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Cross-Border M&A –
2020 Checklist for Successful Acquisitions in the United States

M&A continued its robust pace in 2019, with nearly $3.9 trillion in global deal volume for the year, the third-highest volume of the last decade. The U.S. market was particularly strong, making up for relative weakness in Europe and Asia. The boom was fueled largely by mega-deals, with a surge in transformative transactions compensating for a decline in smaller deals and the raw number of deals. The seven largest transactions of 2019 – all announced in the first six months of the year – accounted for nearly $500 billion in deal volume. Three transactions – the sale of Celgene to Bristol-Myers Squibb, the merger of United Technologies and Raytheon and the sale of Allergan to AbbVie – each exceeded $80 billion. By the end of 2019, the volume of transactions of more than $20 billion was 41% higher than in 2018, while the volume of all other transactions was down 13% versus 2018.

As for cross-border deals, a relatively low $1.2 trillion of last year's deals (including only one of the 10 largest deals) were cross-border, reflecting dealmakers' watchful eye on international trade tensions, the impact of Brexit and geo-political shifts. Approximately 14% of last year's $1.9 trillion U.S. deal volume involved non-U.S. acquirors, with foreign capital helping to fuel many domestic deals as well. Canadian, French, German, Japanese and U.K. acquirors accounted for approximately 53% of the volume of cross-border deals involving U.S. targets, and acquirors from China, India and other emerging economies accounted for approximately 8%.

Despite the inevitable uncertainties inherent in the current climate, we expect cross-border transactions into the U.S. to continue to offer compelling opportunities. And, as always, 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, as is a thoughtful assessment of recent changes to the CFIUS regime and U.S. governance trends discussed below.

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*. A high percentage of investment into the U.S. remains well-received and is not politicized. However, a variety of global economic fault lines and the Trump administration's aggressive rhetoric on trade and "America First" continue to 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. This is especially important in light of the ongoing shift in the U.S. towards "stakeholder governance" and the growing embrace of ESG (environmental, social and governance) principles by shareholders and companies alike, as detailed in our firm's recent Thoughts for Boards of Directors in 2020.

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 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 transactions, including forcing post-consummation divestitures, as was the case with two Chinese companies' investments in technology startups Grindr and PatientsLikeMe, allegedly due to concerns regarding cybersecurity or access to sensitive personal data. CFIUS's jurisdiction was significantly expanded in 2018 with the approval of the Foreign Investment Risk Review Modernization Act (FIRRMA), which set 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. Among the key changes, FIRRMA expanded CFIUS's jurisdiction to include the review of "non-controlling" investments in U.S. businesses that involve critical technologies or infrastructure or sensitive personal data of U.S. citizens, and imposed mandatory filings – a significant departure from the prior voluntary regime – for certain transactions involving a foreign investor in which a foreign government has a substantial interest. Some provisions of the new law took effect upon enactment, while others require formal rulemaking by CFIUS. In October 2018, the Treasury Department issued interim regulations to implement some of FIRRMA's changes, and in September 2019, it released proposed rules to implement most of the remaining provisions. The proposed rules are expected to become effective in early 2020.

  Among other things, the recently issued proposed rules introduce a mandatory filing requirement for certain investments resulting in foreign-government-controlled entities obtaining 25% or more of the voting power in U.S. businesses involved in critical technology or infrastructure or sensitive personal data. The draft regulations also identify several categories of businesses involving "critical technology," including the sorts of military- and defense-related items with which CFIUS has traditionally been associated, as well as certain "emerging and foundational technologies" used in industries such as computer storage, semiconductors and telecommunications equipment. Businesses involving "critical infrastructure" are identified by reference to a list of 28 subsectors listed in an appendix, including, among others, telecommunications networks, electric power generation, transmission, distribution and storage facilities, certain oil and gas systems, financial market utilities and exchanges, and airports and ports. With respect to businesses involving "sensitive personal data," the proposed regulations include any business that maintains or collects genetic information or other "identifiable data" such as financial, health-related, biometric or insurance data for more than one million individuals. The proposed regulations also implement the real estate provisions of FIRRMA by expanding CFIUS's jurisdiction to capture the purchase, lease or concession of certain U.S. real estate to a foreign person. Covered real estate includes real estate that is located within an airport or maritime port, or is located within "close proximity" (generally one mile) or the "extended range" (in most cases 99 miles) of specific military installations. Casting this wide net is emblematic of FIRRMA's new approach to evaluating the national security implications of a particular investment. Rather than the more traditional indicia such as protection of defense facilities and infrastructure, government contracts, etc., FIRRMA mandates that CFIUS view national security through a wider lens and acknowledge that the capability to develop emerging technologies, both digital and otherwise, is critical to ensuring long-term U.S. national security.

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.

As with antitrust, remedies in the form of security mitigation efforts are increasingly common as a way to resolve CFIUS objections. These remedies often take the form of restrictions on the flow of information or data that CFIUS might deem to be sensitive, whether by firewalls or the creation of so-called "security subsidiaries" with specially comprised boards, or other remedies. It remains to be seen whether these remedies continue to pass muster following the passage and implementation of the FIRRMA-related changes. 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 more than 70% of the volume of cross-border deals into the U.S. in 2019 (up from an average annual share of 55% over the prior four years), as compared to approximately 32% of the volume of all deals involving U.S. targets in 2019. 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 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.

- *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 in the energy sector in particular, which has suffered significant losses over the past several years. 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); allows the debtor to maintain significant control over its normal business operations; provides relative predictability in outcomes; may ease certain antitrust and securities regulatory burdens; and allows for the imposition of debt restructurings on non-consenting creditors, making reorganizations more feasible. Multinational debtors have filed bankruptcy petitions in the U.S. and linked the confirmation of a plan of reorganization with successful administration of related foreign insolvency proceedings. Large non-U.S. companies have also continued to turn to Chapter 15 of the U.S. Bankruptcy Code to obtain "recognition" of foreign insolvency proceedings in a U.S. bankruptcy court. The requirements for such recognition are minimal, and include such connections to the U.S. as debt instruments with U.S. choice of law or venue provisions or payment of a retainer to U.S. counsel. Recognition under Chapter 15 has facilitated restructurings and asset sales by providing debtors with protection from creditors in the U.S. and the ability to administer U.S. assets.

  Firms evaluating a potential acquisition of a distressed U.S. target or U.S.-based assets should consider the full array of tools that the U.S. bankruptcy process makes available. These include 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. Section 363 sales, in particular, continue to be common as they can be completed comparatively quickly, efficiently and cheaply, and provide the acquiror with the certainty provided by a court order approving the transaction.

  Transaction certainty is critical to the 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 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*. After the choppy end of 2018, acquisition financing markets were robust throughout 2019, both for investment-grade and high yield borrowers. Substantial commitments to finance acquisitions for investment-grade issuers have been available, and while acquisition financing commitments for high-yield borrowers have been more selective, they remain strong.

  Of course, whether and for how long the bull market in acquisition financing remains running is a matter of lively debate, and reliance on an abundance of low-cost debt should be approached with caution. Doing deals in 2020 with leverage will require careful planning and thoughtful approaches to negotiating a financing commitment. Important questions to ask when considering a transaction that requires debt financing include: what is the appropriate level of leverage for the resulting business; what financing market has the most favorable after-tax costs, terms and conditions for a particular cross-border deal; what is the optimal mix of currencies, including considering 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. 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 2017 fundamentally altered the landscape for U.S. business taxation. 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 2017 legislation 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 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 2017 legislation did not change the U.S. tax rules generally applicable to corporate mergers and acquisitions, and also left in place existing rules applicable to "inversion" transactions. In fact, the law contains harsh additional rules intended to deter inversions. Rather than simplifying corporate taxation, U.S. tax "reform" has further exacerbated the complexity of U.S. tax rules applicable to multinational groups. On a positive note, extensive administrative guidance issued by the U.S. Department of the Treasury and the Internal Revenue Service in 2018 and 2019 has provided taxpayers with greater certainty regarding the interpretation of many of the new rules.

  Understanding the interplay of these new rules frequently requires detailed modeling. Specifically, 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 under the statute and under recently proposed regulations that may further diminish the value of target net operating loss carryforwards, 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 under prior law to "push" acquisition debt into the U.S. group. Another critical diligence item is confirming a target's one-time "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 negatives historically associated with having a U.S.-parented multinational group, a non-U.S.-parented group may avoid application of the U.S. CFC rules, which have been significantly 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 be 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. Recent enforcement actions show that 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 in 2018 has not affected the review process in most transactions because the administration of the antitrust laws in the U.S. is carried out by professional agencies that tend to rely 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 generally be 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 U.S. antitrust agencies continue to carefully 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.

Adam O. Emmerich
Jodi J. Schwartz
David A. Katz
Ilene Knable Gotts
Joshua R. Cammaker
Andrea K. Wahlquist
T. Eiko Stange
Eric M. Rosof
Emil A. Kleinhaus
Raaj S. Narayan
Amy R. Wolf
Robin Panovka
Scott K. Charles
Andrew J. Nussbaum
Mark Gordon
William Savitt
Karessa L. Cain
Joshua M. Holmes
Gordon S. Moodie
Edward J. Lee
Matthew T. Carpenter