Outbound China M&A and investment – US

By Louis J Bevilacqua and Jiannan Zhang

Cadwalader Wickersham & Taft LLP

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, including any 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.

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.

Appropriate due diligence regarding bribery, money laundering, and intellectual property issues, is critical to successful dealmaking in the US.
(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 Exxon-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 Exxon-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 Exxon-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 Exxon-Florio process and, undoubtedly, the broad sweep of FINSA imposes new concerns on industries previously believed to be unaffected by the Exxon-Florio process. Moreover, the Exxon-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.

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 and its amendments – that apply only to ‘issuers’ – generally or in connection with a specific review or investigation.

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.
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 that 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.

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;
Most notably, the Patriot Act significantly widened the anti-money laundering regulatory framework in the US by broadening the definition of ‘financial institutions’ 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.

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.
很多时侯，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从未出现的各种天气情况。现时中国的境外投资潜力就像前所未有的情况：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。
- 许多具备实力的公司杠杆过高，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资金。
- 上海和香港的首次公开发行股票市场复市，为合并和扩展新收购公司提供所需的资金来源。
- 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资金。
- 上海和香港的首次公开发行股票市场复市，为合并和扩展新收购公司提供所需的资金来源。

《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、交易内容和一些分拆和合并交易的竞争问题的文件。

- 收购方和被收购公司签订协议或意向书前，即可进行申报。
- 申报信息会保密，一旦申报即开始30日的首次等待期(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，以确定交易是否引发任何具体的垄断问题，审查等待期届满，审查机构会：(1) 让等待期继续而没有任何行动；(2) 发出“第二要求”，要求交易双方提供信息。交易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、数据和对质询的回应。“第二要求”发出后，审查等待期会自动延长30日，延长自交易双方证明(直接收购要约的，仅需收购方证明)其“实质性遵守第二要求”开始。现金收购要约的，自实质性遵守后，“第二要求”的发出延至等待期第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临时禁制令。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。

国家安全
2007年根据《外商投资与国家安全法》修订的《埃克森—弗罗里亚修正案》规定，美国总统有权展开调查，以确定外国投资者提出或参与外国人的、可能涉及对美国外国投资的影响的并购交易(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，是管理《埃克森—弗罗里亚修正案》和《外商投资与国家安全法》审查程序的美国跨政府多部门委员会。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、国土部长、国务卿和能源部长，以及劳工部长和国家安全局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“观察并适时参与”的机关包括劳工及预算办公室主任、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理

中国境外并购与投资—美国
路易斯・J・本维拉卡 和 张建南
美国凯威莱德律师事务所

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

www.chinalawandpractice.com

2010年中国境外投资指南 >> 99
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少数已发行、具投票权的股权、董事代表权、特别股权、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，委员会会考虑外方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，以阐释在评估交易会否带来国家安全风险时所必须考虑的因素：

1) 对应付国防预算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、材料和其他供给和服务等；
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) 对售卖军事货物、设备和技术给其他国家的潜在影响：(A) 被国外国投资委员会判定为支持恐怖主义和扩散导弹、生化武器的国家；(B) 被国外国投资委员会判定为对美国国家安全造成潜在威胁的国家；(C) 被国外国投资委员会判定为支持扩散的国家；
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，(A) 被国外国投资委员会判定为支持恐怖主义和扩散导弹、生化武器的国家；(B) 被国外国投资委员会判定为对美国国家安全造成潜在威胁的国家；(C) 被国外国投资委员会判定为支持扩散的国家；
7) 对美国“关键技术”的潜在威胁。

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。

《外商投资与国家安全法》大大地扩张了《埃克森—弗罗里奥修正案》审查的适用范围，无疑这样的扩张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包含了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

上个世纪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。在随后的调查中，美国证券交易委员会发现了这些贿赂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记录中，且很多更是由需要申报经审计财务报告的发行人所支付。由于美国证券交易委员会的调查和冷战高峰期一系列涉及美国公司行贿其他国家政府官员的丑闻，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。
为《经济合作与发展组织国际商务交易活动防止贿赂外国公职人员公约》（“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具有独立的权力向发行人及高级管理人员、董事、员工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。与其他刑事法例相似，司法部有独立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：

- 贿赂行为；
- 促使接受任何形式的金钱提供、支付、支付承诺或支付授权，或任何有价值的东西提供、馈赠、馈赠承诺或馈赠授权；
- 于外国官员、政党、政党成员或政府参选人；
- 以影响公务行为或决定，使其违反反贿赂作为或不作为，如利用影响政治或政府部门的行为；
- 为协助支付人取得或维持与任何人之间的业务，或协助付款人进行任何不正当好处。

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)需要报告的外国公司，发起美国预托证券的外国公司。一般说来，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，受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年法典清楚将包括美国子公司等外商企业排除于直接监管范围以外，非企业本身符合“发行人”资格，尽管如此，外商企业亦须受美国法律的制约。司法部虽然似乎曾经对此抱怨，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，国会对明确将《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发行人进行非法支付。

1998年的修正案同时明确将刑事处罚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。

总的来说，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。在民事案件中，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，则在证券交易所提起的民事诉讼或司法部提起的民事诉讼中，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的身份被起诉。

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，公司或被撤销营业执照，公司或被禁止在美国政府承包合同。1998年《海外反腐败法》的修正案扩大了“金融机构”的定义，大大扩充了美国反洗钱的监管框架。受监管的“金融机构”包括了美国的存款机构(所有银行、信托公司和储蓄机构)，外国银行设有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。

反洗钱
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》”），起草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》等现有法律。

《爱国法》扩大了“金融机构”的定义，大大扩充了美国反洗钱的监管框架。受监管的“金融机构”包括了美国的存款机构(所有银行、信托公司和储蓄机构)，外国银行设有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。

寻求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》。
知識產權

擬向美國公司投資的投資者必須考慮知識產權的潛在問題，包括專利、商標和著作權等。投資前需進行詳細的盡職調查，確保投資不侵犯第三方知識產權。

投資者在考慮投資前，應首先與被投資公司簽訂協議，確認其擁有的知識產權的範圍和結構，並確保在投資後能夠合法使用這些知識產權。

在投資後，投資者還需注意以下幾方面的問題：

1. 確定被投資公司購買的知識產權的範圍和結構，並理解這可能涉及到的專利、商標和著作權等。
2. 確保投資者在投資後能夠合法使用這些知識產權，並理解在投資後可能出現的法律風險。
3. 在投資後，投資者需確保投資符合相關的法律規定，並理解任何違規行為可能導致的罰款或訴訟。

美國 - 富邏輯性的監管制度

美國的監管制度覆蓋範圍廣泛，同時富邏輯性和高透明度。因此，如果有適當的計劃和具備相關知識的顧問，監管制度通常不會對大部分交易造成重大負擔。