

ALSTON & BIRD LLP



中国企业走进美国 (投资美国案例分析)

Helen Su (苏慧伦)

helen.su@alston.com

1950 University Ave., 5th Floor
East Palo Alto, California

www.alston.com

Market Access for Foreign Investors



- U.S. generally friendly to foreign investment, with few limitations or restrictions
- Minimal restrictions on flows of capital, with limits primarily tied to limitations on foreign bribery, anti-money laundering, and economic sanctions
- To the extent restrictions apply, typically arise at the U.S. Federal level within specific industries, primarily due to national security interests
- Even if investment permitted, export controls still will apply, including to commodities, software and technology

Types of Investment in the U.S.



- Business partnership / collaboration / license
- Joint venture
- Acquiring shares (minority, majority or 100%)
 - Merger and acquisition
- Acquiring assets
- Greenfield investment

Five Key Points to Remember



1. U.S. legal framework

- Federal republic with dual sovereignty
 - U.S. federal laws
 - State laws
- Some areas of law are “coextensive” with both federal and state law applying
- In the event of a conflict, U.S. federal law will govern

Five Key Points to Remember



2. Deal and tax structure

- Deal structure
 - Share?
 - Asset (tangible; intangible)?
 - Greenfield?

- Tax structure
 - Offshore arrangement (tax heaven, tax treaties, etc.)
 - Investment vehicle(s) in the U.S.
 - Corporation
 - Partnership
 - Limited Liability Company (LLC)
 - Branch Office: office of foreign entity in the U.S., not a separate legal entity, requires registration and licensure in state where business will be conducted

Five Key Points to Remember



3. Due diligence

- Value / risk assessment
 - Calculating the price
 - Verifying the deal structure is appropriate
- Allocation of risks
 - Representations and warranties
 - Escrow / indemnity
 - Use of insurance coverage

Five Key Points to Remember



4. Intellectual Property

- Tax consideration
 - Cost, royalty , price, profit, etc.
- Freedom to operate
 - IP due diligence
 - Ownership
 - Validity
 - License in and out and other agreements
 - IP clearance

Five Key Points to Remember



5. Government Filings / Permitting

- Generally, approval of foreign investments is not required unless industry subject to direct federal oversight (e.g., financial institutions, aviation) or CFIUS review
- Committee on Foreign Investment in the United States (CFIUS)
 - Reviews foreign acquisitions of “control” of US persons engaged in interstate commerce which “threaten to impair” US “national security” where no other provisions of law provide adequate protection
 - “Control” very broadly defined (not just majority ownership)
- Anti-Trust Approval
 - Investments meeting certain thresholds (both transaction and parties) will require antitrust clearance from U.S. government

Five Key Points to Remember



5. Government Filings / Permitting

- Certain investments require ongoing reporting even if initial approval not required
 - International Investment Survey Act
 - Requires reporting of 10 percent or more voting interest to Department of Commerce Bureau of Economic Analysis
 - Purchases of 200 acres or more of U.S. land must be reported
 - Information kept confidential and used only for analytical purposes
 - Acquisition of agricultural land requires reporting to Department of Agriculture

Engage Counsel Early On



10



Questions?

THANK YOU
HELEN SU