January 5, 2023

Cross-Border M&A –
2023 Checklist for Successful Acquisitions in the United States

After a record-shattering year for M&A in 2021, a crescendo that built over a decade, powered by unique pandemic conditions, 2022 was, statistically, a reversion to the mean. Worldwide M&A volume was $3.6 trillion in 2022, as against $6.2 trillion in 2021 and an average of $4.3 trillion annually over the prior ten years (in 2022 dollars). Average, however, 2022 was anything but. Russia's invasion of Ukraine sparked the largest armed conflict in Europe since World War II, creating a mass humanitarian crisis in Ukraine and the region, multiplying food and energy insecurity around the world, and exacerbating unresolved supply chain disruption caused by the coronavirus pandemic. Fiscal stimulus and adaptive monetary policies that supported growth during pandemic lockdowns were followed by inflation and hawkish policy responses, reversing a nearly 40-year trend of declining interest rates.

While M&A was not isolated from all of this upheaval, cross-border M&A continued to be attractive to dealmakers. Cross-border deals were 32% ($1.1 trillion) of global M&A in 2022, consistent with the average proportion over the prior ten years (35%). Acquisitions of U.S. companies by non-U.S. acquirors were $217 billion in transaction volume and represented 6% of 2022 global M&A volume and 19% of 2022 cross-border M&A volume. Canadian, British, Australian, Singaporean and Japanese acquirors accounted for 50% of the volume of cross-border acquisitions of U.S. targets, while acquirors from China, India and other emerging economies accounted for about 8%.

We expect cross-border transactions into the U.S. to continue to offer compelling opportunities in 2023. Transacting parties will do better if they are well-prepared for the cultural, political, regulatory and technical complexity inherent in cross-border deals. Advance preparation, strategic implementation and deal structures calibrated to likely concerns are critically important. Now, more than ever, thoughtful regulatory strategy and creative financing approaches deserve special focus.

The following is our updated checklist of matters 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. There is no one-size-fits-all roadmap to success.

- *Political and Regulatory Considerations*. A high percentage of investment into the U.S. will be well-received and not politicized. However, a variety of global economic fault lines continue to make it critically important 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

If your address changes or if you do not wish to continue receiving these memos, please send an e-mail to Publications@wlrk.com or call 212-403-1443.

W/4457471

understood to exist. High-profile transactions may result in political scrutiny by federal, state and local officials. The likely concerns of 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. Anticipation of these concerns is especially important in light of the increasingly widespread acceptance in the U.S. of stakeholder governance and embrace of ESG (environmental, social and governance) principles by shareholders and companies alike. Planning for these issues is made all the more complex in the current political climate, in which debates about corporate purpose, stakeholder considerations and ESG factors in corporate decision-making have become politicized.

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, the type of transaction and the geographic distribution of the workforce, labor unions may well play an active role during the entirety 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 advisors at an early stage when planning any potentially sensitive deal.

- *CFIUS*. The scope and impact of regulatory scrutiny of foreign investments in the U.S. by CFIUS has expanded significantly over the last decade, particularly following passage of the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018, and a series of implementing rules adopted by the U.S. Department of Treasury. As FIRRMA has been implemented, the role of CFIUS and the need to factor into deal analysis and planning the risks and timing of the CFIUS review process has been further heightened. Although notification of most transactions remains voluntary, FIRRMA introduced mandatory notification requirements for certain transactions, including investments in U.S. businesses associated with critical technologies, critical infrastructure, or sensitive personal data of U.S. citizens where a foreign government has a "substantial interest" (*e.g.*, 49% or more) in the acquiror. Critical technology and critical infrastructure are broad and flexible concepts, and FIRRMA expanded their scope to include "emerging and foundational technologies" used in computer storage, semiconductors and telecommunications equipment sectors and critical infrastructure in a variety of sectors. Supply chain vulnerabilities during the pandemic have also increased the likelihood that investments in U.S. healthcare, pharma, and biotech companies will be closely reviewed by CFIUS.

For example, as evidenced by CFIUS's opposition in 2021 to South Korean chip maker Magnachip Semiconductor Corp.'s merger with Wise Road Capital Ltd., a Chinese private equity firm, CFIUS will take an expansive view of its jurisdiction when semiconductor supply, even involving non-military applications, is at stake. CFIUS had "called in" the transaction for its review even though the transacting parties indicated that they had no U.S. nexus except for being incorporated in Delaware, having a Delaware subsidiary, and being listed on the NYSE, with any de minimis sales into the U.S. only occurring through third-party distributors and resellers. Magnachip's 2020 annual report, though, indicated that it had a facility in San Jose, California, which it used for "administration, sales and marketing and research development functions," that had been closed only in September 2020. A notable aspect of the deal was CFIUS's issuance on June 15, 2021 of an interim order preventing Wise Road from completing the acquisition of Magnachip pending its review of the transaction. While FIRRMA gave CFIUS the authority to prevent consummation of a transaction pending its review, CFIUS has so far rarely used that authority. In abandoning the transaction, Magnachip cited its inability to obtain CFIUS's approval for the merger. Companies operating overseas with even a limited nexus to the U.S. need to undertake CFIUS due diligence before engaging in a transaction in sectors that may involve core national security areas of interest.

Personal data is also a key area of scrutiny for CFIUS. Most recent enforcement actions involved concerns about Chinese investors' access to sensitive personal data of U.S. citizens. CFIUS enforcement in these sectors is likely to continue, as is a focus on domestic supply chain security to ensure that neither the U.S. nor its allies will be dependent on critical supplies from certain nations, including China. At the same time, the U.S. is likely to remain open to foreign investment, even in the national security sector. Most foreign investment will still be cleared, although it may get close review and possibly require mitigation actions, especially to the extent involving intellectual property, personal data, and cutting-edge or emerging technologies. While notification of a foreign investment to CFIUS remains largely voluntary, transactions that are not reviewed remain subject to potential CFIUS review in perpetuity.

Thus, conducting a risk assessment for inbound transactions or investment early in the process is prudent to determine whether the investment will require a mandatory filing or may attract CFIUS attention. Parties may wish to take advantage of the "declarations" process, which provides expedited review for transactions that present little or no significant risk to U.S. national security. Parties should also agree on their overall CFIUS strategy and consider the appropriate allocation of risk as well as timing considerations in light of possibly prolonged CFIUS review.

- *Antitrust Issues*. The U.S. antitrust enforcement agencies have had an aggressive enforcement agenda. Recently enacted federal legislation provides for significant increases in the budgets of these agencies. The scope of issues being reviewed in strategic transactions has expanded, and may result in delay and further efforts being required by the parties to get the deal cleared as quickly as possible. Although most enforcement continues to involve situations in which 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 also arise if a non-U.S. acquiror operates

either in an upstream or downstream market of the target. In addition, a new law will require companies to disclose information regarding subsidies they receive from a "foreign entity of concern." Such foreign entities include, among other things, countries determined by the Secretary of Energy, in consultation with the Secretary of Defense and the Director of National Intelligence, "to be engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States." China, Russia, Iran, and North Korea are among the countries currently identified as "foreign entities of concern." Pursuant to the new law, the federal antitrust agencies, in consultation with other government agencies, will promulgate rules that specify the information that affected parties must include in their HSR Forms and when such changes will take effect. Once effective, filing parties should expect increased scrutiny of any disclosed foreign subsidies, even if such subsidies are unrelated to the transaction being notified.

For a vast majority of transactions, the ultimate outcomes of transactions remain predictable and achievable without the need for remedies or litigation. Even in transactions that raise concerns, careful planning and a proactive approach to engagement with the agencies can facilitate getting the deal through.

For those transactions that raise antitrust concerns, parties should be prepared to deal with the U.S. antitrust agencies' strong preference for (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. Also, the agencies have shown a greater willingness to refuse to engage in remedies discussions in some transactions, and transacting parties should be prepared to litigate, possibly with a remedy in place that resolves any concerns that the court may find justified. In all transactions, pre-closing integration efforts should 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.

- *Debt Financing*. After years of easy borrowing, 2022 brought a halt to "lower for longer" rates and booming credit. Global high-yield bond issuance volume cratered to less than a third of 2021 levels; investment-grade bond issuances fared better, but still fell 20% year-over-year. Leveraged loans also slowed significantly with volume falling to just 36% of 2021 levels.

  Challenging debt markets, which featured a substantial number of "hung bridges," sent some high-yield acquirors looking for acquisition financing alternatives, including by turning to "direct lenders" as a source of acquisition financing. Direct lenders played a major role in leveraged buyouts in particular in 2022, reportedly providing debt financing in six of the ten largest leveraged buyouts of the year globally. In other instances, buyers sought "seller financing" (a feature used in some carveout deals), or, in the case of some private equity buyers, increased their equity checks.

Looking ahead to 2023, with rates still elevated and the credit environment uncertain, corporate borrowers and sponsors will need to plan rigorously for financing-fueled acquisitions. Obtaining committed financing in particular will require both creativity and a willingness to not let the perfect be the enemy of the good-enough. Important questions to ask when considering a transaction that requires debt financing include: which financing market has the most favorable after-tax costs, how committed the financing is or should be (or *must* be by law, depending on the jurisdiction of the target); which lenders have the best understanding of the acquiror's and target's businesses (including both sector and locale); whether there are ways to share financing risk between a buyer and seller; and which banks or direct lenders are in the strongest position to provide acquisition financing commitments (and whether to seek financing from banks alone, direct lenders alone, or to speak with a mix thereof).

- *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.

- *Acquisition Currency*. Cash remains the predominant form of consideration in cross-border deals into the U.S., with all-cash transactions representing more than 64% by value of cross-border deals into the U.S. in 2022 (above the annual average of 55% over the prior five years). 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). If U.S. target shareholders are to obtain a continuing interest in a surviving corporation that is not already publicly listed in the U.S., non-U.S. acquirors should 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. Equity markets have never been more global, 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 proscribe 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.

- *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.

- *Litigation*. Shareholder litigation continues to accompany many transactions involving a U.S. public company but is generally no 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 even delayed 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 non-financial "therapeutic" concessions. 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 careful planning can substantially reduce the risk of U.S. shareholder litigation, the reverse is also true: the conduct of the parties during negotiations, if not responsibly planned in light of background legal principles, 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 regulators should be conditioned in advance (to the extent possible) to expect litigation in the U.S. 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. Turning back a high-profile litigation campaign by the plaintiffs' bar, the New York courts recently made clear that deal-related fiduciary duty claims not arising under U.S. law should generally not proceed in the U.S. These rulings provide welcome comfort that U.S. courts will refuse to export their expansive discovery and procedural rules in the mine run of situations.

  The pandemic reinforced the importance of merger agreement provisions governing the choice of law and the choice of forum in the event of disputes between the parties—particularly disputes in which one party may seek to avoid the obligation to consummate the transaction. In *Travelport Ltd* v. *Wex*, for example, the English High Court interpreted the material adverse effect provisions of the parties' agreement under English law in a manner that surprised many U.S. observers. Similarly, in separate decisions examining whether and when a party can exit a merger agreement because the counterparty breached its interim operating covenants, the Superior Court of Justice in Ontario reached a different result than the Delaware courts. These disputes, reflecting the transactional disruption occasioned by the pandemic, have taught again an important lesson: cross-border transaction planners should consider the courts and laws that will address a potential dispute and 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*. Understanding the U.S. and non-U.S. tax issues affecting target shareholders and the combined group is critical to structuring any cross-border

transaction. In transactions involving the receipt of acquiror stock, the identity of the acquiring entity must be considered carefully. Although some of the U.S. tax law changes enacted in 2017 (*e.g.*, reduced corporate income tax rate and introduction of a deduction for dividends received from non-U.S. subsidiaries) have ameliorated certain of the adverse tax consequences traditionally associated with being U.S.-parented, others remain or have been exacerbated (*e.g.*, continued application of "controlled foreign corporation" (CFC) rules to non-U.S. subsidiaries and expansion of such rules to provide for minimum taxation of CFC earnings (GILTI)). Where feasible, it often will be preferable from a U.S. tax perspective for the combined group to be non-U.S.-parented. In transactions involving an exchange of U.S. target stock for non-U.S. acquiror stock, the potential application of "anti-inversion" rules—which could render an otherwise tax-free transaction taxable to exchanging U.S. target shareholders and could result in significant adverse U.S. tax consequences to the combined group—must be evaluated carefully. Combining under a non-U.S. parent corporation frequently is 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.

The Inflation Reduction Act of 2022, enacted last August, introduced two new taxes effective for tax years beginning after December 31, 2022: (1) a 15% corporate alternative minimum tax (CAMT) on the "adjusted financial statement income" of certain large corporations and (2) a non-deductible 1% excise tax on certain stock buybacks. The CAMT generally applies to corporations with average annual adjusted financial statement income over a three-year period in excess of $1 billion (but a lower $100 million threshold applies to U.S. corporations that are members of a non-U.S.-parented group that satisfies the $1 billion threshold). By introducing a parallel set of tax rules—with broad regulatory authority for the Treasury Department to "carry out the purposes" of the new tax—the CAMT adds significant complexity for large taxpayers, and IRS guidance on many critical issues remains to be issued. While the CAMT shares certain features with the OECD's "Pillar 2" (which also would impose a 15% minimum tax on the book income of certain large multinational enterprises), numerous differences give rise to complex coordination issues. The new 1% excise tax on repurchases of stock of publicly traded corporations applies to a wide scope of transactions well beyond conventional stock buyback programs. For example, under recently issued IRS guidance, the excise tax would apply in all-cash acquisitions to the extent the consideration is paid with cash (including borrowing proceeds) of the U.S. target and would apply in "reorganizations" with respect to consideration received by the U.S. target's shareholders, other than acquiror stock or securities that can be received on a tax-free basis. In certain circumstances, the excise tax can apply to repurchases by publicly traded non-U.S. corporations (*e.g.*, if such corporation was the acquiring entity in an "inversion" transaction occurring after September 20, 2021 or if the repurchase is funded by a U.S. subsidiary).

Potential acquirors of U.S. target businesses should carefully model the anticipated tax rate of the combined business, taking into account the CAMT and any non-U.S. minimum taxes on book income, limitations on the deductibility of net interest expense and 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. Such modeling requires a detailed understanding of existing and planned related-party transactions and payments involving the combined group. In particular, the combination of the relatively low U.S. corporate income tax rate and limitations on the deductibility of interest expense have made it less attractive to "push" acquisition debt into a U.S. target group.

- *Employee Compensation and Benefits Matters*. In the acquisition of a U.S. target company, employee compensation and benefits arrangements require careful review as part of the diligence process and are often a key element of deal-related negotiations. Because both existing compensation arrangements and new arrangements that the target company seeks to implement in connection with a transaction may have a material impact on retention of target employees (and, therefore, the successful post-closing operation of the target's business) and may have significant associated costs, close coordination among the corporate development, finance, human resources and legal teams at the acquiror, the acquiror's investment bankers, and the acquiror's external transaction counsel is critical in order to ensure that all elements are properly accounted for in the valuation analysis, transaction terms, and integration plan.

  In particular, equity incentive compensation is an area that requires significant focus as it is highly utilized at U.S. companies and, though the practices vary depending on whether a company is publicly traded or privately held, the sector in which it operates, the size of its employee population, and other relevant factors, it would not be uncommon for equity awards to represent 10% or more of a company's fully diluted equity value and for such awards to be held by a substantial percentage of the employee population. Consequently, outstanding equity awards will need to be addressed at multiple stages of the deal process, including accounting for awards in the valuation analysis and purchase price negotiations, establishment of parameters for grants of incremental equity awards between signing and closing, and inclusion of provisions regarding treatment of all outstanding equity awards in the transaction agreement (which treatment must be consistent with the contractual terms of the awards).

  Additionally, acquirors should be mindful that, because U.S. employment laws are generally less prescriptive on compensation and benefit matters than the laws of many non-U.S. jurisdictions, some matters that are covered by applicable law outside the U.S. are generally negotiated on a bespoke basis in U.S. transactions. For example, it is customary in U.S. transaction agreements to include a covenant requiring that the acquiror maintain compensation and benefits for target company employees at specified levels (generally linked to either pre-closing levels or levels applicable to similarly situated acquiror employees) for a specified period of time following the closing (generally 12 months). While this covenant is not individually enforceable by target company employees as a contractual matter, it is a specific indication of the acquiror's intended treatment of target employees and, because the terms of the covenant are communicated to employees, a failure of the acquiror to comply with the covenant would have significant consequences both as to employee satisfaction and retention at the target company and more broadly for the acquiror's reputation when entering into future transactions. Another example is that, in the U.S., severance benefits are generally a

matter of contract rather than statute, and negotiation of specific severance protections for target employees—generally in the form of a commitment from the acquiror to maintain existing severance protections or to allow the target company to implement new or enhanced protections in advance of closing—is common.

- *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.

- *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.

- *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.

- *Distressed Acquisitions*. In a relatively quiet year for U.S. bankruptcy filings, the U.S. remained the forum of choice for cross-border restructurings. Although tighter fiscal and monetary policy and reductions in governmental support as the pandemic eased, along with rising inflation, negatively impacted many in industries such as aviation and energy that had held on or even thrived during the pandemic, Chapter 11 filings by large companies declined from 2021. The wave of filings in the cryptocurrency sector is the outlier, but it stems from its own anomalous causes. Nonetheless, some multinational companies continued in 2022 to take advantage of the debtor-friendly and highly developed body of reorganization laws, as well as the specialized bankruptcy courts, that have long made U.S. Chapter 11 bankruptcy filings attractive. Among the advantages of a U.S. bankruptcy are the expansive jurisdiction of the courts (such as a worldwide stay of actions against a debtor's property and liberal venue requirements); the ability of the debtor to maintain significant control over its normal business operations; relative predictability in outcomes; and the ability to bind holdouts to debt compromises supported by a majority of holders and two-thirds of the debt. In addition, companies exposed to potential mass tort liability now routinely invoke Chapter 11 in an effort to resolve all claims against the company in a single forum.

  U.S. bankruptcy courts generally permit the sale of substantial assets or of the whole company during, or in connection with emergence from, a Chapter 11 proceeding. Features of the Bankruptcy Code of particular importance to M&A transactions include the ability to obtain a sale order providing title to assets free-and-clear of all prior liabilities and liens on a worldwide basis, the ability to borrow on a super-senior basis to fund the company during and upon exit from bankruptcy, the ability to reject undesirable contracts and leases while keeping those desired by the buyer, and the easing of certain antitrust and securities regulatory burdens.

  Those evaluating a potential acquisition of a distressed target with a connection to the U.S. should consider the full array of tools that the U.S. bankruptcy process makes available. Those could include acquisition of the target's fulcrum debt tranches that are expected to be equitized 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. In addition, multinational companies facing potential mass tort liability should consider use of Chapter 11 for subsidiaries with a sufficient U.S. connection to protect a purchaser from the overhang of legacy liabilities.

  Transaction certainty is critical to a debtor and its stakeholders and thus to a potential acquiror's success in a distressed context. Accordingly, non-U.S. participants need to plan carefully (particularly with respect to transactions that might be subject to CFIUS review, as discussed above) to ensure that their bid will be considered on a level playing field with U.S. bidders. Acquirors must also be aware that there are numerous constituencies involved in a bankruptcy case that they will likely need to address (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, and that there exists an entire subculture of sophisticated investors, lawyers and financial advisors that must be navigated.

Various options are available to troubled companies seeking to take advantage of the U.S. bankruptcy laws. Multinational debtors often file bankruptcy petitions in the U.S. and link the confirmation or consummation of a plan of reorganization with successful administration of related foreign ancillary insolvency proceedings. Even when the principal proceeding takes place elsewhere, large non-U.S. companies can file cases under Chapter 15 of the U.S. Bankruptcy Code to obtain "recognition" of foreign insolvency proceedings in a U.S. bankruptcy court. The legal requirements for such recognition are minimal, and can include minor connections to the U.S. such as debt instruments with U.S. choice of law or venue provisions, or payment of a retainer to U.S. counsel. Recognition of a foreign proceeding under Chapter 15 facilitates restructurings and asset sales by providing debtors with many of the same protections that Chapter 11 provides from creditors in the U.S., and the ability to take control of and administer U.S. assets. Chapter 15 also provides the ability to bind U.S. creditors or holders of U.S. law debt to the terms of a restructuring plan implemented in a foreign proceeding, so long as the proceeding accords with broadly accepted principles of due process and creditors' rights.

- *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.

Adam O. Emmerich
Scott K. Charles
David A. Katz
Andrew J. Nussbaum
Mark Gordon
William Savitt
Emil A. Kleinhaus
Gordon S. Moodie
Emily D. Johnson
Erica E. Bonnett
Matthew T. Carpenter
Robin Panovka
Jodi J. Schwartz
Ilene Knable Gotts
Joshua R. Cammaker
T. Eiko Stange
Joshua M. Holmes
Karessa L. Cain
John R. Sobolewski
Raaj S. Narayan
Amy R. Wolf