

Cross-Border Deals – Merger and Acquisition Checklist

Expert knowledge means success

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Introduction

As more and more companies venture abroad, the cross-border acquisition will play an increasingly important role as an alternative to green field start-up operations, joint ventures, and other forms of foreign market entry. An international acquisition may be particularly attractive to a foreign company whose strategy is to gain instant goodwill, distribution and/or management expertise in the relevant local market.

Further, this investment strategy will become more popular as developing countries continue to relax their foreign investment controls to allow more opportunities for 100% foreign ownership of domestic companies.

The prospect of having to deal with one or more different legal systems and cultures makes life complicated for organisations engaged in Mergers and Acquisitions (M&A) work - properly conducted due diligence takes on an even greater role when piecing together a successful international acquisition programme. It really is the case of "Look before you leap!"

The first question you may encounter is: "What's the difference between due diligence in a domestic and a so-called 'cross-border' deal?" Well, it's certainly more than merely putting three of your finest young people on a plane with the standard instructions to make sure to physically touch every piece of paper! And as the quote from Sun Tzu (the ancient Chinese military strategist) suggests, the key is "knowing the direct, as well as indirect, ways to accomplish the task at hand".

In that regard, Part I of this paper discusses some of the strategic considerations of M&A in the cross-border due diligence process, including certain cross-cultural considerations, selecting and working with foreign local lawyers and confidentiality concerns. Part II of this article is a sample checklist for the buyer's due diligence, setting out recommended due diligence procedures and considerations. Whilst this article focuses on strategic considerations in the context of a negotiated cross-border acquisition of a private company, they are also (for the most part) equally applicable in the context of acquisitions of listed foreign companies.

Part I: Strategic Considerations

Cross-border acquisition due diligence will require the buyer and its lawyers to focus on host country-specific, as well as target-specific, investigations. Host country-specific due diligence recognizes that a corporate acquisition of a foreign target is only one of several forms of foreign direct investment.

Whether the investment is a joint venture, strategic alliance, or corporate acquisition, a foreign investor must be well-versed in matters such as the cultural, geographic, and legal environment in the host country of the proposed business venture. In the midst of a global M&A transaction, the buyer and its lawyers may become obsessed with target-specific minutia, without devoting sufficient time and energy into understanding the environment in which the buyer will be conducting its newly-acquired business venture. The buyer's lawyers (and other advisors), therefore, should lawyer the buyer to carefully consider the "big picture," that is, the important considerations in buying and operating a business in the host country. Understanding the forest is just as important as buying the trees! For the purposes of this article, however, the discussion will be limited to target-specific due diligence, with the understanding that there are many areas of overlap in the various matters to be considered.

Purpose of Due Diligence Review

In the M&A arena (domestic as well as international), the principal purpose of legal due diligence is to assist the buyer in understanding, from a legal perspective, the target's business in order to:

- Provide the buyer with the necessary information about the target to allow the buyer to make an informed investment decision with respect to the proposed acquisition;
- Identify, understand, and to the extent possible, quantify "deal breakers" and other risks and liabilities associated with the target's business;
- Verify the accuracy and completeness of the seller's representations and warranties to be set out in the acquisition agreement and other disclosures (including disclosures in the seller's disclosure schedules or letter);

- Place the buyer in a better position to negotiate (or if necessary, adjust) the purchase price and to tailor the appropriate representations and warranties and indemnities to be obtained from the seller in the acquisition agreement;
- Identify legal and contractual impediments to the completion of the proposed acquisition; including required governmental and other third party authorisations, consents, and approvals.

Cross-Cultural Considerations

In cross-border acquisitions, the buyer's lawyer must be sensitive to the fact that attitudes toward due diligence (as well as acquisitions in general) may vary from country to country. So, the first step is to find out how due diligence is dealt with and used in the foreign jurisdiction. If you regularly engage in cross-border transactions, you'll consult the relevant materials that you almost certainly keep in your knowledge database, separated country-by-country. If that's not available, then you should send someone to a good business or commercial library to find a few of the many articles written by foreign lawyers on due diligence in their particular country. Articles such as this one will only give you an overview of the generally relevant considerations. The key is to be specific and get the details on each jurisdiction with which you are dealing. Excellent sources include publications from the most law societies and professional bodies as well as from law firm networks such as Lex Mundi (US) and LawGroup UK. After your homework is done, consult your chosen foreign local lawyer for his or her input as it relates to the particulars of your deal.

Your homework will likely result in a generalisation that global due diligence practice may be separated (and most likely, oversimplified) into two schools: the practice from the U.S., U.K., and other common law jurisdictions (the "Anglo-Saxon" practice) and the practice by the rest of the world (represented principally by practitioners of some form of civil law). Under the common law practice, lawyers and their clients almost uniformly expect comprehensive due diligence to be conducted before the acquisition is closed or completed.

But such practice often raises two common issues with cross-cultural overtones: scope and timing of the due diligence review. In-depth investigation of the target and its

business affairs is accepted practice for lawyers in common law jurisdictions and their clients. In US M&A circles, for example, the common belief is that the buyer can never do enough due diligence. Such a comprehensive approach is grounded on the doctrine of *caveat emptor* - with a "let the buyer beware" environment, the burden of investigation is squarely placed on the buyer's shoulders. As such, targets and sellers are generally accustomed to having a team of the buyer's junior lawyers spend several weeks at the target's offices reviewing mountains of the target's more sensitive documents. In contrast, due diligence in other countries may be somewhat more abbreviated. For example, the matters normally covered by a US-style due diligence investigation may not be necessary elsewhere because in civil law countries many of those issues are covered by specific rules.

In some countries, comprehensive due diligence may be interpreted as intrusive, at best, and, at worst, a sign of mistrust or bad faith on the buyer's part. In Japan, for example, there is hesitation to conduct full-blown reviews in order to preserve the spirit of mutual trust between the buyer and the seller. Under the Japanese system, the burden of diligence is placed on the seller, not the buyer. The seller has a good faith duty to satisfy the buyer's reasonable and good faith expectations in a business transaction. Such an approach is grounded in a strong Japanese tradition of honesty in business dealings, and by the desire of Japanese businessmen to maintain long-term relationships. It is important to note that doing business on the basis of long-term relationships is common in the rest of Asia, as well as Latin America. A stark contrast to the *caveat emptor* approach!

Timing of the review should also be handled with a view toward cultural sensitivity. For the "Anglo-Saxon" lawyers, the due diligence review is generally conducted before the definitive acquisition agreement is signed. More commonly, the due diligence work is conducted during the negotiation of the definitive acquisition agreement. At the very least, the buyer's satisfaction with the outcome of its due diligence is made a *condition precedent* to the buyer's obligation to close the transaction. In many countries, however, it is not uncommon for due diligence to be completed as a condition subsequent to closing. As with the scope of due diligence, therefore, timing of the review

may result in a culture clash where one party views such a demand as a sign of mistrust or bad faith.

In cross-border acquisitions, the buyer's lead lawyer should consult with his local lawyer to determine that particular country's due diligence practice. The due diligence review could then be tailored to provide as much information and comfort to the buyer as possible but in a manner that is sensitive to local customs and practice. The buyer's lawyer must be culturally sensitive to the fact that not all countries are accustomed to the detail-oriented and document-intensive style of US or UK deal making. In most parts of Asia, for example, the "deal" is embodied in the harmonious relationship between the parties. For Westerners, the "deal" is typically embodied in the documents. Thus, the stage is set for a classic clash of cultures, which can usually be avoided with proper planning. Moreover, if there is more than one bidder for the target, a buyer may be at a distinct competitive disadvantage where the other bidder proves to be more culturally sensitive to the target's attitude toward the due diligence process.

Nevertheless, a buyer may not be comfortable with anything less than a comprehensive, pre-closing review. In that case, the buyer's lead lawyer may be faced with the challenge of conditioning not only the seller, but also the buyer's local lawyer, for the in-depth, pre-closing review. Fortunately, most sophisticated business lawyers around the world have experience with the US-style of due diligence and can easily facilitate the buyer's need for a comprehensive review.

Confidentiality, Export, and Exchange Controls

The very nature of due diligence contemplates disclosure of the target's more sensitive information. In domestic acquisitions, lawyers are accustomed to the target's need to maintain the confidentiality of the target's trade secrets and other proprietary information. In cross-border acquisitions, however, the buyer and target must also be well-versed in government imposed restrictions against exports of sensitive information to a foreign buyer. Such regulated information may typically include information relating to national security or defence, bank secrecy laws, and company trade secrets. For example, U.S. companies are prohibited from exporting

certain technical data to certain prohibited countries. As with other government imposed export restrictions, violations of the U.S. rules are subject to civil and criminal penalties.

While compliance obligations are generally imposed on the target, the buyer's lawyer (working with the target's lawyer) may need to develop special procedures to meet such requirements. Typically, confidentiality agreements will be entered into, and will be sufficient, to address these concerns. In some instances, a governmental license must be obtained prior to the target's disclosures. In other instances, the relevant government's restrictions may completely prevent a disclosure to the foreign buyer. Lawyer, therefore, needs to be aware of any such export restrictions and the obligations (including any penalties) they may impose. Failure to properly plan for these types of export restrictions will, at the very least, result in a delay in the acquisition.

While less important in these days of foreign investment liberalization, foreign exchange controls may represent traps for the unwary international dealmaker. Local government procedures requiring registration of foreign capital, controlling hard currency dividend repatriation, or dictating complex multi-tier exchange rates must be factored early on the negotiation and deal structuring process. Therefore, due diligence should take into account the relevant jurisdiction's restrictions on the inflows and outflows of hard currency and foreign capital, in general. To the extent possible, the likelihood of the imposition of foreign exchange controls should also be ascertained.

The Role of Representations and Warranties, Indemnities, and Legal Opinions

There are practical limitations as to what assurances one can obtain about the target company's business and assets.

In practice, the scope of a due diligence review is often limited by many factors such as time and expense considerations, access and availability, and cultural concerns. From a cost/benefit perspective, it may not be feasible to fly lawyers to every corner of the globe where the seller conducts business - and, at some point, the benefits to be gained from reviewing all the target's litigation matters (especially if the target is involved in significant product liability cases) will be

outweighed by the costs involved.

From an availability perspective, access to the target's facilities and employees will typically be limited by the seller, who's trying to minimise disruption of the target's daily operations. Also, public documents in some countries may take weeks or months to obtain (if they are available at all). It may therefore be difficult, if not impossible, to independently verify title to certain types of assets such as real property and related liens and encumbrances. From a cross-cultural perspective, the buyer's due diligence may be limited by the buyer's desire to preserve a spirit of mutual trust. Under circumstances where comprehensive due diligence review may not be feasible, cost-effective, or available, the buyer should consider, and take advantage of, the interplay of the seller's representations and warranties, indemnities, and legal opinions.

In practice, the seller's representations are commonly considered the cornerstone of the acquisition agreement, with three basic functions:

- to assist the buyer in understanding the target's business and in conducting due diligence;
- to allow the buyer to refuse to close the acquisition if the representations are not true at closing or completion of the transaction; and
- to enable the buyer to recover damages if a representation turns out to be false when made, whether or not the transaction closes.

The seller's representations may also function as a substitute for further due diligence where the information to be verified is unavailable or cannot be confirmed in a cost-effective manner. Acquisition agreements typically provide for contractual indemnities to be given by the seller for breaches of the seller's representations. Such indemnities (subject to the scope of the representations), provide the buyer with comfort that it will have a contractual remedy should material information with respect to the target's business, ownership, or other matters customarily covered by the seller's representations prove to be false or misleading.

It's best to understand the limitations of relying on the seller's representations in place of a comprehensive due diligence review. First, the seller's indemnification is a post-closing or completion remedy after the deal is done. Once the seller has been paid the full

purchase price, contractual indemnities are only as good as the seller's ability to meet its financial obligations. One practical way to deal with a concern about the ultimate recoverability of an indemnity claim is this: instead of paying the seller the full purchase price at closing or completion, it's common for the buyer to withhold a portion of the purchase price in escrow or some other form of fiduciary arrangement as a ready source of funds to compensate for losses suffered by the buyer for any number of reasons, including, the seller's misrepresentations.

Another limitation to relying on the seller's representations relates to whether an indemnity for money damages will sufficiently compensate the buyer's loss (notwithstanding the seller's credit worthiness). For example, lack of title to an important parcel of land or some mineral mining right may not be cured by money damages. Other problems that may be cured by an award of money damages may still be unwelcome to the buyer due to lost opportunity costs, i.e., the time, expense, and effort expended on a business that now may never prosper to the extent expected, or worse, may consume the buyer and its personnel in protracted litigation in foreign lands and judicial systems.

Legal Opinions

Legal opinions rendered to the buyer by the seller's or the target's lawyer may, to a limited extent, serve as a substitute for certain matters that would otherwise be subject to the buyer's due diligence review. Legal opinions should generally be limited to legal, as opposed to factual, matters. The scope of the legal opinion will typically cover most of the important legal issues that would be the subject of the buyer's due diligence, including, the target's due organisation and good standing, the target's capitalisation and ownership, existence of material litigation or impediments to the completion of the acquisition, and whether completion of the transaction will violate applicable laws. Essentially, reliance on a legal opinion from the seller's or the target's lawyer, in lieu of performing the buyer's own due diligence with respect to the matters covered, shifts the due diligence burden to the opinion giver.

Limitations to using a legal opinion as a substitute for further due diligence may arise from the fact that, in most jurisdictions, legal opinions only represent the opinion giver's professional judgement and are not to be construed as guarantees. Lack of a lawyer/client relationship or privity between the opinion giver (the seller's lawyer) and recipient (the buyer) may also preclude or severely limit the buyer's legal remedies against the opinion giver for opinion letter inaccuracies. Additionally, giving and receiving legal opinions in corporate acquisitions is customary in some countries (e.g., U.S. and England). In other countries (e.g., Korea, France, and The Netherlands), however, requests for legal opinions are not so commonplace and the buyer's lawyer should consult with local lawyer before launching a UK or US-style legal opinion request.

The seller's representations and indemnities and opinions of the seller's lawyer are best when used to supplement a comprehensive, pre-closing due diligence review of the target. In addition, such a review should be the preferred method to investigate the target's business because it provides the buyer with an advanced opportunity to minimise as much risk as possible.

Selection of and Working with Foreign Lawyers

It's important for the buyer to ensure that a competent foreign lawyer is engaged via a careful selection process and to ensure that the company's usual lawyers work with and supervise such associated lawyer diligently throughout the due diligence process and until the transaction is concluded. The following may serve as a practical checklist for locating, selecting, and managing foreign lawyer.

In locating foreign lawyer, it is important to have access to as many sources as possible. The following are some suggestions:

- Past experience - first of all, personal experiences are invariably the best source. Find out what you can about the foreign lawyer you're proposing to work with – records of past experiences and references will certainly help. An international lawyer's own "directory of foreign lawyers" is the most valuable asset available for selecting a foreign lawyer;
- International Bar Associations - if you regularly engage in cross-border transactions, you should ensure that your lawyer participates in one or more

international lawyers' associations. The largest of such organisations is the International Bar Association based in London. Others such as the Inter-Pacific Bar Association, Inter-American Bar Association, and LawAsia are prominent associations with a more regional focus;

- Referrals – a referral from another lawyer whose judgment is trusted is the next best alternative as a source of foreign lawyer;
- Overseas Offices – often, the larger overseas law firms will have an office in a large city near to you – contacting them and obtaining details about their overseas offices will be a more reliable source than a directory listing of an unknown foreign lawyer. But, they must be examined with the same care as any other foreign contact. In particular, inquire carefully about the local expertise of the overseas office, and the qualification of its lawyers who practice there;
- Network of Firms - networks or consortia of law firms are becoming more common and may be a valuable resource. But take care - just because a firm provides good legal service in one foreign jurisdiction does not mean it will necessarily choose its partners or associated firms in other countries wisely. Some of the more prominent networks include Lex Mundi, TerraLex, Interlaw and (in the UK) LawGroup;
- Directories - directory listings are occasionally an unavoidable last resort. A number of directories of lawyers are available. It's helpful, however, to learn how to use these directories before they're needed by reviewing the listings in each directory to determine which are the most inclusive and informative.

Accounting Considerations

In international acquisitions, the buyer and its lawyer must recognize early on in the process that there is no such thing as "global" generally accepted accounting principles ("GAAP"). The closest standard to global GAAP is the initiative sponsored by the London-based International Accounting Standards Committee (the adoption of which is voluntary by each country's accounting standards authority). Of course, the buyer's accountants will take the lead on accounting and financial matters. The lawyers, however, must also focus on the differences in GAAP in the relevant jurisdictions which may include different rules and treatment of items such as merger accounting (pooling v. purchase), amortisation of goodwill, inventory, and R&D costs. Proper due diligence by the buyer's lawyers and accountants, with appreciation of each

jurisdiction's GAAP, will enhance the buyer's ability to structure the deal (e.g., purchase price calculations and adjustments and earn-outs) and to avoid potentially disastrous pitfalls.

Conclusion

As more and more companies go global, cross-border acquisitions will continue to gain popularity as an alternate form of foreign market entry. Comprehensive legal due diligence, when properly conducted, provides much-needed assistance and comfort to the buyer's assessment of the risks and benefits associated with a cross-border acquisition of a foreign company. With proper attention to the interplay of relevant legal, cultural, and other strategic considerations, a buyer can effectively ensure that, at least from a legal perspective, it is getting what it bargained for in the world of cross-border acquisitions.

PART II: Buyer's Due Diligence Checklist (Cross- Border Acquisition)

Foreign Direct Investment Regulation

With respect to the laws of host country(ies) of the Company and its subsidiaries, determine the legal nature of:

- Foreign direct investment regulation, including:
- Host country definitions of nationals, residents, and non-residents;
 - Foreign direct investment notification and screening controls (e.g., national security screening);
 - Foreign ownership controls, including ownership percentage limitations, form of investment controls (e.g., equity, debt, or other investment interest), and sector controls (e.g., sensitive areas and industries such as national security, aviation, broadcasting, television, newspaper publishing, banking, and natural resources);
 - Share transfer restrictions;
 - Nationality or residency requirements for company directors and others;
 - Foreign investment incentives; and
 - Local content (or rules of origin) requirements for the Company's products (currently being sold and to be sold post-acquisition).

- Foreign exchange controls including:
 - Restrictions on transfers of money into or out of the host country;
 - Exchange rate controls;
 - Repatriation of profit controls;
 - Hard currency availability and controls; and
 - Foreign exchange reporting requirements.

Company Organisation and Ownership

- Organisational and ownership charts or other similar information relating to the Company and its subsidiaries, including all corporations, limited liability companies, partnerships, joint ventures or other entities in which the Company or any subsidiary owns any interest, directly or indirectly, together with a description of the nature of such interest;
- Charter or organisation documents of the Company (such as the Memorandum and Articles of Association of a UK company) and its material subsidiaries and any amendments thereto;
- Bylaws or regulations of the Company and its material subsidiaries, and any amendments thereto;
- Minutes of directors' and shareholders' meetings of the Company and its material subsidiaries since an agreed specified date;
- List of shareholders and shares issued and outstanding for the Company and its material subsidiaries;
- Stock transfer books of the Company and its subsidiaries;
- Agreements among the Company, its subsidiaries, and their respective shareholders or third parties relating to voting, disposition, or acquisition of securities of the Company and its subsidiaries;
- All quarterly, annual, and other periodical reports and other communications to the shareholders of the Company and its material subsidiaries;
- Schedule of all jurisdictions in which the Company or any material subsidiary is qualified to do business or otherwise operating;
- Good standing and tax certificates for the Company and its material subsidiaries in the relevant jurisdictions in which the Company or its material subsidiaries have offices or do business;
- All documents relating to anti-takeover measures including any shareholders' rights plans;

- All other material agreements and documentation since an agreed specified date to which the Company or its subsidiaries is or was a party, relating to any business combination or any material acquisition or disposition of assets, whether or not consummated;
- All documentation related to the acquisition of the Company by Seller, including, without limitation, any acquisition agreement, any other agreement entered into in connection with or pursuant to such acquisition agreement and all documentation related to the financing of the acquisition or any security given in connection with it.

Affiliate Agreements

- A list of all affiliates and associates of the Company, all shareholders of the Company and details of holders of more than 5% of the capital stock of the Company or any material subsidiary and all directors and officers of the Company and each of its affiliates and associates;
- Copies of all written agreements and summaries of all unwritten arrangements or understandings between the Company and any of the parties listed above or any of their affiliates or associates since an agreed specified date, whether or not presently in effect.

Examples of the type of documents described above include, without limitation:

- Agreements with respect to apportionment or sharing of tax liability;
- Indemnification agreements;
- Leases;
- Guarantees and Indemnities;
- Consulting, management or other service agreements;
- Agreements with respect to shared facilities and functions;
- Purchase and supply contracts; and
- Licenses.

Indebtedness and Obligations

- Schedule of all indebtedness owed by the Company or its subsidiaries in excess of an agreed de minimus level;
- Instruments evidencing indebtedness or lines of credit, whether or not for borrowed money, as to which the Company or any subsidiary is the borrower, or to which any of their respective assets may be subject, and any correspondence with any lenders pertaining to amendments or waivers

regarding such arrangements;

- All security agreements, trust indentures, mortgages, deeds of trust, guarantees, instalment purchase agreements, finance leases, letters of credit, contingent obligations and indemnities and other documents (including agreements relating to acquisitions involving the Company or subsidiaries) to which the Company or any of its subsidiaries may be held liable in whole or in part or to which any of their respective assets may be subject;
- Documents relating to any loans made by the Company or any subsidiary to any officer, director, or principal shareholder of either the Company or any such subsidiary or any affiliate;
- Outstanding letters of credit and performance and other bonds issued by or for the account of the Company or any subsidiary;
- Correspondence with and reports to lenders since an agreed specific date, including all compliance reports submitted by the Company or its subsidiaries or independent accountants;
- Recent compliance certificates concerning satisfaction of covenants contained in the Company's obligations for borrowed money or other debt and any other debt covenant compliance calculations, if applicable.

Government Regulations

- Copies of all licenses, permits or other authorisations issued to the Company or any subsidiary by any government agency, with material conditions, if any;
- Copies of all reports to or correspondence with any national, state or foreign regulatory authority with respect to other Company or any subsidiary since an agreed specified date;
- Any reports, notices or correspondence relating to any purported violation or infringement by the Company or any subsidiary of any government regulation, including, but not limited to, the areas of competition law or restricted trade practices, equal opportunity, occupational safety and health and environmental protection.

Taxation

- Name and address of the Company's tax advisor (including partner in charge);
- All national, state and other tax returns filed by or with respect to the Company or any subsidiary since an agreed specified date, to the relevant tax authority - such as the Inland Revenue (UK), or Internal Revenue Service (US) and all related correspondence;
- All closing letters or other materials relating to the initiation or termination of a dispute with relevant governmental authorities (foreign or domestic) regarding matters of taxation;
- Correspondence, assessments and audits since an agreed specified date with respect to VAT or similar sales taxes;
- Documents relating to any group registration arrangements for VAT, accounting and payment of VAT and any penalties or interest charges imposed thereon, requirements to give security for VAT;
- Information regarding any inter-company transactions involving the Company, and any other inter-company accounts which could be liquidated upon the Company departure from the consolidated group;
- Information regarding inter-company distributions and obligations involving the Company.

Financial Data

- All documents filed with the relevant securities regulatory authority, the London Stock Exchange and/or the US Securities and Exchange Commission by the Company or the Seller, as the case may be, since an agreed specified date;
- All audited or unaudited financial statements of the Company since an agreed specified date, including both consolidated and consolidating balance sheets and income statements, and reports by independent accountants with respect to such statements, if any;
- All reports and management letters from the auditors to the Company and representation letters by the Company to its auditors and related correspondence since an agreed specified date;
- Internal budgets, forecasts and projects prepared since an agreed specified date, including internal memoranda describing the assumptions used in preparing such budgets and projections;
- Inventory and accounts receivable review;

- Sales, operating income, and assets by country;
- Detail of sales, cost of goods sold, marketing, and research and development by product;
- Detail of pro forma balance sheet line items and contingent liabilities;
- Detail of foreign currency adjustments;
- Detail of reserves;
- Review of major operational and accounting changes over the past (say 5 years);
- Detail on impact of recently adopted and proposed rules of relevant national accounting standards authority (such as the International Accounting Standards Committee, London; US Financial Accounting Standards Board);
- Name, address and other contact details of the Company's auditors (including partner in charge).
- Management and Employees
- Organisation charts and biographies of key employees of the Company and its material subsidiaries;
- All employment and golden parachute agreements, consulting agreements, and union or collective bargaining contracts (including side letters). Please specifically identify when each is due for re-negotiation;
- Any written employment manual or other literature regarding terms and conditions of employment generally furnished to employees;
- Files documenting compliance with relevant jurisdiction's employee welfare and pension regulatory authorities;
- All agreements with present or former employees with regards to confidentiality, assignment of intellectual property rights, and/or non-competition, and all such agreements between employees and former employers;
- All agreements between the Company and employees of the Company or any subsidiary, including agreements with respect to loans or extensions of credit (other than advances of expense in the ordinary course) and with respect to indemnification;
- List of officers and other key personnel and their annual pay and benefits;
- Schedule of all options and stock appreciation rights (indicating whether statutory or nonqualified), exercise price, and when exercisable;
- Full details and valuations and actuarial reports of employee benefit and pension and retirement plans to include:
 - Pension
 - Stock options or stock appreciation rights

- Bonus
- Profit-sharing
- Deferred compensation
- Equity participation
- Retirement
- Medical reimbursement
- Life Insurance
- Disability
- Savings
- Policies on termination notice, insurance, holiday, and sick leave
- Name and address of the Company's employee benefit advisers and actuaries.

Legal Proceedings

- List of all pending or threatened litigation, arbitration proceedings, or governmental investigations and proceedings (domestic or foreign), including parties, damages and other remedies sought, nature of action, amount of insurance and whether any insurer has disclaimed coverage or issued a reservation of rights;
- All pleadings and other important documents relating to all material litigation, arbitration, and governmental proceedings;
- List of all orders, writs, decrees, injunctions, judgments or rulings by any court, arbitration panel, or governmental agency which may bind the Company or any subsidiary;
- Correspondence from lawyers to auditors concerning litigation and other legal proceedings since an agreed specified date;
- Details of any settlements, consent decrees, or other agreements in connection with litigation and other adversarial proceedings made since an agreed specified date or any waiver or agreement cancelling any claim or right of substantial value to which Target or any of its subsidiaries is a party or is bound, requiring or prohibiting any future activities;
- All correspondence relating to any alleged infringement of any patent, trademark or other intellectual property rights;
- All correspondence relating to any threatened governmental investigation or alleged violation of law or regulation.

Properties

- A schedule of all property (freehold or leasehold) owned by the Company or any subsidiary, indicating in each case the ownership, location, use and material characteristics (including term, renewals, and rent obligations) of such property;
- Copies of mortgages on property owned by the Company or any subsidiaries;

- Existing title insurance policies or abstracts of title, including all deeds and related instruments, to property owned by the Company or any subsidiary;
- Copies of leases or subleases on all property leased by or to the Company or any of its subsidiaries, and all files containing correspondence regarding alleged defaults of such leases with lessors or lessees;
- Any valuation reports on properties;
- Copies of any existing surveys with respect to all property owned or leased by the Company or any of its subsidiaries;
- A schedule of all material equipment used by the Company or any of its subsidiaries in its business, indicating the ownership and nature of such equipment and the material terms of any finance lease or security agreement pursuant or subject to which such equipment may be leased or owned.

Operational Matters

- All joint venture, strategic alliance, partnership, management, consulting, and research and development agreements to which the Company or any subsidiary is a party;
- List of sources of supplies of principal inventory items purchased since an agreed specified date;
- Copies of purchase and supply contracts and description of their terms, including price determination, conditions, special concessions, etc.;
- All marketing, sales, franchise, distribution, commission, agency, or representative agreements, and a list of independent sales persons or distributors;
- List of customers, by product, who since an agreed specified date have accounted for or will account for in excess of an agreed percentage of the revenues in any period (say 6 months) of the Company or any subsidiary;
- Description of stock management procedures;
- A list of the primary competitors of the Company;
- Standard forms used in connection with the sale of Company products since an agreed specified date, including, without limitation, purchase orders, sales orders, quotation forms, etc.;
- All documents since an agreed specified date creating any express or implied warranties with respect to products manufactured or distributed by the Company;

- All written agreements with respect to advertising, promotion or public relations and copies of all advertising copy used since an agreed specified date;
- Any written description of credit or collection policies.

Insurance Policies

- All contracts, policies and certificates of insurance, including without limitation, the following coverage:
 - General liability
 - Products liability
 - Fire or other casualty
 - Directors' or officers' liability
 - Worker's compensation
 - Employee life insurance
- Any reports or correspondence concerning the adequacy of such coverage, reservation of rights, or the denial of coverage under such policies.

Material Agreements

- Default notices under any material contracts, or summaries of similar occurrences affecting or which may be reasonably expected to affect, Target or its subsidiaries;
- Any other material contract or agreement not listed in this request, including, without limitation, any agreement requiring the consent of a third party to the proposed transactions, or any agreement as to which a default may occur as a result of the proposed transactions, and also including, without limitation, any agreement or understanding restricting in any way competition between the Company and any actual or potential competitor and any default notices under any material contract.

Environmental Matters

- All internal reports concerning environmental matters relating to current or former properties of the Company and its subsidiaries;
- Copies of any statements or reports given by the Company or any of its subsidiaries by any national, state, or local department of environmental regulation or any similar federal, state, or local regulatory body, authority or agency;
- All notices, complaints, writs, summonses or similar documents sent to, received by or served upon the Company or any of its subsidiaries by any national, state, or local department of environmental regulation or any similar national, state or local regulatory body, authority or agency.

Marketing and Pricing Practices

Copies of all items requested below, since an agreed specified date:

- Legal complaints or letters of complaint from any customer or competitor concerning pricing practices;
- Any business plans, marketing plan documents, sales forecasts, etc. prepared in connection with the development or implementation of any marketing plan or strategy, including documents discussing pricing, price trends, off-list pricing, whether historical or forecasted;
- Any call reports prepared in connection with visits to any customer, supplier or distributor;
- Any "competitive price" or "competitive information" requests or reports from sales representatives, etc.;
- Price lists, whether published or unpublished;
- Announcements to the trade regarding pricing or promotional programmes;
- Documents sufficient to show standard terms and conditions of sales and purchases;
- Policies regarding pricing allowances, such as discounts, co-operative advertising, credit, etc.

Intellectual Property

- A list of all trademarks, service marks, trade names, copyrights, and patents owned or used by the Company and any of its subsidiaries and all other material intellectual properties of the Company and any of its subsidiaries;
- A non-legal, technical assessment and inventory of specific technology (the "Specified Technology"), its development history, and success in the marketplace, including feasibility studies for adaptation to contemplated uses;
- A list of authors, contributors, independent contractors, and employees involved in the development of the Specified Technology, and any (or lack of) related employment/development agreements;
- A list of all proprietary products not protected by patents and steps taken to ensure the secrecy thereof;
- Any and all letters patent and certificates of registration for the Company's intellectual properties, including:
 - any national registration;
 - any state or other provincial registrations; and
 - any foreign registrations.

- Documentation sufficient to evidence the following:
 - any pending applications to register a trademark, service mark, copyright, or patent in the relevant jurisdiction's intellectual property registration authority [e.g., UK or US Patent and Trademark Office] (the "Trademark Registry");
 - any pending applications to register a trademark, service mark, copyright, or patent with any state [or provincial] agency or office;
 - any ongoing opposition or cancellation proceedings in the Trademark Registry;
 - any periodic affidavits or renewals required to be filed with the Trademark Registry;
 - any refusals to register any trademark, service mark, copyright, patent, or other intellectual property right (national, state, or foreign);
 - any petitions to cancel, oppose, or re-examine any trademark, service mark, copyright, patent, or other registered intellectual property right (state, federal, or foreign);
 - all trademark, service mark, copyright, patent, know-how, technology or other intellectual property license agreements to which the Company or any of its subsidiaries is a party;
 - all assignments of trademark, service mark, copyright, patent, know-how, technology or other intellectual property rights by or to the Company or any of its subsidiaries;
 - all challenges or claims made by or on behalf of the Company or any of its subsidiaries with regard to the Company's or any of its subsidiaries' rights in its trademarks, service marks, copyrights, patents, know-how, technology or other intellectual property, including any lawsuits brought with respect thereto; and
 - all challenges or claims made by any third party with regard to the Company's or any of its subsidiaries' use or ownership of its trademarks, service marks, copyrights, patents, know-how, technology or other intellectual property or rights therein, including any lawsuits brought with respect thereto.
- All correspondence between the Company or any of its subsidiaries and the Trademark Registry or between the Company or between any of its subsidiaries and any state office or agency with regard to the items listed above;
- All other agreements affecting the Company's or any of its subsidiaries' trademarks, service marks, copyrights, patents, know-how, technology or other intellectual property or rights therein (e.g., providing for the payment or

receipt of royalties);

- All confidentiality, secrecy, employee assignment of inventions, and other agreements to which Target or any of its subsidiaries is a party or is bound, and which relate to proprietary information or intellectual property rights of Target, any of its subsidiaries, or any third party.

Miscellaneous

- Any reports to the Board of Directors of the Company or its subsidiaries regarding any illegal payments or questionable activities, including payments to governmental officials;
- Recent analyses of the Company or its industries prepared by investment bankers, engineers, management consultants, accountants or others, including marketing studies, credit reports and other types of reports, financial or otherwise;
- All significant recent management, marketing, sales or similar reports relating to broad aspects of the business, operations or products of the Company or its subsidiaries;
- All press releases issued by the Company or any significant subsidiary since [insert specific date];
- All recent articles or brochures relating to the Company or its subsidiaries or any of their products, services or material events;
- Any other documents or information which, in your judgment, are significant with respect to any portion of the business of the Company or which should be considered and reviewed in making disclosures regarding the business and financial condition of the Company to prospective investors.

Further Information

This guide is for general interest - it is always essential to take advice on specific issues. We believe that the facts are correct as at the date of publication, but there may be certain errors and omissions for which we cannot be responsible.

If you would like to receive further information about this subject or other publications, please call us – see our contact details on the next page.

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