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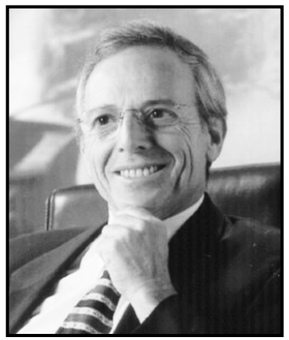
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A Practical Guide For Non-U.S. Companies
Considerations In Acquiring A U.S. Target

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Sills Cummis in the News

Why are more and more non-U.S. companies seeking business opportunities in the U.S.? A number of economic trends have contributed to this dynamic movement:

- Lower valuation of target U.S. companies over the past two years;
- U.S. companies' refocus on core businesses, thereby divesting non-core operations and assets;
- Dramatic increase in the value of the Euro against the dollar; and
- Less competition from would-be U.S. acquirors due to less than favorable stock market conditions.

Although large foreign companies sometimes acquire major public U.S. companies in headline-stealing deals, more often foreign buyers engage in transactions that are privately negotiated by the parties. These transactions involve complex legal, tax and business issues. Effectively identifying and addressing these issues is critical to the success of an acquisition transaction. Foreign companies acquiring U.S. businesses face additional issues and challenges, especially when these companies have little or no U.S. infrastructure or deal experience. Over the past two decades, Sills Cummis has created a specialized multi-disciplinary team of attorneys who have focused on international M&A transactions and gained the experience and cultural knowledge necessary to help non-U.S. clients effectively navigate the complexities of the U.S. markets. Listed below is a brief overview of some of the more significant issues that our international clients face in privately negotiated non-U.S. /U.S. acquisition transactions.

Restrictions On Foreign Ownership

One of the first issues a foreign buyer must evaluate in a potential transaction is whether there are any restrictions on foreign investment in the target company's industry or other regulatory factors that might affect the acquisition. Although the U.S. probably leads the world in welcoming foreign investment, restrictions exist in several areas.

Exon-Florio

The Exon-Florio Amendment (Exon-Florio) authorizes the Committee on Foreign Investment in the United States (CFIUS) to investigate and evaluate the national security effect of certain acquisitions of U.S. assets by foreign-controlled entities. While national security concerns are most obvious in the defense industry, Exon-Florio can reach many other industries, including technology and technology related fields.

Other Common State and Federal Restrictions

Companies engaged in certain businesses may be subject to additional state or federal restrictions on foreign ownership. This is most often the case in highly regulated industries such as air transportation, public utilities, maritime operations, mining, telecommunications, insurance and others. Situations in which buyers are caught off-guard by such restrictions most often involve operations of the target company that are incidental to its core business. We recently, for example, dealt with the federal prohibition on the ownership by foreign persons of U.S. flag vessels. Our non-U.S. client was acquiring a U.S. entity which owned a fleet of barges used for the transportation of its raw materials and finished goods on U.S. waterways. Although there was no particular restriction on foreign ownership of the target company, our client had to exclude the barges from the acquisition and make alternate arrangements for the transportation previously provided by the barge fleet. If identified in the early stages of a transaction, as was the case in this deal, this type of issue can easily and inexpensively be addressed.

Hart-Scott-Rodino And The "Ultimate Parent Entity"

Foreign as well as U.S. buyers are subject to U.S. antitrust laws. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) requires pre-transaction notification to the U.S. Department of Justice and the Federal Trade Commission of transactions that meet certain financial guidelines. These guidelines relate to the sizes of the buyer, the seller and the transaction itself. One aspect of the HSR reporting requirements that can be particularly troublesome for some foreign buyers is the requirement that the "ultimate parent entity" of the acquiror submit detailed financial and other information. For buyers from countries such as Italy, South Africa, South Korea and others where companies are often many steps removed from their ultimate parent companies through complicated ownership structures, obtaining cooperation from significant stockholders who may qualify as the "ultimate parent entity" often proves difficult. We encourage our clients to meet with our antitrust team early in a transaction so that we can help identify the information they will need, thus allowing them to be ready to make the HSR filing immediately after signing a definitive acquisition agreement.

Special Issues/ Special Expertise

Industry-Specific Knowledge

For any transaction involving a non-U.S. acquiror, industry-specific knowledge is tantamount to success. For example, Sills Cummis has been singled out for its handling of Pharmaceutical/Med-Tech mergers and acquisitions. In this particular industry, identifying and obtaining the necessary regulatory approvals can be an enormous task. It is necessary to determine what country the operating assets are in and where the distribution networks are. This is usually very complex because of multi-jurisdictional issues. One acquisition we handled involved distribution networks in 17 countries. Foreign law firms worked under our guidance in all of these countries in order to orchestrate the closing and make sure we resolved the multi-jurisdictional issues and transferred title on the same day at the same time. In addition, we had to deal on a country-by-country basis with regulatory approvals relating to ownership, currency issues, patent issues, IP issues and licensing agreements. Obviously FDA, HSR and European Union regulatory approvals had to be obtained.

Other Considerations

For the foreign buyer with limited U.S. infrastructure and deal experience, the due diligence process raises unique issues. It is important for the foreign buyer to decide which portions of the due diligence evaluation can realistically be completed by its own personnel and which portions would best be handled with the help of outside legal counsel and specialized consultants. Foreign buyers often overestimate the ability of non-U.S. managers to effectively evaluate documents and face-to-face meetings with target company personnel in a foreign environment.

Due diligence obviously applies to any transaction regardless of where the parties are situated. In the case of non-U.S. acquirors, however, counsel has to recognize the cultural differences and the nuances of the U.S. laws and carefully lay them out for the client. The goal, of course, is for the acquiror to gain as complete an understanding of the target company's legal, business and financial affairs and how they play out in a U.S. environment.

Areas of particular importance include evaluation of historical, pending and threatened litigation to which the target is, has been or may be a party. This is particularly important in the case of non-U.S. acquirors who don't always fully appreciate the ever-litigious nature of U.S. companies, shareholders and employees. These clients need to assess historical and current compliance by the target company with federal, state and local environmental laws which, although some other nations are quickly catching up, are among the strictest in the world. All buyers also need to evaluate the scope and magnitude of the target company's liabilities to its employees in such areas as pension obligations, obligations triggered by a change-of-control or severance (pre- or post-closing) and claims or potential claims by employees or former employees for improper labor or employment actions by the target company. This can be an especially daunting task for the non-U.S. buyer. U.S. law and business practice are often in stark contrast to those in the buyer's home country. For example, many European and Japanese buyers accustomed to strict laws and customs that assure workers lifetime tenure, are quite surprised by the relative ease with which an acquiror can reduce the U.S. target company workforce immediately after closing.

Cross-Border Structural Issues

The ultimate choice of transaction structure will generally be made by the parties after careful consideration of a number of factors, including, among others, avoidance of unwanted liabilities, preservation of certain assets (*e.g.*, accumulated net operating losses, non-assignable contracts, etc.) and achievement of the tax objectives of the parties. For the foreign buyer, the unique issues arising in structuring the transaction most often relate to cross-border taxation and financial reporting. Since the issues faced by the foreign buyer may not be all that familiar to the U.S. seller, it is important that the foreign buyer be prepared to explain in greater detail than it might be used to the reasons for preferring a particular structure. This may mean providing an introductory overview of its home country tax laws and accounting practices. Enlisting the assistance of experienced international tax counsel and an accounting firm familiar with both the home country and U.S. laws and practices is the best way to avoid costly mistakes in structuring the transaction.

A Magnification Of Culture Clash

The integration of a newly acquired business with an existing organization is, perhaps, the most difficult challenge faced by any acquiror. For the foreign buyer, integration issues are often magnified exponentially due to cultural and business differences.

The mere scope of the arrangements that must be in place on the closing date can be staggering. Unlike a U.S. company making a domestic acquisition, a foreign company may not have the infrastructure in place even to handle such seemingly routine tasks as opening bank accounts, hiring U.S. accountants and shopping for U.S. liability insurance. Unlike the U.S. acquiror, the foreign buyer may have to go through the process of making appropriate immigration arrangements for its transition team. Depending upon the time difference between the home office and the target company location, members of the transition team may not be able to attend to issues that arise in their regular assignments while serving transition duty. These and other added complexities make it vital that the foreign acquiror begin integration planning very early in the transaction. Such fundamental questions as who will run the new business and what the lines of communication between the new business and the home office will be must be addressed and answered as early as possible. Ideally, the home office personnel who will be responsible for running the new business should be given as much of a hand in the acquisition process as possible so that they are intimately familiar with the target company when the closing date arrives.

Conclusion

Any international company seeking to establish or maintain a competitive global business posture must give serious consideration to maximizing its opportunities in the U.S. market. But for the non-U.S. buyer, completing a U.S. acquisition can be a difficult process complicated by cultural, legal and logistical issues unique to non-U.S. companies. At Sills Cummis, we have learned that to be truly effective in representing non-U.S. clients in these transactions, we must expand our role well beyond the customary attorney-client relationship and serve also as a business and cultural advisor.

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