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Cross-Border M&A –
2019 Checklist for Successful Acquisitions in the United States

M&A in 2018 began with a bang, with more than $350 billion of deals in January 2018 – a January level not seen since 2000 – and much chatter that M&A volume for the year could hit an all-time record. As it turned out, 2018 was a tale of two cities, with M&A continuing at a torrid pace during the first half of the year, and falling off markedly during a second half of geopolitical tension and market volatility. Overall, M&A volume for 2018 reached a very robust $4 trillion, but fell short of overtaking deal volume in 2007 and 2015. M&A being lumpy and unpredictable as ever, 2019 has opened with a number of notable deals, not least the sale of Celgene to Bristol-Myers Squibb for $95 billion, somewhat defying gloomy predictions for the year.

As for cross-border deals, interestingly, a record $1.6 trillion (39%) of last year's deals (including six of the 10 largest deals) was cross-border M&A, despite growing trade tensions and anti-globalist rhetoric.

Acquisitions of U.S. companies continued to dominate the global M&A market in 2018, representing 43% of global M&A volume ($1.7 trillion), higher than the average over the last decade. Approximately 16% of U.S. deals involved non-U.S. acquirors. German, French, Canadian, Japanese and U.K. acquirors accounted for approximately 60% of the volume of cross-border deals involving U.S. targets, and acquirors from China, India and other emerging economies accounted for approximately 10%.

Whatever 2019 does bring – in addition to trade tensions and protectionist rhetoric, cyber insecurity, slowdowns in China and a number of other emerging economies, gloom about the interest rate and debt financing pictures in the U.S., geopolitical risks all around the world, and inevitable but as-yet-unknown curve balls from politicians – we expect the pace of cross-border deals into the U.S. to remain strong. And, as always, transacting parties who are smart and well prepared – particularly when engaging in cross-border deals with all of their cultural, political and technical complexity – will do better. Advance preparation, strategic implementation and deal structures calibrated to anticipate likely concerns will continue to be critical to successful acquisitions in the U.S. In light of the recent changes to the CFIUS regime (discussed below), careful attention to CFIUS, well in advance of any potential acquisition, is obviously essential.

The following is our updated checklist of issues that should be carefully considered in advance of an acquisition or strategic investment in the U.S. Because each cross-border deal is unique, the relative significance of the issues discussed below will depend upon the specific facts, circumstances and dynamics of each particular situation.

- *Political and Regulatory Considerations*. Much investment into the U.S. remains well received and not politicized. However, a variety of global economic fault lines and the Trump administration's aggressive rhetoric on trade and "America First" make it more important than ever that prospective non-U.S. acquirors of U.S. businesses or assets undertake a thoughtful analysis of U.S. political and regulatory implications well in advance of any acquisition proposal or program. This is particularly so if the target company operates in a sensitive industry; if post-transaction business plans contemplate major changes in investment, employment or business strategy; or if the acquiror is sponsored or financed by a foreign government or organized in a jurisdiction where a high level of government involvement in business is generally understood to exist. High-profile transactions may result in political scrutiny by federal, state and local officials. The likely concerns of federal, state and local government agencies, employees, customers, suppliers, communities and other interested parties should be thoroughly considered and, if possible, addressed before any acquisition or investment proposal becomes public. Similarly, potential regulatory hurdles require sophisticated advance planning. In addition to securities and antitrust regulations, acquisitions may be subject to CFIUS review, and acquisitions in regulated industries (*e.g.*, energy, public utilities, gaming, insurance, telecommunications and media, financial institutions, transportation and defense contracting) may be subject to an additional set of regulatory approvals. Regulation in these areas is often complex, and political opponents, reluctant targets and competitors may seize upon perceived weaknesses in an acquiror's ability to clear regulatory obstacles as a tactic to undermine a proposed transaction. Finally, depending on the industry involved, type of transaction and the geographic distribution of the workforce, labor unions will likely continue to play an active role during the entire phase of the process. Pre-announcement communications plans must take account of all of these interests. It is essential to implement a comprehensive communications strategy, focusing not only on public investors but also on all of these other core constituencies, prior to the announcement of a transaction, so that all of the relevant constituencies may be addressed with appropriately tailored messages. It will often be useful, if

not essential, to involve experienced public relations firms at an early stage when planning any potentially sensitive deal.

- *Transaction Structures*. Non-U.S. acquirors should consider a variety of potential transaction structures, particularly in strategically or politically sensitive transactions. Structures that may be helpful in sensitive situations to overcome potential political or regulatory resistance include no-governance and low-governance investments, minority positions or joint ventures, possibly with the right to increase ownership or governance rights over time; partnering with a U.S. company or management team or collaborating with a U.S. source of financing or co-investor (such as a private equity firm); utilizing a controlled or partly controlled U.S. acquisition vehicle, possibly with a board of directors having a substantial number of U.S. citizens and prominent U.S. citizens in high-profile roles; or implementing bespoke governance structures (such as a U.S. proxy board) with respect to specific sensitive subsidiaries or businesses of the target company. Use of debt or preferred securities (rather than common stock) should also be considered. Even seemingly more modest social issues, such as the name of the continuing enterprise and its corporate location or headquarters, or the choice of the nominal legal acquiror in a merger, can affect the perspective of government and labor officials.

- *CFIUS*. Last year the Committee on Foreign Investment in the United States (CFIUS) – a multi-agency governmental body chaired by the Secretary of the Treasury, the recommendations of which the president of the United States has personal authority to accept or reject – continued to use its authority to block or cause parties to abandon several transactions, including, most notably, Broadcom's unsolicited bid to acquire Qualcomm (after President Trump issued an executive order to block the transaction) and Ant Financial's proposed acquisition of MoneyGram International. In addition, in August 2018, President Trump signed into law the Foreign Investment Risk Review Modernization Act (FIRRMA), setting in motion the most sweeping changes in more than a decade to the procedures and authority by which CFIUS reviews foreign investments for national security concerns. The key changes in the CFIUS process include the following:

  - Expands CFIUS's jurisdiction to include the review of "non-controlling" investments in U.S. businesses that involve critical technologies, critical infrastructure or sensitive personal data of U.S. citizens.

- Imposes mandatory filings – a significant departure from the prior voluntary regime – for transactions involving a foreign investor in which a foreign government has a substantial interest and the acquired U.S. business involves critical technology or infrastructure.

- Provides a new abbreviated declaration for low-risk transactions.

- Grants CFIUS the authority to suspend consummation of a transaction that may pose a risk to the national security of the United States during the time that it is under review.

- Changes a number of administrative provisions to the CFIUS process, including, among others, (1) extending the time frame for the review of transactions – the initial review phase from 30 to 45 days and the second-stage investigation phase from 45 to 60 days in "extraordinary circumstances" – and (2) establishes filing fees not to exceed the lesser of 1% of the transaction value or $300,000.

Some provisions of the new law took effect upon enactment, while others will require formal rulemaking by CFIUS. While the full implications of the new law will depend on the yet-to-be-implemented provisions, the changes are expected to increase the number of CFIUS filings and result in longer overall review periods for many transactions, thus further increasing the potential impact of CFIUS in cross-border deals. As a result, it will remain critical for foreign acquirors to factor into deal analysis and planning the risks and timing of the CFIUS review process. We recommend three rules of thumb in dealing with CFIUS:

- In general, even for transactions that do not trigger a mandatory filing, it is prudent to make a voluntary filing with CFIUS if an investigation is reasonably likely or if competing bidders are likely to take advantage of the uncertainty of a potential investigation.

- It is often best to take the initiative and suggest methods of mitigation early in the review process in order to help shape any remedial measures and avoid delay or potential disapproval.

- It is often a mistake to make a CFIUS filing before initiating discussions with the U.S. Department of the Treasury and other officials and relevant parties. In some cases, it may even be prudent to make the initial contact prior to the public announcement of the transaction. Consultation with the U.S. Department of the Treasury

and other officials (who, to date, have generally been supportive of investment in the U.S. economy) and CFIUS specialists will generally provide a good sense of what it will take to clear the CFIUS process. Retaining advisors with significant CFIUS expertise and experience is often crucial to successful navigation of the CFIUS process. Transactions that may require a CFIUS filing should have a carefully crafted communications plan in place prior to any public announcement or disclosure.

Although practice varies, some transactions in recent years have sought to address CFIUS-related non-consummation risk by including reverse break fees specifically tied to the CFIUS review process. In some of these transactions, U.S. sellers have sought to secure the payment of the reverse break fee by requiring the acquiror to deposit the amount of the reverse break fee into a U.S. escrow account in U.S. dollars, either at signing or in installments over a period of time following signing. While still an evolving product, some insurers have also begun offering insurance coverage for CFIUS-related non-consummation risk, covering payment of the reverse break fee in the event a transaction does not close due to CFIUS review, at a cost of approximately 10% to 15% of the reverse break fee.

- *Acquisition Currency*. Cash is the most common form of consideration in cross-border deals into the U.S., with all-cash transactions representing approximately 57% of the volume of cross-border deals into the U.S. in 2018 (up from approximately one-half in 2015 and 2016, but down from nearly two-thirds in 2017), as compared to approximately 44% of the volume of all deals involving U.S. targets in 2018. However, non-U.S. acquirors must think creatively about potential avenues for offering U.S. target shareholders a security that allows them to participate in the resulting global enterprise. For example, publicly listed acquirors may consider offering existing common stock or depositary receipts (*e.g.*, ADRs) or special securities (*e.g.*, contingent value rights). When U.S. target shareholders obtain a continuing interest in a surviving corporation that had not already been publicly listed in the U.S., expect heightened focus on the corporate governance and other ownership and structural arrangements of the non-U.S. acquiror, including as to the presence of any controlling or large shareholders, and heightened scrutiny placed on any *de facto* controllers or promoters. Creative structures, such as issuing non-voting stock or other special securities of a non-U.S. acquiror, may minimize or mitigate the issues raised by U.S. corporate governance concerns. The

world's equity markets have never been more globalized, and investors' appetite for geographic diversity never greater; equity consideration, or an equity issuance to support a transaction, should be considered in appropriate circumstances.

- *M&A Practice*. It is essential to understand the custom and practice of U.S. M&A transactions. For instance, understanding when to respect – and when to challenge – a target's sale "process" may be critical. Knowing how and at what price level to enter the discussions will often determine the success or failure of a proposal; in some situations it is prudent to start with an offer on the low side, while in other situations offering a full price at the outset may be essential to achieving a negotiated deal and discouraging competitors, including those who might raise political or regulatory issues. In strategically or politically sensitive transactions, hostile maneuvers may be imprudent; in other cases, unsolicited pressure might be the only way to force a transaction. Takeover regulations in the U.S. differ in many significant respects from those in non-U.S. jurisdictions; for example, the mandatory bid concept common in Europe, India and other countries is not present in U.S. practice. Permissible deal protection structures, pricing requirements and defensive measures available to U.S. targets will also likely differ in meaningful ways from what non-U.S. acquirors are accustomed to in their home jurisdictions. Sensitivity must also be shown to the distinct contours of the target board's fiduciary duties and decision-making obligations under state law. Consideration also may need to be given to the concerns of the U.S. target's management team and employees critical to the success of the venture. Finally, often overlooked in cross-border situations is how subtle differences in language, communication expectations and the role of different transaction participants can affect transactions and discussions; preparation and engagement during a transaction must take this into account.

- *U.S. Board Practice and Custom*. Where the target is a U.S. public company, the customs and formalities surrounding board of director participation in the M&A process, including the participation of legal and financial advisors, the provision of customary fairness opinions and the inquiry and analysis surrounding the activities of the board and financial advisors, can be unfamiliar and potentially confusing to non-U.S. transaction participants and can lead to misunderstandings that threaten to upset delicate transaction negotiations. Non-U.S. participants must be well advised on the role of U.S. public company boards and the legal, regulatory and litigation

framework and risks that can constrain or prescribe board or management action. These factors can impact both tactics and timing of M&A processes and the nature of communications with the target company.

- *Distressed Acquisitions*. Distressed M&A is a well-developed specialty in the U.S., with its own subculture of sophisticated investors, lawyers and financial advisors. Because of its debtor-friendly reorganization laws, the U.S. continues to be a popular destination for restructurings of multinational corporations, including those with few assets or operations in the U.S. Among other advantages, the U.S. bankruptcy system has expansive jurisdiction (such as a worldwide stay of actions against a debtor's property and liberal filing requirements), provides relative predictability in outcomes and allows for the imposition of debt restructurings on non-consenting creditors, making reorganizations more feasible. Large non-U.S. companies have also continued to turn to Chapter 15 of the U.S. Bankruptcy Code, which accords key protections from creditors in the U.S. to debtors that are already in insolvency proceedings abroad and has facilitated restructurings and asset sales approved outside the U.S. Firms evaluating a potential acquisition of a distressed target based in the U.S. should consider the full array of tools that the U.S. bankruptcy process makes available, including acquisition of the target's fulcrum debt securities that are expected to be converted into equity through a restructuring, acting as a plan investor or sponsor in connection with a plan of reorganization, backstopping a plan-related rights offering or participating as a bidder in a court-supervised "Section 363" auction of a debtor's assets (which continue to be common, as they can be completed comparatively quickly, efficiently and cheaply). Transaction certainty is critical to success in a distressed context, and non-U.S. participants accordingly need to plan carefully (particularly with respect to transactions that might be subject to CFIUS review, as discussed above) to ensure they will be on a level playing field with U.S. bidders. Acquirors must also be aware that they will likely need to address the numerous constituencies involved in a bankruptcy case (including bank lenders, bondholders, distressed-focused hedge funds and holders of structured debt securities and credit default protection, as well as landlords and trade creditors), each with its own interests and often conflicting agendas.

- *Debt Financing*. Acquisition financing markets have become increasingly stressed in the later part of 2018, with high-yield borrowers particularly affected. Substantial commitments to finance acquisitions for high- to mid-

investment grade issuers remain available (albeit at somewhat higher yields). However, low-investment grade issuers have received increased scrutiny, in part for fear that economic stress could result in downgrades to high yield. High-yield commitments have been more significantly affected by the recent downturn in credit markets, with yields rising significantly, and the amount of increases in price, fees and changes to structure and terms (called "flex") that the banks can utilize in order to off-load their commitments in a syndication process rising substantially.

These considerations may drive the mix of consideration that will be seen in successful deals in 2019, and will make more important developing structures and approaches to minimizing requirements to refinancing existing debt of an acquiror or target. Moreover, creative approaches to allocating financing risk between buyers and sellers may also be helpful to getting deals done, as the cost and availability of acquisition financing adapts from the strong markets over the past few years to the current environment.

In partial offset to these challenges, the effect of lower corporate taxes in increasing the amount of cash that corporations can dedicate to debt reduction after an acquisition should help provide some comfort to jittery lenders, and the increased availability of offshore cash should also continue to reduce the amount of debt necessary to finance acquisitions.

In a year when the acquisition financing playbook that relied on an abundance of low-cost debt will need to be changed, doing deals in 2019 with leverage will require careful planning, creative deal making, and thoughtful approaches to negotiating a financing commitment. Important questions to ask when considering a transaction that requires debt financing include: what the appropriate leverage level for the resulting business is; where financing with the most favorable after-tax costs, terms and conditions is available; what currencies the financing should be raised in; how fluctuations in currency exchange rates can affect costs, repayment and covenant compliance; how committed the financing is or should be; which lenders have the best understanding of the acquiror's and target's businesses; whether there are transaction structures that can minimize financing and refinancing requirements; whether there are ways to share financing risk between a buyer and seller; which banks are in the strongest position to provide acquisition financing commitments; how many banks should be included in a process to line up the financing so as to best

determine current market conditions; and how comfortable a target will feel with the terms and conditions of the financing.

- *Litigation*. Shareholder litigation accompanies many transactions involving a U.S. public company but generally is 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 – which form a separate category requiring special care and planning – there are very few examples of major acquisitions of U.S. public companies being blocked or prevented due to shareholder litigation or of materially increased costs being imposed on arm's-length acquirors. In most cases, where a transaction has been properly planned and implemented with the benefit of appropriate legal and investment banking advice on both sides, such litigation can be dismissed or settled for relatively small amounts or other concessions. Moreover, the rate of such litigation (and the average number of lawsuits per deal) has declined in recent years, due in part to changes in the law that reduced the incentives for shareholder plaintiffs' attorneys to bring such suits. Sophisticated counsel can usually predict the likely range of litigation outcomes or settlement costs, which should be viewed as a cost of the deal.

  While well-advised parties can substantially reduce the risk of U.S. shareholder litigation, the reverse is also true: the conduct of the parties during negotiations can create an unattractive factual record that may both encourage shareholder litigation and provoke judicial rebuke, including significant monetary judgments. Sophisticated litigation counsel should be included in key stages of the deal negotiation process. In all cases, the acquiror, its directors and shareholders and offshore reporters and regulators should be conditioned in advance (to the extent possible) to expect litigation and not to view it as a sign of trouble. In addition, it is important to understand that the U.S. discovery process in litigation is different, and in some contexts more intrusive, than the process in other jurisdictions. Here again, planning is key to reducing the risk.

  Likewise critical is careful consideration of the litigation aspects of a cross-border merger agreement. The choice of governing law and the choice of forum to govern any potential dispute between the parties about the terms or enforceability of the agreement will substantially affect the outcome of any such dispute and may be outcome-determinative. Parties entering into cross-border transactions should consider with care whether to specify the

remedies available for breach of the transaction documents and the mechanisms for obtaining or resisting such remedies.

- *Tax Considerations*. Tax legislation enacted in December 2017 fundamentally altered the landscape for U.S. business taxation effective January 1, 2018. Key statutory changes include: a permanent reduction in the corporate income tax rate to 21%, full expensing for "qualified property" placed in service prior to January 1, 2023, a deduction for "foreign-derived intangible income" (FDII), limitations on the deductibility of business net interest expense to 30% of "adjusted taxable income" (an amount that approximates EBITDA and, beginning in 2022, EBIT), limitations on the use of a corporation's net operating loss carryforwards to 80% of taxable income in any particular year, limitations on deductible payments made from U.S. to non-U.S. affiliates in large multinational groups by way of a "base erosion and anti-abuse tax" (BEAT), and disallowance of deductions for certain interest and royalty payments to related non-U.S. parties pursuant to "hybrid" arrangements. In addition, the new law made sweeping changes to the U.S. taxation of income earned by non-U.S. subsidiaries of a U.S. corporation by providing for a one-time "transition tax" on the historic earnings of such non-U.S. subsidiary, a 100% deduction for dividends received by a domestic corporation from 10% owned non-U.S. corporations (which may also eliminate tax on gain recognized upon a sale or disposition of a stake in such non-U.S. corporations), and a new minimum tax on earnings of non-U.S. subsidiaries (GILTI).

  Importantly, the new law did not change the general U.S. tax rules applicable to corporate mergers and acquisitions, and also left in place existing rules governing the taxation of certain passive and related-party income derived by a "controlled foreign corporation" (CFC) as well as rules applicable to "inversion" transactions. In fact, the new law contains harsh additional rules intended to deter inversions. Thus, tax reform has further exacerbated the complexity of U.S. tax rules applicable to multinational groups. And, while the U.S. Department of the Treasury and the Internal Revenue Service have issued extensive administrative guidance in 2018, significant uncertainty regarding the interpretation of the new law is likely to remain until such guidance is finalized.

  Potential acquirors of U.S. target businesses should carefully model the anticipated tax rate of such businesses, taking into account the benefits of the reduced corporate tax rate, immediate expensing and, if applicable, the

favorable deduction for FDII, but also the impact of the new limitations on net interest expense deductions and certain related-party payments, limitations on the utilization of net operating losses, as well as the consequences of owning non-U.S. subsidiaries through an intermediate U.S. entity. This will typically require a detailed understanding of existing and planned related-party transactions and payments involving the target group. In particular, the combination of the reduced corporate income tax rate and new limitations on the deductibility of interest expense generally make it less attractive than in the past to push acquisition debt into the U.S. group. Another critical diligence item is confirming a target's transition tax liability and whether it has validly elected to pay such liability over time.

In cross-border transactions involving the receipt of acquiror stock, the identity of the acquiring entity must be carefully considered. While U.S. tax reform has ameliorated some of the concerns historically associated with having a U.S. parented group, a non-U.S. parented group may avoid application of the U.S. CFC rules, which have been expanded by the GILTI regime. Because tax reform made the anti-inversion rules even more restrictive, combining under a non-U.S. parent corporation frequently will be feasible only where shareholders of the U.S. corporation are deemed to receive less than 60% of the stock of the non-U.S. parent corporation, as determined under complex computational rules.

- *Disclosure Obligations*. How and when an acquiror's interest in the target is publicly disclosed should be carefully controlled and considered, keeping in mind the various ownership thresholds that trigger mandatory disclosure on a Schedule 13D under the federal securities laws and under regulatory agency rules such as those of the Federal Reserve Board, the Federal Energy Regulatory Commission (FERC) and the Federal Communications Commission (FCC). While the Hart-Scott-Rodino Antitrust Improvements Act (HSR) does not require disclosure to the general public, the HSR rules do require disclosure to the target before relatively low ownership thresholds may be crossed. Non-U.S. acquirors should be mindful of disclosure norms and timing requirements relating to home jurisdiction requirements with respect to cross-border investment and acquisition activity. In many cases, the U.S. disclosure regime is subject to greater judgment and analysis than the strict requirements of other jurisdictions. Treatment of derivative securities and other pecuniary interests in a target other than common stock holdings can also vary by jurisdiction.

- *Shareholder Approval*. Because most U.S. public companies do not have one or more controlling shareholders, public shareholder approval is typically a key consideration in U.S. transactions. Understanding in advance the roles of arbitrageurs, hedge funds, institutional investors, private equity funds, proxy voting advisors and other market players – and their likely views of the anticipated acquisition attempt as well as when they appear and disappear from the scene – can be pivotal to the success or failure of the transaction. These considerations may also influence certain of the substantive terms of the transaction documents. It is advisable to retain an experienced proxy solicitation firm well before the shareholder meeting to vote on the transaction (and sometimes prior to the announcement of a deal) to implement an effective strategy to obtain shareholder approval.

- *Integration Planning*. Post-acquisition integration is often especially challenging in cross-border deals where the integration process may require translation across multiple cultures, languages and historic business practices or limited by regulation. If possible, the executives and consultants who will be responsible for integration should be involved in the early stages of the deal so that they can help formulate and "own" the plans that they will be expected to execute. Too often, a separation between the deal team's modeling of the expected synergies and the integration process of the execution teams invites slippage in execution of a business plan that in hindsight is labeled by the integration team as overly ambitious, whether in terms of scale or timing, or simply without full consideration of the legal processes and political landscape in certain jurisdictions. Integration planning should be carefully phased in as implementation may not occur prior to the receipt of certain regulatory approvals.

- *Corporate Governance and Securities Law*. Current U.S. securities and corporate governance rules can be troublesome for non-U.S. acquirors who will be issuing securities that will become publicly traded in the U.S. as a result of an acquisition. SEC rules, the Sarbanes-Oxley and Dodd-Frank Acts and stock exchange requirements should be evaluated to ensure compatibility with home jurisdiction rules and to be certain that a non-U.S. acquiror will be able to comply. Rules relating to director independence, internal control reports and loans to officers and directors, among others, can frequently raise issues for non-U.S. companies listing in the U.S. Non-U.S. acquirors should also be mindful that U.S. securities regulations may apply to acquisitions and other business combination activities involving non-U.S. target companies with U.S. security holders. The U.S. Securities and

Exchange Commission has taken a generally realistic and cooperative attitude towards regulation during the Trump administration, but has not significantly altered the regulatory landscape for public companies and transactions, which remains complex and demanding of careful attention.

- *Antitrust Issues*. To the extent that a non-U.S. acquiror directly or indirectly competes or holds an interest in a company that competes in the same industry as the target company, antitrust concerns may arise either at the U.S. federal agency or state attorneys general level. Although less typical, concerns can also arise if a non-U.S. acquiror competes either in an upstream or downstream market of the target. As noted above, pre-closing integration efforts should also be conducted with sensitivity to antitrust requirements that can be limiting. Home jurisdiction or other foreign competition laws may raise their own sets of issues that should be carefully analyzed with counsel. The change in the leadership of the U.S. antitrust agencies is not likely to affect the review process in most transactions because the administration of the antitrust laws in the U.S. is carried out by professional agencies relying on well-established analytical frameworks. Accordingly, the outcomes of most transactions can generally be easily predicted. Deals that will be viewed by the agencies as raising substantive antitrust concerns, and the degree of difficulty in overcoming those concerns, can also be confidently identified in advance. In such situations, careful planning is imperative and a proactive approach to engagement with the agencies is generally advisable. In addition, the Trump administration is likely to continue to scrutinize the remedies offered by transaction parties, and to prefer (1) divestitures in lieu of conduct remedies that require ongoing oversight to ensure compliance and (2) acquirors of the divestiture assets to be approved prior to closing rather than permitting divestiture acquirors to be identified by the parties and approved by the agency after closing.

- *Due Diligence*. Wholesale application of the acquiror's domestic due diligence standards to the target's jurisdiction can cause delay, waste time and resources or result in missing a problem. Due diligence methods must take account of the target jurisdiction's legal regime and, particularly important in a competitive auction situation, local norms. Many due diligence requests are best channeled through legal or financial intermediaries as opposed to being made directly to the target company. Due diligence requests that appear to the target as particularly unusual or unreasonable (which occurs with some frequency in cross-border deals) can

easily create friction or cause a bidder to lose credibility. Similarly, missing a significant local issue for lack of jurisdiction-specific knowledge or understanding of local practices can be highly problematic and costly. Prospective acquirors should also be familiar with the legal and regulatory context in the U.S. for diligence areas of increasing focus, including cybersecurity, data privacy and protection, Foreign Corrupt Practices Act (FCPA) compliance, and other matters. In some cases, a potential acquiror may wish to investigate obtaining representation and warranty insurance in connection with a potential transaction, which has been used with increasing frequency as a tool to offset losses resulting from certain breaches of representations and warranties.

- *Collaboration*. More so than ever in the face of current U.S. and global uncertainties, most obstacles to a deal are best addressed in partnership with local players whose interests are aligned with those of the non-U.S. acquiror. If possible, relationships with the target company's management and other local forces should be established well in advance so that political and other concerns can be addressed together, and so that all politicians, regulators and other stakeholders can be approached by the whole group in a consistent, collaborative and cooperative fashion.

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