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An Overview of Considerations for Chinese Companies in Acquiring and Operating Business in the United States and Engaging in Other U.S. Transactions

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A growing number of Chinese companies have made acquisitions, entered into joint ventures or engaged in Greenfield investments in the United States in furtherance of their particular strategic goals.[1] Examples of recent deals include two acquisitions of U.S. companies by Alibaba and the acquisition of a U.S. CAD/CAM company by ZWCAD Software, Co., Ltd. Many other Chinese companies are considering doing so for their own strategic objectives. These strategic objectives will vary from company to company and industry to industry, but typical reasons include more direct access to the U.S. market for Chinese goods, acquisitions of technology and other intellectual property, acquisitions of brands and access to distribution channels. For example, Bosideng International Holdings announced in September 2010 that it is looking to acquire a retail store in the United States. Bosideng's Chairman, Gao Dekang, was quoted in *Forbes*' magazine stating "'[t]he economic downturn makes it a good time to shop for U.S. assets.'"[2]

Many Chinese companies consider the appropriate U.S. acquisition[3] an attractive strategic opportunity. Some though may hesitate to proceed due to concerns regarding the U.S. transaction process and, perhaps even more significantly, business and legal matters regarding the operation of the acquired U.S. company post-transaction and whether there is any potential impact under U.S. regulatory requirements on the non-U.S. business of the Chinese company. This paper: (1) provides an overview of certain key U.S. legal and process considerations regarding both aspects, and (2) explains how some assumptions are false, as well as of certain positive aspects of the U.S. legal system as it pertains to conducting business in the United States, with the purpose of demonstrating that, for a worthwhile strategic opportunity and with proper planning and implementation, Chinese companies should not be dissuaded by these considerations from proceeding with their U.S. strategic plans and instead can achieve their objectives and benefit thereby.[4]

Transaction Process Considerations

There are several aspects of the U.S. transaction process which will be discussed in this paper. Chinese companies contemplating entering the U.S. market are faced with many of the same transactional considerations which may be novel to them compared to those considerations first faced by earlier entrants into the U.S. market. Transactions in the United States are carried out in accordance with U.S. practices generally which involve various considerations and are subject to U.S. laws. Thus, most new market entrants are

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subject to a learning curve and would benefit from the assistance of expert U.S. legal counsel and other advisers.

Identifying Potential Targets

Once a Chinese company has established the strategic objectives it wants to obtain from an inbound U.S. transaction, the initial task is to identify U.S. companies that may enable the company to achieve these goals. Depending upon the Chinese company's own experience with U.S. companies, it may be familiar with many, if not the majority, of potential targets. In that case, the Chinese company may use its own resources to initially determine which U.S. companies may be the most attractive opportunities and then proceed to assess the potential interest in a transaction on the part of the identified companies.

If the Chinese company does not have such in-depth knowledge or expertise or does not want its interest to become publicly known, at least initially, a common alternative approach is to engage an U.S. investment banker to assess the U.S. market and identify and conduct research on potential targets. Engaging an investment banker for such an assignment can be beneficial in that it is an excellent means of obtaining an assessment of the market as well as many of its players.

In some cases, a Chinese company may receive, either directly or through intermediaries, such as its law firm or accounting firm or an investment banker, information about an U.S. company that is being marketed. Such a situation can be advantageous in that it indicates that the U.S. company is actively exploring a transaction and presumably has assembled relevant information for prospective buyers, potentially unlike the foregoing approaches, but does not have the same foundation of a thorough market analysis to help assess whether this is an optimal opportunity.

A Chinese company which decides that its strategic objectives may benefit from a U.S. transaction must decide what assets to allocate to this process, both internal and external, and how best to identify and approach appropriate targets.

Valuation Metrics

Different valuation metrics or methodologies are commonly used in the United States in pricing companies in different industries. Even within an industry, methods may vary per target company based on factors such as whether the company is public or private, its size and its margins, among others. In considering potential targets, a Chinese company should be aware of the commonly used applicable valuation methodology. This can either be ascertained by the Chinese company itself based on its research or, as is very often the case, through experienced investment advisors or other industry experts.

Buyer's Due Diligence of the Prospective Target

Due diligence is critical in evaluating a prospective target company, including its strengths, weaknesses, value, and ultimately determining whether and to what extent the target company may further the Chinese company's strategic objectives. Due diligence pertains to all aspects of the target, thus the prospective buyer will benefit if it and its advisers engage in business due diligence, legal due diligence, accounting due diligence, technology due diligence, and other due diligence as appropriate. After the due diligence process, the buyer, often in conjunction with its advisers, must decide whether it will proceed with a transaction with the target, and if so, on what terms. On occasion, some prospective buyers will not devote substantial attention or resources to various aspects of due diligence, believing that the failure to do so will not adversely impact them or will otherwise be unnecessary. While this is a decision to be made by the buyer, most U.S. advisors would strongly recommend against this approach,

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believing that some problems not uncovered in due diligence can often not be adequately redressed later. In fact, most advisors would counsel that due diligence should be perceived by prospective Chinese buyers as the critical means to satisfy itself that it is acting prudently and in the best interests of its company and its stakeholders in proceeding with a transaction.

Business due diligence is undoubtedly the most important aspect in that it is critical to judging whether, the potential target meets, or can be developed to meet, the business objectives underlying the Chinese company's strategic goals. The prospective buyer plays a critical role in this business due diligence, analyzing the target company's business practices, relationships, results, position in the market and future opportunities, among other elements. A knowledgeable investment banker can be of great assistance in this regard.

Broadly speaking, the ultimate purpose of legal due diligence, *i.e.*, the investigation of legal matters regarding the U.S. acquisition candidate by U.S. legal counsel on behalf of the Chinese company, is to determine whether, from a legal perspective, there are circumstances or impediments which might adversely affect the buyer's transaction objectives. A simple example is an examination of the chain of title of intellectual property in the case of an acquisition of a technology company so as to confirm that the company does own the intellectual property as claimed. Legal due diligence includes identifying and analyzing legal problems that exist or may potentially arise with respect to the target company and, in some instances, assessing their impact on valuation and, in other instances, advocating measures to protect the buyer from these legal problems, as well as to allocate legal responsibility for them to the seller. As part of legal due diligence, counsel reviews the target's material contracts and other material documents for matters such as potential loss of rights upon a change of control, and the need for third-party consents and outstanding litigation. The counsel then analyzes them to determine what legal risks, if any, exist with respect to them, as well as the target company's right to carry on its business post-closing under its existing arrangements. Legal due diligence is also important as a means of determining, based upon documents and other materials, whether the target company is being operated in accordance with applicable laws, and thus whether its operating results are sound from a legal perspective and legally it can continue to be operated in the same manner post-transaction.

Due diligence can, if desired, be done in stages to limit costs, although if timing is critical, such as in an auction, a bankruptcy or other competitive bidding process, the prospective buyer may need to engage in the full due diligence at one time. While certain aspects of due diligence can and should be performed by the Chinese buyer on its own behalf, in order to properly protect itself and enhance its prospects of realizing its strategic goals, the Chinese company would be best served by retaining upfront various U.S. advisors, including, at least initially, U.S. legal counsel and, in general, a U.S. investment banker, and subsequently financial personnel, technology experts and others as the process dictates. Due diligence does involve a commitment of resources, but it is critical to ensure thorough and accurate fact finding, and thus enable the prospective Chinese buyer to have maximum understanding of the proposed target.

Target's Due Diligence of Prospective Buyer

Assuming the transaction does not involve the U.S. company or its owners receiving equity in the Chinese buyer or otherwise having a valid reason to be concerned about the Chinese buyer's business or financial condition, the amount of any due diligence performed by the U.S. company regarding the Chinese buyer which the U.S. company can persuasively argue it must conduct should be expected to be limited.

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Certain Potential Purchase Agreement Considerations

It is not the purpose of this paper to discuss the terms and conditions of transaction agreements generally utilized in the United States. A Chinese buyer might do well to bear in mind though that insisting on an agreement approach involving terms and conditions which deviate substantially from those viewed as "U.S. style" or are dramatically contrary to "U.S. practices" may be disfavored by U.S. companies and their advisors and may even result in U.S. companies electing to not consummate a transaction. Accordingly, a few terms and issues are noted here. The Chinese buyer will have to decide whether to make a filing under the Committee on Foreign Investment in the United States ("CFIUS"),[5] which then triggers a U.S. government approval process, and will need various Chinese regulatory approvals for a transaction and the export of foreign currency. One issue which may arise is whether, as between them, the buyer in particular will require the seller to bear the financial cost of the failure to obtain any approval. Conversely, the buyer may take the position that even though it has signed a transaction agreement, between the time it does so and the closing, it should have a "fiduciary out"—a basis not to close if another deal is in the best interests of its stockholders. In this case it would not be unusual for the Chinese buyer to seek a fee if this provision is employed. Consistent with U.S. practice, and especially in light of most U.S. companies unfamiliarity with Chinese laws and its judicial system, U.S. parties should be expected to take the position that the transaction agreements must be governed by U.S. law, often the law of the state in which the U.S. company resides, or sometimes of another state such as New York, and that any dispute will be resolved in the United States.

Consideration of Post-Transaction Legal Requirements

In contemplating a U.S. transaction, two key legal considerations for deciding whether to proceed are: (1) what impact, if any, U.S. laws may have on the Chinese company itself and its business operations outside the United States, and (2) the significance of U.S. laws to the U.S. target post-transaction. The application post-transaction of several key legal obligations will be discussed in this paper. Regarding the first point, assuming the transaction has been structured properly[6] and the acquired operation is operated properly post-transaction, U.S. laws should not impact the Chinese buyer's business[7] materially or at all outside the United States, nor would it require significant disclosure with the U.S. government regarding non-U.S. activities of the Chinese buyer. As to the second point, these laws apply to all businesses located in the United States, so while some may appear to be burdensome, they generally should not materially disadvantage one U.S. business versus another provided that the business is operated properly and in general should not apply in a materially adverse manner to the U.S. company merely because it now has a foreign owner. This section of the article focuses on selected material laws and legal principles which apply to U.S. businesses generally, regardless of their industry.[8]

U.S. Federal Income Taxes

The following discusses the major U.S. federal income tax issues that are generally relevant in this context. Note that this paper does not address any non-U.S. tax considerations, and a Chinese company should consult its own Chinese tax advisors.

Taxation and Income Tax Reporting for the U.S. Subsidiary

The U.S. subsidiary conducting business in the U.S. would be required to file federal income tax returns, as well as applicable state and local tax

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returns, and pay any taxes due.[9] The U.S. subsidiary also must file information returns if applicable, such as to report certain transactions with its Chinese parent and other related parties (for example, purchases and sales of goods between them). Other than the disclosure in the U.S. subsidiary's federal income tax return of the Chinese buyer as the owner of the subsidiary or any such information returns, no disclosure would usually be required regarding the Chinese buyer, or at all regarding its non-U.S. operations as part of federal income tax filings.

Dividends

In the event that a U.S. subsidiary elects to pay dividends to any foreign entity, it may do so but it must withhold U.S. tax from the dividend at the legally required rate, remit the amount withheld to the U.S. Internal Revenue Service ("IRS"), and file IRS forms disclosing (among other things) the name of the recipient, i.e., in this case, the Chinese parent. Subject to a tax treaty between the United States and the applicable foreign jurisdiction, withholding is generally required at an amount equal to 30 percent of the dividend. In the case of a dividend by a U.S. subsidiary to a Chinese parent, the amount required to be withheld is reduced to 10 percent, provided that the Chinese parent is otherwise entitled to the benefits of the income tax treaty between the U.S. and China, which in the ordinary course should not be problematic. The mere receipt of a dividend should not require the Chinese parent itself to make any filing with the IRS, provided that the appropriate amount is fully withheld by the U.S. subsidiary.

Limited Exposure of Chinese Buyers to U.S. Subsidiary Liabilities

In the overwhelming majority of circumstances, so long as appropriate corporate procedures and other practices are observed, the Chinese buyer, as the parent company, should not be liable under U.S. law for the liabilities of its acquired U.S. subsidiary.[10]

Inapplicability to Chinese Buyers of U.S. Securities Laws

A significant number of Chinese companies have chosen to become "public companies" under the U.S. securities laws, and their shares are traded on U.S. securities exchanges and markets. In any such case the Chinese company is required to make initial substantial and detailed public disclosures regarding itself and its subsidiaries and their worldwide operations as part of "going public", as well as being obligated to make ongoing extensive periodic public reports, and automatically becomes subject to various other laws and regulations.[11] By contrast, an acquisition of a U.S. company by a foreign buyer pursuant to which the foreign buyer does not issue any securities, for example a purchase solely for money, does not subject the foreign buyer to U.S. securities laws and the foreign buyer does not need to make any disclosures thereunder. Thus, such an acquisition is much less revealing and much less intrusive than a public offering. Moreover, even if the foreign buyer does pay for the U.S. company by issuing its own securities in whole or in part, except under circumstances where the U.S. company is itself already a public company or has a very significant number of stockholders, the foreign buyer would still not need to make public disclosures under the securities laws comparable to those in a public offering. Nor would it become subject to the ongoing public reporting requirements under the securities laws, although with respect to the transaction it would be subject to the U.S. laws governing material misstatements or omissions in the context of an offer and sale of securities.

Limited Applicability to Chinese Buyers of the U.S. Foreign Corrupt Practices Act

The U.S. Foreign Corrupt Practices Act (the "FCPA")[12] prohibits certain types of payments to

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foreign government officials or certain other foreign persons by U.S. companies and related parties, such as officers, directors or stockholders to, *inter alia*, influence acts or decisions of foreign official to assist in obtaining or retaining business for the U.S. company.[13] A U.S. company does not cease to be subject to the FCPA if it is acquired by a foreign company.[14] Non-U.S. activities conducted by the foreign buyer unrelated to its U.S. subsidiary do not, however, become subject to the FCPA, and thus the foreign buyer does not become prohibited from engaging in the enumerated activities on its own behalf. Nonetheless, a foreign stockholder of a U.S. company should be cautious and bear in mind that it would be liable under the FCPA if it engaged in the prohibited activities not in order to assist itself in obtaining or retaining business for itself, but if it did so for the benefit of its U.S. subsidiary.

Environmental Laws

The United States, at the federal, state and local level has numerous, often overlapping and detailed environmental laws, including the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[15] Some of these are based on strict liability rather than a fault-based system. Some laws pertain to hazardous substances and companies that use them in the operation of a business, while others apply to the production and emission of wastes and pollutants. In the case of contaminated properties, cleanup is often required. Due to the extensive nature of environmental laws, in many cases, extensive involvement of environmental legal counsel and other advisers is necessary. The U.S. Supreme Court, the highest judicial body in the United States, has established the basis under which a parent corporation may or may not be liable for a violation of the CERCLA by its subsidiary in *United States v. Bestfoods*, 524 U.S. 51 (1998) In brief, the Supreme Court limited a parent corporation's CERCLA liability of a subsidiary corporation to limited circumstances: first, when the commonality of identity between the parent and the subsidiary is such that the subsidiary's corporate veil is pierced under the state law under which the subsidiary is organized[16]; second, when the parent actively participates in and exercises control over the operations of the subsidiary's facility.[17] With respect to the parent's direct liability, the court held that the parent "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous wastes or decisions about compliance with environmental regulations" in order to be held liable.[18] As a result, this case provides guidance as to the procedures and practices that a parent corporation can observe, and thereby not be liable under CERCLA.

Limited Applicability to Chinese Buyers of U.S. Product Liability Law

A foreign company that manufactures or sells defective products into the United States can be found responsible under U.S. law for damages from resulting product liability claims. By contrast, the manufacture and sale in the United States of defective products by a U.S. subsidiary should, under appropriate circumstances, not expose the foreign parent to liability. Although the product liability area is one in which U.S. courts are more prone to hold a parent corporation liable for its subsidiary's actions, various conditions must be met before it will generally do so[19] and the foreign company parent is in a better defensive position than if it had manufactured or sold the goods itself.

Labor and Employment Laws

There are a myriad of U.S. federal, state and local laws governing the hiring, employment, treatment, benefits and termination of employment of employees in the United States. In general, these laws apply on a uniform basis to all U.S. businesses, although some do not apply at all or have less stringent requirements in the case of smaller businesses, or as a practical matter prove irrelevant. For example, there are various laws regarding the formation, recognition and rights of unions and

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their members, but the overall number of union employees has been declining and the existence of unions in certain industries, in particular high technology and service-type businesses, is much less common than in others. Other laws prohibit not hiring employees based on certain protected classes, such as race, gender (including pregnancy), age, religion or national origin, as well as handicapped persons under certain circumstances. Other laws establish minimum wages, maximum number of hours to be worked, generally by non-salaried and certain salaried employees, workers compensation for injured employees, and payments into unemployment insurance funds for benefits for employees terminated involuntarily. However, the terms of these laws do not apply to the non-U.S. activities of a foreign company. One federal law of particular potential importance to foreign buyers is The Worker Adjustment and Retraining Notification Act ("WARN").[20] WARN requires employers with 100 or more full-time employees to provide 60 days written notice to employees in the event of a "plant" closing or mass layoffs at a single site. Some states have laws based on similar principles, but with lower thresholds. WARN and its state counterparts may be particularly important to foreign companies acquiring a U.S. business if the buyer is planning to relocate significant portions of the acquired business to outside of the United States. Moreover, while WARN does not apply to the conduct engaged in outside of the United States by a foreign entity, the regulations under WARN make clear that the parent corporation of an entity engaging in layoffs covered by WARN can be liable for its subsidiaries' failure to comply with WARN "depending upon the degree of [the subsidiaries'] independence from the parent."[21]

Industry-Specific Laws

There are also laws which pertain only to specific industries. For example, there are laws that apply solely to healthcare providers, others that apply only to banks or to companies in the financial services industry, the mining industry and television and radio. A foreign company considering acquiring a U.S. business does best to understand what industry-specific laws may apply, and consider their potential impact, if any, on the transaction itself, the operation of the U.S. company after the closing of the transaction, or on the Chinese parent.

Favorable Legal Aspects to Acquiring and Operating a U.S. Business

While many foreign companies may have concerns about the U.S. legal system and doing business in the United States, there are a significant number of benefits to acquiring U.S. businesses and the conduct of their operations in the United States as compared to similar activities in many other jurisdictions. Some of the more significant points are noted below.

In general, foreign companies are not prohibited per se from buying or establishing businesses in the United States. There are no requirements for minimum U.S. ownership of businesses in general. Two key exceptions to the foregoing are businesses involving national security pursuant to CFIUS[22] and in a limited number of regulated industries. Subject to the foregoing, the actual technical steps to affect a change in ownership of a U.S. corporation are very simple and do not require registration or other filings with government authorities, but are effective merely upon the sale of stock.

In some circumstances, for example involving the establishment of a new business or the acquisition of a troubled U.S. corporation, there may be opportunities in connection with a transaction to receive tax benefits or other incentives from state and local authorities to entice the foreign corporation. These might include tax incentives pertaining to real estate taxes, for example, or abatements of other charges. In such situations, this has an obvious positive economic impact on a potential transaction.

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While there are federal regulations on capital and exchange controls, there are no general restrictions on remittance to a foreign parent of profits or dividends (subject to the discussion on withholding above), or royalties or license fees. This facilitates the opportunity for a foreign parent to repatriate funds if it wishes to do so.

As a general matter, the U.S. has a highly-developed body of laws with clear and objective criteria regarding permitted and prohibited activities as well as a generally objective enforcement system. This enables companies in the U.S. to operate their businesses so as to have a significant basis to believe that they are doing so in accordance with legal requirements and on a "level playing field."

The U.S. also has a highly-developed body of law to protect intellectual property. Any holder of such rights believing that it is being infringed upon can sue for damages, as well as sue to cause a cessation in infringement. Legal protection is also available for trade secrets which have been obtained improperly, such as by theft or breach of contract. The foregoing provides valuable protections to companies to which intellectual property is an important aspect of their business.

As discussed above, there are significant laws pertaining to employees. However, as compared to many other developed nations, as a whole these laws are generally more favorable to employers. Assuming that a U.S. company engages in proper procedures in its hiring and adoption of employee policies and handbooks, it is common that most employees, other than perhaps the most senior executives, are considered "employees at will" and therefore, can be terminated at any time without any notice or severance except as the employer may have established generally. In this regard, the U.S. offers employers much more freedom than, for example, many European countries.

Summary

There is an interest in and potential benefits to be derived by Chinese companies engaging in acquisitions, joint ventures or start-up operations in the United States. In fact, the number of Chinese companies engaging in such transactions has been increasing. While some Chinese businesses may have only limited familiarity with U.S. legal requirements and various business practices, including the manner in which transactions are conducted in the United States, and especially with the use of U.S. legal counsel and other U.S. advisors, these matters can be easily handled so as to make such transactions more attractive. Moreover, Chinese businesses should recognize that the U.S. legal and business climate offers various advantages as compared to other systems and markets, and thus actually heighten the benefits of engaging in transactions in the United States.

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[1] For a discussion of some of the key legal matters involved in the acquisition process itself, see "*Acquisitions by Chinese Companies in the United States*" by Andrew M. Ross (The Review of Securities & Commodities Regulation, Vol. 43, No. 10, May 19, 2010)

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("*Ross*"). Copies of this article in both English and Chinese can be accessed at Loeb & Loeb LLP's website (www.Loeb.com) in the 'Publications' section, http://www.loeb.com/news/articledetail.aspx?article=1271.

[2] Russell Flannery, www.forbes.com, Sept. 24, 2010, "*China's Down King Bosideng Aims to Open Store in New York in 2011*".

[3] For brevity's sake this paper will generally refer only to "acquisitions" but the considerations discussed generally apply throughout to joint ventures, and those under the heading "Post-Transaction Considerations" also apply to Greenfield or start-up investments.

[4] This paper is not intended to be a complete analysis of all U.S. legal requirements, but instead it is in initial overview of the major considerations and laws which are most likely to be relevant to such matters generally. Any specific proposed transaction should be reviewed with U.S. counsel and take into account the particular facts of that transaction, including the nature of the business involved. This paper is limited to the laws of the United States as they currently exist, and except as specifically stated otherwise, addresses solely U.S. federal laws and not the laws of any state or local jurisdiction.

[5] CFIUS, *i.e*., the Committee on Foreign Investment in the United States (Section 721 of the Defense Production Act of 1950, 50 App. U.S.C. 2170 (as amended by the Foreign Investment and National Security Act of 2007). The purpose of CFIUS and the regulations thereunder is to authorize the president to suspend or prohibit any acquisition, merger or takeover when, in the president's judgment, there is credible evidence to believe that in such transaction the foreign person exercising control over a business engaged in interstate commerce *might* (emphasis added) take action that would threaten to impair national security.

[6] For purposes of this paper, it is assumed that as a result of the transaction the acquired U.S. business is owned and operated by a U.S. corporation which is a direct or (except with respect to the tax discussion below) indirect subsidiary of the acquiring Chinese company. This would be a common structure in many transactions. It is also assumed that neither the Chinese buyer itself nor any of its non-U.S. subsidiaries is conducting business in the United States.

[7] Substantially all of the considerations discussed in this section apply to all foreign buyers and owners of U.S. businesses. Accordingly, all references to "foreign buyers" or "foreign parent" or similar terms include Chinese companies.

[8] There are of course many other U.S. laws and this paper is not intended to address all laws. U.S. legal counsel, accountants and U.S. management of a U.S. company should all be consulted regarding such matters as they pertain to a particular business.

[9] State and local tax filings vary between states and localities and are not the subject of this paper. However, as a general principle, these filings should not raise any significant concerns with respect to the foreign operations of the Chinese buyer.

[10] The U.S. legal principles under which a parent corporation may be held liable for the activities of its subsidiaries are generally known as "piercing the corporate veil" and "alter ego" liability. In brief, key preventive measures to avoid the former are observance of the subsidiaries' corporate formalities (for example, decision making by the subsidiaries' own board of directors), different compositions of the boards and officers of the parent and the subsidiary, and the subsidiary maintaining separate adequate books and records. The "alter ego" theory focuses on whether the persons acting on behalf of the subsidiary are its own officers and employees, or those of its parent.

[11] U.S. Securities Act of 1933, as amended, and U.S. Securities Exchange Act of 1934, as amended.

[12] 15 U.S.C. §§ 78 dd-1 et seq.

[13] In the case of U.S. public companies, the FCPA also requires specific procedures regarding recording of transactions and other record keeping requirements.

[14] However, if the acquisition was of a public company, the record-keeping and procedural requirements would no longer apply.

[15] 42 U.S.C. §9601 et seq.

[16] Id at 63.

[17] Id at 65.

[18] Id at 66-67.

[19] See Note 9, *supra*.

[20] 29 U.S.C. §2101 et seq.

[21] 20 C.F.R. 639.3(a). The Regulations cite some of the relevant factors to be considered in making this determination, including common directors and/or officers, de facto exercise of control, unity of personnel policies emanating from a common source, and the dependency of operations. This analysis is similar to the corporate veil piercing and alter ego theories discussed earlier. *See* note 9, *supra*.

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[22] *See* the discussion of CFIUS in *Ross*, note 1, *supra*.

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