solicit shareholder approval was inaccurate or otherwise misleading. While certainly a distraction, these types of claims, in which shareholders generally seek to delay or prevent the deal, and related damages, are usually easily resolved through mootness dismissals in which the target company agrees to provide supplemental disclosures and pay a relatively modest fee to plaintiffs' counsel.

9. 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 the deal 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 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.
Key considerations include the following:

- Acquirors commonly enter into new employment arrangements with key members of the target company's management team in connection with an acquisition to help ensure a smooth transition and stable post-closing leadership.
- Most US sellers insist that acquirors maintain a level of employee compensation and benefits (often including performance incentives and sometimes severance) – that is similar to the target company's existing compensation and benefits structure – for a transitional period after the closing (typically 12–18 months).
- US employers often use non-compete agreements as a method of preserving critical human capital. The enforceability of these non-compete agreements is subject to a facts-and-circumstances analysis that varies from state to state. In general, states typically provide that a non-compete agreement is enforceable if it is reasonable in scope and duration and is bargained for in exchange for consideration. There has been a growing trend, however, against enforcement of non-competes in many states (with some exceptions for highly-paid executives). California, Minnesota, North Dakota, and Oklahoma, for example, prohibit non-competes (in certain circumstances, however, even in those states non-compete agreements bargained for in connection with the sale of a business may be enforceable against a key employee who is also a seller of that business). The law in this area continues to evolve and some state legislatures, including in the Commonwealth of Massachusetts, have passed laws that are designed to promote competition and therefore tend to be more favorable to employees. Florida is a notable exception and has recently passed laws which are designed to enforce non-competes. Needless to say, companies with a multi-state workforce cannot take a one-size-fits-all approach to non-compete agreements, and well-advised non-US acquirors carefully tailor non-compete agreements based on the nuanced rules in each jurisdiction.

- Cash and equity incentive plans, including transaction-related bonuses, are often implemented by non-US acquirors and US target companies to stabilize or retain the workforce in connection with a transaction, or to reward certain employees for the incremental work undertaken by them in relation to the transaction.
- Establishing employee compensation and benefit programs on a tax-efficient basis is critical. Many US target companies will have existing arrangements for management that will need to be terminated, or in certain transaction structures assumed or otherwise kept in place, upon closing. Costs associated with the termination, cash settlement, or other treatment of a target company's equity, or other incentive awards, should be considered when a non-US acquiror is negotiating its own incentive compensation arrangements for retained executives, and should be taken into account when determining the purchase price.
- If a non-US acquiror is seeking to carry out headcount reductions, it may be relatively easier to do so in the United States than in many non-US countries. In contrast to many non-US countries in which employers may only terminate employees for cause, employment in the United States is predominantly "at-will," which means, as a general matter, that an employer can terminate an employee or otherwise change the terms of the employment relationship at any time in its sole and absolute discretion. Although both common law and statutory exceptions to the at-will rule exist, at-will employment is a bedrock principle in the United States (other than in Montana). For large-scale headcount reductions, or ones resulting in the closure of a particular worksite, there are notification requirements that might be triggered under US federal, state, and local employment laws (and severance may be required in New Jersey).
- Trade unions, works councils, and other employee representative bodies are far more common outside the United States than in the United States. Where trade unions are involved, however, there can be significant additional obligations and requirements under the law and any collective bargaining agreements between the employer and the unions. A non-US acquiror will also want to understand the potential costs around any promised increases in benefits or compensation under the terms of a collective bargaining agreement or any such increases that might result from negotiations around the renewal of an expiring collective bargaining agreement.

10. Intellectual property and data protection

10.1 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 as well as 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. In the case of software products, for example, the protection offered varies significantly if the IP is an unregistered trade secret, statutory copyright, or patent. The industry in which the owner of the IP operates also influences the degree of protection, so the extent and depth of legal due diligence should be calibrated accordingly. For example, IP due diligence for a biotechnology company is likely to focus on a small handful of patents, whereas IP due diligence for a software company is likely to focus on the processes for ensuring that ownership of IP created by employees and outside developers vests in the target company. Because the default laws designed to allocate ownership of IP rights are not harmonized across jurisdictions or across 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 of the IP 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 is, or can be, protected both within and outside of the United States.

In addition to IP owned by a US target company, companies also in-license IP and data from third parties, in some cases to incorporate into their customer-facing products and services, and in virtually all cases to provide back-office support and technology. In the United States, the default rules for assignability of IP license agreements differ from the treatment of assignability of many other commercial contracts. Due diligence on business-critical IP licenses and data access rights therefore should address the possible outcomes, whether the IP license can be transferred with the target company's business, whether adequate rights can be provided on a transitional basis, or whether a new IP license or alternative arrangements need to be put in place prior to closing the transaction.

IP due diligence is increasingly focusing on artificial intelligence (AI) and machine learning tools deployed by target companies. These include agentic AI applications, data analytics and decision support, and back-office automation, and require confirmation that the target company has appropriate rights for all related uses, is complying with applicable license and use-restriction provisions, and that all related rights will remain available to the target company and the acquiror following closing.

10.2 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 laws and regulations (including a number of sector-specific requirements), state laws, and industry standards or "best practices" that apply differently across jurisdictions, industries, and data subjects.

Since the European Union'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. Starting with California, which enacted a law that took effect on January 1, 2020, many states have adopted data privacy laws. These laws all follow a similar framework that borrows from the GDPR, but each law has unique nuances that can make compliance challenging. Meanwhile, companies must maintain compliance with existing sector-specific federal privacy requirements, such as for children's data or financial information, which overlay onto state law requirements.

Cybersecurity protections are more common, but similarly fragmented. All 50 US states have data breach notification laws, with each law having differences in key provisions such as how many individuals' data must be affected before notification is required and what content must be included in a notification. Sector-specific requirements also overlay onto these laws, imposing stricter requirements on certain industries and entities.

In light of the increased regulatory push and several large-scale data breaches that have occurred in recent years – and given that the non-US acquiror will often assume the liabilities of the US target company for past non-compliance with privacy laws – potential acquirors should tailor their due diligence exercise to the risk profile of the target company. Often, an acquiror's due diligence should focus not only on the jurisdiction in which the target company is domiciled, but also and often more importantly on the jurisdictions and industries in which the target company operates, collects personal data, processes such data, offers products or services, and monitors individuals. For instance, given the GDPR's extraterritorial scope and increased fines for non-compliance, it is important to assess the potential applicability of the GDPR even for US target companies that do not have a strong nexus to the European Union.

Acquisitions in certain industries and jurisdictions may also warrant additional scrutiny. For example, companies that engage in significant personal data processing activities pose a higher enforcement risk, particularly if they operate in states like California that have a comprehensive privacy law. Similarly, acquisitions of financial services and healthcare providers can pose a greater data protection risk as a result of existing sector-specific laws.

11. Representation and warranty and other transactional risk insurance products

11.1 RWI overview

Representation and warranty insurance (RWI) is popular in the United States, particularly in the private M&A space, and obtaining an RWI policy is now standard market practice for private transactions. Market acceptance has increased, in part, due to a maturing RWI market in which valid claims against policies are being paid by insurance providers. 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. Rarely does the RWI process slow down deal timing; rather, as RWI coverage helps address what are often complex transaction negotiations around post-closing indemnification and other rights, RWI often helps to accelerate discussions and allocate risk more efficiently.

In addition to standard RWI coverage of between 10%-20% of transaction value, larger coverage amounts are being placed through the use of "tower" structures in which multiple RWI providers participate using a layered or stacking approach, and the insured receives the benefit of a blended premium rate as the RWI providers higher in the tower charge lower premiums because providers lower in the tower have greater exposure. As the primary RWI insurer leads the RWI process, the use of a tower structure does not typically add any significant burden on the acquiror. Recently, there also has been an increase in "nil retention" policies (i.e., no deductible policies) for breaches of true fundamental representations (for example, organization, power and authority, capitalization, and brokers fees).

11.2 RWI benefits and limits

The key benefit of RWI to the seller is the limitation or elimination of the seller's liability for losses incurred by the acquiror after the closing that result from breaches of representations and warranties by the seller or target company (so-called "no survival deals"). But using RWI can also benefit non-US acquirors:

- RWI can help make the acquiror's bid in an auction process more attractive and, in many cases, obtaining RWI is a requirement sought to be imposed by sellers in connection with the auction process in any event.
- RWI can sometimes reduce time and effort spent on negotiating the acquisition agreement, which can be a critical factor in a competitive process.
- RWI can be helpful in cases where the acquiror would like to preserve important post-closing relationships with sellers (including management teams of the target company that often in the transaction "roll over" their ownership positions in the target company) by allowing the acquiror to seek to recover its losses from a creditworthy insurer under its RWI policy instead of directly from the sellers.
- Sellers may be more willing to expand the substantive coverage of their representations and warranties and reduce the use of knowledge and materiality qualifiers, thereby expanding the acquiror's basis for recovery under the RWI policy.

RWI, however, has its limits. As the name suggests, RWI only covers the acquiror's losses that result from unknown breaches of the seller's/target company's representations and warranties and not losses that result from breaches of the seller's/target company's covenants. RWI also does not cover known material issues or matters that are the subject of a deal-specific indemnity (or matters that have not been subject to market standard due diligence) and typically does not cover other types of known risks, contingent or otherwise.[15]

RWI also has successfully been used in connection with transactions involving distressed assets and sales in the bankruptcy context (i.e., Section 363 sales), which are addressed briefly below in Section 12 *(Distressed acquisitions).* While each distressed situation involves certain complexities and, therefore, more scrutiny is likely to be given by the RWI provider in connection with the sale of a distressed asset, particularly outside of the formal bankruptcy process, RWI has been and can be obtained in such situations. It is worth noting that to the extent the RWI providers see a transaction as more likely to attract a claim against the RWI policy, the pricing of any RWI policy is likely to be higher than the typical RWI policy.

Often, an RWI policy covers a pre-closing tax indemnity if contained in the underlying purchase agreement, or it will contain a "synthetic" pre-closing tax indemnity (in lieu of a tax indemnity in the underlying purchase agreement) providing coverage for a target company's pre-closing taxes. However, such coverage normally will not cover taxes that are accrued but not yet payable for pre-closing periods, transfer taxes, or known tax issues.

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[15] There are certain exceptions to this general rule, but they are beyond the scope of this article.

11.3 Tax insurance

Specific insurance policies may also be obtained to mitigate tax risk. Tax insurance is frequently used to limit a non-US acquiror's (or taxpayer's) potential downside risk if, for example, there is an adverse determination by a taxing authority in relation to a target company's historic tax position. Tax insurance policies cover risk associated with the tax-free nature of a transaction or the tax consequences of a pre-closing reorganization. Such policies are generally used, in the transaction context, if an uncertain tax risk is not covered under the RWI policy. Whether tax insurance will be available for any particular risk is a fact-specific inquiry and will depend, in large part, on how comfortable the insurance provider is that the tax risk will not result in a loss under the policy in excess of the retention.

11.4 Contingent risk insurance

Another type of transaction risk insurance that is sometimes used is contingent risk insurance. This is used to cover the potential loss associated with a known contingent liability, such as an adverse determination in a pending lawsuit, that would typically not be covered by RWI or a tax-specific policy. Because the risk is known, contingent risk insurance tends to be expensive compared to RWI or tax insurance policies. But in the right situation it can protect a non-US acquiror against potentially significant losses if the risk actually materializes. Similar to tax insurance, whether contingent liability insurance will be available for any particular matter is a fact-specific inquiry and will depend, in large part, how comfortable the insurance provider is that the contingent liability will not result in a loss under the policy in excess of the retention.

12. Distressed acquisitions[16]

A financially distressed US target company may present opportunities for non-US acquirors to invest in the United States on more financially attractive terms than might otherwise be the case, particularly in the current environment of elevated interest rates, constrained liquidity, and increasing refinancing pressure on leveraged borrowers. But transactions involving financially distressed target companies can also present significant risks that require careful navigation. For example, an acquiror seeking to purchase assets from a financially distressed company should be aware that the transaction may be subject to unwinding 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 reasonably equivalent value in exchange for its assets and was insolvent at the time or became insolvent as a result of the sale. The potential lookback period to unwind the transaction ranges from two to four years, depending on applicable state law. Additionally, if a seller files for bankruptcy after signing a purchase agreement, but prior to closing the sale, it may have the opportunity to reject, or repudiate, the purchase agreement. Even if the transaction closed prior to the bankruptcy filing, the seller could seek to reject related transaction documents that include ongoing post-closing obligations such as guarantees, transitional services arrangements, or other commercial agreements entered into as part of the transaction. A counterparty to a rejected agreement is generally entitled only to an unsecured damages claim, which often receives little to no

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[16] Please note that the US bankruptcy laws are complex and the discussion herein is general and does not cover all aspects of US bankruptcy laws or exceptions to general principles.

value in a bankruptcy. While certain mitigants may be available in these circumstances, it is usually not possible to eliminate these risks entirely.

Given these challenges, potential acquirors sometimes seek instead to purchase a distressed target company's assets through a US bankruptcy process commonly referred to as a "Section 363 sale" or a plan of reorganization. Pursuant to the US Bankruptcy Code, a debtor can sell its assets "free and clear" of virtually all liens, claims, and encumbrances, which provides significant protection against post-closing "successor liability" claims against the acquiror and the risk that the transaction will be unwound. In addition, acquiring assets through such a bankruptcy process eliminates the requirement to obtain third-party consents to assign certain leases and contracts, provides an expedited waiting period under the HSR Act, exempts sales from certain state laws, including in relation to bulk sales and stockholder approval, and exempts plan sales from transfer taxes. However, bankruptcy sales may be contested and also generally require broad public notice, a robust marketing process, and a public auction to ensure that the ultimate sale price reflects the "highest and best" offer available. While sales in bankruptcy can be accomplished efficiently, these requirements can cause delay, increased costs and competition, and third-party scrutiny.

Another method pursuant to which a distressed US target company may be acquired is a so-called "loan-to-own" strategy, which involves lending to the distressed target company or purchasing a controlling amount of the outstanding debt of the distressed target company (generally at a discount), in either case with the goal of acquiring the target company through an in-court or out-of-court debt-to-equity conversion or purchasing the target company's assets through a partial or full credit bid (i.e., using the debt as acquisition currency). An acquiror may leverage its creditor position to exert control over the restructuring process, including through threat of foreclosure. While loan-to-own strategies remain common, particularly among private credit investors and alternative asset managers, their execution has become increasingly complex and contentious amid heightened judicial scrutiny and evolving liability management practice. Executing on a loan-to-own strategy can be complex, and if not done properly, can result in recharacterization of the debt as equity, subordination of the debt, limitations on credit bidding, and lender liability, among other consequences.

Importantly, distress and the bankruptcy process do not insulate a transaction from CFIUS or antitrust scrutiny, and timing considerations can sometimes be especially acute in a bankruptcy or rescue financing contexts, so careful consideration and planning is required.

13. Politics and local market practice

13.1 Politics

The role of politics in cross-border M&A varies greatly. With an increasing number of geopolitical conflicts, political intervention in cross-border transactions and heightened levels of regulatory scrutiny and nationalism sometimes may become relevant. This means that in certain cases non-US acquirors and investors may need to rethink their approach to and timeline for a transaction, as well as prepare a narrative that is convincing to applicable regulators and other political stakeholders.

It is critical to remember for this purpose that "politics" extends beyond federal and state regulators, and includes other constituencies such as key customers, suppliers, and employees, and any such narratives should be tailored accordingly. The importance of identifying in advance the key constituencies that could influence the success of the transaction and figuring out how best to address their potential concerns should not be underestimated. In some cases, particularly in the case of a high-profile transaction in a sensitive sector, or in a situation involving a state-owned enterprise, politics (separate and apart from CFIUS) need to be carefully and thoroughly considered before making any public announcements concerning the deal.

13.2 Local market practice

In the same vein, understanding and accepting local market M&A practice can help to ensure a smooth process and, particularly in a competitive auction setting, help to put a non-US acquiror on equal footing with its US competition. While there may be situations in which it is appropriate to depart from market custom and practice, non-US acquirors who blindly insist on doing it "the way we do it at home" can sometimes find it difficult to succeed.

Patient and experienced advisers can be useful in this regard. Conforming to local market custom and practice rarely results in unacceptable levels of risk and may even result in better outcomes than can be expected in the home market. While it is natural for non-US acquirors to want to engage legal, financial, accounting, and other advisers with whom they have worked in the past in their home markets, it is almost always advisable also to engage local US advisers (beginning with the US colleagues of trusted non-US advisers, if applicable) who are familiar with US concepts. These include, for example, US generally accepted accounting principles and common approaches to purchase price adjustments, as well as US market practice more generally, including as it relates to auction practice, disclosure practice, and various other aspects of M&A practice detailed in this article.

14. 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 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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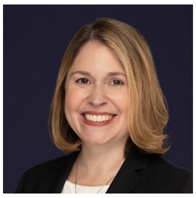

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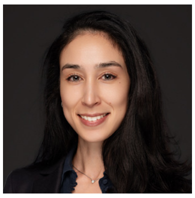

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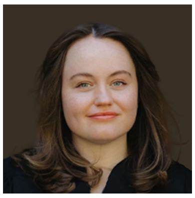

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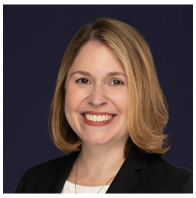

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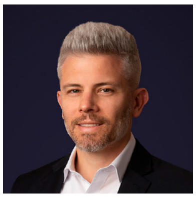

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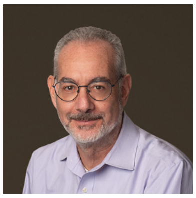

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