

China-Outbound/US-Inbound M&A



Recently, Anbang terminated its attempt to purchase Fidelity and Guaranty after it failed to obtain certain required US regulatory approvals. **Messrs Sean M Keyvan** and **Greg Oguss** of **Sidley Austin LLP** give an insight into these required US regulatory approvals and how foreign acquirers can navigate them successfully.



Mr Sean M Keyvan



Mr Greg Oguss

In recent years, Chinese acquirers have been involved in some of the most notable M&A transactions in the US insurance industry.

Representative transactions include Fosun's acquisitions of Meadowbrook Insurance Group and Ironshore, China Minsheng's acquisition of Sirius International Insurance Group, and China Oceanwide's pending acquisition of Genworth Financial, which, as of this writing, remains subject to US regulatory approval.

In addition to those consummated and still-pending transactions, in April 2017, Fidelity and Guaranty Life (F&G) announced the termination of its proposed sale to Anbang Insurance Group, whose announcement came after Anbang failed to obtain certain required US regulatory approvals over a 17-month period following signing.

As Anbang's fateful attempt to purchase F&G illustrates, Chinese investors contemplating US acquisitions should be cognisant of the general US insurance regulatory framework and specific regulatory requirements that must be successfully navigated in order to consummate such transactions.

Form A approval process

In the US, the primary responsibility for insurance regulation rests with the individual states rather than the federal government.

Any person or entity seeking to acquire control of a US insurance company must file and receive an approval of what is known as a "Form A" statement (a change of control application) from the target's home state regulator and, potentially, regulators in certain other states in which the target does business.

In reviewing a Form A application, state regulators will consider the qualifications and fitness of the acquirer and its management, the acquirer's future business plans for the target, any potential anti-competitive effects of the proposed transaction, and whether the transaction will be consistent with best interests of the target's policyholders and the insurance-buying public.

Anbang's unsuccessful attempt to purchase F&G

While Fosun and China Minsheng have been successful in navigating the Form A approval process, as noted above, Anbang did not obtain Form A approvals from regulators in New York and Iowa within the time-frame allowed under the merger agreement.

According to reports, regulators in those states were unwilling to grant approvals due to Anbang's failure to adequately respond to certain questions about its complex ownership structure.

Transparency issues

Given the amount of media attention that the F&G transaction has received, some US insurance regulators may harbour transparency-related concerns when presented with future Form A applications filed by certain Chinese acquirers.

As a result, sellers in insurance company transactions likewise may have concerns regarding the ability of Chinese acquirers to obtain approvals from US regulators, which, in turn, could affect sellers' assessments of closing certainty associated with proposals by Chinese bidders relative to those of other bidders.

To pre-empt tensions with regulators regarding transparency and address closing certainty concerns of sellers, in certain cases, post-closing ownership of a target insurance company may be structured in a manner that simplifies the ultimate control structure and removes from the state regulators' review, persons associated with the acquirer that will not have input in decisions involving the management or strategic direction of the target insurance company.

More generally, acquirers should anticipate negotiations with regulators regarding requirements and restrictions on the acquirer's operation of the target post-acquisition, such as restrictions on the payment of dividends, enhanced scrutiny of affiliated transactions, commitment to maintain a heightened capital level at the target and/or to provide capital support, and commitment to maintain employees in the state.

Restriction on acquirers that are owned or controlled by governments

In addition to the Form A requirements, more than half of US states have restrictions prohibiting insurers owned or controlled by a domestic or foreign government from being licensed to conduct insurance business within their borders.

Due to a perception among US regulators that there is widespread government ownership of private Chinese companies at various levels, Chinese acquirers should expect to face inquiries on this front from regu-

lators during the Form A process. In the event that an acquirer has some level of government ownership, certain structuring solutions may exist to allow the consummation of the transaction to comply with such statutory restrictions.

Committee on Foreign Investment in the United States (CFIUS)

In addition to seeking state insurance regulatory approval, the parties to an acquisition of a US-based insurance company may also decide to seek approval of the transaction by the Committee on Foreign Investment in the United States (CFIUS), an inter-agency US government committee that reviews foreign investments in US businesses to determine whether they pose a threat to US national security.

In assessing whether a proposed transaction gives rise to national security concerns, CFIUS will examine the risk associated with the potential buyer and security vulnerabilities associated with the US business being acquired.

One area of concern is whether the buyer is state-owned or is otherwise subject to state influence. Generally, CFIUS is less concerned with private Chinese entities as buyers, as opposed to state-owned entities.

Other key areas of focus by CFIUS are whether (i) the transaction will give the buyer access to classified or sensitive government information; (ii) the US business has US government contracts; (iii) the transaction will give the foreign investor access to national security-related infrastructure; (iv) the US business possesses sensitive technology; or (v) the US business is located near sensitive military or intelligence installations.

Perhaps more relevant for insurance company targets is CFIUS' interest in transactions that could enable sensitive protected health information (PHI) or personally identifiable information

(PII) to be exposed to foreign-controlled entities.

Costs and benefits of going to CFIUS for approval

Because CFIUS filings are voluntary, foreign acquirers must weigh the costs and benefits of making a formal filing.

If the parties submit a CFIUS notice, CFIUS has the authority to prevent the transaction or require prescriptive measures designed to mitigate the risk of the transaction to US national security, such as a requirement to dispose of, or wall off, aspects of the target that implicate US national security concerns.

If the parties do not submit a formal notice, CFIUS could review the transaction post-closing and potentially take remedial action, including ordering divestment of the US business. The parties can seek to minimise the risk of post-closing mitigation measures by voluntarily adopting procedures and policies to address potential areas of concern.

Need to be transparent with regulators

Notwithstanding heightened scrutiny by US regulators of Chinese investors seeking to acquire US-based insurance companies, investment by Chinese acquirers in the US is possible and welcomed by many regulators, particularly many state regulators looking to attract foreign investment into their local economy.

The key lesson to be learned from prior Chinese investors who have sought to acquire US-based insurance companies is to be transparent in responding to questions from regulators and to develop a well thought out business plan to be shared with the regulators during the approval process. 

Mr Sean M Keyvan is a partner and leader of the insurance M&A sub-practice group of Sidley Austin LLP. Mr Greg Oguss is an associate in the firm's insurance transactional practice.