December 20, 2007

Cross-Border M&A –
2008 Checklist for Making Acquisitions in the U.S.

Of the $1.4 trillion of U.S. M&A activity in 2007, approximately $339 billion (24.5%) involved non-U.S. acquirers, as compared to $182 billion (12.5%) in 2006 and $133 billion (11.9%) in 2005. Acquirers from Western Europe and other industrialized nations accounted for about 77% of 2007's foreign acquisitions, and acquirers from emerging markets (including China and sovereign wealth funds) accounted for an especially significant 23%. The recent investments by Abu Dhabi's ADIA in Citibank, Singapore's Temasek in UBS, and China's CIC in Morgan Stanley show the growing strength and appetite of acquirers from emerging markets.

The principal drivers of foreign acquisitions of U.S. businesses have strong momentum. The significantly weakened dollar and the credit crisis continue to create bargains for foreign investors flush with strong currencies and large pools of investment capital derived from natural resources and exports. The enormous growth of sovereign wealth funds in Asia and the Middle East (currently holding, by some estimates, in excess of $1.5 trillion for investment) continues to whet the appetite for acquisitions that yield a greater return than U.S. Treasuries. The strategic benefits of acquiring American brands, resources, distribution systems and technology continue to lure foreign companies. And if the U.S. sinks into a recession, domestic M&A activity would be depressed and offshore buyers could easily find themselves in an environment with more bargains and less competition for targets. As a result, it appears that the pace of foreign acquisitions of U.S. companies is likely to increase significantly in 2008, although there is a growing global threat of protectionism. While some regulation is appropriate in order to protect national security and other vital interests from foreign acquirers, excessive protectionism would impede the now-global market for corporate control and inevitably would cause a devaluation of companies in countries with overly protectionist policies.

From a strategic perspective, recent high-profile cross-border transactions highlight the importance of advance planning and strategic thinking in implementing U.S. acquisitions by non-U.S. acquirers. Following is a checklist of critical current issues that should be considered in advance of any such acquisition:

- *Political Considerations*. Careful thought should be given to political ramifications in advance of any acquisition proposal, particularly if the target company is in a sensitive industry or if the acquirer is sponsored or financed by a non-U.S. government. Concerns of federal, state and local government agencies, employees, customers, suppliers, communities and other interested parties should be addressed strategically. If possible, relationships with the target company's management should be established well in advance so that political and other concerns can be addressed in a collaborative manner.

- *Transaction Structures*. Flexible acquisition structures may be necessary or expedient. Structures that may be helpful in particular circumstances include a minority position or joint venture, possibly with the right to increase to full ownership over time; making the acquisition in partnership with a U.S. firm; or utilizing a controlled or partly-controlled U.S. acquisition vehicle, possibly with a board of directors having a substantial number of U.S. citizens and a prominent American as a non-executive chairman.

- _Regulatory Hurdles_. Any weaknesses in the ability to clear regulatory hurdles could be used by reluctant targets, competing bidders or competitors of the target to frustrate the acquisition. In addition to securities and antitrust regulations, acquirers should plan for a review by the Committee on Foreign Investment in the United States (CFIUS) under the Exon-Florio Act, discussed below; and, in transactions involving regulated industries (*e.g.*, energy, public utilities, gaming, insurance, telecommunications and media, financial institutions, and defense contracting), prepare for an additional layer of approvals.

- _CFIUS_. The U.S. Congress' passage of the Foreign Investment and National Security Act of 2007, which amends the Exon-Florio Act, highlights the continuing scrutiny of cross-border transactions. Transactions most likely to attract the greatest scrutiny by CFIUS, the multi-agency governmental body that reviews transactions in which foreign acquirers could obtain "control" of a U.S. business or assets, involve investments by foreign governments or investments in U.S. infrastructure, technology or energy assets. Two useful rules of thumb in dealing with CFIUS are, first, that in general it is prudent to make a voluntary filing with CFIUS if the likelihood of an investigation is reasonably high or if competing bidders are likely to take advantage of the uncertainty of a potential investigation, and, second, that it is often best to take the initiative and suggest methods of mitigation early in the review process in order to help shape any remedial measures and avoid delay or potentially disapproval. (Our July 13, 2007 memorandum on CFIUS provides further information in this regard.)

- _M&A Rules of the Road_. It is critical to understand the custom and practice in U.S. M&A transactions. Successful execution is more art than science, and early involvement by experienced U.S. advisors will be important. Knowing how and at what price level to enter the discussions may make or break a proposal – in some situations it is prudent to start with an offer on the low side, while in others offering a full price at the outset may be essential to achieving a negotiated deal and discouraging competitors, including those who might raise political or regulatory issues. In sensitive transactions, hostile maneuvers may be imprudent.

- _Tax Considerations_. Tax issues are critical to structuring the transaction. Non-U.S. acquirers contemplating a dividend stream flowing from the U.S. target should structure with a view toward withholding tax requirements and should consider the possibility of utilizing a subsidiary located in a country that has a favorable tax treaty network or other tax attributes that will minimize the taxes imposed on the dividends as they cross borders. The proportion of debt and equity will be important from a tax perspective, as will be obtaining U.S. interest deductions on acquisition indebtedness. In tax-free (stock-for-stock) acquisitions, special rules applicable to foreign acquisitions may be relevant.

- _Disclosure Obligations_. How and when an acquirer's interest in the target is publicly disclosed should be carefully controlled and considered, keeping in mind the various ownership thresholds that trigger mandatory disclosure on a Schedule 13D under the securities law, and regulatory agency rules such as those of the Federal Reserve Board, the Federal Energy Regulatory Commission, and the Federal Communications Commission. While the Hart-Scott-Rodino Antitrust Improvements Act does not require disclosure to the general public, the Hart-Scott rules do require disclosure to the target's management before relatively low ownership thresholds can be crossed.

- *Market Players*. Understanding in advance the roles of arbitrageurs, hedge funds, institutional investors, private equity funds, proxy voting advisors and other important market players – and their likely views of the anticipated acquisition attempt – can be pivotal to the success or failure of the contemplated transaction.

- *Financing*. The recent credit market upheaval has put even more scrutiny on the financing aspects of transactions. Critical questions to consider include where financing with the most favorable terms and conditions is available; how committed the financing is; which lenders have the best understanding of the target's business; and how comfortable the target will feel with the terms and conditions of the financing.

- *Corporate Governance and Securities Law*. U.S. securities and corporate governance rules can be troublesome for non-U.S. acquirers who will be issuing securities that will become publicly traded in the U.S. as a result of an acquisition. SEC rules, the Sarbanes-Oxley Act and stock exchange requirements should be evaluated to ensure compatibility with home country rules and to be certain that the non-U.S. acquirer will be able to comply. Rules relating to director independence, internal control reports and loans to officers and directors, among others, can frequently raise issues for non-U.S. companies listing in the U.S.

- *Antitrust Issues*. To the extent that a non-U.S. acquirer directly or indirectly competes or holds an interest in a company that competes in the same industry as the target company, antitrust concerns may arise either at the federal agency or state attorneys general level. Although less typical, concerns can also occur if the foreign acquirer competes either in an upstream (*e.g.*, major input) or downstream market of the target.

Global capital flows, multinational enterprise and cross-border M&A activity have never been as common or as sensitive as they are today. With advance planning and careful attention to the greater complexity and spectrum of issues that characterize cross-border M&A, such transactions can be accomplished in most circumstances without falling into the pitfalls and misunderstandings that have often characterized cross-cultural business dealings in the past.

Adam O. Emmerich
Robin Panovka
David A. Katz
Ilene Knable Gotts
Joshua R. Cammaker