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# M&A Activity in the U.S.: What Chinese Investors Need to Know to Be Successful

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Against the backdrop of the recent market volatility and a weak global economic outlook, it is interesting to note that outbound acquisitions by Chinese corporations reached a new record for the first half of 2011. Chinese acquisition activity in the U.S. will likely further intensify, as recent European monetary instability and increases in commodity prices and currency exchange rates in the Asia-Pacific region make U.S. targets comparatively more attractive to Chinese investors.

Although several high-profile deals involving Chinese companies have been blocked on national security grounds, the vast majority of Chinese investments in the U.S. have obtained regulatory clearance, and, in recent days, the U.S. government has emphatically reiterated its commitment to making the U.S. the top target of Chinese global investments.

Most transactions undertaken by Chinese companies in the U.S. can be successfully implemented through a combination of a careful analysis of relevant local and national political implications, the identification of the most appropriate transaction structure, and a timely review of all legal issues that could complicate the negotiations.

Below is a brief discussion of several major issues affecting Chinese strategic investments in the U.S.

**National Security Review**

Chinese acquirers and U.S. targets must pay significant attention to the national security review of the Committee on Foreign Investment in the United States (“CFIUS”), which could result in the disapproval or divestiture of any substantial Chinese investments in the U.S. (excluding greenfield investments). Although applicable statutes do not define “national security,” the factors that CFIUS considers in making its assessments are often problematic for Chinese companies. Nevertheless, by following some useful basic guidelines when dealing with CFIUS — including engaging in early discussions with U.S. Treasury officials and CFIUS experts, making advance voluntary filings with CFIUS when appropriate, and, if necessary, offering methods of mitigation early in the review process — Chinese acquirers will likely be able to mitigate against possible risks inherent in a U.S. acquisition.

**Other Regulatory Approvals**

Where targets are U.S. public companies, in addition to the risk of derivative securities’ litigation, parties to the transaction should take note of the detailed disclosure and approval requirements imposed by U.S. corporate and securities laws. To the extent that a Chinese acquirer is active in the same industry as the target company, the proposed transaction may also trigger a premerger notification requirement and be subject to federal antitrust review. Finally, acquisitions in certain sensitive industries — including banking, telecommunications, defense, mineral resources and energy — often require separate approvals by federal and state regulators.

Chinese investors and their U.S. counterparts should also be aware that prior approval of the Chinese Ministry of Commerce may be required for certain Chinese investments in the U.S., based on the size of the transaction and the jurisdictions and industries involved.

**M&A and Corporate Issues**

While special considerations apply to acquisitions of publicly traded companies, the choice of the most efficient acquisition structure (e.g., stock or asset purchase or a merger) is usually a function of the parties' mutual goals and the specific facts of each particular transaction. Key among these are the desire to maximize tax efficiency, the buyer’s desire to minimize exposure to the target’s liabilities, the need to obtain required corporate consents and third-party approvals, and other statutory issues. As CFIUS often closely examines what the Chinese investor’s ongoing role will be in the target business post-closing, certain Chinese acquirers may need to consider alternative transaction structures, including settling for a minority investment or a joint venture; investing in preferred stock or debt securities; making the acquisition in collaboration with a U.S. lender, private equity firm or co-investor; or employing a U.S. acquisition vehicle with U.S. involvement in the management.

It is also essential that due diligence and negotiations be conducted by experienced U.S. advisors in line with local custom and practice. The advice of seasoned professionals is key in helping to identify critical issues (e.g., current or threatened litigation; potential employment, labor, environmental concerns; and intellectual property matters) and, especially in a competitive auction situation, achieving a negotiated deal and outmaneuvering potential competitors.

**Post-Closing Considerations**

Chinese acquirers should recognize, and attempt to deal from the outset with, any post-closing integration issues that could complicate the successful implementation of a transaction. Special emphasis should be placed on ongoing compliance issues, including U.S. securities rules relating to director independence, internal control reports and loans to officers and directors; licensing restrictions on the exports of certain items; and any potential issues arising under the Foreign Corrupt Practices Act.

**Conclusion**

The U.S. remains a particularly attractive destination for Chinese investors. In addition to the traditional lure of the rich public and private capital markets, opportunities for investment abound in a wide variety of industry sectors, including infrastructure, information technology, media and entertainment, life sciences, pharmaceuticals, real estate, natural resources, power generation and consumer products. Although regulatory oversight, as in most countries around the world, is a fact of life in the U.S., as participants in China's fast-growing economy begin to ponder expansion beyond the lands of the Middle Kingdom, they will likely find the U.S.'s entrepreneurial spirit and decidedly pro-business environment a very compelling proposition.

For a greater in-depth discussion of the critical issues touched upon above that should be considered in advance of any strategic investment by Chinese companies in the U.S., please **click here**.

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