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EXIT PROVISIONS

- ▶ COMPANIES LOOKING FOR FASTER GROWTH and higher returns and, therefore, considering emerging or nontraditional markets for investment, such as in Latin America, must address the associated higher risk and uncertainties arising from an unpredictable legal environment and limited observance of, or differences from, US-style corporate governance.

Alternatives to traditional M&A investment structures that take the form of strategic alliances, such as joint ventures, distributorships, supply agreements, contract manufacturing and licensing arrangements or combinations thereof, can be used creatively to help mitigate risk by limiting exposure to a counterparty's liability and the legal risks a particular market may pose, and protect pre-existing assets while allowing for customised economics. These structures are also useful as a component of traditional M&A transactions when the parties need to maintain an ongoing economic relationship for several years post-transaction. These structures also allow an investor to secure the long-term participation and benefit of a partners' influence and economic position in the market rather than losing that involvement at the time it is most needed.

Of equal importance to choosing the optimal structure for investment is anticipating and planning an exit strategy at the outset by establishing objective valuation mechanisms, enforceable termination rights, transparent financial reporting, allocation of rights to jointly developed



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Susan Failla's practice focuses on corporate finance and mergers and acquisitions. She represents public and private buyers and sellers in domestic and international merger and acquisition transactions, including joint ventures, spin-offs, strategic sales of assets, lease portfolio management and commercial aspects of strategic restructurings. She has led capital markets transactions totalling over \$100bn for companies in such industries as consumer products, energy, information services, restaurant and financial services. A significant part of Ms Failla's practice consists of cross-border transaction work, including representation of corporations doing business in Latin America and the Caribbean.

» assets and enforceable non-competes, among others. It is understandable that parties often resist engaging in discussions that acknowledge the potential failure of the alliance, since the initial focus with any form of strategic alliance is on establishing the business relationship, as well as the belief that the circumstances involving an exit are impossible to predict. Careful consideration of the triggers for termination or exit, however, as well as the consequences of such an action, are a worthwhile and necessary part of the planning and negotiation process. This is especially true when operating in less established markets where valuation disconnects are prevalent between a local partner's estimation of growth prospects and that of a foreign investor. Well-drafted exit provisions should allow the parties to terminate the arrangement and preserve as much value as possible. Valuation provisions should be designed so as to inflict the least harm on the value of the parties' remaining business interests.

Strategic alliances often provide the most flexible and profitable vehicle for investment in emerging markets, especially when exit mechanics are given adequate attention and take into account local law restrictions on foreign ownership of assets. By using the various legal and economic components available to the parties in structuring an alliance, each party can achieve its central objectives while anticipating and protecting against legal, market and other risks.

The challenge lies in striking a delicate balance between earning the trust of your business partners and protecting your own interests. ■

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