January 3, 2012

Cross-Border M&A – Checklist for Successful Acquisitions in the U.S.

Despite a sluggish fourth quarter, total U.S. deal volume for 2011 was a robust $930 billion, up 11% from 2010 and continuing the path to recovery following the slump precipitated by the 2008 financial crisis. Acquisitions by non-U.S. acquirors, however, totaled only $145 billion, down 34% from 2010, with European acquirors sitting on the sidelines, Asian acquirors focusing largely on regional consolidation and emerging market opportunities, and other emerging market players' enthusiasm for U.S. deals also dampening. Only 16% of announced U.S. deals in 2011 involved non-U.S. acquirors or investors.

It's too soon to say whether 2012 will see a resurgence in cross-border deals, but it remains clear that, despite some well-publicized examples of thwarted deals and fears of growing protectionism, U.S. deal markets continue to be very accessible to non-U.S. acquirors and investors. Sophisticated market participants have come to understand that, except in the defense sector and certain other strategically sensitive areas, most acquisitions in the U.S. can be effected through careful advance preparation, strategic implementation and deal structures that anticipate likely concerns. Cross-border deals involving investment into the U.S. are more likely to fail because of poor planning and bad execution rather than due to fundamental legal restrictions.

Following is our updated checklist of issues that should be carefully considered in advance of any acquisition or strategic investment in the U.S. While the list is comprehensive, each cross-border deal is different, and implementation of the checklist will depend upon the specific facts, circumstances and dynamics of the particular situation:

- *Political and Regulatory Considerations*. Even though foreign investment in the U.S. remains generally well received and rarely becomes a political issue in the context of specific transactions, prospective non-U.S. acquirors of U.S. businesses should undertake a comprehensive analysis of the U.S. political and regulatory implications well in advance of any acquisition proposal or program, particularly if the target company operates in a sensitive industry or if the acquiror is sponsored or financed by a foreign government. It is imperative that the likely concerns of federal, state and local government agencies, employees, customers, suppliers, communities and other interested parties be thoroughly considered and, if possible, addressed prior to any acquisition or investment proposal becoming public. Moreover, it is essential that a comprehensive communications plan be in place prior to the announcement of a transaction so that all of the relevant constituencies can be targeted and addressed with the appropriate messages. It is often useful to involve local public relations firms at an early stage in the planning process. Similarly, the potential regulatory hurdles require sophisticated advance planning. In addition to securities and antitrust regulations, acquisitions may be subject to CFIUS review (discussed below), 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 layer of regulatory approvals. Regulation in these areas is often complex, and political opponents, reluctant targets and competitors may seize on any perceived weaknesses in an acquiror's ability to clear regu-

latory obstacles. Given that 2012 is an election year, politics is likely to play a bigger role than usual in transactions involving offshore acquirors or investors; such deals will accordingly require greater advance planning and sensitivity. In addition, depending on the industry involved and the geographical distribution of the workforce, labor unions may be more active and play a greater role in the current political environment.

- *Transaction Structures*. Acquirors should be willing to consider a variety of potential transaction structures, especially in strategic or politically sensitive transactions. Structures that may be helpful in particular circumstances include no-governance and low-governance investments, minority positions or joint ventures, possibly with the right to increase to greater ownership or governance over time; making the acquisition in partnership with a U.S. company or management or in collaboration with a U.S. source of financing or co-investor (such as a private equity firm); or 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 a prominent American as a non-executive chairman. Use of preferred securities (rather than ordinary common stock) or structured debt securities should also be considered. Even more modest social issues, such as the name of the continuing enterprise and its corporate location or headquarters, or the choice of the nominal acquiror in a merger, can affect the perspective of government and labor officials.

- *CFIUS*. Under current U.S. federal law, the Committee on Foreign Investment in the United States (CFIUS) — a multi-agency governmental body chaired by the Treasury Department — has discretion to review transactions in which foreign acquirors could obtain "control" of a U.S. business or in which a foreign acquiror invests in U.S. infrastructure, technology or energy assets. Although filings with CFIUS are voluntary, CFIUS also has the ability to investigate transactions at its discretion, including after the transaction has closed. Three useful rules of thumb in dealing with CFIUS are:

  - first, that in general it is prudent to make a voluntary filing with CFIUS if the likelihood of an investigation is reasonably high or if competing bidders are likely to take advantage of the uncertainty of a potential investigation;

  - second, that 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; and

  - third, that it is often a mistake to make a CFIUS filing prior to initiating discussions with the Treasury Department 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. CFIUS is not as mysterious or unpredictable as some fear — consultation with U.S. Treasury and other officials (who generally want to be supportive and promote investment in the U.S. economy) and CFIUS specialists will generally provide a good sense of what it will take to clear the 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 require a carefully crafted communications plan be in place prior to any public announcement or disclosure of the pending transactions.

- *Acquisition Currency*. While cash remains the predominant (although not exclusive) form of consideration in cross-border deals, non-U.S. acquirors should 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 entering into dual-listing arrangements. When 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 the issuance of 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.

- *M&A Practice*. It is essential to understand the custom and practice in 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. U.S. takeover regulations 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 also may differ from what the non-U.S. acquiror is accustomed to in deals in their home countries. Sensitivity must also be given to the distinct contours of the target board's fiduciary duties and decision-making obligations under U.S. law.

- *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 the 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 need to be well-advised as to the role of U.S. public company boards and the legal, regulatory and litigation framework and risks that can constrain or prescribe board 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 sub-culture of sophisticated investors, lawyers and financial advisors. When evaluating a distressed target, acquirors should consider the full array of tools that may be available, including acquisition of the target's fulcrum debt securities that are expected to become the equity through an out-of-court restructuring or plan of reorganization, acting

as a plan investor or sponsor in connection with a plan, backstopping a plan-related rights offering or participating as a bidder in a court-supervised "Section 363" auction process, among others. Acquirors also need to consider the differing interests and sometimes-conflicting agendas of the various constituencies, including bank lenders, bondholders, distressed-focused hedge funds and holders of structured debt securities and credit default protection.

- *Financing*. Ongoing volatility in the global credit markets has increased scrutiny on the financing aspects of transactions. Important questions to consider include where financing with the most favorable terms and conditions is available; how committed the financing is; which lenders have the best understanding of the acquiror's and target's businesses; whether to explore alternative, non-traditional financing sources and structures, including seller paper; whether there are transaction structures that can minimize refinancing requirements; and how comfortable the target will feel with the terms and conditions of the financing. Note that under U.S. law, unlike the laws of some other jurisdictions, foreign acquirors are not prohibited from borrowing from U.S. lenders, and they generally may use the assets of U.S. targets as collateral (although there are some important limitations on using stock of U.S. targets as collateral). Likewise, the relative ease of structured financing in the U.S. market should benefit an offshore acquiror, with both asset-based and other sophisticated securitized lending strategies relatively easy to implement and available in the market.

- *Litigation*. Shareholder litigation is routine in transactions in the U.S. and is generally not a cause for concern. 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 is settled for relatively small amounts or other concessions, with the positive effect of foreclosing future claims and insulating the company from future liability. Sophisticated counsel can usually predict the likely range of settlement costs, which should be viewed as a cost of the deal. In all cases, the acquiror, its directors, 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 the U.S. discovery process in litigation as it is significantly different than the process in other jurisdictions and, even in the context of a settlement, will require the acquiror to provide responsive information and documents (including emails) to the plaintiffs.

- *Tax Considerations*. Tax issues may be critical to structuring the transaction. Non-U.S. acquirors contemplating a dividend stream flowing from the U.S. target should structure with a view toward withholding tax requirements and should consider the possibility of utilizing a subsidiary located in a country that has a favorable tax treaty network or other tax attributes that will minimize the taxes imposed on the dividends as they cross borders. The relative proportions of debt and equity will be important from a tax perspective, as will obtaining U.S. interest deductions on acquisition indebtedness. In tax-free (stock-for-stock) acquisitions, special rules applicable to foreign acquisitions may be relevant.

- *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's management before relatively low ownership thresholds can be crossed. Non-U.S. acquirors have to be mindful of disclosure norms and timing requirements relating to home country 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 also vary by jurisdiction and have received heightened regulatory focus in recent periods.

- *Shareholder Approval*. Few U.S. public companies have one or more controlling shareholders, a circumstance which renders shareholder approval, where required, a key variable. Understanding in advance the roles of arbitrageurs, hedge funds, institutional investors, private equity funds, proxy voting advisors and other important 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. It is advisable to retain a proxy solicitation firm to provide advice prior to the announcement of a transaction so that an effective strategy to obtain shareholder approval can be implemented.

- *Integration Planning*. One of the reasons deals sometimes fail is poor post-acquisition integration, particularly in cross-border deals where multiple cultures, languages and historic business methods may create friction. If possible, the executives and consultants that 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 and the integration/execution teams invites slippage in execution of a plan that in hindsight is labeled by the new team as unrealistic or overly ambitious. However, integration planning needs to be carefully phased in as implementation cannot occur prior to the receipt of certain regulatory approvals.

- *Corporate Governance and Securities Law*. 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 country rules and to be certain that the 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. companies with U.S. security holders.

- *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 federal agency or state attorneys general level. Although less typical, concerns can also arise if the foreign 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 country competition laws may raise their own sets of issues that should be carefully analyzed with counsel.

- *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 funneled through legal or financial intermediaries as opposed to being made directly to the target company. Making due diligence requests that appear to the target as particularly unusual or unreasonable (not uncommon in cross-border deals) can easily cause a bidder to lose credibility. Similarly, missing a significant local issue for lack of local knowledge can be highly problematic and costly.

- *Collaboration*. Most obstacles to a deal are best addressed in partnership with local players whose interests are aligned with those of the 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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As always in the global M&A game, results, highpoints and lowpoints for 2012 are likely to include many surprises, and sophisticated acquirors will need to continually refine their strategies and tactics as the global and local environment develops. However, despite the still turbulent global economic environment, and even during an election year in the U.S., the rules of the road for successful M&A transactions in the U.S. remain well understood and eminently capable of being mastered by well-prepared and well-advised acquirors from all parts of the globe.

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