Outbound China M&A and investment – US

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From time to time, conditions come together to create the 'Perfect Storm'. Meteorologists use this term rarely and as a benchmark to compare all subsequent weather events. The potential for outbound investment from China today points to a similar unprecedented event: a flood of investment opportunities in the US that could extend for the next several years.

When the following factors converge, they prove to be all-powerful indicators as to why Chinese companies have a unique opportunity to purchase US-based assets and companies today:

- M&A pricing multiples have retreated to far more reasonable levels than those from 2005 to mid-2008.
- Private equity competitors remain on the sidelines, hesitant to invest until the credit markets loosen.
- Numerous quality companies are overleveraged and excellent opportunities exist to obtain ownership control through recapitalisation transactions.
- The worldwide recession is finding its floor and domestic demand from China will provide a natural basis for future growth in key industries.
- The Chinese government has issued policies to encourage Chinese companies to acquire strategic assets abroad and the huge Chinese foreign currency reserve provides the war-chest for such acquisitions.
- The resurgence of the IPO market in Shanghai and Hong Kong provides a ready source of capital to consolidate and expand newly-acquired businesses.

Given the initiative to expand into the US by many Chinese companies, the following summarises some of the most important US pre-acquisition requirements of which buyers need to be aware. Understanding and appropriately addressing cross-border regulatory filings, including those related to antitrust and national security (CFIUS and export control), as well as conducting appropriate due diligence regarding bribery, money laundering, and intellectual property issues, is critical to successful dealmaking in the US.

Antitrust

Any outbound investment strategy into the US must account for US antitrust laws, including statutory filing requirements with the federal antitrust authorities for certain transactions. Generally, for transactions exceeding US$65.2 million, the parties must file notification with the antitrust agencies (the US Department of Justice and the Federal Trade Commission) under the Hart-Scott-Rodino Antitrust Act (HSR). A reportable transaction cannot close until the HSR filing is made and all applicable waiting periods have expired or have been terminated without government challenge. The purpose of the HSR notification is to enable the government to review the merger and to address any antitrust concerns before the merger closes. Nonetheless, most transactions are cleared by the antitrust authorities. It is worth noting that the agencies may, however, investigate non-reportable transactions if they believe the transaction raises competitive concerns. Ultimately, it is the federal courts that have the final word if the agencies choose to challenge any transaction.

Antitrust analysis in the US is highly developed under stated 'Merger Guidelines' developed by the federal antitrust authorities. The Merger Guidelines set forth specific analyses to gauge the competitive impact of a transaction on the marketplace. These analyses go beyond a brief exposition, but they normally require defining the market and determining the competitive effect on the market due to the transaction.

(i) The HSR filing and initial waiting period

In considering potential antitrust issues relating to any outbound investment, the first step the acquirer and target corporation should take is determining whether a filing will be required. If a transaction meets the filing thresholds under the HSR rules (and no exemptions apply), the parties should move promptly to gather the relevant information to be contained in the filing, as antitrust review can sometimes become the determining factor in the transaction timeline. The HSR notification form requires the parties to provide financial information, a description of the transaction, and certain documents that analyse the competitive aspects of the transaction.

Appropriate due diligence regarding bribery, money laundering, and intellectual property issues, is critical to successful dealmaking in the US

The acquirer and target corporation can file the HSR notification as soon as they have a signed agreement or letter of intent. The HSR notification is confidential and its filing triggers an initial 30-day waiting period (15 days for a cash tender offer). During this period, the antitrust agencies will review the transaction to determine whether they have any substantive antitrust concerns. At the conclusion of the initial waiting period, the reviewing agency will either: (1) allow the waiting period to expire without action; or (2) issue a 'Second Request' for information. The parties can request early termination of the waiting period; however, they may not receive it.

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(ii) The Second Request

Although infrequent, a Second Request is typically a very broad request for documents, data, and interrogatory responses. Issuance of a Second Request automatically extends the initial waiting period for an additional 30 days that begins after both parties have (or, in the case of an exchange offer, after the acquirer has) certified 'substantial compliance' with the Second Request. For cash tender offers, the issuance of a Second Request extends the initial waiting period for 10 days after substantial compliance. Each transaction is different, but the process can take several months to complete.

(iii) Concluding an investigation

At the end of the second 30-day waiting period, the government will either (1) take no action, allowing the waiting period to terminate; or (2) sue to block the deal, typically seeking a preliminary injunction from a federal district court. In some cases, to avoid a lengthy court battle, the acquirer and target corporation will agree to divest portions of the business or to limit certain forms of conduct pursuant to a consent decree.

Antitrust review can play a key role in any sizeable transaction and should be anticipated at the outset of any proposed transaction.

National security

Under the Exon-Florio Amendment – and as amended in 2007 by the Foreign Investment and National Security Act of 2007 (FINSA) – the US President is authorised to undertake an investigation to determine the effects on 'national security' of mergers, acquisitions and takeovers proposed by or with foreign persons that could result in 'control' of persons engaged in interstate commerce of the US (a so-called 'Covered Transaction'). The Committee on Foreign Investment in the United States (CFIUS or Committee), chaired by the Department of the Treasury, is the US Government's inter-agency committee tasked with the Exon-Florio/FINSA review process. Other permanent members of CFIUS include the US Attorney General and the Secretaries of Homeland Security, Commerce, Defense, State and Energy – and as non-voting members, the Secretary of Labor and the Director of National Intelligence.

Other Executive departments/agencies can be added on a case by case basis as the President deems appropriate – the President has thus far designated the US Trade Representative and the Director of the Office of Science and Technology. Others designated to 'observe, and as appropriate, participate' include the Director of the Office of Management and Budget, Chairman of the Council of Economic Advisors, Assistant to the President for National Security Affairs, Assistant to the President for Economic Policy and Assistant to the President for Homeland Security and Counterterrorism. Generally, one agency takes the lead on a CFIUS review.

In analysing any proposed transaction, questions arise as to whether the proposed deal is a Covered Transaction that is subject to review; if so, whether 'control' exists; and if 'control' is present, whether the transaction implicates the 'national security of the US'. Under CFIUS's regulations, the term 'control' means 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'.

Where more than one foreign person has an ownership interest in an entity, the regulations state that 'consideration will be given to factors such as whether the foreign persons are related or have formal or informal arrangements to act in concert, whether they are agencies or instrumentalities of the national or sub-national governments of a single foreign state, and whether a given foreign person and another person that has an ownership interest in the entity are both controlled by any of the national or sub-national governments of a single foreign state'.

The term 'national security' is not defined under the Exon-Florio Amendment or FINSA, other than to note that the term includes issues relating to homeland security. Instead, the law provides a list of 11 illustrative factors that must be taken into consideration in assessing whether the transaction poses national security risks:

1) The potential effects on domestic production needed for projected national defense requirements;
2) The potential effects on the capability of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
3) The potential effects on the control of domestic industries and commercial activity as it affects the capability and capacity of the US to meet the requirements of national security;
4) The potential effects on sales of military goods, equipment, or technology to any country (A) identified by the Secretary of State as supporting terrorism, missile proliferation or chemical and biological weapons proliferation, or (B) identified by the Secretary of Defense as posing a potential regional military threat to the interests of the US, or (C) listed as supporting nuclear proliferation;

5) The potential effects on US international and technological leadership in areas affecting US national security;
6) The potential effects on US 'critical infrastructure', including major energy assets; FINSA defines 'critical infrastructure' as 'systems and assets, whether physical or virtual, so vital to the US that the incapacity or destruction of such systems or assets would have a debilitating impact on national security';
7) The potential national security effects on US 'critical technologies';
8) Whether the transaction involves control by a foreign government;
9) Whether the subject country adheres to nonproliferation controls, cooperates with the US in counter-terrorism efforts, and whether the transaction creates a potential for transshipment or diversion of technologies with military applications;
10) The long-term projection of US requirements for sources of energy and other critical resources and material; and
11) Other factors determined to be appropriate, generally or in connection with a specific review or investigation.

The CFIUS review process is entirely voluntary, although the Committee has the authority to compel a review if the parties to a transaction decide not to submit the deal for review. If a review is in order, CFIUS's regulations set forth a detailed set of approximately 50 questions that must be answered, thereby forming the basis of the parties' notice of the proposed foreign acquisition to CFIUS. The Committee has 30 days after receiving and accepting a notice of a proposed transaction to determine whether a full investigation is warranted. If it is not, a letter concluding review is issued to the parties to the transaction. Most transactions are concluded within the initial 30 day period. When CFIUS is unable to conclude its preliminary review during 30 days, a party may voluntarily withdraw and resubmit, thereby restarting the 30 day process.

If, during the initial review, CFIUS determines that: (1) the transaction threatens to impair US national security and the threat has not yet been mitigated; (2) the lead agency recommends an investigation and CFIUS concurs; (3) the transaction would result in foreign government control; or (4) the transaction would result in the control of any US critical infrastructure that could impair US national security and the threat has not yet been mitigated, then CFIUS must conduct and complete within 45 days an investigation of the transaction. Once the 45-day period expires, the transaction mandatorily goes to the President's desk for final action within 15 days.

Subject to making certain 'findings', the President is authorised to take such action as he considers appropriate to suspend or prohibit any transaction. Or, in the case of a transaction that has already been consummated, order divestment of assets so as not to impair US national security. Notwithstanding this power, the President has rarely invoked this authority. Failure to notify CFIUS does not preclude future investigation and transactions that are not reviewed potentially remain permanently open to scrutiny.

FINSA greatly expanded the scope of the Exon-Florio process and, undoubtedly, the broad sweep of FINSA imposes new concerns on industries previously believed to be unaffected by the Exon-Florio process. Moreover, the Exon-Florio/FINSA process is increasingly politicised and businesses may expect more thorough CFIUS reviews, and greater scrutiny by Congress. More deals likely will be subject to CFIUS review due to a broadened concept of 'national security' to include homeland security and critical infrastructure. While it is the policy of the US to welcome foreign investment, foreign investors are well advised to carefully assess whether a filing is in order.

Bribery

One of the many consequences of the Watergate scandal in the early 1970s was the discovery of a widespread practice by US companies of bribing foreign government officials in return for their assistance in obtaining or retaining government business or obtaining other favourable government treatment. In a subsequent investigation, the SEC found that these payments – many of them made by issuers required to file audited financial statements – had been paid through 'off-the-books' accounts or were otherwise improperly recorded in the companies' books and records. As a result of the SEC's investigation – and a number of scandals involving US companies bribing officials of allied governments during the height of the Cold War – the US Congress enacted the Foreign Corrupt Practices Act (FCPA) in 1977, acting to restore the integrity of the American business system and to protect the national security of the US.

For many years, the US was the only country to implement and actively enforce measures to prohibit its citizens and businesses from bribing foreign officials. For over 20 years, no country followed the US lead in prohibiting foreign bribery. Finally, in the late 1990s, persistent US efforts paid off with the signing and subsequent ratification of a number of international agreements requiring signatories to enact laws similar to the FCPA. The most prominent and rigorous of these agreements was the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In 1998, the FCPA was amended to more closely reflect the requirements of the OECD Convention, although the basic prohibitions of the FCPA remained largely the same.

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The FCPA consists of four provisions – three prohibiting bribery and one requiring accurate books and records and internal controls – that apply only to 'issuers', whether US or foreign, i.e. those companies whose securities are traded on the US stock exchanges. Significantly, due to its origin as a proposal by the SEC, the FCPA provides for both civil and criminal enforcement. The SEC has the sole authority to bring a civil case against 'issuers', as well as their officers, directors, employees, and agents, and stockholders acting on the issuer's behalf. For all other companies and individuals – foreign or domestic – the Department of Justice (DOJ) has authority to bring a civil enforcement action. Finally, as with any criminal statute, the DOJ has the sole authority to bring a criminal

case, and it may do so against any entity or individual subject to the FCPA's prohibitions.

Similar to the domestic bribery statute, the FCPA's anti-bribery provisions prohibit direct or indirect payments of money or 'anything of value' to a foreign official in order to obtain or retain business. The basic elements of a violation of the anti-bribery provisions are as follows:

- To act corruptly;
- In furtherance of an offer, payment, promise to pay, or authorisation of the payment of any money, or offer, gift, promise to give, or authorisation of the giving of anything of value;
- To any foreign official, foreign political party, political party official or candidate for public office;
- For the purpose of influencing any act or decision in an official capacity; inducing an act or omission to act in violation of official duty; inducing the use of influence to affect an act of the government or an instrumentality of the government;
- In order to assist the payer in obtaining or retaining business for or with, or directing business to, any person or securing any improper advantage.

The anti-bribery provisions apply to 'issuers', 'domestic concerns', and foreign persons acting within the US. The term 'issuer' is defined as any company subject to the registration or reporting requirements of the Securities Exchange Act of 1934 as amended (the 1934 Act). Issuers may also be foreign companies, including a foreign company with American Depository Receipts (ADRs), which are registered pursuant to Section 12 or required to file reports under Section 15(d) of the 1934 Act. In general, publicly-held companies with securities or ADRs listed on securities exchanges in the US are issuers subject to the anti-bribery provisions. The FCPA further applies to all officers, directors, employees, or agents of an 'issuer', regardless of nationality.

A 'domestic concern' is any US person or business entity other than an 'issuer', including US citizens working for foreign concerns. The salient feature of the domestic concern is the nexus with the US. Under the definition of 'domestic concern', as adopted in 1977, a subsidiary corporation which was organised under the laws of the US, or a subsidiary corporation that had its principal place of business in the US, would be subject to the anti-bribery provisions of the FCPA. Domestic concerns employed or retained by foreign entities and foreign subsidiaries are also within the purview of the anti-bribery prohibitions. An individual's or business entity's status as a domestic concern does not change with location or with employment relationships.

The original 1977 statute explicitly excluded foreign corporations, including subsidiaries of US companies, from direct coverage unless they qualified as 'issuers' in their own right. Further, although the 1977 statute provided for criminal liability over all officers, directors, and stockholders acting on behalf of an issuer or a domestic concern, regardless of nationality, it appeared to limit liability over foreign employees and agents to civil liability alone. Although the DOJ seemed to share this view, it has recently embraced a different interpretation and, in criminal cases arising from an investigation of pre-1998 conduct, charged two foreign nationals with having acted as agents of domestic concerns. In 1998, Congress explicitly extended the scope of the FCPA to include 'foreign persons'. In the amended statute, 'foreign persons' are defined to include companies or persons that do not otherwise qualify as issuers or domestic concerns, that do something in the US in furtherance of an unlawful payment to a foreign official.

The 1998 amendments also explicitly expanded criminal liability to foreign nationals who were employees and agents of issuers and domestic concerns. The DOJ has utilised this expanded scope and brought charges against foreign nationals who, it alleged, acted as agents of a domestic concern.

In summary, the DOJ and the SEC have a variety of statutory options at their disposal when it comes to charging foreign corporations who satisfy some form of jurisdictional requirement. They may be charged in a criminal case as a 'foreign person'. If their securities are traded in the US through ADRs, the entity may be charged in either a civil case by the SEC or a criminal case by the DOJ as an 'issuer'. Finally, the entity may also be charged as an 'agent' of either an issuer or a domestic concern.

Foreign companies exploring investment opportunities in the US, those seeking to tap US capital markets by listing ADRs, and foreign nationals – among others – need to pay close attention to the FCPA

Both the DOJ and the SEC have been very aggressive over the years in prosecuting those who violate the FCPA. Fines can be in the millions of dollars and companies may be forced to disgorge its ill gotten gains, lose US export privileges, and face debarment from US Government contracting. In addition, individuals may be subject to imprisonment. Foreign companies exploring investment opportunities in the US, those seeking to tap US capital markets by listing ADRs, and foreign nationals – among others – need to pay close attention to the FCPA, as well as the anti-bribery laws of the other nations in which they do business.

Money laundering

In response to the attacks on the US on September 11 2001, the US Government adopted the sweeping US Patriot Act (Patriot Act). Among other things, the Patriot Act was drafted with the specific intent to bolster the ability of government regulators to prevent and detect money laundering generally and more particularly with respect to the financing of terrorism. It was meant to strengthen, but not replace, laws already in force. This included the Bank Secrecy Act of 1970 and the Money Laundering Control Act of 1986.

Most notably, the Patriot Act significantly widened the anti-money laundering regulatory framework in the US by broadening the definition of 'financial institutions'. The rules regulating 'financial institutions' now encompass: US depository institutions (all banks, trust companies and thrift institutions); US agencies and branches of foreign banks; private banks; investment banks; brokers and dealers in securities and commodities; futures commission merchants;

commodity trading advisers; registered commodity pool operators and mutual and offshore funds; investment companies (irrespective of the requirement to register under the Investment Company Act of 1940); insurance companies; loan and finance companies; credit unions; credit card issuers and operators; issuers and redeemers of travelers' checks; money orders or similar instruments; as well as individuals involved in real estate closings or settlements, among others.

The Patriot Act requires 'financial institutions' to institute minimum standards for the verification of the identity and legitimacy of clients. It also requires enhanced due diligence on certain accounts involving foreign persons, expands requirements for private banks and correspondent accounts, requires brokers, dealers and investment advisers to report suspicious activities, prohibits correspondent accounts for shell banks, and regulates the use of so-called 'concentration accounts'. The Patriot Act requires institutions to designate a compliance officer, conduct ongoing employee training and ensure a viable independent audit function. In addition, it creates new violations that could trigger the application of money laundering laws, compels the production of documents located outside the US and expands asset forfeiture provisions.

As to account due diligence, financial institutions must now, among other things, verify customers' names against government issued lists of known or suspected terrorists or terrorist organisations. This can be done quite easily online. Further, the Patriot Act requires that financial institutions establish due diligence policies and controls on foreign private banking and correspondent accounts. To deter abuse of such accounts, due diligence measures must include verification of whether the customer is a senior foreign politician, as well as the source of funds deposited into such account and the account's purpose. Financial institutions must also review the activity in a private banking account to ensure that transactions align with the information obtained about the client. The financial institution is required to file a 'suspicious activity report' with the US Government when it suspects money laundering. Finally, where a senior foreign political figure is the nominal or beneficial owner of a private banking account, there must be enhanced review of the account and reports must be made of transactions that may involve the proceeds of foreign corruption.

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Congress has also passed other laws that strengthen the penalties against money laundering. These include the forfeiture of assets both in the US and abroad for money laundering infractions. The US regulatory regime over financial institutions has only strengthened, and foreign investors need familiarity with the precise rules governing their respective financial institutions.

Intellectual property

A potential investor considering investing in a US corporation must also consider potential issues relating to intellectual property (IP). This includes patents and patent applications, trade marks and trade mark applications, and copyrights and copyright applications. These issues include: (1) determining the full scope and structure of the target corporation's ownership of IP; (2) obtaining and recording security interests over the target corporation's IP in the event of a loan to the target corporation; (3) ensuring continued permitted use of IP used by the target corporation (and the possibility of third party consents being required but not obtainable in the event of assignment, licensing, sublicensing, change of control, or bankruptcy); and (4) exposure to liability for third party IP infringement claims, including any indemnification given to the target corporation's licensees and sublicensees, as well as any indemnification received from third party licensors.

The first step is to determine the full scope and structure of the target corporation's ownership of IP. This is done by obtaining a full schedule identifying any and all IP owned by the target corporation (including its subsidiaries and affiliates) that remains in force (i.e. not expired or otherwise revoked or cancelled) in any country, and to identify the corporate entities which own such IP. This will reveal whether the target corporation has adopted an IP holding company structure – whereby a single entity has title to all the IP and licenses back the IP to the target corporation's operating units – or whether IP ownership is scattered across different operating units.

If the investment is in the form of a loan to the company, the target corporation should pledge its IP as collateral for the loan to the potential investor. This can be done by entering into a security agreement that grants a security interest over IP in all countries where IP is owned, and record this security interest with the relevant recording offices in the relevant countries – such as the national patent and trade mark or industrial property offices and/or registers of movable property. Note that for IP located in countries with federal systems, such as Canada, it may be necessary to record these security interests on the provincial or state level as well as on the federal/national level (for example, Quebec Register of Movable Property). Furthermore, as part of the IP due diligence process, one should conduct IP lien/ownership searches in the relevant countries to make sure there is not another lienholder out there with superior rights over the IP, and that the target corporation actually owns the IP as represented. Realise also that recording IP liens across a large number of countries can be very expensive.

It is important for a potential investor to determine and review the full extent of any IP licenses – either to the target corporation or by the target corporation – because one cannot assume that the potential investor or the target corporation itself can continue to use the IP it is using after the proposed investment or control transaction. For example, the target corporation may have existing contractual restrictions prohibiting licensing key IP to the investor if the target corporation previously entered into exclusive license agreements or agreements with non-compete provisions. Consent of a third party to any assignment, license, or sublicense of IP to the investor (or in the event of a change of control of the target corporation in favour of the acquirer) may be required if IP was developed with a third party (whether in a joint venture or otherwise, and whether or not the third party has formal co-ownership of the IP) or if IP used by the company is not owned by the company but only licensed from a third party licensor.

Furthermore, unless the license agreement provides otherwise, a third party licensor may have the right to terminate a licensee upon transfer, or if the licensee enters into bankruptcy. Since such third party consents may not be obtainable or bankruptcy may not be avoidable, careful attention should be given to whether use of any such IP is indeed required to carry out the investor's and the company's business plan going forward – and prior to making any investment in the company. Where the company licenses or sublicenses IP to third parties, the investor must also consider the royalty flow from such licenses or sublicenses and the need to continue to service such licenses.

Potential exposure to IP infringement liability should also be explored. For example, an investor should obtain information about whether the target corporation has competent freedom-to-operate opinions regarding the technology it uses. The investor must evaluate those opinions and/or obtain competent freedom-to-operate opinions if the target corporation does not have them already. An investor should also investigate whether the company is already involved in, or is potentially involved in, any IP disputes with third parties – and analyse the merit of any such IP disputes. Such a review should also consider whether the target corporation may be liable for treble damages for willful patent infringement. Finally, an investor should evaluate the target corporation's license agreements and any provisions by which the target corporation has indemnified third party licensees or sublicensees for IP infringement, or which indemnify the target corporation for IP infringement in the event of third party claims.

The US – a logical landscape

The US regulatory landscape, albeit extensive, is actually quite logical and transparent. Consequently, with the right level of planning and knowledgeable advisers, it does not generally impose significant burdens on most transactions. As the economies of the US and the world recover from the recent recession, the opportunities for significant value creation through strategic acquisitions in the US are available for companies that thoughtfully assess target strategic investment opportunities, carefully diligence the target companies, and execute their acquisition strategies.

中国境外并购与投资——美国

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很多时候，某些情况会同时发生，形成千载难逢的“完美风暴”。气象学者很少使用这个名词，主要是以此作标准来比较后来出现的各种天气情况。现时中国的境外投资潜力就像是前所未有的情况：中国资金涌入美国，且可能持续数年。

以下因素同时出现时，能强烈显示为何现时是中国公司购买美国资产和公司无可比拟的时机：

- 相比2005年至2008年年中，并购价格倍数已回复到非常较合理的水平。
- 私募基金对市场维持观望态度，等待信贷放宽才作投资打算。
- 很多具备实力的公司杠杆过度，因而带来通过资本重组交易取得公司控制权的最佳机会。
- 环球经济衰退逐渐见底，中国的国内需求顺理成章为主要行业提供未来增长的基础。
- 中国政府发布政策，鼓励中国公司收购海外战略性资产，中国庞大的外汇储备为这些收购交易提供所需的财力。
- 上海和香港的首次公开发行股票市场复苏，为合并和扩展新收购公司提供所需的资金来源。

很多中国公司计划拓展美国市场，下文概述在美国进行收购前，买家所需要注意的一些重要条件。要成功于美国完成交易，了解和适当地处理有关反垄断和国家安全(美国外国投资委员会和出口管制)等跨境申报，以及进行有关贿赂、洗钱和知识产权的尽职调查均十分重要。

反垄断

任何进入美国投资的策略必须考虑到美国的反垄断法，例如某些交易必须向联邦反垄断机构进行法定申报。根据《哈特 — 斯各特 — 罗迪诺反垄断法》(《反垄断法》)，交易额超过6,520万美元的，交易方一般必须向反垄断机关(美国司法部和美国联邦贸易委员会)申报。需要申报的交易必须完成《反垄断法》申报，待所有适用的等待期届满或被终止而政府未有提出异议，方可完成交易。申报的目的是让政府审查合并交易，并在交易完成前解决任何垄断问题。不过，大部分交易都能通过反垄断机关的审查。但要注意，对于无需申报的交易，机关如认为交易会引起竞争问题的，可以调查该项交易。若机关决定质疑交易，联邦法院有最终决定权。

美国的反垄断分析非常完善，合并指引由联邦反垄断机构制定。合并指引列出判断交易对市场竞争的影响的分析方法，这些分析方法不只是简要的说明，通常还需要界定所属市场和判定交易对市场竞争的影响。

(i) 《反垄断法》申报及初始等待期

在考虑与任何境外投资相关的潜在反垄断问题时，收购方和被收购公司首先应判断是否需要申报交易。如果交易达到《反垄断法》的申报标准(而交易并不适用任何豁免)，交易双方应即时收集申报所需的信息，因为反垄断审查有时会左右收购所需的时间。申报表格要求交易双方提供财务信息、交易内容和一些分析交易竞争问题的文件。

收购方和被收购公司签订协议或意向书后，即可进行申报。申报信息会保密，一旦申报即开始30日的初始等待期(现金收购要约的等待期为15日)。等待期间，反垄断机构会审查交易，以判断交易是否牵涉任何具体的垄断问题。初始等待期届满，审查机构会：(1)让等待期过去而没有任何行动； (2)发出“第二要求”，要求交易双方提交信息。交易双方可请求提早终止等待期，但申请不一定获批准。

(ii) 第二要求

“第二要求”虽不经常出现，但却是一个典型的宽泛要求，要求交易双方提供文件、数据和对质询的回覆。“第二要求”发出后，初始等待期会自动延长30日，延长期自交易双方证明(置换收购要约的，仅需收购方证明)其“实质性遵从第二要求”起开始。现金收购要约的，自实质性遵从后，“第二要求”的发出延长初始等待期10日。每项交易的情况并不相同，但过程可能需要数月完成。

(iii) 完成调查

在第二次三十天的等待期终结后，政府会：(1) 让等待期过去而没有任何行动； (2) 由政府提起诉讼阻止交易，通常是向联邦地方法院申请暂时禁制令。为了避免冗长的诉讼程序，有些案件的收购方和被收购公司会根据收购同意法令，协议剥离部分业务或限制某些活动。

反垄断审查在大型交易中占重要一环，因此应在任何交易初期有所准备。

要成功于美国完成交易.....以及进行有关贿赂、洗钱和知识产权的尽职调查均十分重要

国家安全

2007年根据《外商投资与国家安全法》修订的《埃克森—弗罗里奥修正案》规定，美国总统有权展开调查，以确定由外国人提出或涉及外国人的、可能导致对美国州际商务参与人的控制的并购交易(俗称“受监管交易”)对国家安全所带来的影响。美国外国投资委员会由财政部主持，是负责《埃克森—弗罗里奥修正案》和《外商投资与国家安全法》审议程序的美国跨政府部门委员会。其他永久委员会成员包括司法部长、国土安全部长、商务部长、国防部长、国务卿和能源部长，以及劳工部长和国家情报局长等不具投票权的成员。

美国总统可以按个别案件需要，为委员会加入合适的执行部门和机构。到目前为止，总统曾指定美国贸易代表和科技办公室主任加入委员会，其他被指定“观察并在适当时候参与”的机关包括管理及预算办公室主任、白宫经济顾问委员会主席、总统国家安全事务助理、总统经济政策助理和总统国土安全及反恐助

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理。通常，美国外国投资委员会的每项审查由一个机构主导。

分析拟进行交易时，应研究交易是否属于需审查的受监管交易，如果属于的话，是否存在控制权变更问题；若涉及控制权问题的，交易会否对美国国家安全产生影响。根据美国外国投资委员会规定，“控制权”是指通过持有机构大多数或具影响力的少数已发行、具投票权的股权、董事会代表权、委托代理人表决权、特别股份、合同安排、正式或非正式一致行动安排等方式取得直接或间接权力，可判定、指导或决定有关机构的重要事项，无论当事人是否行使该权力。

根据法规，如果超过一个外国人持有机构的股权，委员会会考虑外国当事人是否有关联或有正式或非正式一致行动安排、是否是同一国家的中央政府或地方政府的辖下机关或部门，或持有机构股权的外国人及其他人是否均由同一国家的中央政府或地方政府所控制。

《埃克森—弗罗里奥修正案》与《外商投资与国家安全法》并没有界定“国家安全”的意思，仅指出国家安全包括涉及国土安全的问题。法律列出以下11个项目，以阐释在评核交易会否带来国家安全风险时所必须考虑的因素：

1) 对应付国防预计所需的本地生产的潜在影响；
2) 对本地行业应付国防需求的能力的潜在影响，包括是否有足够人力资源、产品、技术、材料和其他供应和服务等；
3) 对本地行业和商业活动操控的潜在影响，因为会影响美国应付国家安全需求的能力和实力；
4) 对售卖军事货品、设备和技术给以下国家的潜在影响: (A) 被国务卿确认为支持恐怖主义和扩散导弹、生化武器的国家；(B) 被国务卿确认为对美国国家利益造成潜在区域军事威胁的国家；(C) 被列为支持核扩散的国家；
5) 在影响国家安全的领域里，对美国的国际和技术领导地位所带来的潜在影响；
6) 对美国主要能源资源等“关键基建”的潜在影响，《外商投资与国家安全法》中“关键基建”的定义为有形或无形的、对美国极其重要的系统和资产，这些系统和资产丧失效力或被损害会对国家安全造成莫大影响；
7) 对美国“关键技术”的潜在国家安全影响；
8) 交易是否由外国政府操控；
9) 有关国家是否遵守不扩散核武管制和与美国合作反恐，交易是否有可能让作军事用途的技术中转或转向其他地区；
10) 美国对能源和其他关键资源及材料的长远预计需求；
11) 一般来说或对特定审查或调查而言，被认为适当的其他因素。

美国外国投资委员会的审查完全属于自愿性质，但如果交易当事人决定不提交交易进行审查时，委员会有权强行审查该项交易。委员会的规定列明当事人必须提供答案的大约50条问题，这便成为了当事人向委员会申报有关拟海外收购的主要部分。委员会在收到和受理了计划交易的通知30日内，决定是否需要对交易展开全面调查。若不需要，委员会会向交易当事人发信通知其审查完结。大部分交易都会于初始的30日期限内通过审查。如果委员会未能在30日内完成初步审查，当事人可以自愿撤回并重新申报交易，30日的审查过程重新展开。

如果委员会在初步审查过程中认定交易属于以下任何一种情况，必须于45日内进行并完成交易的调查：(1) 交易可能会削弱美国国家安全，而威胁并未有减轻；(2) 主导机构建议对交易进行调查，而委员会赞成建议；(3) 交易会导致外国政府拥有控制权；(4) 交易会导致美国关键基建项目由外国人操控，可能削弱美国国家安全，而威胁并未有减轻。

45日的期限届满后，强制规定个案送交总统，由总统于15日内决定最终行动。

在作出“裁定”后，总统有权采取适当的行动，以暂停或禁止任何交易。如果交易已完成，总统可以命令剥离资产，以避免损害美国国家安全。话虽如此，总统甚少行使这项权力。没有通知美国外国投资委员会，并不排除将来会出现调查，始终未经审查的交易永远都有可能受到检查。

《外商投资与国家安全法》大大扩阔了《埃克森—弗罗里奥修正案》审查的适用范围，无疑这样的扩阔让以往被认为不受影响的行业也需关注。另外，审查越来越政治化，企业可能会面对更彻底的审查和国会更严密的监察。由于国家安全的定义扩大至包含国土安全和关键基建，相信将有更多交易需经由美国外国投资委员会审查。尽管美国推行吸引外资的政策，外国投资者应小心检查是否已妥善处理申报事宜。

贿赂

上世纪70年代初期发生的水门事件的众多后果之一，是发现美国公司很多都会通过贿赂外国政府官员以获取或维持来自政府的业务，或谋取其他政府优惠待遇。在随后的调查中，美国证券交易委员会发现，这些贿款是通过帐外帐户支付或被不正当地记录在公司的帐目和纪录里，且很多更是由需要申报经审计财务报表的发行人所支付。由于美国证券交易委员会的调查和冷战高峰期一系列牵涉美国公司贿赂其他同盟政府官员的丑闻，美国国会于1977年制定了《海外反腐败法》，以恢复美国商业制度中的诚信及维护美国国家安全。

多年来美国是唯一一个施行和积极执行措施，禁止公民和公司贿赂外国官员的国家。超过二十年都没有国家跟随美国，禁止贿赂外国人员的行为。在90年代后期，美国持续的努力终于取得成果，一些国家签订并承认数项国际协议，规定签约国家制定与《海外反腐败法》类似的法律，最著名和要求严格的协

尽管美国推行吸引外资的政策，外国投资者应小心检查是否已妥善处理申报事宜

议为《经济合作与发展组织国际商务交易活动反对行贿外国公职人员公约》(“公约”)。1998年《海外反腐败法》进行修改，以更贴近公约的要求，虽然法律中基本禁止的项目大部分维持不变。

《海外反腐败法》有四项规定，包括三项禁止贿赂，一项要求准确的帐目、记录和内部控制，适用于美国和外国发行人，即公司证券于美国证券交易所上市交易的公司。由于该法源于证券交易委员会的建议书，法律设有民事和刑事执法规定。美国证券交易委员会有独一的权力向发行人及其高级管理人员、董事、员工、代理人和获授权代表发行人的股东提起民事诉讼。对于所有其他外国或国内公司和个人，司法部有权进行民事强制执行。一如其他刑事法例，司法部有独一的权力提起刑事诉讼，而司法部也可向违反《海外反腐败法》的机构或个人提起刑事诉讼。

与美国国内贿赂条例相近，《海外反腐败法》中的反贿赂规定禁止向外国官员直接或间接提供金钱或其他有价值的东西，以获取或维持业务。违反反贿赂规定的基本元素包括：

- 腐败行为；
- 促使接受任何形式的金钱提供、支付、支付承诺或支付授权，或任何有价值东西的提供、馈赠、馈赠承诺或馈赠授权；
- 予外国官员、政党、政党人员或公职参选人；
- 以影响公务行为或决定，诱使他人违反职务作为或不作为，诱使利用影响力影响政府或政府部门的行为；
- 为协助支付人取得或维持与任何人之间的业务，或协助付款人为任何人取得、维持或带来业务，或协助支付人获取不正当好处。

反贿赂规定适用于发行人、国内人，以及在美国活动的外国人。“发行人”是指任何受美国经修正的《1934年证券交易法》(《1934年法》)中登记和申报规定监管的公司。发行人也可以是根据《1934年法》第12条登记或根据第15条(d)需要提交报告的外国公司，包括发行美国预托证券的外国公司。一般来说，在美国交易所上市证券和美国预托证券的公开上市公司为受反贿赂规定监管的发行人。《海外反腐败法》亦适用于发行人任何国籍的高级管理人员、董事、员工和代理人。

国内人是指任何发行人以外的美国个人或商业机构，包括受雇于外国人的美国公民。国内人的显著特征是其与美国的关系。根据1977年“国内人”的定义，按美国法律设立的子公司，与主要营业地位于美国的子公司，均受《海外反腐败法》的反贿赂规定监管。受外国实体和外国子公司雇用或聘用的国内人亦属于反贿赂规定的监管范围。个人和公司的国内人地位不会随著地点或劳动关系而改变。

原1977年法规清楚将包括美国子公司等外国企业排除于直接监管范围以外，除非企业本身符合“发行人”资格。另外，尽管1977年法规列明代表发行人和国内人的任何国籍的高级管理人员、董事和股东的刑事责任，法规似乎将外国员工和代理人的法律责任限制为仅民事责任。司法部虽然似乎曾经对此抱相同意见，但最近却有不同的诠释。在调查牵涉1998年以前所进行的行为的刑事案件中，司法部控告两名外籍个人担任国内人的代理人。1998年，国会明确将《海外反腐败法》的适用范围延伸至“外国人”，包括非发行人或国内人的公司和个人，且其在美国进行一些行为促使对外国官员进行非法支付。

1998年的修正案同时明确将刑事责任的范围延伸至包括发行人和国内人的员工和代理人的外国人，司法部曾根据这项延伸向其指控的担任国内人代理人的外籍个人提起诉讼。

总括来说，司法部和美国证券交易委员会在控告符合管辖要求的外国公司时，都会有多项法定选择可供挑选。在刑事案件中，这些公司或以“外国人”身份被起诉。如果公司证券通过美国预托证券在美国买卖交易，则在美国证券交易委员会提起的民事诉讼或司法部提起的刑事诉讼中，可作为“发起人”被起诉。公司也可能以发行人或国内人的代理人身份被起诉。

多年来，司法部和美国证券交易委员会在起诉违反《海外反腐败法》的人方面非常进取，罚款可以高达数百万美元，公司或被迫交出违法所得，可能丧失美国出口优惠待遇和被禁止承包美国政府合同。另外，个人可能被处以徒刑。寻求美国投资机会和拟通过美国预托证券上市以进入美国资本市场的外国公司和外籍个人及其他人，应仔细了解《海外反腐败法》和他们发展业务的其他国家的反贿赂法律。

洗钱

2001年9月11日发生恐怖袭击后，美国政府制定了《美国爱国法》(“《爱国法》”)，草拟法律时特别著重加强政府监管机构防止和侦查洗钱行为的能力，尤其是为恐怖活动提供资金的行为，目的是加强而非取替1970年《银行保密法》和1986年《洗钱监控法》等现行法律。

《爱国法》扩大了“金融机构”的定义，大大扩阔了美国反洗钱的监管框架。受监管的“金融机构”现包含了美国的存款机构(所有银行、信托公司和储蓄机构)，外国银行设于美国的代理机构和分行，私人银行，投资银行，证券和商品经纪及交易商，期货经纪商，商品交易顾问，注册商品基金及互惠基金和离岸基金，投资公司(无论是否需要根据1940年《投资公司法》注册登记)，保险公司，贷款和金融公司，信用合作社，信用卡发行和营运公司，旅行支票发行和兑现公司，汇票和类似票据，以及参与房地产过户的个人等。

寻求美国投资机会和拟通过美国预托证券上市以进入美国资本市场的外国公司和外籍个人及其他人，应仔细了解《海外反腐败法》

《爱国法》要求“金融机构”订立核实客户身份和合法性的最低标准，并要求加强某些涉及外国人帐户的尽职调查，增加私人银行和对应帐户的要求，要求经纪、交易商和投资顾问申报可疑交易活动、禁止空壳银行设立对应帐户，并监管所谓的“集中帐户”的用途。《爱国法》要求机构设定合规管理人员，负责持续员工培训和确保可行的独立审计。另外，法律增加了违反洗钱法的行为，要求提交在美国以外的文件，并增加有关资产没收的规定。

至于帐户尽职调查方面，金融机构现在必须按照政府印发的已确定或怀疑恐怖分子或恐怖组织的名单核实客户的名字，这可在互联网上轻易地完成。另外，《爱国法》规定金融机构制订适用于外国私人银行和对应帐户的尽职调查政策和监管。为防止滥用这些帐户，尽职调查措施必须包括查明客户是否外国资深政治人物，以及存入这些帐户的资金来源和帐户的用途。金融机构还必须审查私人银行帐户的活动，以确保交易吻合客户提供的资料。怀疑洗钱活动的，金融机构必须向美国政府提交一份“可疑活动报告”。如果一个资深外国政治人物是私人银行帐户的名义持有人或实际拥有人，金融机构必须加强帐户的审查，交易可能涉及外国贪污所得的，必须提交有关报告。

国会也已通过其他法律加强洗钱活动的刑罚，包括因违反反洗钱法规而没收在美国和海外的资产。美国已经加强对金融机构的监管，因此外国投资者应多了解监管其金融机构的详细规定。

知识产权

拟向美国公司投资的投资者必须考虑有关知识产权的潜在问题，包括专利及专利申请、商标及商标申请和著作权及著作权申请。有关问题包括：(1)确定被收购公司拥有的知识产权的范围和结构安排； (2) 以贷款形式向被收购公司投资的，应取得有关知识产权的担保权益并处理相关的登记手续；(3)确保可继续使用被收购公司获准使用的知识产权(在转让知识产权、许可或再许可他人使用许可、公司控制权转移和公司破产的情况下，使用知识产权是否可能需要但无法取得第三方的同意)； (4)牵涉第三方的侵犯知识产权的控诉所负的责任，包括给予被收购公司的被许可人和再被许可人的赔偿，以及来自第三方许可人的赔偿。

第一步是要确定被收购公司拥有的知识产权的范围和结构，这可通过索取被收购公司(及其子公司和关联公司)在任何国家拥有的有效知识产权(即知识产权的使用期限尚未届满，或没有被撤销或注销)的清单，并确定拥有这些知识产权的机构，这会显示被收购公司有否采用知识产权控股公司的模式(即所有知识产权由一个实体持有，然后再许可被收购公司的营运部门使用该知识产权)，还是知识产权权属散布在不同的营运部门。

如果投资者以向公司贷款的方式进行投资，被收购公司应为知识产权设定质押，作为拟投资者的贷款担保。公司可与投资者签订担保协议，在获得知识产权的所有国家设立知识产权担保物权，并到有关国家的办事处(例如国家专利和商标或行业财产办事处及动产登记处)登记担保权益。要注意的是，如果知识产权位于如加拿大等实行联邦制度的国家，可能需要在省/州级及联邦/全国级系统登记担保权益(例如魁北克省的动产登记处)。在知识产权尽职调查过程中，应在相关国家搜寻有关知识产权的留置权和权属，以确定没有其他留置权人对知识产权享有优先权，以及被收购公司确实如述拥有知识产权。亦需留意的是，在多个国家登记知识产权的留置权可能非常昂贵。

拟投资者应判断和检查知识产权许可的范围(包括被收购公司获许可和被收购公司许可他人使用的知识产权)，不应假定拟投资者或被收购公司在进行投资或控制交易后可继续使用知识产权，例如，被收购公司可能曾经签订了专有许可协议或包括非竞争规定的协议，禁止许可投资者使用主要知识产权。如果公司与第三方共同开发知识产权(不管是否以合资或其他形式进行或第三方是否正式取得知识产权的共同拥有权)，或公司从第三方许可人获许可使用知识产权而没有拥有权，转让知识产权或许可或再许可投资者使用该知识产权(或被收购公司的控制权由收购方取得)或需要第三方的同意。

另外，第三方许可人有权在转让知识产权后或被许可人破产时终止许可，除非许可协议另有规定。在上述情况下，由于不一定能取得第三方的同意，公司也可能未能避免破产，因此投资者在向被收购公司投资前，应谨慎考虑实行投资者和公司的业务计划时，是否确实需要使用有关知识产权。公司许可或再许可第三方使用知识产权的，投资者必须考虑这些许可所获取的许可使用费和继续营运许可的需要。

投资者亦应研究可能因侵犯知识产权而产生的法律责任，例如，投资者应了解被收购公司是否对其所用的技术有自由使用权。如果被收购公司未能提供自由使用权的意见，投资者应评估和取得有关意见。投资者亦应调查公司是否与第三方产生或可能产生任何有关知识产权的纠纷，并分析这些纠纷的法律依据。此外，也要考虑被收购公司会否因故意侵犯专利权而被处以三倍赔偿金。投资者应审核被收购公司的许可协议，以及要求被收购公司就侵犯知识产权赔偿第三方被许可人或再被许可人的条款，或在第三方索赔中，就知识产权侵权赔偿被收购公司的有关规定。

美国 – 富逻辑性的监管制度

美国的监管制度所覆盖的范围广泛，但同时颇富逻辑性和透明度高。因此，如果有恰当的计划和具备相关知识的顾问，监管制度通常不会对大部分交易造成重大负担。美国和环球经济逐渐复苏，这为企业带来利用战略性收购来大大增值的机会。企业应仔细评估战略投资机会，对被收购公司进行详细的尽职调查，并实施其收购策略。