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## Cross-Border Acquisitions Present Issues Not Found in Domestic Deals Part 2

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This is the second part of our discussion of issues arising in cross-border acquisitions, both inbound and outbound. For Part 1, please [click here](#). Parts 1 and 2 do not identify all issues that may apply to cross-border transactions.

### Reporting to the Bureau of Economic Analysis

*Inbound deals.* A U.S. business enterprise in which a foreign person or company owns, directly or indirectly, a 10% or greater voting interest is required to file certain reports with the Bureau of Economic Analysis of the US Department of Commerce, unless an exemption applies. This includes foreign ownership of real estate (except residential real estate held exclusively for personal use and not for profit-making purposes). Reporting is an obligation of the U.S.-owned enterprise, not the foreign owner.

Form BE-13 requires information about new investments (acquisitions of voting interests, establishment of new businesses or expansion of existing businesses). A report is required only if the acquisition or expansion involves total cost greater than \$3 million, but even if that threshold is not met the enterprise must file a claim for exemption. Reports are required to be filed within 45 days after the investment transaction occurs. Although the purpose of the report is simply to allow the Bureau to compile information, there are fines for failure to file and even imprisonment for a “willful” failure.

### Other Potential Legal Issues

*Immigration.* Whether inbound or outbound, an acquiror in a cross-border transaction will often want to place executives with the acquired company. This will require compliance with immigration law and regulations of the U.S. in inbound deals and the home country in outbound deals. Failure to obtain necessary visas, permits or other authorizations on a timely basis can

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impair the acquiror's business plan for operation of the business post-closing.

*Non-U.S. Labor and Employment Law.* Outbound acquirors are often surprised to discover how greatly foreign country employment regulation differs from U.S. regulation. It may be considerably harder to terminate employees in non-U.S. jurisdictions than it is in the U.S. Some countries require establishment of a works council to which certain decisions must be taken. Special rules often apply to employment contracts, and state-sponsored pension systems may require mandatory contributions. Employees of an acquired company may have notification rights and the right to accept employment following the transaction or instead to terminate employment and be entitled to severance benefits.

*Privacy and Data Protection Laws.* The General Data Protection Regulation became effective in the EU in 2018. It applies to collection or use of personal information of EU residents and gives them the right to control the flow of their personal information. GDPR defines processes to monitor compliance and imposes large fines for non-compliance. Acquirors of businesses that collect personal information of EU residents (even if the business itself is not located in the EU) must take care to ensure compliance with GDPR.

*Environmental and Intellectual Property Laws.* Acquirors in outbound transactions need to understand what liabilities they may be charged with under foreign laws applicable to the environment. They also must understand registration and renewal procedures for intellectual property in each jurisdiction where protection of IP is important.

*Other Local Laws.* Many countries impose restrictions or requirements that may affect outbound transactions. These may include local rights of first refusal for municipalities to acquire real property of target companies, requirements to unwind statutory profit and loss pooling agreements, investment restrictions and local ownership requirements, and requirements that an asset purchaser assume related liabilities.

### **Practical Considerations**

Other practical considerations for cross-border transactions include:

*Due Diligence.* Performing due diligence investigations can be hampered when substantial information is in a foreign language. English translations of government-filed documents usually will not be considered official. Some countries permit dual-language filing.

*Foreign Exchange.* Pegging the rates at which different currencies will be converted may be important in a cross-border deal. This can affect the base purchase price, conversion of financial results into a different currency, and earn-out amounts paid over time. Currency fluctuations may affect the determination of whether an earn-out has been achieved, the amount to be paid under the earn-out and whether purchase price adjustments based on working capital fluctuations are required. Parties should determine who will bear currency risk and whether collars or other devices will be used to allow re-computation if exchange rates exceed designated limits. Also, if escrow accounts are established in non-U.S. currencies, the parties must consider the effect of exchange rates on their obligation to

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fund those accounts and their ability to withdraw funds.

*Accounting.* Reported financial results may need to be reconciled to different accounting principles. U.S. companies normally report under U.S. generally accepted accounting principles (GAAP), but businesses in other jurisdictions may report under a country-specific GAAP regime or under International Financial Reporting Standards (IFRS). Transaction parties should understand the differences between, for instance, GAAP and IFRS, and how those differences may affect their evaluation of the transaction. Differences may also exist in the typical internal accounting procedures and controls implemented by parties in different jurisdictions.

*Financing.* If secured financing is involved, the parties must understand the procedures for creating, perfecting and enforcing a lien, mortgage or other security interest in foreign countries.

*Governing Law and Dispute Resolution.* The choice of law to govern the transaction agreements and the venue in which disputes may be brought can be a key determinant of the parties' ability to enforce their contractual rights. Many agreements specify arbitration for dispute resolution, but that involves choices also, including the venue at which arbitration would be held and the convention (e.g., American Arbitration Association rules or International Chamber of Commerce rules) under which the proceedings will be conducted.

*Cultural Integration.* Obviously, completing the acquisition transaction is merely the first step in integrating the businesses. Failure to understand or appreciate cultural differences between countries can make integration very bumpy and even prevent the deal from delivering the expected benefits. This requires anticipating issues such as language incompatibility, diverse cultural backgrounds and their effect on reporting relationships, and how cultural customs may clash with legal requirements from jurisdiction to jurisdiction.

**Justin Klimko**

313.225.7037

klimkojg@butzel.com

**Jennifer Consiglio**

248.593.3023

consiglio@butzel.com

**Laura Johnson**

248.593.3014

johnson@butzel.com

**Neil Patel**

248.258.1317

pateln@butzel.com

## CLIENT ALERTS

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**Arthur Dudley, II**

313.225.7070

[dudleya@butzel.com](mailto:dudleya@butzel.com)