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Understanding the Process of an M&A with Foreign Investors

By Ahvi Spindell
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When American companies are approached by foreign business looking to merge, acquire, or strategically invest, understanding the process can do much to ensure the best possible deal.

Approximately 84 percent of all foreign companies have entered the U.S. through mergers with and acquisitions of U.S. companies over the past decade, according to a report recently released by The Organization for International Investment (OFII), a nonprofit trade association representing global companies.

Therefore, it should be no surprise that "foreign investors are just as sophisticated as any other investor on deal negotiation," Laura Nemeth, a corporate partner at Squire Sanders, a Cleveland-based international law firm, told IMT.

Nemeth represents foreign companies that acquire U.S. companies. She has represented clients from a host of countries in deals ranging from $10 million to $500 million.

"They [foreign companies] know what they want," she said. "If it is a strategic acquisition, they're looking to acquire the business because there is a particular business fit for them."

In a financial investment, the investor is going to be looking for a return, Nemeth said. But in an acquisition, the foreign entity is concerned with how the U.S. business is going to be operated going forward.

One of the most important moves a U.S. company should make in such an acquisition is to retain experienced legal counsel, she said.

"A lot of small companies may have lawyers that they use that are not used to doing larger or international deals, and that can often result in difficult negotiations," Nemeth pointed out. "Because they don't know what's customary to give or not to give, it can cause protracted negotiations, ill will, and the foreign investor to perhaps negotiate harder."

Legal counsel is needed from the outset to guide the U.S. company in the letter-of-intent phase, during which the parties explore whether a deal is possible and what the terms might be. It is typically not binding on either party.

Once a letter of intent is signed and the parties move forward with due diligence and definitive documentation, legal counsel can ensure that there is less likelihood of any misinterpretation by the U.S. company that would cause a retraction of agreed upon terms, Nemeth said.

The definitive agreement can then be negotiated and signed.

"[O]nce the definitive agreements are signed, there's a period of time during which the parties will complete their due diligence and go on to acquire the necessary consents," Nemeth said.

Those consents could involve third parties with whom the U.S. business has contracts, or any antitrust filings that might be required.

During the due diligence phase, the foreign investor will look at all of the material contracts that the U.S. company has signed. Those contracts might be assignable to the acquiring company, depending on the structure of the deal.

The acquisition is concluded after all the "conditions to closing" are satisfied. "So there's actually that extra step between definitive agreement signing and closing," Nemeth said.

One of the most important things that management of the U.S. company will need to do is determine how much control it is willing to give up and whether the foreign company is going to come in and run the business, Nemeth said. Is this foreign company looking to acquire a controlling interest, such that the current owners, managers, or executives risk losing their jobs?

U.S. company management also needs to consider cultural differences that could emerge in working with foreign investors, particularly if the acquisition is the foreign company's first venture into the U.S. market, Nemeth said.

A foreign investor might be unfamiliar with U.S. employment laws or union requirements. "So it is important from the foreign investment side to make sure that that knowledge gap is bridged," she said.

U.S. company executives should consider informally talking to the foreign company management -- not the highest level but at lower levels to find out how happy they are working there, Nemeth suggested.

"My advice to U.S. companies is don't let a particular unknown prohibit you from doing the deal," she said. "Every investor's different and it's incumbent upon you to get to know that company and its culture and its management style no matter where that company is based, in order to make sure that it's a good fit for your business and your employee base."