Miller Canfield

ACQUIRING BUSINESSES IN THE USA

An Overview For **Global Buyers**

ACQUIRING BUSINESSES IN THE USA

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The information in this booklet provides an overview of the fundamental legal considerations to be addressed when acquiring or establishing a business in the USA. This publication is for general information only and should not be used as a basis for specific action without obtaining legal advice.

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SECTION 1 INTRODUCTION

This paper examines some of the legal and other issues that an entity organized under a non-US jurisdiction should consider when evaluating an acquisition of a business based in the US. The term "business" is used broadly in this paper to include free-standing companies, subsidiaries and divisions of companies, and any collection or aggregation of assets that forms an operating enterprise.

This paper focuses primarily on the acquisition of privately held businesses in negotiated transactions. It does not address the additional considerations involved in the acquisition of a US public company or unfriendly or hostile acquisitions.

This paper provides a high-level review of the acquisition process in the US, identifies the principal participants and their roles, describes the primary acquisition documents and their main features and mentions a few regulatory issues that need to be considered.

SECTION 2 INITIATING THE TRANSACTION

Typically, the acquisition process will be initiated in one of three ways. There may be an existing relationship between the foreign buyer and the domestic seller, and the transaction may be initiated and negotiated directly between the parties. The prospective foreign buyer might instead be approached by the seller's investment banker to determine the buyer's level of interest in an acquisition of a certain type or size of business. In making this initial contact, the investment banker may not identify the particular target, or the banker might provide very limited "teaser" information to solicit interest in a possible transaction. Finally, the prospective foreign buyer might retain its own investment banker to locate possible sellers meeting specified parameters with which the buyer can then attempt to conclude a transaction, either directly, or most often, with the help and assistance of the investment banker.

SECTION 3 US ACQUISITION VEHICLE

One of the first decisions for a prospective foreign buyer involves establishing a presence in the US, if it has not already done so in connection with other business operations. The most commonly used entities for US acquisitions are corporations and limited liability companies. Sometimes a partnership is used, but its use is generally limited to joint ventures in which the foreign buyer will be a participant. As between corporations and limited liability companies, by far the most common structure is the corporation, and the most common jurisdiction for forming a corporation is the State of Delaware, although there may be business or other reasons for forming the acquisition vehicle under the laws of another state. The acquisition vehicle, be it a corporation or a limited liability company, will often be formed as a subsidiary of its foreign parent, and each will provide flexibility of operation and a high level of liability protection to the parent corporation.

SECTION 4 US DEAL STRUCTURE

The three most commonly used acquisition structures of US businesses are an asset transaction, a stock transaction and a statutory merger.[1] In some situations, including,

[1] While a merger structure is often used when the US target is a public company or when the consideration to be paid consists of buyer's stock or other securities, since the focus of this paper is on cash transactions involving the acquisition of privately-held targets, the choice generally narrows to either an asset transaction or a stock transaction.

for example, when the target business is operated by or across several subsidiary entities or divisions of the seller, a combination of these structures may be employed. For tax and potential successor liability concerns, buyers generally prefer to purchase assets and assume only certain liabilities of the target, while for the very same reasons, sellers favor stock transactions, with the owners of the target company retaining none of its liabilities. This is particularly true when a private equity or hedge fund is selling one of its portfolio companies. In that situation, neither the fund nor any of its investors wishes to retain any of the target's liabilities, and often will require that the transaction be structured as a stock transaction.

SECTION 5 THE ACQUISITION PROCESS AND DOCUMENTATION

Confidentiality Agreement

Virtually all serious discussions and negotiations between a prospective buyer and seller begin with the execution of a Confidentiality Agreement as a precondition to the buyer obtaining access to the information it will require to decide whether and how to formulate a proposal to purchase the target. Except in those situations where the proposed transaction involves the formation of a joint venture or where the prospective buyer is proposing to pay consideration other than cash, most Confidentiality Agreements are unilateral, meaning that they provide access to confidential information to, and restrictions on, the use of that information by the prospective buyer only.

The Confidentiality Agreement will provide the prospective buyer, and its advisers and representatives, with access to the seller's confidential information for the limited purpose of evaluating whether to engage in a transaction with the seller. The information provided cannot be used for any other purpose, and must be returned or destroyed in the event the buyer elects not to go forward with a transaction. The seller might also ask for a provision restricting the ability of the prospective buyer to hire away its employees in the event the prospective buyer elects not to go forward with the transaction; and if the seller is a public company, it might require that the prospective buyer agree not to attempt to acquire the seller by stock accumulation or other means in the event it elects not to proceed with a negotiated transaction. Other commonly negotiated provisions include the extent to which the confidential information can be shared by the prospective buyer with its outside advisors and representatives including debt and equity financing sources, disclaimers with respect to the accuracy or completeness of the information provided, provisions with respect to sensitive information, including export control covenants in appropriate contexts, and term and termination.

Due Diligence

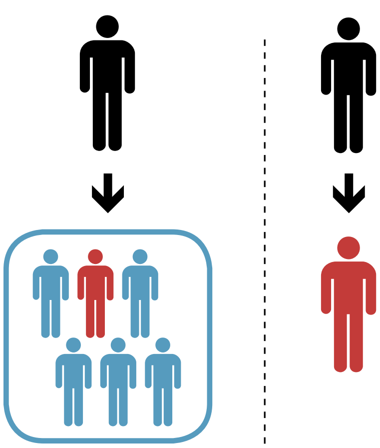
When the appropriate Confidentiality Agreement is in place, the parties may proceed with the "due diligence" phase of the transaction, which generally describes the investigative process the prospective buyer and its advisors will engage in to determine whether or not to make an offer for the target; and, if so, the terms of that offer. The due diligence process will cover financial, business, operating and legal issues relating to the target and its business. Due diligence is most often performed by a team made up of the buyer and its financial and operational personnel, accountants, and legal counsel. In addition, consultants may be used for environmental, employee benefits, insurance and other reviews. For large or complex transactions, the due diligence process can be a lengthy, time consuming and expensive undertaking.

While the process may take different forms depending upon the stage of the transaction, it generally begins with a specific due diligence request prepared by the buyer and its counsel requesting access to and the right to review a wide range of documents and other information relating to the target and its business. The information and documents assembled by the seller and response to the due diligence request are often made available to a prospective buyer in a designated data room, which can be a physical location controlled by the seller, or, as is often the case today, a virtual (internet-based and password-protected) data room established and populated by the seller. In either situation, access to the data room materials will be limited to designated representatives of the buyer who are subject, directly or indirectly, to the confidentiality restrictions of the Confidentiality Agreement.

The due diligence process is often staged, with particularly competitive or other sensitive information being withheld until a transaction is probable. In some cases, the parties may structure a third party review process for competitively sensitive information designed to address possible implications under antitrust laws.

The ultimate product of the legal due diligence phase may be a due diligence report prepared by the buyer's attorneys, that identifies what has been examined and any exceptions or concerns identified as part of the review. A due diligence report is commonly produced to summarize the findings.

The diligence reviews may continue through all stages of the acquisition process, before and after negotiation and execution by the parties of the definitive acquisition agreement and through to the closing, although the vast majority of the diligence reviews should certainly be completed before the definitive agreement is delivered.



Process Diverges

The acquisition process diverges depending on whether the proposed transaction involves one buyer and one seller, or the prospective buyer is one participant in an auction process being conducted by the seller. Each type of transaction will be considered separately.

One Buyer, One Seller

If the transaction involves one buyer and one seller, then the next step might involve the preparation and possible execution of a letter of intent relating to the potential transaction. A letter of intent will normally contain provisions which are drafted to be non-binding, and other provisions intended to be binding. The non-binding provisions generally relate to the structure and economic terms of the proposed transaction. While at this stage of the process there is no final agreement between the parties on economic terms, it is

> While the initial draft is often prepared by buyer's counsel and therefore is "buyer friendly," many of the provisions will be highly negotiated before the agreement can be finalized and accepted by both parties.

sometimes desirable to memorialize the parties' discussions of deal structure, price and other key economic terms before incurring the expense of drafting and negotiating a definitive acquisition agreement and incurring additional costs of continuing diligence. The non-binding understandings that might appear in a letter of intent include the proposed purchase price and payment and adjustment terms, the terms of employment agreements with key target management personnel, and a description of other key provisions, including indemnities, treatment of union and non-union employees, tax considerations and allocations, noncompetition restrictions, transition arrangements, special intellectual property licensing agreements, and closing conditions, all which are to be included in the definitive agreement.

In addition to the non-binding provisions, a letter of intent often will contain binding provisions. From the buyer's prospective, these might include a provision for continued access by the buyer and its representatives to the facilities, personnel, books, records, documents and data of the seller, and a provision requiring the seller to deal exclusively with the prospective buyer for some period of time in order to see if a definitive agreement can be reached between the parties. Other binding terms may include allocation of transaction expenses, term and termination of the letter of intent, and dispute resolution.

Because a court could determine that provisions of a letter of intent create binding obligations, even in those situations where the provisions are stated to be non-binding, in many cases the parties in US transactions will dispense with a letter of intent and proceed directly to negotiating the definitive acquisition agreement.

Definitive Acquisition Agreement

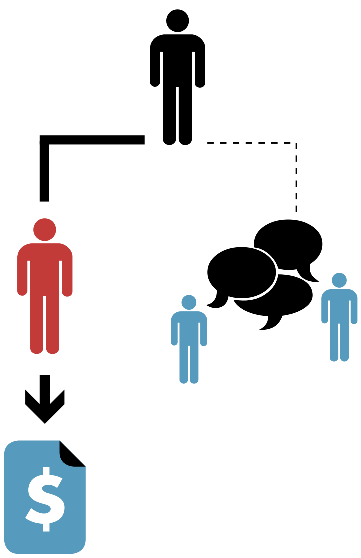
The principal acquisition document for a negotiated transaction, the definitive acquisition agreement, can take various forms and be known by various names, depending on the structure of the transaction. In the US, definitive acquisition agreements are detailed and specific. While the initial draft is often prepared by buyer's counsel and therefore is "buyer friendly," many of the provisions will be highly negotiated before the agreement is finalized and accepted by both parties.

A Definitive Acquisition Agreement will usually contain the following principal provisions:

- In a transaction structured as a stock or equity acquisition, the equity interests to be acquired, the target company's authorized and issued capitalization and equity-based securities. In a transaction structured as an asset acquisition, a definition and description of the assets that will be acquired and liabilities assumed and those that will be excluded and retained by the seller.
- Detailed representations and warranties by the seller, including those relating to the authorization and authority to complete the transactions, the organization and capitalization of the target, known and contingent liabilities, litigation affecting the target or the proposed transaction, title to assets, intellectual property matters, product and warranty responsibilities, compliance with environmental, labor and other applicable laws, the accuracy and completeness of financial statements of the target company, and many other of the aspects of the target company and its business

target company, and many other of the aspects of the target company and its business and assets. The seller also will prepare and deliver a set of disclosure schedules which will include exceptions to the representations and warranties.

- The purchase and payment terms, and any pre- or post-closing purchase price adjustments and confirmation procedures.
- The provision for any escrow or holdback, to serve as a source of indemnification for breaches of the agreement by the seller.
- Affirmative and negative covenants, most of which require the seller to take certain actions and refrain from others prior to the closing.
- Conditions to the closing of the transaction, including receipt of necessary regulatory approvals or third-party consents, the continued accuracy of the representations and warranties in all material respects, performance of covenants, and the absence of material adverse changes, and closing deliveries.



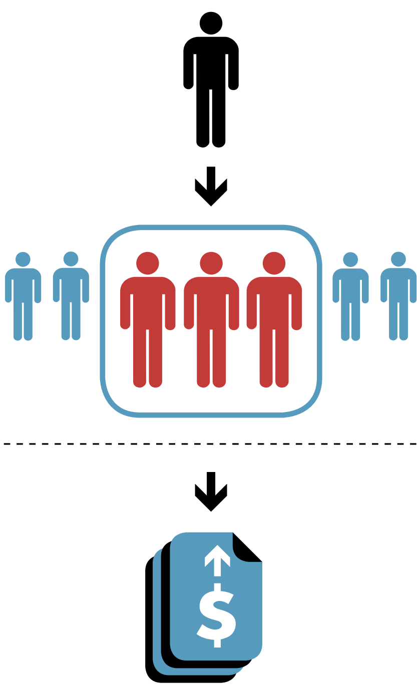
- Termination rights, which generally spell out the circumstances under which the buyer (and sometimes the seller) might be entitled to terminate the transaction, generally because one or more of the closing conditions have not or cannot be met, the seller has breached the agreement, or the target company has suffered a material adverse change or event since the execution of the definitive agreement. Prior to the closing, a definitive acquisition agreement can be terminated by a buyer in the event it is has negotiated a "no-shop" clause and the seller violates a "no-shop" clause by soliciting or negotiating with other interested prospective buyers once the definitive acquisition agreement has been signed. This provision, if triggered, can also result in the payment of a termination fee (generally a percentage of the purchase price up to approximately 5%) by the seller to the buyer.
- Most definitive acquisition agreements contain a provision whereby the seller will indemnify the buyer, post-closing, against losses and damages suffered by the buyer arising from breaches of representations, warranties and covenants by the seller and may also include specially negotiated indemnities covering specifically identified contingent and other liabilities. The indemnification obligation of the seller with respect to representations and warranties will often extend for stated periods which may be different for some representations and warranties (including, for example, environmental and tax) and without a stated period in the case of other representations and warranties (including, for example, title to assets or the stock being acquired) following the closing, and may be subject to a specified deductible in favor of the seller and a cap, or ceiling amount, beyond which the seller will not have any further indemnification obligation. The scope, survival periods, limitations and disclaimers as to the indemnification provisions and whether they are to be the exclusive remedy can be expected to be intensely negotiated by the parties.

The auction process begins with the distribution to prospective bidders of a short summary describing the target and its business.

Auctions: Buyer's View

While the "one buyer, one seller" sales process and the competitive auction process result in comparable transactions — the sale of the target to one buyer — they differ in many important respects. One difference is that the auction process is controlled by the seller, and if successfully planned and implemented, may create a competitive bidding environment and may or may not result in a higher price. Moreover, because the seller controls not only the auction process, but certain of the terms and conditions of sale, bidders can find themselves under pressure to overbid on the purchase price while agreeing to water down or eliminate provisions from the definitive acquisition agreement that would normally be for the buyer's benefit.

The auction process many times begins with the distribution to prospective bidders of a short summary describing the target and its business, commonly referred to as a "teaser." If the prospect has an interest in participating in the auction process, it will then enter into a confidentiality agreement in order to receive the "confidential information memorandum" (CIM) prepared by the seller with the help of its investment banker and sometimes the seller's attorneys. The CIM will generally describe the target, its business, operations, assets, management and prospects and will include historical and forecasted financial information. A bidder will also receive what is commonly called a "bid process letter" that describes the rules for bidding, and provides the seller's right to terminate or modify the bid process at any time. A bidder may or may not get access to the data room at this point for preliminary due diligence reviews prior to making an initial bid.

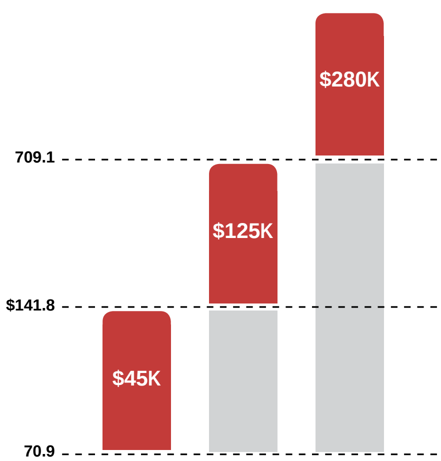


Many auctions are divided into two phases or bidding rounds. In the first round (phase 1), bidders are asked to submit initial non-binding bids and generally are asked not only to specify a price or price range, but also specify the methodology and assumptions made to reach that price. A bidder will also describe any required financing it will need for the transaction and the steps taken to secure that financing. The bidder will have to disclose in the bid process letter those conditions to which its final bid will be subject, including additional due diligence, corporate and regulatory approvals, and completion of necessary financing.

From these initial or phase 1 bids, a smaller group of bidders, determined by the seller and its advisors as offering the best combination of price, terms and the ability to consummate the transaction, is selected. This smaller group of bidders will then be invited to participate in a phase 2 round, in which they will be asked to "improve" their bids (and therefore their chances of success) by increasing the purchase price and/or eliminating some of the conditions to closing from their phase 1 bids. Additional diligence reviews may be offered as well as an invitation to one or more "management presentations" at which the prospective bidder will meet with existing management, receive detailed presentations on the operations of the target and be afforded the ability to ask questions and receive answers from management. The prospective phase 2 bidders will also often receive at this time a definitive acquisition agreement prepared by the seller (and therefore, "seller friendly") to be marked up and submitted as part of the phase 2 bid. The phase 2 bid process letters are substantially similar to those used in the first round, except that the bid in the phase 2 letter may be required to be binding through a specified date, and will contain few, if any, conditions (such as additional due diligence or availability of financing). While phase 2 calls for a marked-up definitive acquisition agreement to accompany the bid, increasingly the custom in the US is that the bidder will submit an “issues” list and make its bid subject to resolution of those issues in connection with the negotiation and completion of a mutually satisfactory definitive acquisition agreement.

Regulatory Approvals: Antitrust Approval Under HSR

Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), together with Section 13(b) of the Federal Trade Commission Act and Section 15 of the Clayton Act, the U.S. Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) identify and investigate certain transactions that could significantly lessen competition if allowed to proceed as proposed. The HSR Act required that parties to certain mergers and acquisitions notify the FTC and DOJ regardless of whether the buyer is a foreign entity. Unless exempted, transactions which meet all of the following three jurisdictional tests are subject to the filing and review process under HSR.



- **Commerce.** If the proposed buyer or proposed seller is engaged in commerce in the US or in any activity affecting US commerce. This requirement will always be met with a target that is domiciled in the US.
- **Size of Transaction.** If, as a result of the acquisition, the proposed buyer will hold voting securities or assets of the target with a value of more than $70.9 million.
- **Size of Person.** If the size of the transaction is greater than $70.9 million, but does not exceed $283.6 million, one person involved in the transaction has total assets or annual net sales of at least $141.8 million and the other person has worldwide total assets or annual net sales of at least $14.2 million. Transactions with a value greater than $283.6 million are reportable without regard to the size of person test.

These dollar thresholds are adjusted annually. The figures shown reflect adjustments for 2013. If the thresholds are met, the buyer and seller are required to file separate notifications with both the DOJ and FTC. The proposed transaction cannot be consummated for a period of 30 days while the DOJ and FTC review the application to determine whether further review or action is required under the federal antitrust laws. The reviewing agency can shorten the review period by granting an “early termination” or extending the waiting period if the reviewing agency determines additional information is required and issues a so-called “second request” for that information. A second request extends the waiting period for a specified period, usually 30 days.

The buyer is obligated to pay a graduated filing fee that varies with the size of the transaction at the time the application is filed, although it is common practice for the buyer and seller to agree to split the fee. The current fees are:

- $45,000 for transactions valued at more than $70.9 million, but less than $141.8 million
- $125,000 for transactions valued at more than $141.8 million, but less than $709.1 million
- $280,000 for transactions valued at $709.1 million or more

The filing obligations of HSR do not bear on the substantive legal analysis applied by the DOJ and FTC in examining the competitive impact of a proposed transaction. The legal analyses applied by the agencies are beyond the scope of this paper, but generally involve analysis of the impact of the transaction on US customers of the buyer or the seller, or both.

It is important to point out that in recent years the FTC and DOJ have increased their cooperation with international merger authorities. In particular, transactions that are notified in multiple jurisdictions are often subject to a coordinated review and investigation by the applicable antitrust reviewing agencies. The US has entered into a memorandum of understanding with the European Commission, which was recently amended, pursuant to which the US and the European Commission have agreed to cooperate with each other when investigating the anticompetitive effects of potential transactions. The US has also entered into bilateral cooperation agreements with China, Chile and India.

➤ Regulatory Approvals: CFIUS Approval Under FINSA

A foreign buyer should bear in mind that a merger, acquisition or takeover that could result in foreign control of a US business (Covered Transaction) can be blocked by the President of the United States. In 2012, notable deals were either blocked by the President or recommended for withdrawal by the Committee on Foreign Investment in the United States (CFIUS). In one case, the President forced two Chinese citizens that had already closed on an acquisition of four wind farm companies in Oregon to unwind the transaction simply because the proximity of the wind farms to a naval base created national security concerns.

The only way parties can be certain that a Covered Transaction will not be later unwound is for parties to jointly obtain clearance of the transaction from CFIUS pursuant to the Foreign Investment and National Security Act of 2007 (FINSA) and the 2008 Final Rule (Exon- Florio). CFIUS is the inter-agency committee of the US that has the responsibility to review all Covered Transactions. If CFIUS finds that a Covered Transaction, as currently structured, poses national security concerns, then CFIUS may order the parties to abide by mitigation measures, recommend that the structure of the transaction be modified, recommend that the parties withdraw from the transaction, or submit the transaction to the President for his final review and determination.

Under Exon-Florio, the President has broad authority to review all Covered Transactions which include all "mergers, acquisitions, and takeovers [that] could result in foreign control of persons engaged in interstate commerce in the United States." After reviewing the transaction, if the President determines that the Covered Transaction poses a threat to national security that cannot otherwise be addressed, the President may block the transaction or take any other action in his discretion to protect the national security of the US. It is important for companies to keep in mind that the President's authority can be triggered even if the transaction is structured wholly offshore — i.e., the transaction only involves foreign companies — because a change in control of a foreign company could ultimately result in a change in control of a US business.

At the outset of a proposed transaction, and certainly before engaging in deal negotiations, parties to a Covered Transaction should consult with legal counsel as to how the transaction should be structured and whether the parties should file a joint voluntary notification with CFIUS. Legal counsel can also help arrange pre-notification meetings and/or conference calls with CFIUS to help facilitate the notification process.

The seller and buyer should consider notifying CFIUS of a proposed transaction if the transaction will give the foreign entity "control" of a US business and the transaction may raise political or national security related concerns. Transactions that would result in control by companies from countries such as China, Russia or countries from the Middle East may receive heightened scrutiny. Furthermore, companies should consider notifying CFIUS if the US business involves "critical infrastructure"[2] or "critical technologies"[3] since foreign control of these types of businesses is presumed to raise national security related concerns.

"Control" is a key concept for the Exon-Florio analysis, because the entire authority that stems from Exon-Florio, including the authority of CFIUS to review or investigate a notified transaction as well as the authority of the President to take action to suspend or prohibit a transaction, is predicated on foreign "control" of a person engaged in interstate commerce in the US. Even though significant flexibility is inherently required in a national security regulation, the statutory standard for Exon-Florio is not satisfied by anything less than control. But "control" is a very broad concept, and may go beyond traditional ownership standards.

CFIUS has declined to adopt a control test based on objective standards, such as particular percentages of shares or the composition of the board of directors. Instead, CFIUS maintains the longstanding approach of defining "control" in functional terms as the ability to exercise certain powers over important matters affecting an entity. In particular, "control" is defined as the "power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding [certain matters], or any other similarly important matters affecting an entity."

[2] "Critical Infrastructure" is defined as "systems and assets, whether physical or virtual, so vital to the United States that the[ir] incapacity or destruction... would have a debilitating impact on national security, national economic security, national public health or safety." It is presumed that transactions involving "critical infrastructure" implicate national security.

Specific classes of "critical infrastructure" have not been identified and the determination is made on a case-by-case basis. Historically, businesses within telecommunications, transportation, energy, defense, and technology sectors have been considered as "critical infrastructure."

[3] Critical technologies are those that relate to defense or national security, nuclear equipment, material or facilities, certain toxins or related agents, or items controlled under multilateral regimes or in connection with regional stability or wiretapping, and chemical or biological weapons.

The shareholding and the ability to control the appointment of board seats are relevant to a control analysis. All relevant factors are considered together in light of their potential impact on a foreign person's ability to determine, direct, or decide important matters affecting an entity. In some cases, even loans can qualify as triggering a change in "control" if there are specific indicia of control not typical of a loan. In addition, investments below ten percent can be considered "covered" if facts suggest that control is conferred by the transaction.

While providing notification to CFIUS of a transaction involving foreign investment remains voluntary, good corporate policy dictates that parties to a proposed transaction involving foreign control of a US company engage in this review process. CFIUS does retain the right to review in the future any acquisition that was not notified or reviewed by CFIUS. In addition, failure to seek a review could result in the US government stepping in at a later, post-transaction, date to unwind the deal or to place certain restrictions on the transaction that may significantly alter the terms of the transaction. No public notice of the review is given and all information is strictly confidential, except as required by certain administrative or judicial actions.

It is vital for buyers to conduct export compliance due diligence well in advance of deciding whether to purchase a US company subject to the ITAR.

Regulatory Approvals: DDTC Approval Under ITAR

When an acquisition involves acquiring a company subject to the International Traffic in Arms Regulation (ITAR), the parties to the transaction must submit at least two notifications to the Directorate of Defense Trade Controls (DDTC) at the US Department of State with an initial notification to be submitted in advance of the acquisition and a final notification to be submitted after the transaction closes. When a foreign person would be a acquiring "control" of a U.S. company subject to ITAR, the parties must notify the DDTC via registered, overnight mail 60 days prior to the closing (the notification period is five days for wholly domestic transactions). After the transaction closes, the parties have five days to notify the DDTC that the transaction closed, which triggers the commencement of the process to transfer appropriate licenses, authorizations and registration. Acquisition of at least 20 percent of the assets or voting securities of a US company subject to ITAR is deemed to be acquisition of "control" by a foreign entity.

While the seller can submit a single initial notification on behalf of the buyer and seller, the preference and common practice is for the buyer and seller to send the notifications in separate, coordinated responses submitted in parallel to DDTC. The initial notification must include detailed information about the transaction, including the anticipated closing date and whether the transaction will be consummated through an asset or equity purchase. Additionally, the notifications should include as an attachment illustrative charts of the before and after structure of the companies illustrating how the transaction will be affected.

The initial notification requires inclusion of a copy of the seller's ITAR/Export Control Compliance Procedure (including training materials) currently in place as well as the buyer's ITAR Compliance Plan detailing how the buyer will prevent unauthorized exports from taking place. It is very important that these documents be tailored to the specific business. Legal counsel can assist in conducting compliance audits on the seller's procedures as well as evaluate the robustness of the buyer's plan.

DDTC has recently made changes to its notification guidelines now requiring the parties to indicate in their initial notification whether a voluntary CFIUS notification related to the transaction will also be made. This information can be shared with CFIUS to assist the committee in reviewing a Covered Transaction of which it was not voluntarily notified. In the event the parties state that they will not make a CFIUS notification, DDTC expects the parties to provide an explanation as to why no such notification will be made. In the event that the parties state in their initial notification to DDTC that the parties have not yet determined whether a CFIUS notification will be made, they will need to supplement their initial ITAR notification with their determination. The initial notification should be supplemented with any other material changes to the transaction not reflected in the initial notification.

It is important to keep in mind that the release of technical data and/or know-how to foreign nationals in the US is a "deemed export" for which an export license must be obtained. Therefore, before a seller shares any controlled technical data or know-how to a foreign person (including emailing or posting controlled information on a data site that can be accessed by foreign persons), an appropriate export license must be obtained.

A buyer should also keep in mind that the DDTC does not hesitate imposing successor liability on buyers for the past export control violations by the seller prior to the acquisition. Penalties for export control violations can be in millions of dollars. Accordingly, it is vital for buyers to conduct export compliance due diligence well in advance of deciding whether to purchase a US company subject to the ITAR.

➤ Regulatory Approvals: Approvals Under US Regulations

Acquiring "control" of institutions engaged in regulated businesses in the US, including for example, banking and insurance may require separate governmental approvals and regulatory reporting. The supervisory and regulatory responsibilities for domestic banking institutions are divided among several different federal (and possibly state) regulatory agencies depending on the type of the charter. The scope and extent of these regulatory requirements, and the compliance with them, are not covered in this paper, but can be dealt with separately with respect to particular buyers and targets that might be affected by such laws and regulations.

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USA ▪ CANADA ▪ MEXICO ▪ POLAND ▪ CHINA

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