

中国法通讯 China Law Newsletter 跨境贸易与投资 Cross-border Trade and Investment

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编者按：本刊旨在报道与中国有关的跨境贸易与投资的最新动态与我们的实务经验，但本刊不可替代个案的正式法律意见。若您重复收到本刊或者要订阅、退订或进一步了解本刊的内容，请与大成的有关律师联系。

Editor's note: the purpose of this publication is to report the most recent developments in the field of cross-border trade and investment in connection with China, as well as our practical experience therein. However, this publication should not be treated as a substitute for a formal legal opinion in individual cases. If you have received this publication more than once, or would like to subscribe or unsubscribe to this publication, or follow up on any issues raised in this publication, please be in contact with the lawyer you usually deal with at Dacheng Law Offices.

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立法新闻

LEGISLATIVE NEWS

- 国务院发布《国务院关于加强进口促进对外贸易平衡发展的指导意见》（来源：www.gov.cn，2012 年 5 月 2 日）

State Council Releases Guiding Opinions of State Council on Enhancing Import and Promoting Balanced Development of Foreign Trade (Source: www.gov.cn, May 2, 2012)

4 月 30 日，国务院发布了《国务院关于加强进口促进对外贸易平衡发展的指导意见》（《意见》），明确了包括加大财税政策支持、改善金融服务等多项加强进口的措施。《意见》提出要进一步优化进口商品结构，稳定和引导大宗商品进口，积极扩大先进技术设备、关键零部件和能源原材料的进口，适度扩大消费品进口。《意见》明确，加大财税政策支持力度，以暂定税率的方式，降低部分能源原材料的进口关税，适当降低部分与人民群众生活密切相关的生活用品进口关税。

On April 30, the State Council released the Guiding Opinions of State Council on Enhancing Import and Promoting Balanced Development of Foreign Trade (the "Opinions"), clarifying the measures for import enhancement including strengthening fiscal and tax policy support as well as improving financial services. The Opinions put forward to further optimize the structure of imported commodities, stabilize and guide the import of bulk commodities, to actively expand the import of advanced technical equipment, key components and parts, as well as energy raw materials, and to reinforce the import of consumables to a justified extent. As clarified in the Opinions, to enhance the support for fiscal and tax policies, the import tariff duties of some energy raw materials and of some articles for daily use closely related to the living of the masses shall be reduced to an appropriate degree by employing interim tax rates.

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- 国务院发布修改《机动车交通事故责任强制保险条例》的决定（来源：www.gov.cn，2012 年 5 月 2 日）

State Council Announces the Decision of Revising Regulations on the Compulsory Insurance for Liability for Traffic Accidents of Motor Vehicles (Source: www.gov.cn, May 2, 2012)

3 月 30 日，国务院公布了 国务院关于修改《机动车交通事故责任强制保险条例》的决定，自 2012 年 5 月 1 日起施行。修改后该《条例》的第五条第一款由原来的“中资保险公司经保监会批准，可以从事机动车交通事故责任强制保险业务”修改为“保险公司经保监会批准，可以从事机动车交通事故责任强制保险业务。”这意味着，我国正式向外资保险公司开放交强险市场，中国保险业进入全面开放阶段。

On March 30, the State Council announced the decision of the State Council on

revising the Regulations on the Compulsory Insurance for Liability for Traffic Accidents of Motor Vehicles, effective as of May 1, 2012. After such revision, the first paragraph of Article 5 of the Regulations will be revised from original "Chinese-funded insurance companies may, upon the approval of the CIRC, engage in the business of the compulsory insurance for liability for traffic accidents of motor vehicles" to "Insurance companies may, upon the approval of the CIRC, engage in the business of the compulsory insurance for liability for traffic accidents of motor vehicles", which means that China will formally open the market of compulsory insurance for liability for traffic accidents of motor vehicles for foreign-funded insurance companies, and that China's insurance industry will enter into a fully open age.

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- 中日韩三国正式签署《关于促进、便利和保护投资的协定》（来源：新华社，2012 年 5 月 14 日）

China, Japan and South Korea Formally Signed the Agreement for the Promotion, Facilitation and Protection of Investment (Source: Xinhua News Agency, May 14, 2012)

5 月 13 日，第五次中日韩领导人会议上正式签署了《中华人民共和国政府、日本国政府及大韩民国政府关于促进、便利和保护投资的协定》。该协定共包括 27 条和 1 个附加议定书，囊括了国际投资协定通常包含的所有重要内容，包括投资定义、适用范围、最惠国待遇、国民待遇、征收、转移、代位、税收、一般例外、争议解决等条款。

On May 13, the Agreement among the Government of the People's Republic of China, the Government of Japan and the Government of the Republic of Korea for the Promotion, Facilitation and Protection of Investment was formally signed at the Fifth China-Japan-ROK Leaders' Meeting. With 27 clauses and one additional protocol, the Agreement covers all important contents generally included in an international investment agreement and has clauses such as investment definition, applicable scope, most-favored-nation treatment, national treatment, imposition, transfer, subrogation, tax, general exceptions and dispute settlement.

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- 卫生部发布《卫生部关于社会资本举办医疗机构经营性质的通知》《卫生部办公厅关于确定社会资本举办医院级别的通知》（来源：www.gov.cn，2012 年 5 月 21 日）

MOH Releases Circular of Ministry of Health on the Nature of Medical Institutions Established by Social Capital and Circular of Ministry of Health on Determining the Grades of Medical Institutions Established by Social Capital (Source: www.gov.cn, May 21, 2012)

4 月 13 日，卫生部发布了《卫生部关于社会资本举办医疗机构经营性质的通知》，指出社会资本可以按照经营目的，自主申办营利性或非营利性医疗机构。5 月 17 日，卫生部发布了《卫生部办公厅关于确定社会资本举办医院级别的通知》，要求卫生行政部门在设置审批社会资本举办的医院（含中外合资合作医院）时，应当根据《医疗

机构管理条例》、《医疗机构设置规划》等规定，及时确定其级别。

On April 13, the Ministry of Health (the "MOH") released the Circular of Ministry of Health on the Nature of Medical Institutions Established by Social Capital, pointing out that social capital may apply for the establishment of non-profit or for-profit medical institutions at its own discretion according to operation purposes. On May 17, the Ministry of Health released the Circular of Ministry of Health on Determining the Grades of Medical Institutions Established by Social Capital, requiring health administrative authorities to determine their grades in accordance with the Administrative Regulations on Medical Institutions and the Establishment Plan for Medical Institutions when examining and approving the hospitals established by social capital.

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- 国务院国资委印发《关于国有企业改制重组中积极引入民间投资的指导意见》（来源：www.sasac.gov.cn，2012 年 5 月 28 日）

SASAC Prints and Distributes Guiding Opinions on Actively Absorbing Private Investment during SOE Restructuring (Source: www.sasac.gov.cn, May 28, 2012)

5 月 23 日，国务院国有资产监督管理委员会印发了《关于国有企业改制重组中积极引入民间投资的指导意见》（《意见》），鼓励和引导民资参与国企改革重组。《意见》规定，国有企业在改制重组中引入民间投资时，应当通过产权市场、媒体和互联网广泛发布拟引入民间投资项目的相关信息，优先引入业绩优秀、信誉良好和具有共同目标追求的民间投资主体；民间投资主体参与国有企业改制重组可以用货币出资，也可以用实物、知识产权、土地使用权等法律、行政法规允许的方式出资，可以通过出资入股、收购股权、认购可转债、融资租赁等多种形式参与国有企业改制重组。

On May 23, the State-owned Asset Supervision and Administration Commission of the State Council (the "SASAC") printed and distributed the Guiding Opinions on Actively Absorbing Private Investment during SOE Restructuring (the "Opinions"), encouraging and guiding private capital to participate in the reform and restructuring of state-owned enterprises (the "SOEs"). As specified in the Opinions, at the time of absorbing private investment during SOE reform and restructuring, SOEs shall release the information relating to the intention of absorbing private investment through property rights market, media and internet with priority on the private investors that have good performance and reputation, as well as the common goal with such SOEs. To participate in SOE reform and restructuring, private investors may make monetary investment, or employ other ways of capital contribution as permitted by laws and administrative regulations, such as capital contribution in kind, and through intellectual property rights and land use rights. Investors may participate in SOE reform and restructuring through equity acquisition, direct investment, acquisition of convertible bonds, lease financing and otherwise.

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- 中国将开展人民币对日元直接交易（来源：新华社，2012 年 5 月 30 日）

China to Launch Direct Trading Between RMB and Japanese Yen (Source: Xinhua News Agency, May 28, 2012)

经央行授权，中国外汇交易中心 29 日发布《关于发展人民币对日元直接交易市场的公告》，宣布自 2012 年 6 月 1 日起银行间外汇市场完善人民币对日元的交易方式，发展人民币对日元直接交易。根据相关规定，自 6 月 1 日起，银行间外汇市场人民币对日元交易实行直接交易做市商制度，直接做市商承担相应义务，连续提供人民币对日元直接交易的买、卖双向报价，为市场提供流动性。

On May 29, the China Foreign Exchange Trading System issued the Announcement on Developing Direct Trading between RMB and Japanese Yen upon authorization from the People's Bank of China, declaring to improve the trading mode between RMB and the Japanese Yen (CNY/JPY) and launch direct trading between the two currencies on the inter-bank foreign exchange market. According to the relevant provisions, the trading between RMB and the Japanese Yen on the inter-bank foreign exchange market will practice direct trading market operator system from June 1, and the direct market operators shall bear the relevant obligations of continuously providing direct CNY/JPY trading quotations of buying and selling to inject vitality into to the market.

同时，改进人民币对日元汇率中间价形成方式。人民币对日元汇率中间价由此前根据当日人民币对美元汇率中间价以及美元对日元汇率套算形成，改为根据直接交易做市商报价形成，即中国外汇交易中心于每日银行间外汇市场开盘前向银行间外汇市场人民币对日元直接交易做市商询价，将直接交易做市商报价平均，得到当日人民币对日元汇率中间价。

Meanwhile, the formation of the middle price of the CNY/JPY exchange rate will be improved. Previously, the CNY/JPY middle price was formed on the basis of the CNY/USD middle price and the USD/JPY exchange rate. But it will be determined by the quotation of the direct trading operators, that is to say, the China Foreign Exchange Trading System will, before the opening of inter-bank foreign exchange market each day, inquire the CNY/JPY direct trading operators on the inter-bank foreign exchange market, and calculate the average quotation of such direct trading operators to get the middle price of CNY/JPY exchange rate of the very day.

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- 国务院常务会议通过《“十二五”国家战略性新兴产业发展规划》（来源：www.gov.cn，2012 年 5 月 31 日）

Development Plan of National Strategic Emerging Sectors during 12th Five-Year Period Passed at the Executive Meeting of the State Council (Source: www.gov.cn, May 31, 2012)

5 月 30 日，国务院总理温家宝主持召开国务院常务会议，讨论通过《“十二五”国家战略性新兴产业发展规划》（《规划》），提出了七大战略性新兴产业的重点发展方向和主要任务，还提出了 20 项重大工程。七大战略性新兴产业，分别是指节能环保产业、新一代信息技术产业、生物产业、高端装备制造产业、新能源产业、新材料产业、新能源汽车产业。

On May 30, Wen Jiabao, Premier of the State Council, chaired an executive meeting of the State Council, at which the Development Plan of National Strategic Emerging Sectors

during 12th Five-Year Period (the "Plan") was deliberated and passed, pointing out the key development direction and major tasks of 7 strategic emerging sectors, as well as 20 key projects. The 7 strategic emerging sectors are energy-saving environmental protection, new-generation information technology, biology, high-end equipment manufacturing, new energy, new materials and new-energy automobile.

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投资动态

INVESTMENT DEVELOPMENTS

- 外资在华收益率高出中国对外资产收益率一倍（来源：第一财经周刊，2012 年 5 月 2 日）

Yield Rate of Foreign Capital in China is Twice the Yield Rate of China's Capital Abroad (Source: <http://cbnweekly.dooland.com/>, May 2, 2012)

据统计，外资在华收益率高出了中国对外资产收益率 1 倍左右。根据外汇局近日澄清，2011 年我国对外投资收益 1280 亿美元。不过根据数据，2011 年对外负债的成本为 1549 亿美元，净逆差为 268 亿美元。据此前外汇局公布的《2011 年末中国国际投资头寸表》，2011 年底我国对外资产累计 4.7 万亿美元，对外负债 2.0 万亿美元，计算得出对外资产累计收益率为 2.7%，对外负债成本累计为 5.2%，也就是说，外资在华收益率高出了中国对外资产收益率 1 倍左右。

According to the statistics, the yield rate of foreign capital in China is nearly twice the yield rate of China's capital abroad. State Administration of Foreign Exchange clarified that the yield of China's investment abroad in 2011 is 128 billion dollars. But according to the data, the cost of China's liabilities abroad in 2011 is 154.9 billion dollars and the net deficit is 26.8 billion dollars. According to the International Investment Position of China in the End of 2011, which were promulgated by State Administration of Foreign Exchange, China's capital abroad in the end of 2011 accumulatively is 4,700 billion dollars, and China's liabilities abroad is 2, 000 billion dollars, and it can be calculated that the accumulative yield rate of China's capital abroad is 2.7% and the accumulative cost of China's liabilities abroad is 5.2%. That is to say, the yield rate of foreign capital in China is nearly twice China's investment abroad.

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- 外资零部件巨头强势本土化扩张（来源：21 世纪经济报，2012 年 5 月 16 日）
Foreign Parts Magnates Strongly Implement Local Expansion in China (Source: 21st Century Business Herald, May 16, 2012)

欧洲两大零部件巨头——博世和法雷奥正在加紧在中国本土化扩张步伐。4 月 25 日，博世与奇瑞合资的汽车电子合资公司成立，合资公司由博世中国、奇瑞汽车、埃

泰克汽车技术有限公司三方组成，三方将整合埃泰克在芜湖现有的汽车多媒体业务，开发和生产汽车多媒体产品，包括汽车组合仪表及信息娱乐系统等。5 月 11 日，法雷奥在广州花都临近东风日产工厂的新工厂开始生产，这家生产电机的工厂已经是法雷奥在中国的 22 家工厂。法雷奥计划未来几年内，迅速扩大其在中国的规模。

The two major European parts magnates-Bosch and Valeo are now intensifying its steps in local expansion in China. On April 25, an automotive electronics joint venture was established, consisting of Bosch China, Cherry Auto and Atech Automotive Technology Co., Ltd. The three parties will integrate Atech's existing automotive multimedia business in Wuhu to develop and produce automotive multimedia products, including automotive instrument cluster and infotainment system. On May 11, Valeo's new factory in Huadu, Guangzhou, located nearby Dongfeng Nissan Production Factory, started its production. This factory manufactures electrical motors and is Valeo's 22nd factory in China. Valeo plans to rapidly expand its scale in China in the next few years.

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- 阿里巴巴 71 亿美元回购雅虎所持 20% 股权 阿里巴巴 71 亿美元回购雅虎所持 20% 股权（来源：新华网，2012 年 5 月 21 日）

Alibaba to Buy back 20% Stake Held by Yahoo for only USD7.1 Billion (Source: www.xinhua.org, May 21, 2012)

阿里巴巴集团 21 日宣布，与雅虎达成股权回购协议。阿里巴巴集团将动用 63 亿美金现金和不超过 8 亿美元的新增阿里集团优先股，回购雅虎所持有的阿里巴巴集团 20% 股权。雅虎和软银在阿里巴巴的投票权也将被大大稀释。阿里巴巴方面表示，交易完成后，新的公司董事会中，软银和雅虎的投票权将降至 50% 以下。

Alibaba Group announced on May 21 that it has reached a buyback agreement with Yahoo that Alibaba Group will buy back Yahoo's 20% stake in Alibaba Group for USD6.3 billion cash and not more than USD800 million of newly-increased preferred shares of Alibaba Group. The voting right of Yahoo and SoftBank in Alibaba will be diluted remarkably. Alibaba said that after the deal is closed, the voting right of Softbank and Yahoo in the new Board will reduce to 50% below.

阿里巴巴与雅虎之间的股权合作关系始于 7 年前。2005 年，雅虎以 10 亿美元加上雅虎中国的资产，兑换了阿里巴巴集团约 40% 的股份。

The equity partnership between Alibaba and Yahoo began 7 years ago. In 2005, Yahoo exchanged USD1 billion plus Yahoo China's assets for about 40% stake in Alibaba Group.

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实务经验

PRACTICAL EXPERIENCE

综述：中国公司在美收购运营企业及从事其他对美交易的相关考量因素

An Overview of Considerations for Chinese Companies in Acquiring and Operating Business in the United States and Engaging in Other U.S. Transactions¹

作者：安德鲁·M·罗斯/乐博律师事务所

By: Andrew M. Ross, Loeb & Loeb LLP

越来越多的中国公司在美国进行收购、成立合资企业或参与新建项目投资，从而推进他们的特定战略目标。新近的交易案例包括阿里巴巴公司完成两笔对美国公司的收购以及广州中望龙腾软件股份有限公司完成对一家美国 CAD/CAM 软件公司的收购。其他许多中国公司则为了实现自己的战略目标正跃跃欲试。这些战略目标因公司和行业各异而有所不同，但通常是为了以下目的：让中国商品更直接地进入美国市场、收购技术和其他知识产权、以及收购品牌和获得经销渠道。例如，2010 年 9 月波司登国际控股有限公司宣布其正在寻求收购美国的一家零售商店。福布斯杂志援引波司登董事长高德康的话说：“美国经济不景气之时正是购置美国资产的好时机。”

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. 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.”

在许多中国公司看来，进行适宜的美国收购是一种具有吸引力的战略机遇。而有些中国公司则可能感到犹豫，因为它们对美国的交易过程、或许更重要的是有关所收购美国公司的运营方面的交易后商业和法律事宜，以及美国的监管要求是否可能对中国公司的非美国业务产生影响存有顾虑。本文：（1）概述了在某些美国法律和流程方面的主要考量因素，并且（2）解释了为什么某些假设是错误的，以及与在美国开展业务相关的美国法律制度的某些正面因素；目的在于证明，对于有价值的战略机遇，并且通过适当的规划和实施，中国企业不应让这些考量因素阻止他们实施美国战略计划，相反能够实现他们的目标并从中受益。

Many Chinese companies consider the appropriate U.S. acquisition an attractive strategic opportunity. Some though may hesitate to proceed due to concerns regarding the U.S.

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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.

交易过程涉及的考量因素 Transaction Process Considerations

本文将对美国交易过程中的几个方面进行讨论。与较早进入美国市场的中国公司刚开始时面临的因素相比，正考虑进入美国市场的中国公司面临着很多相同的交易考量因素，这些因素对他们来说可能是比较新奇的。在美国的交易通常都是按照美国惯例进行的，涉及到各种考量因素，并且受到美国法律的制约。因此，大多数新的市场进入者都将经历一个学习的过程，并且将受益于美国专业法律顾问和其他顾问提供的协助。

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

确定潜在目标 Identifying Potential Targets

中国公司一旦确定了它想通过某一对美收购交易实现的战略目标，最初的任务就是确定能够使它实现这些目标的美国公司。根据该中国公司与美国公司打交道的经验，它可能熟悉许多（如果不是绝大多数的话）潜在目标公司。在这种情况下，中国公司可以利用其自身资源，初步确定哪些美国公司可能是最具吸引力的机会，继而评估所确定的公司是否对交易有兴趣。

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.

如果中国公司对此了解不够深入或专业，或不希望其意向为公众所知，那么至少在最初阶段，他们往往选择聘请美国投资银行，帮助他们评估美国市场并确定和研究潜在目标。为这一目的聘用投资银行可能是大有裨益的，因为这是获得对市场以及市场中许多公司的评估的极好手段。

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.

在某些情况下，中国公司可能会直接或间接地通过其律师事务所、会计师事务所或投资银行获得关于正在寻求出售的美国公司的信息。尽管有利的一面是，这种情况表明该美国公司正积极寻求交易，并可能已为潜在买家收集了相关信息，这可能与上述方式不同，但它不具备与上述方式相同的全面市场分析基础，从而无助于评估这是否是个好机会。

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.

如果一家中国公司认定其战略目标可能会从美国交易中受益，则其必须指定进入这一交易过程的资产（包括内外部资产），并且确定如何最好地识别和接近合适的收购目标。

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.

估值指标

Valuation Metrics

在美国，对不同行业的公司通常采用的估值指标或方法也有所不同。即使行业相同，对于每个不同目标公司进行估值的方法也可能有所不同；影响因素包括，公司是否上市、公司的规模和利润等等。在考虑潜在目标公司时，收购方中国公司应当了解常用而且适用的估值方法。这可以由中国公司通过调研自行确定，也可以如通常的情况，由经验丰富的投资顾问或其他行业专家进行确定。

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.

买家对潜在目标的尽职调查

Buyer's Due Diligence of the Prospective Target

尽职调查在评估潜在目标公司时是至关重要的，这包括评估潜在目标公司的优势、劣势和价值，从而最终确定目标公司是否或在何种程度上将可能进一步推进中国公司的战略目标。尽职调查涉及到目标公司的方方面面，因此如果潜在买家及其顾问视具体情况进行了商业、法律、会计、技术等尽职调查，则潜在买家将从中受益。经过尽职调查后，买家（通常与其顾问一起）必须确定是否继而开始与目标公司进行交易，以及如果是，基于何种条款进行。有时一些潜在买家不会对尽职调查的各个方面投入大量精力或资源，认为不会造成不利影响，或者认为尽职调查是不必要的。虽然买家可以自行决定不进行尽职调查，但大多数美国顾问都会强烈反对这种做法，因为他们认为一些问题如果不通过尽职调查得以发现，往往在事后就无法得到充分的纠正。事实上，大多数顾问都会建议潜在中国买家将尽职调查视为重要手段，以使其确定自己是在审慎行事，并且所进行的交易符合公司及其利益相关方的最大利益。

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, 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.

商业尽职调查无疑是最重要的一环，它的关键作用在于：判断潜在目标公司能否达到或能够通过进一步完善后达到中国公司战略目标中的商业目标。潜在买家在商业尽职调查中起着关键作用，因为它必须对目标公司的经营方式、各种关系、业绩、市场地位和未来机会等因素进行分析。一个经验丰富的投资银行家可以在这方面提供极大的帮助。

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.

一般而言，法律尽职调查（即美国法律顾问代表中国公司对美国收购目标进行的法律事宜调查）其最终目的是：从法律角度确定是否存在可能对买方的交易目标产生负面影响的情况或障碍。一个简单的例子是：当收购对象是技术公司时，审核知识产权链，以确认该公司是否拥有其声称的知识产权。法律尽职调查包括确定和分析目标公司已有或可能出现的法律问题，以及在某些情况下，评估这些问题对估值的影响；而在另一些情况下，建议采取相关措施以保护买家免受这些法律问题的影响，并将问题的法律责任划转给卖家。作为法律尽职调查的一部分，法律顾问将针对诸如控制权变更后可能发生的权利丧失、是否需要第三方的同意、以及未决诉讼等事宜，审阅目标公司的重大合同和其他重大文件。随后法律顾问将对审阅结果进行分析，以确定存在哪些法律风险（如果有的话），以及目标公司在其现有安排下在交割后经营其业务的权利。法律尽职调查也作为一个很重要的手段用以基于文件和其他资料来确定目标公司是否正按照符合适用法律的方式进行运营，进而确定其经营业绩从法律角度来看是否是健康的，以及在交易后其在法律上是否能继续以相同的方式进行运营。

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.

必要时尽职调查可以分阶段进行以控制成本，但如果时间紧迫（如在拍卖、破产或其他竞标过程中），则潜在买家可能需要一次性地完成全面的尽职调查。虽然尽职调查的某些方面可以、也应该由中国买家自行进行，以便妥善保护自己以及增加实现其战略目标的可能性；但是预先聘请各类美国顾问（包括至少在初期聘请美国法律顾问，以及通常情况下聘请美国投资银行家，并在随后聘请财务人员、技术专家和流程所需的其他人员），将对中国公司最为有利。尽职调查确实涉及到各种资源的投入，但关键的是确保全面和准确的事实调查，从而使潜在中国买家能够对拟议目标公司的了解尽可能深入。

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.

目标公司对潜在买家的尽职调查

Target's Due Diligence of Prospective Buyer

假设交易不涉及美国公司或其所有者获得中国买家的股权或者出于有效缘由而关注中国买家的业务或财务状况，则美国公司能够令人信服地证明它必须对中国买家进行的尽职调查应该是有限的。

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.

某些潜在购买协议的考量因素

Certain Potential Purchase Agreement Considerations

本文并不打算对在美国通常使用的交易协议条款和条件进行讨论。但希望中国买家谨记：其所坚持采用的协议所涉及的条款和条件，如果远远偏离“美国方式”或明显有悖“美国惯例”，则可能不会得到美国公司及其顾问欢迎，甚至可能导致美国公司选择不完成交易。因此，本文将列出一些条款和问题。中国买家将不得不决定是否根据“美国外国投资委员会”（CFIUS）的规定进行申报，这会启动美国政府的审批流程，以及需要中国各监管部门对交易和外汇流出的批准。可能出现的一个问题是，买卖双方特别是买家是否要求卖家承担未能获批的费用。反之，买家可以采取这样的立场：即使它已经签署了交易协议，在签署后和成交之间的期间，它应该有一个“信义义务除外”（fiduciary out）条款——作为另一笔交易符合股东的最大利益时不执行此笔交易的依据。在这种情况下，如果使用了这条规定，则中国买家要求卖家承担费用也不足为奇。按照美国惯例，特别是鉴于大多数美国公司不熟悉中国法律和司法制度，美国相关各方可能会采取的立场是交易协议必须受美国法律（通常是美国公司所在州的法律，或有时是其他州如纽约州的法律）的管辖，并且任何争议都将在美国解决。

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"), 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.

涉及交易后法律要求的考量因素

Consideration of Post-Transaction Legal Requirements

在考虑进行美国交易时，决定是否开始交易的两个主要法律考量因素是：（1）美国法律可能对中国公司本身及其在美国境外的业务运营所产生的影响（如果有的话），以及（2）交易后，美国法律对于美国目标公司的重要性。本文将讨论交易后几项主要法律义务的适用问题。关于第一点，假设该交易已经具有适当的架构，并且被收购的公司交易后得到妥善经营，则美国法律不应对中国买家在美国境外的业务产生重大影响或任何影响，也不会要求中国买家将其在美国境外的业务活动向美国政府进行大量披露。至于第二点，这些法律适用于美国境内的所有企业，因此，虽然一些法律可能看似繁琐，但它们通常不应使一家美国企业与另一家相比明显处于不利地位，前提是该公司得到妥善经营；并且通常不应仅仅因为公司的现有所有者是外国所有者，而对这家美国公司产生严重不利的影响。本文的这一部分侧重于阐述精心挑选出来的、通常适用于美国企业（无论它们是什么行业）的重大法律和法律原则。

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 and the acquired operation is operated properly post-transaction, U.S. laws should not impact the Chinese buyer's business 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.

美国联邦所得税

U.S. Federal Income Taxes

以下阐述的是与这方面通常相关的主要美国联邦所得税问题。请注意，本文不阐述任何非美国税务因素，对此中国公司应咨询其中国税务顾问。

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.

美国子公司的税务和所得税申报

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

在美国运营的美国子公司需要提交联邦所得税申报表，以及适用的州和地方纳税申报表，并缴纳应付税款。美国子公司也必须提交信息申报表（如适用），如申报与中国母公司和其他相关各方进行的某些交易（例如，与他们之间进行的商品的采购及销售）。除了美国子公司在其联邦所得税申报表中披露中国买家为该子公司的所有者和任何此类信息申报表之外，在联邦所得税申报表中通常不要求进行与中国买方相关的其他披露，或根本不要求进行与中国买方的非美国运营机构相关的任何披露。

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 returns, and pay any taxes due. 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.

红利

Dividends

美国子公司可以选择向任何外国实体支付红利，但必须以法律规定的费率从红利中扣缴美国税款，将扣缴金额汇到美国国税局(IRS)，并提交 IRS 表格以披露红利接收方的名称（如在这种情况下为中国母公司）等信息。根据美国与适用的外国司法管辖区之间的税务协定，所需扣缴的金额通常等于红利的 30%。如果是美国子公司给其中国母公司支付红利，所需扣缴金额减少为 10%，但前提是中国母公司有权享受到美中之间所得税协定的好处，而一般情况下这应该不存在问题。如果仅仅是接受红利，则不应要求中国母公司向美国国税局提交任何申报文件，只要相应的金额完全由美国子公司进行扣缴。

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.

中国买家对美国子公司债务的有限责任

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

在绝大多数情况下，只要适当的公司程序和其他做法得到遵守，则根据美国法律，作为母公司的中国买家不应对被收购的美国子公司的债务负责。

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.

美国证券法对中国买家的不适用性

Inapplicability to Chinese Buyers of U.S. Securities Laws

相当多中国企业都选择成为遵循美国证券法规定下的“上市公司”，并且它们的股票在美国证券交易所和证券市场进行交易。在任何此类情况下，作为“上市”的一部分，中国公司必须针对其自身及其子公司以及它们的全球分支机构进行初步的大量且详细的公开披露，并且有义务进行持续且广泛的定期公开报告，并自动接受各种其他法律和法规的制约。相比之下，如果外国买家在收购美国公司时未发行证券（如完全以现金购买），则外国买家不受到美国证券法的制约，并且根据美国证券法，外国买家不需要作出任何披露。因此，与公开发行相比，此类收购所需进行的披露和受到的侵扰都大大减少。而且，即使外国买家通过发行自己的证券来支付全部或部分收购费用，除非美国公司本身就是上市公司或者拥有人数众多的股东，否则根据证券法，外国买家仍然无需像公开发行那样进行公开披露。同时它也不受证券法所规定的持续公开报告要求的制约，但是在交易方面，它将受到管辖证券发行和销售相关的重大错误陈述或遗漏的美国法律的制约。

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. 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.

美国“反海外腐败法”对中国买家的有限适用性

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

美国“反海外腐败法”(FCPA)禁止美国公司及有关各方(如高级职员、董事或股东)向外国政府官员或其他某些外国人士支付某些类型的款项,以影响外国官员的行为或决定等,从而有助于美国公司取得或留住业务。美国公司被外国公司收购后,仍然必须受到FCPA的制约。但是,外国买家进行的与美国子公司无关的非美国活动,不受FCPA的制约,因此,外国买家将不会被禁止以自己的名义从事上述所列举的活动。但是,美国公司的外国股东应谨记:如果它不是为了有助于自己取得或留住业务而是为了其美国子公司的利益,而参与了被禁止的活动;则根据FCPA,它将负有法律责任。

The U.S. Foreign Corrupt Practices Act (the "FCPA") prohibits certain types of payments to 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. A U.S. company does not cease to be subject to the FCPA if it is acquired by a foreign company. 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.

环境法律

Environmental Laws

美国的联邦、州和地方法律中规定了无数详细的但往往内容重叠的环保法律,包括“综合环境反应、赔偿和责任法”(CERCLA)。其中一些法律是基于严格的法律责任,而不是基于过失的体系。一些法律适用于有害物质和在商业运营中使用这些有害物质的公司,而其他法律则适用于废物和污染物的产生和排放。对于受污染的不动产,往往需要进行清理。由于环境法的广泛性,在许多情况下,环境法律顾问和其他顾问的广泛参与是必需的。在“United States v. Bestfoods, 524 U.S. 51 (1998)”法庭意见中,美国最高司法机构即美国最高法院,已建立了母公司对子公司违反CERCLA是否可能负责的依据。简单地说,最高法院将母公司对其子公司应负的CERCLA责任限制为以下少数情况:首先,当母公司和子公司的身份具有共性,子公司的“公司面纱”根据子公司成立所在州的法律被揭开时;其次,当母公司积极参与并行使对子公司工厂运营的控制时。关于母公司的直接责任,法院认为,母公司“必须管理、指导、或执行与污染特定相关的运营,即,运营必须与泄漏、危险废物处置或遵守环境法规的决定相关”时,方可对其追究责任。因此,这个案例对母

公司可以遵守从而不负有 CERCLA 责任的程序和做法提供了指导。

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"). 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; second, when the parent actively participates in and exercises control over the operations of the subsidiary's facility. 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. 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.

美国“产品责任法”对中国买家的有限适用性

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

根据美国法律，对于制造或销售有缺陷的产品到美国的外国公司，可以追究其对产品责任索赔中的赔偿责任。相比之下，如果美国子公司在美国制造和销售有缺陷的产品，则在适当情况下，外国母公司不负有责任。虽然产品责任领域是美国法院更易于因为子公司的行为而追究母公司责任的领域，但是通常在此之前必须达到各种条件，并且与外国母公司自己制造或销售商品相比，这让外国母公司能够更好地为自己辩护。

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 and the foreign company parent is in a better defensive position than if it had manufactured or sold the goods itself.

劳动和就业法律

Labor and Employment Laws

关于在美国的员工招聘、雇用、待遇、福利和解雇，无数的美国联邦、州和当地法律

都进行了规定。一般来说，这些法律都统一地适用于所有美国企业，尽管有些法律根本不适用、对较小型企业的要求不太严格、或经实践证明是不相关的。例如，关于工会及其成员的形成、承认和权利存在各种相关法律，但工会员工的总体人数在不断减少，并且工会在某些行业（特别是在高科技和服务型企业中）中的存在，比在其他行业中要少见的多。其他法律禁止出于某些受保护的类别（如种族、性别（包括怀孕）、年龄、宗教或国籍，以及残疾人员）等原因而在某些情况下拒绝雇佣员工。其他法律则制定了最低工资和最长工作时间（通常针对不领薪水的员工和某些领薪水的员工）、受伤员工的劳工补偿、以及缴纳失业保险基金（针对非自愿被解雇的员工）的款项。但是，这些法律的条款不适用于外国公司的非美国活动。对外国买家可能特别重要的一个联邦法律是“员工整顿及再培训通知法”（WARN）。WARN 要求雇佣 100 名或更多全职员工的雇主，在单个地点进行“工厂”关闭或大规模裁员前 60 天向员工发出书面通知。一些州颁布了基于类似原则的法律，但门槛较低。当买家计划将被收购企业的大部分迁至美国境外时，WARN 以及各州与 WARN 相应的法律，对于收购美国企业的外国公司可能尤其重要。此外，虽然 WARN 不适用于外国实体在美国境外进行的行为，但是 WARN 的条例明确规定：如果一家实体所进行的裁员受 WARN 管辖，则“根据[子公司]独立于母公司的程度”，该实体的母公司可能因其子公司未能遵守 WARN 而被追究责任。

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 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"). 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."

有行业针对性的法律

Industry-Specific Laws

有些法律仅适用于特定行业。例如，有些法律仅适用于医疗服务提供者，而有些则仅适用于金融服务业中的银行或公司、采矿业或电视和电台。考虑收购美国企业的外国公司最好能够理解可能适用的特定行业的法律，并考虑它们对交易本身（如果有的话）、成交后美国公司的运营、或中国母公司可能产生的影响。

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.

对于收购和运营美国企业有利的法律方面

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

尽管许多外国公司可能对美国的法律制度和在美国经商存在顾虑，但是与在其他很多司法管辖区进行类似活动相比，在美国收购并运营美国企业具有诸多好处。其中一些较重要的要点说明如下。

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.

一般来说，外国公司本质上在美国收购或设立企业是不被禁止的。对于企业所有权中美资所占比例，一般不设最低要求。上述规定的两个主要例外是根据美国“外国投资委员会”（CFIUS）的规定，属于涉及国家安全的企业，以及少数的受监管行业中的企业。在遵守上述内容的前提下，使美国公司的所有权发生变更的实际技术步骤非常简单，并且无需进行注册或向政府当局提交其他文件，而仅仅是在股票出售完成之后即告生效。

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 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.

在一些情况下，例如当涉及成立新企业或收购陷入困境的美国公司时，可能有机会获得与交易相关的各州和地方当局为吸引外国公司所给予的税收优惠或其他优惠政策。例如，这可能包括与房地产税相关的税收优惠政策，或其他费用的减免。在此类情况下，这对潜在交易显然具有积极的经济影响。

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.

虽然存在针对资本和外汇管制的联邦法规，但不存在针对给外国母公司汇寄利润、红利（按上述关于扣缴的内容为准）、权利费或许可费的一般限制。这方便外国母公司在希望将资金调回本国时就可以这么做。

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.

一般来说，美国的法制高度完善，对所允许和禁止的活动制定了明确且客观的标准，以及一个普遍客观的执法体系。这使得在美国的公司能够经营自己的业务，并且有切实的依据相信自己的经营活动符合法律要求并且处于公平的竞争环境中。

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."

美国有关保护知识产权的法律也非常完善。任何此类权利的持有人如果认为其权利受到侵害，都可以起诉要求赔偿，以及起诉要求停止侵权。法律也保护商业机密，防止他人不正当地获得（如通过盗窃或违约）商业机密。对于以知识产权为重要业务组成部分的公司，上述法律提供了宝贵的保护。

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.

如上所述，美国有不少与员工相关的重要法律。但是，和其他许多发达国家相比，这些法律总体上通常更有利于雇主。假设一家美国公司在其招聘、员工政策和手册的采用方面都实行了适当的程序；则通常可能除了最高级管理人员之外，大多数员工都被认为是“自愿员工”，并且因此按照雇主通常的规定，可在任何时候被解雇而无需任何通知或解雇费。在这方面，与诸如许多欧洲国家相比，美国为雇主提供了更多的自由。

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.

综述

Summary

中国公司对于在美国进行收购、成立合资企业或初创企业抱有兴趣并有可能获得好处。事实上，从事此类交易的中国公司的数量正不断增加。虽然一些中国企业可能对美国的法律要求和各种商业惯例（包括在美国进行交易的方式，特别是在美国法律顾问和其他美国顾问的使用方面）了解有限，但是这些事宜可以很容易得到解决，从而使此类交易更具有吸引力。此外，中国企业应该认识到，与其他体系和市场相比，美国的法律和商业环境所具有的各种优势，从而实际上增大了他们在美国进行交易能够获得的好处。

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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大成律师事务所建立了覆盖全国、遍布世界重要地区和城市的大成全球法律服务网络。大成的总部设在北京，在中国境内的长春、长沙、常州、成都、重庆、福州、广州、哈尔滨、海口、杭州、呼和浩特、济南、昆明、南京、南宁、南通、青岛、上海、沈阳、深圳、太原、天津、武汉、乌鲁木齐、无锡、厦门、西安、西宁、银川、郑州、吉林、舟山、合肥、南昌、苏州、黄石等 36 个城市设有分所。

Dacheng Law Offices has built a global network of legal service covering China as well as the major regions and cities worldwide. With its head office based in Beijing, Dacheng has established branch offices in 36 Chinese cities, including Changchun, Changsha, Changzhou, Chengdu, Chongqing, Fuzhou, Guangzhou, Harbin, Haikou, Hangzhou, Hohhot, Jinan, Kunming, Nanjing, Nanning, Nantong, Qingdao, Shanghai, Shenyang, Shenzhen, Taiyuan, Tianjin, Wuhan, Urumqi, Wuxi, Xiamen, Xi'an, Xining, Yinchuan, Zhengzhou, Jilin, Zhoushan, Hefei, Nanchang, Suzhou and Huangshi.

大成律师事务所在纽约、洛杉矶、芝加哥、巴黎、新加坡、香港、台湾设立了当地的大成律师事务所，可以提供全面本地业务的法律服务。大成还吸收了 5 家外国律师事务所作为大成网络境外成员单位，并与 9 家外国律师事务所建立了长期稳定的战略合作伙伴关系。

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2009 年，大成作为中国区唯一成员加入了世界最大的、汇集全球顶级律师事务所、会计师事务所、投资公司、金融机构等专业性服务企业和公司的独立专业服务组织 World Service Group（世界服务集团），与 100 多个国家的律师事务所、8 万多名律师建立起了长期稳定的信息交换渠道和业务合作平台，将大成全球化法律服务网络与 WSG 全球网络实现了链接，使大成客户服务体系更广泛地覆盖全球，更有效地满足法律服务市场多样化、多层次的需求。

In 2009, Dacheng Law Offices joined the World Services Group (WSG) as its only member in China. WSG is the world's largest independent multidisciplinary professional service organization with members including professional service providers such as leading law firms, accounting firms, investment companies and financial institutions in the world, whereby Dacheng has established long term steady channel for exchanges, communications and cooperation with law firms and more than 80000 lawyers from more than 100 countries. Dacheng's global network of legal service is linked with WSG's global network through its membership, which launches Dacheng's client service system to the international arena and puts Dacheng into a better position to serve the diversified and comprehensive demands of the legal service market.