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Cross-Border Deals Plentiful But Challenging

As U.S.-based companies continue to be acquisition targets for foreign investors, cross-border investments can become complicated.

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The U.S. wind sector has witnessed an influx of investment from foreign companies in the last few years. Despite the recent market downturn, the drivers of this trend remain in place.

Specific factors driving recent foreign investment into the U.S. wind sector include the size and growth potential of the U.S. renewable energy market; major tax incentives from federal and state governments to support renewable development; other U.S. regulatory and legislative policies favoring renewables, such as state renewable energy portfolio standards; and a relatively weak U.S. dollar.

A number of events within the past few months have further strengthened these drivers. In addition, legislation is currently under consideration by Congress to create a carbon cap-and-trade system and a federal renewable electricity standard. All of these factors mean that U.S. wind companies and their assets will remain appealing targets to foreign investors.

Regulatory approvals

The transfer of ownership of a U.S. renewable company typically requires anti-trust, securities and various energy regulatory approvals. Domestic purchasers are typically subject to some or all of these approvals, but in the case of a foreign buyer, there can be additional approvals or filing requirements that would not apply to a domestic purchaser.

Under the Exon-Florio Amendment to the Defense Production Act of 1950, the president, through the Committee on Foreign Investment in the United States (CFIUS), is authorized to review transactions in which a foreign person acquires, or could acquire control of, a U.S. company or assets and may block the transaction if there is evidence that, in the exercise of such control such foreign person could impair U.S. national security. Filings with CFIUS are voluntary, but CFIUS can initiate review of a covered transaction unilaterally, and the president retains the power indefinitely to nullify the transaction. If parties file within 30 days, the CFIUS must review and clear the transaction or conduct a 45-day investigation, after which it makes a recommendation to the president.

Factors considered by CFIUS include the potential for national security-related effects from the foreign acquisition of U.S. critical technologies and/or infrastructure, including major energy assets. This process still does not mandate notification to CFIUS or mean that if notified, CFIUS is certain following the initial review to investigate every energy transaction. However, parties to a transfer of control in any energy concern should at least consider notifying CFIUS, given the uncertainty that CFIUS could later initiate review and require the completed deal be dissolved.

Under the Trading with the Enemy Act and several other laws, the U.S. government can block a transaction by a U.S. company with specified countries, individuals and companies on lists maintained by the U.S. Treasury Department, the Commerce Department and the State Department and may seize assets that are the subject of such a transaction. Since the lists can be updated at any time, any U.S. company contemplating a sale to any non-U.S. person should require satisfactory evidence that the buyer and its affiliates are not on these lists.

U.S. export control laws also prohibit the unlicensed transfer to anyone overseas of information related to certain products and technologies on alert lists published from time to time by the State Department, the Commerce Department and the Department of Energy (DOE). The products and technologies on the most current alert lists have military applications or civilian and military dual-use applications and do not include products and technologies that are commonly used in wind projects.

Still, parties considering the acquisition by a foreign person of a U.S. wind company that manufactures or is developing innovative or pilot technology or uses specialty materials should, at a minimum, check the most current technology alert lists prior to the prospective transaction.

Foreign ownership of U.S. land

There are federal laws pertaining to foreign ownership of land in the U.S. that potentially affect foreign investment in U.S. renewable companies. The Agricultural Foreign Investment Disclosure Act requires a foreign person who acquires or transfers any interest in U.S. agricultural land to file a report with the U.S. Agriculture Department within 90 days.

The International Investment and Trade in Services Survey Act requires a report to be filed with the U.S. Department of Commerce within 45 days if any foreign person acquires 10% or more in a U.S. business enterprise (including business enterprises that own real estate in the U.S.). The Foreign Investment in Real Property Tax Act of 1980 generally permits the U.S. to impose a tax on the amount realized by a foreign person with respect to the sale of a U.S. real property interest (which includes real property located in the U.S. and stock of certain U.S. corporations).

The tax generally is collected, in part, by requiring the purchaser of the U.S. real property interest to withhold 10% of the sales price. Thus, in addition to the possibility of having to withhold proceeds from the seller on the initial acquisition by a foreign investor, the foreign investor may have proceeds withheld from it when it sells the U.S. real property interest. In addition, there may be tax-filing requirements.

In addition to federal requirements, some U.S. states restrict ownership of agricultural land to U.S. citizens and permanent residents and require that a company owning land zoned for agricultural use be at least majority-owned by U.S. citizens or permanent residents. Treaties between the U.S. and a foreign country may override such state laws. Prospective foreign buyers should carefully check the relevant state and local laws where the target owns real property.

Unless a foreign buyer already has a suitable team in place through a prior acquisition, it will likely desire to retain key members of the existing U.S. management team.

If these are at-will employees or they benefit from change-of-control provisions in their employment agreements that would be triggered by a sale, the prospective buyer should attempt to make sure that key members of target management are willing to stay post-sale.

This dynamic is also present in most domestic mergers and acquisitions (M&A) transactions, but cultural differences may be more pronounced with a foreign buyer.

Most wind projects are located in rural communities and provide jobs, extra income for farmers and ranchers, and local property tax revenue. In turn, the development of these projects is dependent on support from local and state governmental authorities, farming and ranching interests, and economic development commissions. A change in ownership of a project may require some form of local consent or approval.

Even if a change in ownership does not require a formal local consent or approval, local stakeholders may seek other ways to hold up development of a project if there is concern that a new owner may change plans in a manner that reduces benefits to the host community.

Again, these dynamics do not differ from the dynamic in a domestic M&A deal, but there could be enhanced suspicion in rural communities of a non-U.S. owner.

Foreign bidders should also be aware that the relevant transaction agreement and execution tactics vary from similar documentation and tactics in the buyer's home country. Fortunately, the basic documentation of M&A transactions is becoming more standardized around the globe, but new U.S. market entrants should still be prepared for some differences.

Cross-border M&A transactions for wind companies can be challenging. However, the drivers are in place for more deals, and with planning and attention, parties to these deals can efficiently overcome these challenges. NWP

Sellers should ensure that non-U.S. buyers are not on any government alert lists.

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