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China Practice Newsletter

Holland & Knight is a U.S.-based global law firm committed to provide high-quality legal services to our clients. We provide legal assistance to Chinese investors and companies doing business or making investments in the United States and Latin America. We also advise and assist multinational corporations and financial institutions, trade associations, private investors and other clients in their China-related activities. With more than 1,300 professionals in 28 offices, our lawyers and professionals are experienced in all of the interdisciplinary areas necessary to guide clients through the opportunities and challenges that arise throughout the business or investment life cycles.

We assist Chinese clients and multinational clients in their China-related activities in areas such as international business, mergers and acquisitions, technology, healthcare, real estate, environmental law, private equity, venture capital, financial services, taxation, intellectual property, private wealth services, data privacy and cybersecurity, labor and employment, ESOPs, regulatory and government affairs, and dispute resolutions.

We invite you to read our China Practice Newsletter, in which our authors discuss pertinent Sino-American topics. We also welcome you to discuss your thoughts on this issue with our authors listed within the document.

霍兰德奈特律师事务所是一家位于美国的全球性法律事务所，我们致力于向客户提供高质量的法律服务。我们向在美国及拉丁美洲进行商业活动或投资的中国投资人及公司提供他们所需的各类法律协助。我们也向跨国公司、金融机构、贸易机构、投资人及其他客户提供他们于其与中国相关活动中所需的咨询和协助。我们在 28 个办公室的 1300 多名对各领域有经验的律师及专业人员能够协助客户处理他们在经营或投资过程中所遇到的各种机会及挑战。

我们向中国客户及从事与中国有关活动的跨国客户提供法律协助的领域包括国际商业、企业并购、科技法律、医疗法律、房地产、环保法律、私募基金、创投基金、金融法律服务、税务、知识产权、私人财富管理法律服务、信息隐私及网络安全、劳动及雇佣法律、员工持股计划、法令遵循及政府法规、及争议解决。

我们邀请您阅读刊载我们各作者就与中美有关的各议题所作论述的 China Practice 期刊。我们也欢迎您向本期刊的各作者提供您对各相关议题的看法。

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Look before you Leap: Investing in California Real Estate

By Douglas A. Praw

In 2016, overseas real estate investments from China totaled $33 billion. The United States was by far the most popular target, with $14.3 billion flowing to residential, commercial and industrial property acquisitions. Hong Kong came in second with a relatively small $5.32 billion. Between 2010 and 2015, China invested $350 billion in American real estate, with $93 billion of that going into single- and multi-family residences. There are number of places to invest throughout the country, but according to a report by global real estate group JLL, Los Angeles supplanted New York in 2017 as the top U.S. city for foreign investors, based on more than $23 billion invested by foreign nationals in L.A. real estate. That year Los Angeles vaulted to second place behind London, beating out international capitals including Paris and Tokyo as a top destination for foreign investors. Los Angeles, Southern California, San Francisco, Silicon Valley and San Diego continue to remain attractive to foreign investors, looking to deploy capital abroad. This article focuses not on where to invest, but certain consideration to think about when investing in California real estate.

SITE SELECTION

Site selection is critical when it comes to selecting appropriate real estate investments. However, site selection varies for different asset classes, each of which brings with it their own investment returns. U.S. and foreign investors typically have separate criteria for their particular investments. For example, some domestic, privately held real estate investment trusts (REITs) have allocations and separate funds for office buildings, apartment projects and retail centers. Each brings with it its own target returns. These companies also have specific geographic areas in which they invest. Certain funds prefer major metropolises, including New York, San Francisco, Chicago and Los Angeles, while others eye cities on the move, such as Palo Alto and Irvine. Others are more speculative, investing in secondary and tertiary areas such as some areas in Orange and San Diego counties.

Investing in the various asset classes brings with it another complexity if the investor wants to develop the asset, instead of buying an asset that already is stabilized. In-place projects usually carry lower returns as opposed to development projects because there is less risk in the execution of the project.

It is important to recognize the nature of the returns that the investors are looking for and how to adjust the investment based on those returns.

LETTER OF INTENT

Once the investors have selected a desired location and identified the seller of the property, investors move toward a letter of intent. A letter of intent is important as it sets forth the salient deal points in a nonbinding document that serves to set the basis for the negotiation of the definitive deal documents. Typical letters of intent for the acquisition of real estate include a discussion of the purchase price, the nonrefundable deposit, the length of the buyer's due diligence period, the closing date, and any nonstandard features that need to be addressed in the purchase contract. Usually, the only binding terms of a letter of intent are that the parties will keep the transaction and any materials exchanged between the parties confidential and that the seller will only offer the property to the prospective buyer until it is clear that there is not a deal to be had between the parties.

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ACCESS AGREEMENT

Often the negotiation of a definitive purchase and sale agreement takes time. However, as the adage goes, "time kills deals," so to maintain momentum, the parties negotiate and execute an access agreement. This document allows the prospective buyer to go onto the property to start its due diligence investigations. It also sets the confidentiality framework for the sharing of seller's property related documents with the prospective buyer. From the seller's perspective, it wants to make sure that the buyers carries insurance to protect the property if the buyer damages it during its investigations. It also wants to be indemnified for claims arising from buyer's investigations, meaning that if someone is injured in the course of the buyer's investigations, the seller does not want to be held responsible. Finally, the seller wants to ensure that any access by the buyer is subject to the existing rights of tenants on the property, so that the buyer does not disturb the normal course of business operations on the property. If this transaction involves the development of the property, a seller may require that the prospective buyer not interact with the local government agency without the seller present.

As for the buyer, it is critical to be able to access the property to determine its condition, interview tenants and become familiar with the property.

Typically, the term of an access agreement runs until the purchase and sale agreement between the parties is signed. Often a deadline is selected for when the purchase agreement must be signed or the access agreement terminates.

PURCHASE AGREEMENT

The purchase agreement is the definitive document between the parties that governs the relationship between the buyer and seller of real property and dictates the terms upon which seller will sell the property and buyer will buy the property. While each purchase agreement is generally unique, there are certain constants as far as how the document is structured and certain key issues that are negotiated in every document.

Description of the Property. The definition of property is so much more than just the real estate. As the buyer, you want to make sure that the "property" includes the personal property, the improvements, the contracts that exist on the property and the intangible property. Intangible property includes any plans, permits, entitlements and warranties that are associated with the property. This is critical if the investor is buying a development project, meaning that it is buying raw land with the hope of building something on it. If the project is an ongoing concern, the "property" also should include the leases with tenants at the property.

Closing Documents. A part of the purchase agreement will address the documents that are to be delivered at the closing and instructions that indicate to the escrow holder how it should conduct the closing. The critical documents are as follows:

Grant Deed – In California, unlike other jurisdictions, the common form of conveyance document is the "grant deed." A grant deed provides certain guarantees to the new owner, including that the grantor actually owns the property. A buyer should couple this coverage with title insurance. Title insurance is provided by licensed title companies and insures not only that the grantor/seller owns the property, but upon conveyance, the buyer will own the property, subject to only certain other rights of third parties.

Assignment of Contracts – To convey the real estate and the other components of the "property," a buyer should require that the seller assign the contracts, including the leases, pursuant to an assignment of contracts. If there are tenants at the property, an assignment of leases also should be used or the assignment of contracts should specifically address the leases and any security deposit posted by the tenants.

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Bill of Sale – A bill of sale is the usual method to convey personal property, and, like the contract itself, should identify the items transferred with as much specificity as possible.

State Specific Items – In addition to the conveyance documents, California law requires certain other documents be delivered at the closing. Those include a preliminary change of ownership report, a 593-C form and an acknowledgement of the delivery by seller of a natural hazard disclosure statement.

Preliminary change of ownership – The preliminary change of ownership report is a document signed by the buyer and delivered to escrow that shows the amount of the purchase price for the property. This is so the county can reassess the property for purposes of property taxes. In California, property is reassessed when there is a change in ownership and completion of construction. The preliminary change of ownership report assists the county assessor in making the reassessment.

593-C – The California Revenue and Taxation Code requires that the escrow officer withhold 3.33 percent of the purchase price for the payment of taxes on any sale of real property. However, rather than withhold, real estate investors pay capital gains in due course when their fiscal years require the filing of taxes. As such, the 593-C allows for certain exemptions so that the escrow officer does not need to withhold the taxes.

Natural Hazard Disclosure Statement – Another California law, Section 1103 of the California Civil Code, requires that a seller disclose whether the property being sold lies within one or more state or locally mapped hazards, including a special flood hazard area, high fire area and earthquake fault zone.

Closing Statement – This document, signed at closing, sets forth the debits and credits for a transaction. It will show the buyer's purchase price as a credit and then reflect any charges that need to get paid from that purchase price or in addition to the purchase price, including the cost of title insurance premium (as discussed below), the cost of escrow, the cost of any third-party studies and proration items (also discussed below).

Title Review. As part of the buyer's due diligence, it is going to want to evaluate the state of the title to the property. The title is the legal right to the property. A seller conveys title to the property to the buyer pursuant to the grant deed. However, the title is often encumbered by other parties who have rights to the property, so the seller's ownership – and the buyer's future ownership – is not unencumbered. There are certain claims/encumbrances on a title that are acceptable, such as property taxes. The county assessor has a continuing lien on all property to ensure that property taxes are paid timely. There also are instruments recorded against a title that may pre-date the seller's ownership or that were recorded on the title after the seller took the title. For example, there may be utility easements that allow public utilities access to the property to service, maintain or repair gas, electric or water lines underneath the property. There also might be covenants, conditions and restrictions (CC&Rs) that govern the use and operation of the property. A buyer should negotiate time to review the underlining title to the property and understand the instruments that it will be bound by if it acquires the property. There also might be encumbrances that the buyer does not want to inherit, such as the seller's existing financings. During the title review period, which coincides with the due diligence period, a buyer can see whether there are deeds of trust and financing statements that it needs the seller to remove at closing. The seller will use the proceeds of the buyer's purchase price to pay off any existing financing.

A buyer should always understand the state of the title that it is buying. There may be monetary obligations that change the buyer's underwriting that should not be a surprise. For example, a buyer should learn whether the property is part of a property owner's association and whether that association charges annual dues. In connection with any development transaction, the buyer should be certain to learn whether there are easements that run under the property that may be an obstacle to development. It is hard to relocate underground utilities. If one runs through the middle of the property, its presence may impact future development plans.

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The buyer also should use the due diligence time to obtain and study a survey of the property. The survey is the pictorial depiction of the property. It reflects the surveyor's findings about property boundaries, any observed easements and exceptions to coverage in the title commitment, and the improvements, utilities, public access and significant observations on the property, including, whether there are any encroachments onto the property by adjacent landowners. A survey is usually required by lenders in connection with any financing.

Prorations. Every purchase agreement contains a section that describes how the revenue and expenses for the subject property are allocated as of the closing date. When negotiating this aspect of the purchase agreement, it is critical to understand the base underwriting and the allocation between the parties as of the closing date. Some purchase agreements require that the prorations are done as of the date of closing while others are as of the prior day so that the buyer keeps all the revenue for the closing date.

Representations and Warranties. Another component of the purchase agreement is the section that deals with the express representations and warranties that are made by the seller about the specific asset. Sellers typically want to tell the buyer as little as possible about the asset, requiring that the buyer undertake and rely on its own due diligence. The seller does not want to be responsible for anything that the buyer may rely on. However, the buyer should still insist on getting some representations and warranties from the seller about certain aspects of the property. Common representations and warranties relate to the status of the leases at the property, that there is no litigation against the property or against the seller with respect to the property, that none of the rents have been assigned, that the property is in compliance with laws and that there are no hazardous substances on the property. There are other representations and warranties that can and should be made, but the amount of information provided by the seller is negotiated and hinges on which party has the leverage.

DUE DILIGENCE

Once the purchase agreement is signed, the buyer can commence its due diligence, which is an investigation of the property. If an access agreement was signed prior to the execution of the definitive purchase agreement, the buyer can continue its due diligence under the terms of the purchase agreement. During the due diligence period, which can range from a few days to a few months, the buyer should undertake a number of inspections. The time allotted for such inspections is a negotiated term between the parties and largely depends on demand for the property, the type of asset and the nature of the inspections that need to be done. We find that when high-demand class-A buildings with institutional tenants are for sale, buyers use a shorter due diligence period to make their offers more attractive. With development projects that require more risk, buyers are able to negotiate longer periods so that it can investigate the feasibility of the project. In all events, no matter the product type, a buyer should do the following: 1) review the title (as discussed above), 2) obtain a property condition report from a third-party consultant, 3) investigate the environmental condition of the property, 4) review the leases at the property to understand the economics of the lease and whether the tenant has any early termination rights or other rights that would burden the buyer, 5) review the underlying zoning of the property and 6) examine any service contracts that may be assigned to the buyer. We could spend another 10 pages talking about the due diligence process and what to look for, but we will conclude here with stating, "know what you are getting!"

CONCLUSION

Although investors continue to pour into California's real estate market, buyers need to look before they leap. Despite the tightened capital controls in China that have affected Chinese investments in U.S. real estate, there are still deals that can be done. As such, look for next month's issue, when we talk about joint ventures, financing and opportunity zones.

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投资加州房地产：了解清楚后再出手

原文作者：**Douglas A. Praw**

在 2016 年，中国在海外的房地产投资总额达 330 亿美元。美国是中国投资最热门的地点，有 143 亿美元投到美国住宅、商业及工业财产的收购，而香港以吸引相对较少的 53.2 亿美元居次。2010 年到 2015 年之间，中国在美国房地产的投资总额达 3,500 亿美元，其中有 930 亿美元投资于独户住宅及多户住宅。中国的投资遍布于美国许多地方，但根据全球房地产集体仲量联行的报告，夹着外国人投入超过 230 亿美金在洛杉矶房地产之势，2017 年洛杉矶超越了纽约成为外国投资人投资美国金额最多的城市。同年，洛杉矶打败了包括巴黎及东京等国际级首都而跳跃成为仅次于伦敦的吸引外国投资最多的城市。洛杉矶、南加州、旧金山、硅谷和圣地亚哥继续吸引打算在海外置产的外国投资人的兴趣。本文关注的重点并非投资地点，而是在投资加州房地产时应考虑的事项。

地点挑选

当选择投资那个适当的房地产时，地点挑选是非常重要的。不过。地点挑选就各有其一定投资回报的不同资产类别而言有着不同的考量。美国及外国投资人通常对他们特定的投资有不同的标准。例如，有些美国国内私人控有的房地产投资信托基金有拨款及个别基金投资于办公大楼、公寓项目、及零售中心。每项投资有其个别的投资回报目标。这些公司也有他们特定的投资地理区域。某些基金偏好包括纽约、旧金山、芝加哥及洛杉矶等主要大都会，而有些则着眼于成长中的城市，例如帕罗奥图（Palo Alto）及尔湾（Irvine）。另外愿承受更大风险的投资人则投资于第二线及第三线地区，例如在加州橘郡及圣地亚哥郡的某些地区。

如果投资人希望对资产进行开发而不是仅仅购买一个已经稳定的资产的话，它对不同资产类别的投资增添了另一个复杂的考量因素。已经开发好的项目相较开发项目而言，因其存在较少的项目执行风险所以回报也较低。

了解投资人所寻求的回报性质及了解如何根据该等回报对投资进行调整是重要的。

意向书

当投资人选好了一个喜欢的地点及找到了该房地产的卖方，投资人则推进到意向书的签署阶段。意向书是重要的，因为它将交易的重点列于一不具拘束力的文件上以作为协商最终合同的基础。典型的房地产收购意向书的内容包括购买价格的讨论、不于返还的订金金额、买方进行尽职调查的时间长度、交割日期、及另外需于购买合约中谈到的特别事项。通常意向书唯一具有拘束的条款是当事人将对交易及双方交换的任何文件加以保密且卖方在双方明确无法继续进行交易前只提供购买机会给该预计的买方的约定。

进入财产协议

协商一份最终的购买及销售合同通常需费多时。但是，如同格言所述，“时间扼杀了交易”，因此，为了保持交易的动力，当事人协商及签署了进入财产协议。这个文件允许预计的买方进入财产之上以开始他的尽职调查。它也为将与预计的买方分享卖方地产相关文件一事作出了保密的框架约定。从卖方的角

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度而言，它希望确认如买方在调查时损坏了财产时，买方将有保障该财产的保险。它也希望如因买方的调查造成它遭受任何请求主张时，它将获得补偿，即如果有人在买方进行尽职调查时受伤，卖方不希望对此负担责任。最后，卖方希望确保任何买方的进入都会不违反财产的租客现有的权利，而使买方不会打扰该财产上商业的正常运行。如交易牵涉到财产的开发时，卖方可能要求预计的买方在卖方没有一起出现时不得与当地政府部门打交道。

而对买方而言，让买方进入财产以查明财产的情况、访谈租客、及熟悉财产是非常重要的。

一般而言，进入财产协议的有效期间一直延续到买卖合同签署之时。通常当事人会加上一个截止日期要求买卖合同于该日期前签署买卖合同否则参访协议终止。

买卖合同

买卖合同是当事人间规范不动产买卖双方关系及规定卖方将如何出售房地产及买方将如何购买房地产的最终文件。虽每一购买合同一般而言有其特性，该合同就文件如何被安排及在每一文件中协商的某些重点议题存在某些通性。

对财产的描述。财产的定义远超过只称它为房地产。作为一个买方，你希望确保“财产”包括动产、改良物、财产上现存的合约、及无形资产。无形资产包括任何与财产有关的规划、许可、权利及保证。如果买方是购买一开发项目时（即买方买的是素地而计划在其上进行某些建设）这点是非常重要的。如果财产是运营中的财产，该“财产”也应包括财产上的租户的租约。

交割文件。买卖合同的一部将提到在交割时应交付的文件及告知履约保证中介应如何进行交割的指示。这些重要文件如下:

产权状 – 在加州，和其他管辖地区不一样，通常的转让文件是“产权状”。产权状向新的买方提供了某些保证，包括出让方实际拥有财产的保证。买方除了这个保证以外应再加上产权保险。产权保险是由有资质的产权保险公司提供，且除对出让方/卖方拥有财产一事保险外，也对买方在转让时除受某些第三方的权利约束外将拥有财产一事加以保险。

合约的转让 – 为转让房地产及该“财产”上的其他部分，买方应要求卖方根据合同转让的约定转让合约，包括租约。如果财产上存在租客时，应该有租约转让的约定或合同转让条款应明确规范到租约及租户所缴交的任何保证金的问题。

出售单据 – 出售单据是转让动产经常使用的方式，且和合同一样，应尽可能更详细的说明被转让的事项。

州特别规定的事项 – 除了转让文件，加州法律规定某些特定的其他文件须在交割时交付。这些包括初步所有权变更报告、一份 593-C 表格、及卖方交付一份自然灾害揭露声明。

初步所有权变更报告 – 初步所有权变更报告是一份由买方签署而向履约保证中介人提交显示财产购买价款的文件。这使郡政府可以为财产税目的重新评估财产。在加州，财产在所有权变更或建筑完成时进行财产价值重新评估。初步所有权变更报告协助郡的评估人员进行重新评估。

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593-C 表格 – 加州税收及税务法案要求履约保证中介人员扣缴金额等于购买价款 3.33%的金额作为支付房地产任何出售的税。不过，与其进行扣缴，当他们的财务年度要求进行报税时，不动产投资人按时支付了资产利得税。因此，593-C 表格提供了某些豁免而使履约保证中介人员无需进行扣缴。

自然灾害揭露声明 – 加州另一项法律（即加州民法第 1103 条）要求卖方揭露将出售的财产是否坐落于一个或多个州或当地以地图显示的灾害区，例如特别洪水灾害区、火灾高发区、及地震断层区等。

交割文件 – 这份在交割时签署的文件列出交易的金额减项及加项。它将显示买方的购买金额为加项而后反映任何需要由购买金额支付的费用或需额外支付的费用，包括产权保险保费（如下讨论）、履约保证中介的费用、任何第三方研究的费用、及任何需分摊的的费用（亦如下讨论）。

*产权检查。*作为买方尽职调查的一部，买方将希望评估财产产权的情况。产权是对财产的法律权利。卖方依据大产权状将财产的产权移转给买方，但产权通常还存在其他对财产有权利的第三方设定负担，因此，卖方的所有权及买方未来的权利并非不存在设定负担的。而有些对产权的主张/设定负担是可以被接受的，例如财产税。郡政府的评估人对所有财产有留置权以确保所有的财产税均会被按时缴纳。另外也有一些可能发生在卖方取得所有权前或发生在卖方取得产权之后被登记设定于产权之上的约定。例如，可能存在得使公共事业单位进入财产以对位于财产下方的天然气、电力、或水管进行服务、保养、或维修的地役权。或可能存在规范财产使用及运作的承诺、条件及限制。买方应该协商争取时间来检查作为财产基础的产权、及了解如它收购财产后它将受到那些约定的拘束。另外可能存在一些买方不想继受的负担，例如卖方的现有融资。在与尽职调查同时发生的产权检查期间，买方可了解是否存在它需卖方在交割时去除的抵押契状及融资声明文件。卖方将使用买方的购买价金来偿还任何现有的融资。

买方应随时了解它所买的产权的情况。可能存在一些并不会让买方感到意外的改变买方应承担的经济责任的财务义务。例如，买方应该了解是否财产是财产所有人协会的部分及是否该协会收取年费。有关任何开发的交易，买方一定需了解是否存在会对开发造成阻碍的财产下方的地役权。重新安排公共事业地下管线是困难的。如有公共事业地下管线从财产中间穿过，其将影响未来的开发计划。

买方也应运用尽职调查的时间来获得及研究财产的测绘报告。测绘报告是对财产的一份图表式描述文件。它反映了测绘者对关于财产边界、任何观察到的地役权、对产权承诺的涵盖范围的例外、改良物、公共事业、公共进入财产的权利的发现及对财产的重大观察发现，例如是否存在相邻土地所有人对财产的任何侵占。通常放款人在提供任何融资时会要求测绘报告。

分摊款项 – 每一份买卖合同都会包含一个章节说明有关财产及收入及支出在交割日时应如何分配。当协商买卖合同这一部分时，重要的是要了解当事人在交割日时基本应承担的经济责任及其分配。有些买卖合同要求在交割日时进行分担款项的分配，而其他买卖合同则要求在交割日前进行该分配而使买方在交割日时保留所有金额。

承诺及保证

买卖合同的另一部分是处理卖方就特定资产的明示承诺及保证。卖方通常对于资产想告诉买方越少越好，并要求买方负责及依赖其自己的尽职调查。卖方不想对买方所依赖而进行买卖的任何事负责。不过，买方应坚持取得卖方对财产某些事项的承诺及保证。通常的承诺及保证包括关于财产的租赁状况、不存在

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对财产或对卖方就财产的诉讼、租金没有被转让、财产符合法律、且财产上没有危险的物质。其他承诺及保证也应被取得，但卖方应提供多少信息事是需经协商决定的，而该决定也取决于那一方有谈判筹码。

尽职调查

买卖合同签署之后， 买方可开始进行其对财产的尽职调查。如果签署最终买卖合同前签署了进入财产协议，买方可根据买卖合同继续进行其尽职调查。在长度可能从几天到几个月不等尽职调查期间，买方应进行几个调查。可有多少时间进行该等调查是当事人谈判条款的部分，且大部分将取决于对财产的需求程度、资产的形态及需要进行的检查的性质。我们发现当有机构租户进驻的高需求 A 级办公室要出售时，买方使用较短的尽职调查时间来使他们的邀约对卖方更具吸引力。而对需要更多风险的开发项目，买方有办法协商到更长的期间以调查项目的可行性。在所有的情况下，无论产品的形态，买方应作到以下：1) 检查产权 （如上所讨论）， 2) 从第三方顾问处取得财产情况报告，3）对财产的环保情况进行调查，4）审阅财产上的租约以了解租赁的经济状况及租户是否存在会造成买方负担的提前解除租赁的权利或其他权利 ，5）检查财产的分区规划，及 6) 检查任何可能移转给买方的服务合同。我们可花另外 10 页的篇幅来谈尽职调查的过程及尽职调查中该发现的事，但我们以“请了解您所将得到的！”一句话来作为对这个话题的探讨的总结。

结论

虽然投资人将继续投入加州房地产的市场，买方需了解清楚后再出手。尽管中国对资本加强管控一事对中国投资美国房地产有所影响，但仍然存在一些可以进行的交易。因此，请期待我们在下期将对合资、融资及机会特区等话题的讨论。

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Doing Business in the U.S.: Choice of Entity and Operating the Subsidiary

By Neal N. Beaton and Mark Stone

This article sets forth an overview of relevant considerations in connection with a Chinese (or other) entity choosing the appropriate entity for establishing a presence and operating a subsidiary in the U.S.

LEGAL OBJECTIVES

Maintenance of a U.S. subsidiary, whether in the form of a corporation or a limited liability company, by a non-U.S. parent as a separate and independent entity generally has at least two legal objectives:

1) Limitation of Liability. One objective is to minimize the likelihood that the non-U.S. parent will be subjected to the jurisdiction of the U.S. federal and state courts in lawsuits against the parent, seeking to establish that the non-U.S. parent is, in fact, present in the U.S. acting through its U.S. subsidiary. Even establishment of a truly independent U.S. subsidiary corporation or limited liability company will not always shield a non-U.S. parent from liability in the U.S. under certain tort theories of recovery, such as for defective products causing injury or for negligence in which the claim may lie against the non-U.S. parent producer or manufacturer directly as a result of its having placed its products into the stream of U.S. commerce. The non-U.S. parent corporation, however, may be able to obtain sufficient product liability insurance in anticipation of such claims to cover both itself and its subsidiary.

2) Tax Insulation. A second objective in maintaining an independent and separate U.S. subsidiary corporation, as opposed to a limited liability company subsidiary, is to minimize the likelihood that the non-U.S. parent corporation located outside the U.S. will be subjected to U.S. federal and state tax liability and the accompanying reporting. In this connection, the Income Tax Treaty between China (not including Hong Kong Special Administrative Region) and the United States (the Treaty) authorizes the U.S. government to tax the profits of a Chinese corporation connected with its U.S. business if the Chinese corporation carries on business in the U.S. through a "permanent establishment."

If the Chinese corporation is found to have such a "permanent establishment" in the U.S., the Chinese corporation is liable for U.S. taxes on the profits of the Chinese corporation to the extent that those profits are attributable to the "permanent establishment" in the U.S. A "permanent establishment" includes a fixed place of business through which the business of an enterprise is wholly or partly carried on, and, among other things, includes a place of management, a branch or an office. The Treaty does exclude from the definition of a "permanent establishment," however, a facility used solely for the purpose of delivery of goods belonging to the Chinese company so that a mere warehouse-type function, but not any sales activity, can be performed without risk of U.S. federal taxation. The fact that a Chinese parent company controls a U.S. corporate subsidiary, does not of itself constitute either company a "permanent establishment" of the other. However, the Chinese corporation will be considered to carry on its business through a permanent establishment in the U.S. if it conducts its business through a subsidiary formed as a limited liability company. Thus, most non-U.S. parent entities conduct business in the U.S. through a U.S. state-formed corporation rather than a limited liability company.

Notwithstanding the formation of a U.S. corporation, to insulate the Chinese parent from U.S. federal tax liability, the corporate subsidiary should be structured and operated in such a manner that it will not constitute a "permanent establishment" of the parent. In addition to the foregoing considerations, under the Treaty, the subsidiary would be deemed a permanent establishment of the parent if such subsidiary has, and habitually

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exercises in the U.S., an authority to conclude contracts in the name of the parent (with certain limited exceptions). To minimize the risk of "permanent establishment," the subsidiary should act solely on its own behalf and should not possess the power to obligate or act to obligate the parent or otherwise to act on the parent's behalf. Similarly, in order to minimize this risk, management and operations of the parent and the subsidiary should not be so merged that the subsidiary in effect amounts to no more than a name or office through which the parent itself operates. Maintenance of separate books, records, bank accounts and meetings of the subsidiary supports the position that the parent and the subsidiary are independent. Many states effectively follow the relevant federal tax treaty in determining whether a non-U.S. parent is subject to state tax.

Moreover, the subsidiary should deal with the parent on an "arm's-length" basis (i.e., on the same basis on which it would transact business with an unrelated party) because U.S. income tax laws (e.g., Section 482) permit the U.S. Internal Revenue Service (IRS) to reallocate income and deductions among related corporations if their business transactions are at other than "arm's-length." U.S. tax regulations impose certain recordkeeping requirements in this regard. Holland & Knight can advise the parent company more specifically with respect to these transfer pricing considerations and compliance therewith once the facts of the transaction develop.

Form of Entity

The threshold issue is the form of entity to be utilized. Holland & Knight's experience is that in the vast majority of situations involving non-U.S. based entities seeking to do business in the U.S., the incorporation (such as in Delaware) of a wholly owned U.S. subsidiary is the most customary and generally advantageous method of proceeding. The decision is made easier as a result of the significant reduction in the federal corporate income tax rate from 35 percent to 21 percent. The alternatives, a branch office or, as discussed above, a limited liability company (LLC), would potentially expose the parent company to 1) taxation on both its U.S. source income and certain foreign source income, 2) greater U.S. tax authority over, and scrutiny of, its worldwide financial books and records, 3) in the case of a branch office, liability to third parties against its Chinese assets, and 4) U.S. tax on the sale of the LLC interests or branch assets, whereas sale of corporate subsidiary stock by a non-U.S. person unless 50 percent or more of the assets of the subsidiary consists of real estate, is generally free of U.S. tax. While a U.S. corporate subsidiary would be subject to roughly comparable taxes with respect to No. 1 (although it could be greater if the U.S. subsidiary engages in activity outside the U.S.), Nos. 2 through 4 reflect the greater burdens of operating in LLC form. Accordingly, in the absence of factors (not presently known to us but which may include Chinese tax, and governmental considerations) which would dictate otherwise, Holland & Knight would advise that a wholly owned U.S. subsidiary corporation should be established when a U.S. entity is needed.

Financing the Entity

Typically, a newly formed subsidiary will obtain its needed initial capitalization to commence business from two sources, its non-U.S. owner and a bank or other third-party lender located either in the U.S. or outside the U.S. With respect to the non-U.S. owner's contributions, U.S. tax rules have in the past driven what percentage should be owner debt and what percentage should be owner equity. While were no hard and fast rules as it depends on the business needs of the subsidiary and its ability to repay any loan, a typical debt equity ratio was 25 percent debt, including third-party lender debt, and the balance, or 75 percent, equity.

The main reason for owner debt to be as high as possible was that interest payments were deductible against corporate taxable income whereas dividend payments were not. Further, repayment of the loan principal was tax free whereas the distribution of that amount of money could give rise to a 10 percent withholding tax for some of the payment under the U.S.-China tax treaty (30 percent if paid to a Hong Kong Special Administrative Region owner).

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The new U.S. tax law, effective in 2018, reduces the benefit of interest deductions in two significant ways. First, the income tax rate is reduced from 35 percent to 21 percent, so a $100 interest payment in the past reduced taxes by $35 but currently only reduces taxes by $21. Further, there are restrictions under the new law, somewhat similar to measures adopted by the Organization for Economic Co-operation and Development (OECD) and European Union (EU), that limit the ability to deduct interest in the first instance. They include what is referred to as the base erosion and anti-abuse tax (BEAT) limitation, the section 163(j) limitation and other measures. Nonetheless debt continues to have its place in U.S. tax planning in order to achieve some modest level of interest deductions as well as tax free repatriation of some funds and, in the case of a subsidiary holding significant real estate, tax free repatriation of the loan principal that may otherwise be subject to the 10 percent withholding tax (30 percent if paid to a Hong Kong Special Administrative Region lender) in its entirety.

Debt equity planning is individual to each owner and must consider whether the U.S. IRS will recharacterize owner debt as equity because it appears the subsidiary has no real ability to service the amount of loan created, as well as whether Chinese governmental authorities will permit the level of owner of debt to be allowed.

State of Incorporation

In the U.S., a corporation can be established under the laws of any of the 50 states or other jurisdictions. Incorporating in Delaware is generally desirable because of its flexibility in corporate governance issues and access to the Delaware courts, which have shown a willingness to provide greater deference and protection to corporate directors. A Delaware corporation generally can be incorporated in one or two days, and the related organizational documents generally can be prepared in a relatively short period of time. If the subsidiary establishes a place of business in another state (such as New York), or is otherwise doing business in other states, qualification of the subsidiary to do business in such states will be required by making appropriate filings in such states. It is common for companies to incorporate in Delaware even though their principal place of business is elsewhere in the U.S.

Qualification in Other States

Every state's corporation statute requires "foreign" corporations (i.e., corporations incorporated in some other state or country) to qualify to do business in the state if they are "doing business" there. There is, surprisingly, no simple definition of what constitutes "doing business" for corporate qualification (or other) purposes.

The definition of "doing business," rather, has been left to case law which is typically focused on Constitutional limitations on the ability of the state to regulate purely interstate commerce and lists which most state corporation statutes have of activities which by themselves would not constitute "doing business" in the state. Two examples of such lists are as follows:

New York

1) maintaining or defending any action or proceeding, whether judicial, administrative, arbitrative or otherwise, or effecting settlement thereof or the settlement of claims or disputes

2) holding meetings of its directors or its shareholders

3) maintaining bank accounts

4) maintaining offices or agencies only for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities

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Illinois

1) maintaining, defending or settling any proceeding

2) holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs

3) maintaining bank accounts

4) maintaining offices or agencies for the transfer, exchange and registration of the corporation's own securities or maintaining trustees or depositaries with respect to those securities

5) selling through independent contractors

6) soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if orders require acceptance outside this state before they become contracts

7) owning, without more, real or personal property

8) conducting an isolated transaction that is completed within 120 days and that is not one in the course of repeated transactions of a like nature, or

9) having a corporate officer or director who is a resident of this state

There literally are entire books written on the subjects of what constitutes "doing business" and many law review and similar types of articles about this subject. This can be distilled down to the following in our view:

- a company is "doing business" in every state where it physically has an office
- a company is "doing business" in every state where there are full-time employees or employees regularly conduct business, and
- a company is "doing business" in every state where it has physical assets such as the states where it warehouses its inventory

Most state corporation statutes require the appointment of a registered agent in order for a foreign corporation to qualify to do business. This would typically be a corporate service company.

The process of qualifying to do business is relatively simple (i.e., completion of a form and submittal of it with a filing fee and a certificate of good standing from the home jurisdiction) and does not involve any substantive discretion on the part of the state in approving it.

Maintenance of the Subsidiary Separate and Apart from the Parent Company

The U.S. has a system under which there are federal laws and state laws, each state being a sovereign within areas not constitutionally delegated to the federal government. State laws in the U.S. provide for the incorporation of a business with consequent limited liability of the stockholders for acts of the corporate entity. However, under certain limited circumstances a court may disregard the corporate form, either to look past a corporation to its stockholders or past a subsidiary to its parent, when the court finds it necessary to prevent fraud or to achieve

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equity. The purpose of this doctrine of "piercing the corporate veil" is to prevent a corporation from being used to defeat the ends of justice.

If the subsidiary is not operated as a truly independent entity, but acts as a mere instrumentality of the parent, the corporate veil may be "pierced." Of course, the parent has power over general policy because, as the sole stockholder, it elects the directors of the subsidiary corporation, and the directors, in turn, choose the subsidiary's officers. However, exercise of control by the parent over the subsidiary in day-to-day decision-making should be avoided, because such activity, in effect, makes the subsidiary a nullity possessing no independent powers. Management and operations of the parent and subsidiary should not be so merged that the subsidiary in effect amounts to no more than a name or conduit through which the non-U.S. parent conducts business. The extent to which corporate formalities are observed, such as maintaining separate books, records and meetings for the separate companies, and the extent of overlap of directors, officers and employees between parent and subsidiaries, can also be factors examined by a court in determining whether to "pierce the corporate veil."

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在美国经营事业：选择事业组织形式及运行在美国的子公司

原文作者: Neal N. Beaton and Mark Stone

本文对中国（或其他）企业应如何选择合适的组织形式在美国成立事业及应如何运行其在美国的子公司所应考虑的相关因素作一综合介绍。

法律目的

非美国的母公司无论是以一般的公司（即 Corporation）的形式或以有限责任公司（即 limited liability company 或“LLC”）的形式成立一与其分别及独立的美国子公司一般会考虑如下两个法律目的:

1. 责任限制。第一个目的是为降低非美国的母公司在对其提起的诉讼中被主张非美国母公司实际上是透过其子公司而存在于美国，因此应受到美国联邦或州法院管辖的可能风险。即使设立一个真正独立的美国一般的公司（corporation）或有限责任公司（LLC）形式的子公司也没法免除非美国的母公司在美国依某些侵权行为赔偿理论的责任（例如就因瑕疵产品造成损害或因过失而产生对将其产品卖到美国的非美国的生产或制造该等产品的母公司的直接请求）。但非美国的母公司可以取得足够的保险来保护其及其子公司因该等主张可能遭受的损害。

2. 税务隔离。在美国设立一个独立及分别的一般公司（corporation）而非有限责任公司（LLC）作为子公司的第二个目的是减少坐落在美国之外的非美国母公司将需缴纳美国联邦及州税及进行相关申报的可能性。就此点，中国（不包括香港特别行政区）与美国的双边所得税协定（“所得税协定”）授权美国对透过一“常设机构”在美国进行营业的中国公司就其与美国业务有关的利润课税。

如果中国公司被认定在美国有一“常设机构”的话，中国公司将对其可归属其“常设机构”的利润负担美国税。一“常设机构”包括一企业进行全部或部分营业的固定营业场所，包括管理场所、分支机构或办事处。协定有将专为交付属于中国公司的货物的设施排除于“常设机构”的定义之外，所以只为仓储之用而不存在销售行为的活动将可被进行而不会导致美国联邦税的问题。因而中国母公司控制一美国子公司本身并不会造成一公司为另一公司的“常设机构”。不过，中国公司如透过其在美国设立的有限责任公司（LLC）形式的子公司进行营业的话，其将被视为透过在美国的常设机构进行营业。因此，大部分的非美国母公司透过在美国某特定州成立的一般公司（corporation）而非有限责任公司（LLC）形式的子公司在美国进行营业。

尽管设立了美国的一般公司（corporation），为隔离中国母公司于美国联邦税的责任之外，子公司应被以不会导致其被视为中国母公司的“常设机构”的方式规划及经营。除了以上考量外，根据协定，如子公司曾经及经常在美国以母公司的名义行使签署合约的权利的话，该子公司可能被认定母公司的“常设机构”（除某些有限的例外情况之外）。为尽可能降低被视为“常设机构”的风险，子公司应完全以自己的名义行事且不应具有权力加诸义务于母公司或从事某些加诸义务于母公司的活动、或以其他方式代表母公司行事。同样地，为了降低风险，母公司及子公司的管理及运作不应被混在一起而致子公司实际上仅成为母公司运行的名称或办公室而以。维持子公司分开的账册、记录、银行账户及会议有助母公司及子公司为相互独立的个体的主张。许多州实际上按照相关联邦税务协定来决定是否一非美国的母公司应负担美国州税。

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此外，子公司应以“常规”方式（即以与没有关联的他方进行商业交易的方式）与母公司交易，因为美国联邦所得税法（例如第 482 条）允许美国国税局（IRS）就不是以“常规”方式进行的交易重新对相关公司收入及扣除金额进行配制。美国税务法规有要求保留某些记录的规定。我们在得到关于这些交易所发生的事实后可以更具体第提供母公司关于移转定价的考虑点及如何遵循的建议。

组织形式

应采用何种组织形式将是第一个面临的问题。根据我所的经验，绝大部分涉及非美国事业体寻求在美国经营事业时，设立以全资子公司是最常见且一般最有利的方式。这个决定在联邦企业所得税的税率从 35%降到 21%之后更容易做出了。而另外的做法（例如设立分公司或如上所述设立有限责任公司 LLC）将可能造成母公司：（1）应缴纳美国来源所得及其他外国来源所得的税，（2）美国税务当局对其全球财务账册及记录的更多的关注及检验， （3）在分公司的情况下，造成需以中国的资产对第三方的责任负责， 及（4）出售 LLC 利益及分公司资产时应缴纳美国税（而非美国母公司出售其一般公司形式的子公司的股份一般无需付美国税（除非该子公司的 50%或 50%以上的资产由不动产所构成）。虽然美国子公司就上述第一项所述两种收入应缴纳的税应大致相当（虽然如美国子公司在美国境外进行活动是可能税负会更高），上述第 2 到第 4 项成为了以 LLC 形式运行的更大的负担。因此，在没有会显示其他结果的其他我们不知道的因素（例如包括中国税务及政府等因素考量），我们建议当需要一美国事业组织的话，考虑设立一全资拥有的一般公司（corporation）形式子公司。

对组织机构的融资

一般而言，一个新设立的子公司取得开展其业务所需要的初始资金的来源有两种，即来自其非美国的所有人或来自位于美国境内或境外的银行或其他第三方出借方。就有关非美国所有人的出资，美国税法过去的规定影响了多少比例应该为所有人债务及多少比例应该为所有人权益。虽然对该比例没有明确的固定规则，且该比例取决于子公司的商业需求及子公司偿付债务的能力，通常的资金比例为 25%以借贷方式取得，包括向第三方借贷，而其余的 75%为所有人权益。

而尽可能提高所有人债务的主要原因是利息支出可以自应税所得中扣除而股利的支付不可进行扣除。此外，对偿还债务本金的付款是不需课税的而支付股利依中美所得税协定将产生 10%的扣缴税（如向香港特别行政区的所有人支付时税率为 30%）。

2018 年生效的新的美国税法将利息扣除的好处做了两项重大的改变。首先，所得税税率从 35%降到 21%，造成之前 100 美元的利息支出可减少 35 美元的税而现在只能减少 21 美元的税。另外，现在有与经合组织（OECD）及欧盟所采行的规定相近的新的法律限制最初扣除利息的能力。这包括被称为税基侵蚀及反滥用税（BEAT）的限制、163（j）条限制及其他规定。无论如何，以借贷方式取得资金仍然在美国的税务规划中占有其一席之地，以作为达成不太大的利息扣除及以免税方式取回一些资金的方法，而如子公司拥有大量的不动产时，原本可免税归还的贷款金额的本金可能会需就全部金额扣缴 10%的扣缴税（如向香港特别行政区的出借方归还时税率为 30%）。

债务及所有人权益的规划视每一个所有人而有不同，且应考虑美国国税局（IRS）是否会因子公司明显没有实际偿付所创造出的贷款的能力而将所有人债务重新界定为所有人权益、及中国政府部门将多大程度允许以所有人债务的方式出资而进行规划。

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设立公司的州

在美国，公司可在 50 个州的任一州或其他法律管辖区域内设立。一般偏好在德拉瓦州设立公司，因为德拉瓦州对公司治理问题的弹性及可用到愿意更遵从公司董事的决定及对其提供更多保护的德拉瓦的法院来处理相关问题。德拉瓦公司一般可在一两天内完成设立且组织文件一般可在相对较短的时间内完成。如果子公司在其他州（例如纽约州）设立一营业地或以其他方式在其他州进行营业的话，子公司在该其他州应向该其他州申请取得进行营业的资格。在德拉瓦州设立公司而其主要营业场所设在美国其他地方的情况亦是非常常见的。

在其他州取得进行营业活动的资格

每一州的公司法都要求在该州“进行营业活动”的“外来的”公司（即在其他州或国家设立的公司）申请取得在该州进行营业活动的资格。令人感到惊讶的是，对什么会构成为申请资格的目的的“进行商业活动”没有一个简单的定义。

而对“进行营业活动”的定义却留待案例法的决定，而案例法通常着重于美国宪法对各州规范存粹的州际商业行为的能力，且大部分的州的公司法列出什么活动不构成在该州“进行营业活动”的情形。下列为该等列举规定的两个例子:

纽约州

1）进行或防卫任何法律诉讼或程序，不论是司法、行政、仲裁或其他程序，或对其进行和解、或对请求或争议进行和解。

2）举行其董事会或股东会。

3）保有银行账户。

4）专为移转、交换及登记其股票、或对其股票而指定及保有受托人或保管人而保有办公室或代理人。

伊利诺伊州

1）进行、防卫、或和解任何法律程序；

2）举行董事会或股东会会议、或进行其它关于公司内部事务的活动；

3）保有银行账户；

4）为移转、交换及登记公司自有的股票、或对该等股票而保有受托人或保管人而保有办公室或代理人；

5）透过独立的承包商进行销售；

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6）以邮件方式或透过员工或代理人或其他方式招揽或取得订单，而如该订单要求必须在州外被接受以构成合约；

7）仅仅是拥有不动产或动产；

8）进行一项独立在 120 天内完成的交易，且该交易并非重复发生的相似交易的一部分 或

9）有本州居民身份的公司管理人员或董事。

实际上有许多书籍整本都在探讨什么构成“进行营业活动”，且许多法律期刊及类似文章在探讨这个课题。以我们的看法，“进行营业活动”可归结为如下：

- **一公司在其**设有办公室的每一州“进行营业活动”；
- **一公司在其雇有全**职员工或经常进行营业活动的员工的每一州“进行营业活动”；**及**
- **一公司在其**拥有实体资产（例如其设有放置存货的仓库）的每一州“进行营业活动”。

大部分的州的公司法要求指定登记的文件代收人以允许外来公公司申请进行营业活动的资格。而这登记的文件代收人通常由公司服务公司来担任。

申请进行营业活动的资格的程序相对简单（即填妥一份表格，连同申请费及本州所注发的公司存续证明一起提交），且受理申请的州无需实质审查及可通过该等申请。

保有一个与母公司独立及分开的子公司

美国有一个有联邦法律及州法律的制度。每个州在宪法没有将其划归联邦政府的范围内为享有其主权。美国各州的州法规定为营业活动设立公司股东对公司主体的行为负有限的责任。不过，在某些有限的情况下，当法院认为为防止诈欺或为达成公平，法院可以不顾公司的组织形式（不论是直接穿透公司而直接追到其股东或穿透子公司而直接追到其母公司）。这个“穿透公司帘幕”的法律原则的目的是为防止利用公司来打败公平正义的目的。

如果子公司不是以真正独立个体的方式经营，而仅仅作为母公司的工具，这公司的帘幕可能被“穿透”。当然，母公司对子公司的整体政策的决定具有权限，因为作为唯一的股东，母公司选任子公司的董事，而董事选任子公司的管理人员。不过，母公司应避免对子公司的每日决策进行控制，因为该行为会造成子公司成为一个不具独立权限的法律上不存在的实体。母公司及子公司的管理及经营不应被结合在一起而致子公司实际上仅成为非美国的母公司进行营业活动的名称或办渠道而以。公司形式被遵守的程度（例如为不同的公司保持分开的账册、记录及会议、及母子公司的董事、管理人员及员工的重合度）也将是法院决定是否“穿透公司帘幕”所检视的因素。

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Legal Issues and Challenges in the Cosmetics Industry

By: Charles A. Weiss

Companies manufacturing, importing, distributing or selling cosmetics face a number of legal challenges that are unique to that industry. Persons investing in cosmetics companies, or considering entering the U.S. market, should also be aware of these particular challenges. If not completely understood and planned for, these issues can derail what would otherwise be a successful venture. With appropriate legal and regulatory guidance, however, the challenges can be addressed in advance to minimize potential disruption and reduce the risk of incurring costs to address problems after they manifest.

This article presents a brief overview of several areas of law that are either unique to the cosmetics industry, or present risks that are different from other types of consumer products categories. Its purpose is to surface these issues in a way that can help provide guidance as to when to engage specialty counsel and what questions to ask.

INTRODUCTION

Cosmetics are big business under any definition of the word. Most people associate "cosmetics" with makeup and beauty items used primarily by women, such as lipstick, mascara, foundation, concealers, blush, wrinkle creams and maybe perfume.

However, the category of products regulated as "cosmetics" under the U.S. federal Food, Drug, and Cosmetic Act (FD&C Act) – administered by the U.S. Food & Drug Administration (FDA) – is much broader. Under that statute, "cosmetics" are defined in part as:

> "articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body . . . for cleansing, beautifying, promoting attractiveness, or altering the appearance . . . ."   [21 U.S.C. § 321(i)]

In addition to those noted above, this definition includes moisturizers, deodorants, permanent waves, hair colors, most shampoos, most body washes and body bars, most body powders, some mouthwashes and toothpastes, plus any substance intended for use as a component of a cosmetic product.

COSMETIC OR DRUG?

The examples above include qualifiers for some types of products, such as "most shampoos" and "some toothpastes." Why aren't all shampoos and all toothpastes simply cosmetics? The answer is because some of them are also drugs.

Under the FD&C Act, "drugs" are defined in part as:

- "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease"
- "articles (other than food) intended to affect the structure or any function of the body of man or other animals"
- "articles recognized in the official United States Pharmacopoeia . . . ."

[21 U.S.C. § 321(g)(1)]

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Note that the first two prongs of this definition include the phrases "intended for use" and "intended to affect." Why is this important?

Let's start with the example of lipstick. Under the definition of "cosmetic," it can be easily determined that lipstick is an article "intended to be rubbed . . . or otherwise applied to the human body . . . for beautifying, promoting attractiveness, or altering the appearance." Hence, lipstick is plainly a cosmetic.

Now consider how the manufacturer might label its lipstick. If it states that the lipstick "prevents chapping and heals cracked lips," it has turned the product into a drug, because it is now intended to affect the structure or function of the human body. It does not matter if this lipstick is actually effective for these purposes, nor does it matter whether ordinary lipstick that does not make such a claim may help prevent chapped lips by acting as a mechanical barrier. Whether the lipstick with the "prevents chapping and heals cracked lips" label actually works does not matter: by writing this on the label, the manufacturer indicates that it is intended to have these effects, which makes it a drug. And similarly, even if all well-made lipstick helps keep one's lips healthy, it is not a drug because it is not intended to have this effect.

This example illustrates the importance of a product's intended use. How is intended use determined? The first place that the FDA will look is the label, but advertisements and promotional literature will not escape FDA scrutiny. If a manufacturer is promoting its product with claims that cross the line from cosmetic to drug – including statements on a website – they are evidence that the intended use of the product is as a drug.

Thus, what may seem to be minor differences in language on a product's label can have a profound effect on how it is regulated under U.S. law. As one might expect, drugs are regulated far more heavily than cosmetics. With the exception of color additives, ingredients in cosmetics do not require FDA approval. Nor are cosmetics as a whole subject to premarket approval, various registration requirements, certain labeling and disclosure obligations, and other rules that apply to drugs. The point here is not that it's overly burdensome to sell drugs if that's what a company intends to sell, but rather that the laws governing the sale of drugs are overly burdensome if only meant to be selling cosmetics.

A historical example helps illustrate the point. High-end wrinkle creams are among the most expensive cosmetics in the U.S. market, selling for more than $10 per gram. Careful manufacturers, alert to subtle distinctions in language, have generally stated that such products "reduce the appearance" of wrinkles instead of "reducing wrinkles." The intended use of a product that "reduces the appearance" of wrinkles is as a cosmetic (beautifying, promoting attractiveness, or altering the appearance). By contrast, the intended use of a product that "reduces wrinkles" is as a drug (affecting the structure of the body).

Another way that a product that seems to be a cosmetic may end up being a drug is by choice of ingredients. Returning to the examples of cosmetics, we noted above that most shampoos and some toothpastes are cosmetics. But the choice of ingredients can make them drugs too, even if no claim is made on the label that they 1) cure or prevent disease, or 2) affect the structure or function of the body. That is because any product containing an ingredient recognized as a drug is itself a drug. For shampoo, the antidandruff ingredients selenium sulfide and zinc pyrithione are each considered drugs. This means that any shampoo containing each of them is automatically a drug, even if it is not labeled as an antidandruff shampoo. For toothpaste, any form of fluoride is considered a drug, and hence all fluoride-containing toothpastes are automatically drugs even if they are labeled as helping to prevent cavities.

Without attempting to provide an exhaustive comparative list, here are some examples that help illustrate the difference between cosmetics and drugs based on the presence of a drug ingredient:

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COSMETIC	DRUG
Underarm deodorant	Antiperspirant
Whitening mouthwash	Antigingivitis mouthwash
All natural toothpaste	Anticavity toothpaste
Foundation (for face)	Foundation with sunscreen
Scented body powder	Itch-relief body powder
Moisturizing shaving cream	Razor-bump preventing shaving cream
Body wash	Anti-acne body wash
Body bar	Deodorant body bar

A review of Warning Letters sent by the FDA to cosmetics manufacturers can also help illustrate the type of language that will be viewed as making impermissible "drug" claims. Recent examples include the following statements cited by the FDA as falling into this objectionable category, with the key problems noted below each:

"CREAM: …soothing cream that protects and alleviates the skin from the itchiness, pain and irritation of skin ailments such as psoriasis, eczema and rashes…"

Problems: psoriasis and eczema (disease claim); itchiness, pain, irritation and rashes (structure/function claim)

"PLUS CREAM: …blended with Therapeutic Grade Essential Oils beneficial for burns and cuts…break outs from acne to rashes…."

Problem: acne (disease); burns, cuts and rashes (structure/function)

"Eliminate burning, chafing or irritation from skin. . ."

Problem: burning and irritation (structure/function)

"Rebuild Damaged Tissue. . ."

Problem: rebuilding tissue (structure/function)

As can be seen, in order to stay on the "right" side of the line between cosmetics and drugs – and avoid inadvertently transforming a product intended as an ordinary (lightly regulated) cosmetic into a (heavily regulated) drug – the purveyor must carefully attend to both 1) the statements on the label, and 2) the choice of ingredients.

CONSUMER CLASS-ACTION LITIGATION

In general, the FDA does not pay much attention to cosmetics, preferring to devote its resources to more pressing areas, or products that may pose a hazard to public health (as opposed to products that are likely harmless but that simply run afoul of regulatory standards). Unfortunately for manufacturers, however, the FDA is not the only entity that may scrutinize labels or advertising materials for cosmetics.

Plaintiffs' class action lawyers solicit complaints from consumers and themselves scour cosmetics labels and advertisements looking for an opportunity to bring a class action lawsuit. In one telling, consumer class action

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suits provide a way to vindicate consumers victimized by deceptive practices in an omnibus, class lawsuit when each consumer's individual claim would be too small to be worth pursuing. In another, class action suits are a way for lawyers to enrich themselves with frivolous lawsuits filed to coerce settlements from innocent companies. The purpose of this review is not to choose sides in the battle over class action litigation, but to point out several areas that have resulted in class action suits against cosmetics companies, with the idea of learning from other's misfortune.

In February 2019, a major cosmetics company with a line of mass-market products sold in supermarkets and drug stores was sued in California in a class action complaint directed to its line of wrinkle products. The claim was that the product labels made claims of prompt action – such as "immediately" hydrates and makes the skin "more radiant" – in combination with claims that stated that continued use for a period of weeks would reduce wrinkles. According to the plaintiff, this showed the manufacturer's intended use of its products was as a drug, despite the fact that it had never been approved by the FDA as such. And while only the FDA has authority to enforce the FD&C Act, the plaintiff alleged that these representations constituted unfair trade practices under California state law. The interaction between federal law and state law is complex, but the general rule is that states are free to impose stricter standards, so compliance with federal law is not necessarily sufficient to comply with state law.

Labels and advertisements using the word "natural" have also drawn class action lawsuits. For example, a suit was filed in December 2018 in New York against a smaller cosmetics manufacturer that referred to a line of products as "high performance naturals," and stated "we believe in high-performance AND natural." The plaintiff asserted that these representations "are false, misleading, and deceptive" because the products "contain multiple ingredients that are synthetic," including citric acid, xylitol, kaolin and glycerin. To give a sense of the level of analysis behind some cases of this sort, the complaint cited another manufacturer's website for the definition of some of the allegedly "unnatural" ingredients.

The term "hypoallergenic" has also presented a target for class action cases. In August 2018, a case was filed against a major cosmetics manufacturer in New York that has a product line based on claims that its products are hypoallergenic. According to the complaint, each and every product contained one or more "Category 1 skin sensitizers," defined as agents that causes "an allergic response in a significant number of people" at a concentration of 0.1 percent or similar. Among the common cosmetic ingredients alleged in the complaint as rendering the "hypoallergenic" claim misleading were cellulose gum, chamomile extract and niacinamide. For reference, niacinamide is a form of a B vitamin commonly used as a dietary supplement: the complaint identifies it not only as a "Category 1 skin sensitizer" and a "Category 2 eye irritant,"
but as a "mutagen, meaning that it is suspected of mutating human cells in a way that can be transmitted to children conceived after exposure."

In an industry that requires advertising and promotion in order to survive, no amount of legal review can eliminate the risk of class action lawsuits. However, lawyers can help by reviewing copy before it is used, and suggest changes that may reduce the risk without compromising its effectiveness.

PATENTS

In the spectrum of patent "intensity," cosmetics present fewer patent problems than pharmaceuticals but more than most other consumer products. Unlike pharmaceuticals, where most U.S. consumers will happily accept a generic product in order to save money, the acceptability of cosmetics is heavily driven by brand reputation and consciousness. The consumer who will happily select an over-the-counter store-brand pharmaceutical to achieve a modest cost savings over the brand-name product stocked next to it is not so likely to reach for a store-brand shampoo, foundation or lipstick (if even available).

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Although patent infringement cases between two large and established cosmetics companies occur from time to time, they are not very common. Litigation is more likely in the case of a smaller company, or one that is entering a new field, that tries to carve out an exclusive space with its patents to prevent encroachment by larger competitors.

That said, a search of patents and applications will return hundreds of items spanning the entire field of cosmetics, including not just formulations, but also devices and implements such as mascara brushes and various applicators.

In most cases, it is neither necessary nor economically viable to conduct a comprehensive search of patents and applications to assess "freedom to operate" for a prospective new product. A more focused approach, however, is often advisable to prevent the situation in which substantial investments are made in bringing to market a product that infringes a competitor's patent when the opportunity existed to avoid the patent by making minor changes that would not have compromised the potential product's appeal.

First, if the proposed product is to be based on a competitor's marketed product, the packages of that product should be inspected to see if the packages include patent numbers, or refer to a website for patent information. Although patent marking is not mandatory, many companies will mark their products with applicable patent numbers because doing so conveys certain advantages (which are beyond the scope of this article).

Second, even if the proposed product is not based on a competitor's marketed product, the similar products existing in the marketplace can also be checked for patent markings. This is another good way to uncover potential risks.

Third, if a relatively small number of companies are known to be the leaders in a certain category, it is often possible to design a search for patents assigned to those companies that will return a reasonable number of items, making their review a manageable task.

Fourth, if the company has applied for its own patent on the prospective product, the prior art cited by the patent office in the course of examination may return earlier patents that are still in force and which could pose an infringement risk.

Searches and evaluations should be conducted by, or under the supervision of, qualified patent counsel. Reviews conducted by a company's nonattorney employees will not be protected by attorney-client privilege in the event of litigation, and will be available to the other side in the course of pretrial discovery. If they write that there are risks or problems, their statements can be used against the company, even if the conclusions are incorrect or the employees making them did not have legal training, to allege that it willfully infringed (giving rise to claims for enhanced damages and attorneys' fees). Moreover, reviews conducted by technical personnel can oftentimes produce results that are technically correct but legally inaccurate, because the interpretation of patents is more of a legal exercise than a technical exercise.

No discussion of patents would be complete without considering whether, and when, a company should apply for its own patents to protect a new product. There are two competing principles at play.

First, people without familiarity with the patent process may erroneously assume that a new product could not be protected by a patent because it is not too different from previous products. To the contrary, the patent system thrives on small improvements to existing products, and recognizes that innovation and progress typically proceeds in small steps.

Second, some people succumb to a condition recognized by any experienced patent lawyer as "patent mania," believing that everything they do is patentable and that applying for patents is the surest path to success.

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Unless dissuaded, this results in a waste of money and a distraction from actually designing and producing better products, as resources that would be more productively employed elsewhere are poured into the patent process. A sad example from history is Adolphe Sax, inventor of the saxophone, who was driven into bankruptcy by pursuing patent infringement cases.

How best to navigate between these extremes?

The place to start is to consider whether a patent on a new product – assuming that a patent could be obtained – would actually convey any commercial advantage. For example, a patent might be issued to a specific combination of ingredients, with what patent lawyers call a "picture claim." But if competitors could make a product that was just as good, but which would not infringe because it had small changes to the amount or identity of one of the ingredients, the patent would serve no commercial purpose beyond the potential marketing advantage of advertising it as a "patented formulation."

If you conclude that having a patent – assuming that one can be obtained – would be likely to give the company a meaningful commercial advantage, it is advisable to consult with qualified patent counsel on how best to proceed. Commonly, a relatively inexpensive search of the prior art, often called a knock-out search, will provide sufficient information to determine if filing a patent application is warranted.

TRADE SECRETS

Trade secrets have an outsized role in the cosmetics industry because the details and specifics of formulations often cannot be determined from the label's listing of ingredients. Accordingly, cosmetic formulations are commonly considered by their manufacturers to be trade secrets.

A key aspect of maintaining information as a trade secret is taking steps to guard against disclosure. For example, employees should be required to sign confidentiality and nondisclosure agreements at the start of employment, and should receive periodic training about the importance of maintaining confidentiality. Trade secret information should be shared within the company on a need-to-know basis, and should not be disclosed outside the company (for example, to a consultant, contract manufacturer or testing laboratory) absent a suitable nondisclosure agreement. Employees leaving the company should receive, as part of an exit interview, a documented reminder that their obligations to refrain from using or disclosing the company's trade secrets survive the termination of their employment, and be asked to sign an acknowledgement of their understanding. These steps serve the dual purpose of reducing the risk of an improper disclosure, and providing the basis to claim trade secret protection if it becomes necessary to pursue enforcement.

Companies should also be sensitive to reducing the risk of being on the receiving end of a trade secret claim from the former employer of a new hire. As part of the onboarding process, new hires should commit (in writing) to refrain from using or disclosing any confidential information of prior employers. Consideration should also be given to the potential overlap between a new hire's responsibilities and his or her function at the prior employer. When possible, it can be helpful to limit the degree of overlap to both protect against the inadvertent use of a prior employer's trade secret, and to demonstrate in the unfortunate event of a lawsuit, that the company did not hire the person with the idea of obtaining his or her prior employer's trade secrets.

TRADE DRESS

Trade dress refers to the appearance of a product – typically, in the case of cosmetics, the packaging – that serves as an indicator of the product's source. It is similar to a trademark, but more about the overall visual appearance of a product and not a particular name or logo. Trade dress often consists of a combination of elements, such as color, typeface, package shape and the arrangement of design features. While everyone

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understands the obligation to refrain from copying a competitor's trademarks, the need to avoid infringing a competitor's trade dress is not as universally appreciated.

Although it is possible to inadvertently infringe a competitor's trade dress, the more common situation is one in which a designer or marketing person use a competitor's product as the starting point for their design. There is nothing inherently wrong with this, as long as care is taken to make sure that the final product is sufficiently distinctive. Problems arise, however, when decisions are not adequately vetted. For example, if the employee responsible for clearing the proposed design of a product is not informed that a competing product was in the design process, he or she will not know to check it for potential trade dress problems, and may catch the problem only if he or she happens to know of that model product.

Companies working on product design should also consider their own trade dress. The use of a similar design scheme in a consistent manner across a range of products can create trade dress rights that could be asserted against a future competitor that attempts to ride on the company's good will and brand reputation by using a similar scheme on its own products.

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化妆品行业的法律问题和挑战

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制造、进口、分销或零售化妆品的公司面临着许多该行业独有的法律挑战。投资化妆品公司或考虑进入美国市场的投资人也应当了解这些特有的挑战。如果没有完全了解和进行规划，这些问题可能会影响原本可能成功的事业的发展。但是通过适当的法律和法规的指引，可以预先处理这些挑战以最大程度地减少潜在的干扰，并降低发生问题后再处理这些问题可能产生费用的风险。

本文简要地概述几个化妆品行业独有的或是与其他类别的消费品风险不同的法律领域。其目的是将这些问题展现出来，以指引投资人应该在何时聘请专门顾问以及应该咨询哪些问题。

<u>介绍</u>

化妆品不论怎么说都是一个很大的市场。大多数人将“化妆品”与主要由女性使用的化妆品和美妆用品联系起来，例如口红、睫毛膏、粉底、遮瑕、腮红和祛皱产品，或许还有香水。

然而，根据由美国食品和药品管理局（FDA）负责执行的美国联邦《食品、药品和化妆品法案》（FD＆C 法案），“化妆品”的产品类别范围更广。根据该法案，“化妆品”被部分定义为：

> “旨在擦拭、倾倒、洒、喷、或以其它方式施用于人体的物品……用于清洁、美化、提高吸引力或改变外观……” [美国法典第 21 章 321(i) 条]

除了上面提到的那些，这个定义还包括保湿、除臭、烫发、染发、大部分洗发水、大部分沐浴露和香皂、大部分爽身粉、一部分漱口水和牙膏，以及任何打算用作化妆品组成部分的物质。

<u>化妆品还是药品？</u>

上面给出的例子中的某些产品有限定词，例如“大部分洗发水”和“一部分牙膏”。为什么不是所有洗发水和所有牙膏都是化妆品？答案是因为其中一些也是药品。

根据《FD＆C 法案》，“药品”被部分定义为：

- “旨在用于诊断、治愈、缓解、治疗或预防疾病的物品”
- “旨在影响人或其他动物体的结构或任何功能的物品（食物除外）”
- “美国药典官方认可的物品……” [美国法典第 21 章 321(g)(1)条]

请注意，此定义的前两个分段包括“旨在用于”和“旨在影响”的词语。其重要性为何？

让我们从口红的例子开始吧。依“化妆品”的定义，可以容易地确定口红是一个“旨在擦拭……或以其它方式施用于人体……用于美化、提高吸引力或改变外观”的产品。因此，口红显然是一种化妆品。

但现在考虑制造商可能如何标记其口红。如果它说口红“防止龟裂并愈合裂开的嘴唇”，该产品就会变成药品，因为它现在<u>旨在</u>影响人体的结构或功能。这种口红是否能实际实现这些目并不重要，而且没有作出此类声明的普通口红是否就可以通过充当屏障来帮助防止嘴唇干裂也不重要。具有“防止龟裂和愈

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合唇裂”标签的口红是否能实际达到标签上所标注的效用并无关系：通过在标签上写下这一点，制造商表明它旨在产生这些效果，而使它成为一种药品。同样地，即使所有制作精良的口红都有助于保持嘴唇健康，它们仍不是药品，因为它们不旨在产生这种效果。

此示例说明了产品预期用途的重要性。预期用途如何确定？ FDA 首先看的是标签，但广告和促销用语也逃不过 FDA 的审查。如果制造商正在宣传其产品，而声明越过了化妆品的界限而跨入药品，包括在网站上的声明，那么此类声明就是该产品的预期用途是药品的证据。

因此，产品标签语言可能存在的微小差异会对该产品在美国法律下被监管的方式产生深远的影响。正如一般人所预期，药品受到的监管远远超过化妆品。除色素添加剂外，化妆品中的成分不需要 FDA 批 准。整个化妆品也不受面市前批准、各种注册要求、某些标识和披露义务、以及适用于药品的其他规则的约束。这里的重点并不是说，如果您打算出售药品，关于卖药的规定是如何的过于繁琐，而是说如果一企业只是打算出售化妆品，那么就不应被繁琐的监管药品销售的法律所规范。

一个过去的案例有助于说明这一点。高端祛皱霜是美国市场上最昂贵的化妆品之一，每克售价超过 10 美元。谨慎的制造商对语言的微妙区别非常注意，一般都说这些产品“减少皱纹的外观”而不是“减少皱纹”。“减少皱纹外观”的产品的预期用途是作为化妆品（美化、提高吸引力或改变外观）。相反地，“减少皱纹”的产品的预期用途是作为药品（影响身体的结构）。

另一种使看起来像化妆品的产品可能最终成为药品的方式是选择成分。回到我们的化妆品例子，如上所提到，大部分洗发水和一部分牙膏都是化妆品。但是，成分的选择也可以使它们成为药品，即使标签上没有声称它们（i）治愈或预防疾病，或（ii）影响身体的结构或功能。这是因为任何含有被认为是药品成分的产品本身就是一种药品。对于洗发水，去头屑成分硫化硒和吡啶硫酮锌都被认为是药品。这意味着任何含有它们任意一种的洗发水都会自动成为药品，即使它没有被标记为去头屑洗发水。对于牙膏，任何形式的氟化物都被认为是一种药品，因此所有含氟化物的牙膏都自动成为药品，即使它们只被标记为有助于防止蛀牙。

在此我们没有试图穷尽所有的对比，以下为一些可以帮助说明化妆品和基于存在药品成分的药品之间的区别的例子：

化妆品	药品
腋下除臭剂	止汗剂
美白漱口水	抗龈炎漱口水
全天然牙膏	防蛀牙牙膏
粉底（脸部）	含防晒的粉底
有香味的爽身粉	止痒爽身粉
保湿剃须膏	防止须部假毛囊炎剃须膏
沐浴露	抗痤疮沐浴露
身体香皂	除臭身体香皂

FDA 向化妆品制造商发出的警告信函也有助于说明被视为不被允许的“药品”声明的语言种类。最近的例子包括 FDA 将以下陈述归为不被许可的类别，每一个的关键问题如下：

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"霜：......舒缓霜，保护和缓解皮肤免受牛皮癣、湿疹和皮疹等皮肤疾病的瘙痒、疼痛和刺激......"

问题：牛皮癣和湿疹（疾病声明）; 瘙痒、疼痛、刺激和皮疹（结构/功能声明）

"升级霜：......与治疗级精油混合，有助于烧伤和割伤......从痤疮到皮疹......"

问题：痤疮（疾病）; 烧伤、割伤和皮疹（结构/功能）

"消除皮肤的烧伤、擦伤或刺激……"

问题：烧伤和刺激（结构/功能）

"重建损坏的组织……"

问题：重建组织（结构/功能）

可以看出，为了保持在化妆品和药品之间的"正确"一侧，并且避免无意中将旨在作为普通（轻度监管的）化妆品的产品转化为（重度监管的）药品，供应产品的企业必须小心同时注意 1）标签上的陈述，以及 2）成分的选择。

消费者集体诉讼

总的来说，FDA 并没有过多关注化妆品，而是倾向于将资源用于更需迫切关注的领域，或者可能对公共健康构成危害的产品（而不是那些可能无害而只是违反监管标准的产品）。然而对于制造商来说，不幸的是，FDA 并不是唯一一个可能仔细检查化妆品标签或广告材料的机构。

原告的集体诉讼律师向消费者征求投诉，且他们自己搜寻化妆品标签和广告，以寻找机会提起集体诉讼。当每个消费者的个人索赔太小而不值得追诉时，消费者集体诉讼提供了一种方式来保护受欺骗行为损害的消费者。另一方面，集体诉讼是律师用浮滥的诉讼来迫使无辜的公司作出和解以得益自己的方法。本文的目的不是为了选择集体诉讼中哪一方是正确的，而是要指出导致针对化妆品公司的集体诉讼的几个事项，以让读者能从其他人的不幸经历中学习到相关经验。

2019 年 2 月，一家在超市和商店销售了一系列大众市场产品的大型化妆品公司，在加利福尼亚州被提起了针对其抗皱产品系列的集体诉讼。指控该产品标签声称其具有迅速的作用，例如"立即"保湿并使皮肤"更容光焕发"，并声称持续使用数周会减少皱纹的。根据原告的说法，这表明制造商对其产品的预期用途是作为一种药品，尽管事实上它从未被 FDA 批准过。虽然只有 FDA 有权执行《FD＆C 法案》，但原告声称这些陈述构成了加州州法律规定的不公平贸易行为。联邦法律与州法律之间的相互搭配适用是一复杂的问题，但一般规则是各州可以自由地施加更严格的标准，因此遵守了联邦法律不一定就达到足以遵守州法律的程度。

使用"天然"一词的标签和广告也吸引了集体诉讼。例如，2018 年 12 月有一个在纽约针对一家较小的化妆品制造商提起的诉讼，该制造商将一系列产品称为"高性能天然产品"，并表示"我们相信高性能和天然"。原告声称这些表述"是虚假的、误导性的和欺骗性的"，因为产品"含有多种合成成分"，

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包括柠檬酸、木糖醇、高岭土和甘油。为了弄清楚某些此类案件背后的分析水平，该起诉书引用了另一家制造商的网站来定义一些所谓的“非天然”成分。

“低过敏性”一词也成为了集体诉讼案件的目标。 2018 年 8 月，有一个针对纽约一家大型化妆品制造商提起的诉讼，该制造商的一系列产品是基于其产品属于低过敏性的陈述。根据该起诉书，每种产品都含有一种或多种“被定义为在 0.1%或类似浓度下导致“大量人群过敏反应”的添加剂的 1 类皮肤增敏剂”。在起诉书中指出，化妆品成分中常见地使“低过敏性”声称具有误导性的是纤维素胶、洋甘菊提取物和烟酰胺。而烟酰胺是一种常用作膳食补充剂的 B 族维生素：该起诉书不仅将其定义为“1 类皮肤致敏物”和“2 类眼睛刺激物”，而且作为“诱变剂，意味着它被怀疑以一种可传递给接触后怀孕生产下的孩子的方式改变人体细胞。”

在一个需要广告和促销才能生存的行业中，没有办法透过一定的法律审查可以完全免除集体诉讼的风险。不过律师可以在广告和促销使用之前进行审查，并建议可以在不影响其效果的情况下降低风险的变更。

专利

就专利“强度”的层面，化妆品的专利问题比药品少，但比大多数其他消费品多。对于药品，大多数美国消费者为了省钱愿意接受不受专利保护的通用药品，但是不同的是，化妆品的可接受性很大程度上取决于品牌的声誉和认知。一个愿意为了省钱选择商店自有品牌的非处方药而不是放在旁边的名牌药品的消费者，可能不会去买商店自有品牌的洗发水、粉底或唇膏（如果商店有这样的产品的话）。

虽然两家大型化妆品公司之间的专利侵权案件时有发生，但并不非常常见。诉讼更有可能发生在一家规模较小的公司或正在进入一个新领域的公司，如果该公司试图利用其专利开辟一个独有市场，防止大型竞争对手的入侵。

虽然如此，对专利和专利申请的检索将出现数百个项目，涵盖整个化妆品领域，不仅包括配方，还包括如睫毛膏刷和各种涂抹器等的设备和工具。

在大多数情况下，对专利和专利申请进行全面检索以评估未来新产品的“自由实施权利”既不必要也不经济可行。然而，建议进行一个更有针对性的方作法，以防止出现将大量投资投入到侵犯竞争对手专利的产品上，尤其是当有机会通过做一些不会影响潜在产品吸引力的微小变化以避开该专利时。

首先，如果提出的产品是基于竞争对手已经面世的产品，则应检查该产品的包装以确定包装是否标有专利号，或者参考网站获取专利信息。尽管专利标记不是强制性的，但许多公司会将其适用的专利号标记在产能品上，因为这样做会带来某些优势（该讨论不在本文的讨论范围内）。

其次，即使提出的产品不是基于竞争对手已经面世的产品，也可以检查市场上存在的最相似的产品的专利标记。这是发现潜在风险的另一种好方法。

第三，如果众所周知为数不多的公司是某一领域的领导者，通常可以设计一种针对这些公司的检索来取得合理数量的检索结果，使审查成为一项可以控管的任务。

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第四，如果公司已经为预期产品申请了自己的专利，专利局在审查过程中所提到的在先技术可能显示先前存在但仍有效的专利，而其可能造成侵权风险。

检索和评估应由合格的专利律师进行或在其监督下进行。由公司的非律师雇员进行的审查在诉讼中不受律师—客户特权的保护，在审前证据揭露过程中可由另一方获得。如果他们写了存在风险和问题，即使他们的结论是错误的或是制作这些的雇员并未受到法律训练，他们的写法可以用来作为不利公司的证据以声称公司故意侵权（导致增加损害赔偿和律师费的索赔主张）。此外，技术人员进行的审查通常可以产生技术上正确但法律上不准确的结果，因为专利的解释更多是法律活动而不是技术活动。

如果不考虑公司是否应该以及何时申请自己的专利来保护新产品，那么对专利的讨论就不会完整。有两个相互竞争的原则在起作用。

首先，不熟悉专利过程的人可能会错误地认为新产品不能受专利保护，因为它与以前的产品没有太大差别。相反，专利制度通过对现有产品的小改进而蓬勃发展，并认识到创新和进步通常以小步骤进行。

其次，有些人屈服于任何有经验的专利律师都知道的“专利狂热”，认为他们所做的一切都是可以获得专利的，并且在最可靠的成功之路上申请专利。除非有人劝阻，否则这会浪费金钱并分散实际设计和生产更好产品的注意力，因为在其它地方更有效地利用的资源会涌入专利过程。过去一个令人遗憾的例子是萨克斯管的发明者阿道夫·萨克斯（Adolphe Sax），他因追究专利侵权案件而陷入破产。

如何最好地在这些极端之间找到合适的道路？

切入点是考虑新产品的专利（假设可以获得专利）是否会实际传递出任何商业优势。例如，专利可能会颁发给一个具体的成分组合，专利律师称之为“图片声明”。但是，如果竞争对手可以生产出同样出色的产品，但由于对于其中一种成分的数量或特性做出很小的变化而不会侵权，该专利除了将其作为“专利配方”宣传的潜在营销优势之外，没有任何商业用途。

如果您认为拥有专利（假设可以获得专利）可能会给公司带来有意义的商业优势，建议咨询合格的专利律师，了解如何以最佳方式进行。通常，对现有技术的相对便宜的检索（通常称为排除检索）将提供足够的信息以确定是否有必要提交专利申请。

商业秘密

商业秘密在化妆品行业中具有非同寻常的作用，因为配方的细节和具体信息通常无法从标签的成分列表中确定。因此，化妆品配方通常被其制造商视为商业秘密。

将信息作为商业秘密保存的一个关键方面是采取措施防止披露。例如，应该要求员工在就业开始时签署保密协议和禁止披露协议，并应定期接受有关保密重要性的培训。商业秘密信息应在公司内部有需要时才分享，并且在没有合适的保密协议的情况下不应在公司外部（例如，咨询顾问、合同制造商或测试实验室）披露。作为离职面谈的一部分，离开公司的员工应该收到一份文件提醒函，表明他们在雇佣关系终止后不会使用或披露公司商业秘密的义务，并被要求签署他们理解的确认书。这些步骤有双重目的，既降低不当披露的风险，又在有必要请求执行时为主张商业秘密保护提供依据。

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公司还应对降低新雇员的前雇主提出商业秘密索赔风险保持敏感性。作为入职流程的一部分，新员工应（以书面形式）承诺不使用或披露先前雇主的任何机密信息。还应考虑新雇员的责任与其在前雇主中的职能之间可能存在的重叠。在可能的情况下，限制重叠程度可以有助于防止无意中使用先前雇主的商业秘密，并且如果不幸遇到诉讼，可以证明该公司没有因为想获得该雇员先前雇主的商业秘密而雇用。

商品外观

商品外观是指指示产品来源的产品的外观，通常在化妆品的情况下是指包装。它类似于商标，但更多的是关于产品的整体视觉外观而不是特定的名称或标识。商品外观通常由元素的组合组成，例如颜色、字体、包装形状和设计特征的安排。每个人都明白有义务避免复制竞争对手的商标，但避免侵犯竞争对手商品外观的必要性并未得到普遍认可。

虽然有可能无意中侵犯了竞争对手的商品外观，但更常见的情况是设计师或营销人员使用竞争对手的产品作为其设计的起点。只要注意确保最终产品具有足够的独特性，这样做是没有任何本质上的错误的。然而，当决策没有得到充分审查时，问题就出现了。例如，如果负责审查产品设计的员工没有被告知设计过程中考虑了竞争者的产品，他或她将不知道去审查潜在的商品外观问题，他或她可能会发现这类问题如果碰巧知道那个模板产品。

从事产品设计的公司也应该考虑自己的商品外观。在一系列产品中以一致的方式使用类似的设计方案可以创造商品外观权利，可以用来防止未来的竞争对手试图通过在自己的产品上使用类似的方案来利用公司的商誉和品牌名声。

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Class Actions: A Uniquely American Litigation Tool

By Ashley L. Shively

Navigating the laws and regulations of the 50 states and the federal government can be a daunting task for foreign companies entering and operating in the United States. But nearly any international executive will tell you that compliance itself is not their biggest fear — it is class action litigation.[1]

The class action procedure in the United States provides a vehicle for individuals, often with damages too small to cover the cost of litigation, to join together with other, similarly situated, individuals and seek recovery as a group. From the perspective of the judicial system, class actions promise economies of time, money and effort, and perhaps most importantly for a judicial system based on precedent, uniformity of decisions.

Other countries permit litigants to bring lawsuits on behalf of absent class members. But only in the United States is the procedure seemingly shrouded in mystery and fraught with fear. Class actions can cover the spectrum of litigation: civil rights, complex antitrust and securities claims, products liability, employment, environmental, unfair competition, personal injury and mass disasters, and consumer injuries. A litigious public and powerful plaintiffs' bar means that almost every company doing business in the United States, regardless of industry, faces a risk of being named in a class action suit.

Class actions are criticized from all sides — as limiting an individual's right to participate in her lawsuit, and as a weapon of the plaintiffs' bar to coerce settlements and extract outrageous fee awards.[2] Whether those arguments have merit is beyond the scope of this article. Class actions are, and will continue to be, a powerful litigation tool in the U.S. It is thus important for businesses to understand the class action procedure so that they adequately can assess risk and be prepared to vigorously defend themselves, if and when litigation does strike.

This article provides an overview of class actions in the United States and the rules governing such cases and settlements. The article assumes a basis of knowledge regarding the U.S. litigation system. For an introduction to civil litigation in the U.S., please review the article, "Resolving Civil Disputes in the United States," authored by Stacey Wang in the January-February 2019 edition of the Holland & Knight China Practice Newsletter.

PRELIMINARY CONSIDERATIONS WHEN A NEW CASE IS FILED

Assuming that there is jurisdiction over a foreign company (or its U.S. affiliate or subsidiary), a defendant named in a class action lawsuit should investigate at least two key issues right at the outset. First, whether the plaintiff or members of the proposed class may be subject to an arbitration provision and class action waiver, and second, whether to remove a case filed in state court to the U.S. district court for the district and division in which the state court action is pending.

1. Is the Plaintiff (or are Members of the Putative Class) Subject to an Arbitration Provision and/or Class Action Waiver?

Arbitration is an alternative dispute resolution mechanism where the parties agree, often as part of a contract, to submit disputes to a private arbitrator (typically a retired judge) rather than litigate in the courts. A class action waiver is a provision within an arbitration agreement stating that the parties to the contract agree to resolve disputes on an individual basis, and refrain from pursuing or joining a class action.[3] Arbitration is thus an important tool to mitigate class action risk and defend against class claims, particularly claims brought by consumers and employees. A business should consult with counsel in drafting or revising an arbitration

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agreement to have the greatest likelihood of enforceability under the Federal Arbitration Act or equivalent state laws, and ensure an agreement is appropriate in scope.

2. Where to Litigate: State vs. Federal Court?

While each case is unique, federal court is generally the preferred venue to move to compel arbitration, and where arbitration is not available, to defend class action lawsuits. Federal courts typically impose tighter controls on discovery and case management than overworked state courts. And because most class actions are litigated in the federal courts, federal judges are more familiar with the particularities of class litigation and settlements. Thus, when a new class action is filed in state court, a defendant should promptly analyze whether the matter can be removed to federal court. In most cases, a defendant must make the decision to remove within the first 30 days.

Federal courts have jurisdiction over, *inter alia*, 1) cases and controversies arising under the U.S. Constitution and federal laws, and 2) controversies between citizens of different states or a foreign state, and where the matter in controversy exceeds $75,000, called diversity jurisdiction. The Class Action Fairness Act of 2005 (CAFA) expands diversity jurisdiction to give federal district courts original jurisdiction in most class actions in which "the matter in controversy exceeds the sum or value of $5,000,000" in the aggregate and there is at least minimal diversity of citizenship. That means that 1) the claims of individual putative class members, taken together, exceed $5 million (exclusive of interest and costs), and 2) <u>any member</u> of the proposed class is geographically diverse from any defendant.[4]

The procedure to remove a case to federal court varies by court, but typically requires the defendant to file a notice of removal setting forward the basis for federal jurisdiction under CAFA or otherwise, along with supporting documents such as copies of all documents filed in the state court, corporate disclosures and any required administrative documents.

PRE-CERTIFICATION MOTIONS AND DISCOVERY

Class actions initially proceed similarly to any other civil litigation, but because the stakes are much higher, early battles can be bruising. Particularly where U.S. jurisdiction is uncertain, foreign companies can spend significant resources trying to extricate themselves from class litigation. In one current case, two Chinese electronics makers of television and computer-component cathode ray tubes were named in an antitrust price-fixing class action. MDL No. 1917 *In re: Cathode Ray Tube (CRT) Antitrust Litigation*, U.S. District Court for the Northern District of California, Case No. 3:07-cv-05944. The defendants did not initially respond, their default was taken and judgment entered against them. By the time the default was set aside, all the remaining defendants had settled out of the litigation. Now, the Chinese companies are fiercely litigating "jurisdictional discovery" — compliance with which they project to cost between US$1.1 million to $1.8 million — and waiting for the district judge to rule on their claim of immunity under the Foreign Sovereign Immunities Act. *Id.* at Dkt. 5338, p. 5.

Disputes over the pleadings can be equally hard fought. A defendant will frequently challenge the sufficiency of the complaint with a motion to dismiss. But even if the court agrees with the defendant's arguments, it can grant the motion and dismiss the complaint with leave to amend — meaning that the plaintiff will get another opportunity to state viable claims for relief in an amended complaint. Nearly 10 years after litigation was first filed, Chinese defendants in the *Chinese-Manufactured Drywall Products Liability Litigation*, pending in U.S. District Court for the Eastern District of Louisiana, only just recently succeeded in dismissing claims with prejudice brought by Louisiana residents for negligence, nuisance, breach of the warranty of fitness and unjust enrichment.

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Once the complaint is at issue, the parties engage in substantive discovery. In some class actions, the court may bifurcate discovery into two phases: 1) the issues relevant to Rule 23 and class certification, and 2) the merits of the class' underlying claims. In other cases, the parties may engage in both class and merits discovery, often with the aim of setting up a motion for summary judgment under Rule 56. Regardless of the scope, discovery in a class action is often arduous, time consuming and expensive. It is not unusual for millions of emails and electronic records to be collected, reviewed and turned over to the other side.

RULE 23 REQUIREMENTS

The Federal Rules of Civil Procedure instruct courts to determine class certification "at an early practicable time."[5] While the exact timing will depend on the venue and individual judge, defendants should generally expect to substantively brief class certification within the first year of a case.[6]

Class actions filed in federal court are governed by Rule 23 of the Federal Rules of Civil Procedure.[7] Rule 23(a) sets out four prerequisites to any class action:

- The class must be "so numerous that joinder of all members is impracticable." Classes have been certified with as few as 35 members, but normally there are hundreds, thousands or even millions of persons in the class.
- There must be "questions of law or fact common to the class."
- One or more persons who are members of the class may sue as representatives of everyone in the class if their claims or defenses are "typical of the claims or defenses of the class."
- The proposed representative "will fairly and adequately protect the interests of the class."

These four requirements are often referred to as numerosity, commonality, typicality and adequacy of representation. While not explicit in the Federal Rules, many courts also impose an implicit requirement that a class be adequately defined and clearly ascertainable — the court must be able to determine whether an individual is a member of the proposed class.

In addition to the requirements of Rule 23(a), a class action must also satisfy the requirements of one of the three categories in Rule 23(b).

Rule 23(b)(1). A court will certify a class action under this section where prosecuting separate actions by individual class members would create a risk of a) inconsistent or varying adjudication with respect to individual class members that would establish incompatible standard of conduct for the party opposing the class, or b) adjudication with respect to individual members that, as a practical matter, would be dispositive of the interests of other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interest. For instance, when the assets available to pay claims are limited and may not be sufficient to pay all claims.

Rule 23(b)(2). A class action under this section is appropriate if the defendant has acted, or refused to act, on grounds generally applicable to the class, so that injunctive or declaratory relief is appropriate for the entire class, and where any monetary remedy would only be incidental to the injunctive relief.

Rule 23(b)(3). Most class actions seeking money damages are brought under Rule 23(b)(3). To be certified under this subsection, a plaintiff must meet two requirements. First, the plaintiff must show that questions common to the class predominate over any questions that affect individual class members. This assures that the class will be "sufficiently cohesive to warrant adjudication by representation."[8] Second, the

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plaintiff must persuade the judge that class treatment is superior to other available methods to adjudicate the controversy. In determining whether the superiority requirement is met, the court must take into account several factors, the most important of which is "the difficulties likely to be encountered in the management of a class action" or "manageability."[9]

An order granting or denying class certification is immediately appealable.[10]

CLASS SETTLEMENTS ARE NO LESS COMPLICATED

Defendants have a variety of motivations to settle cases on a classwide basis. The enormous damages potentially recoverable in many cases may make the risk of litigating through trial unacceptable. In other cases, defendants are simply looking to "buy peace" and move on. But the mere fact that the parties reach a settlement does not end a class action.[11]

"The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval."[12]

After the parties agree on the terms and execute a formal settlement agreement, the agreement must be presented to the court for determination that the proposed settlement is fair and adequate. The plaintiff (or sometimes, the parties jointly) files extensive briefing on the fairness of the settlement, and the court holds a hearing on preliminary approval to determine whether the proposed settlement is "fair, reasonable, and adequate."

Many settlements require the parties to give notice to the class after preliminary approval is granted by the court.[13] The notice informs class members about the terms of the settlement and final fairness hearing, what class members must do, if anything, to receive the benefits of the settlement, how to opt-out of the settlement and how to object. The parties often retain the services of a third-party administrator to send out notice and respond to inquiries from class members. The cost for the administrator is almost always paid for by the defendant, either directly or indirectly, as part of the overall settlement fund.

Cases removed under CAFA will additionally need to comply with certain notice procedures (beyond those required by Rule 23) in the event of settlement. Within 10 days of filing a proposed class action settlement, each defendant must serve the appropriate state and/or federal officials with notice of the settlement and the supporting documents, including the complaint, details of scheduled hearings, the proposed and final notice to class members, any other contemporaneously made agreements between class counsel and defense counsel, the names of class members (if feasible), and any final judgment or notice of dismissal.

Where a settlement will bind class members, Rule 23(e)(2) requires the court to hold a final hearing and make an express finding that the settlement is fair, reasonable, and adequate. The court must consider whether a) the class representative and class counsel have adequately represented the class, b) the proposal was negotiated at arm's length, and c) the relief provided for class is adequate, taking into account the costs, risk and delay of trial and appeal, the effectiveness of any proposed method of distributing relief to the class, the terms of any proposed award of attorney's fees to class counsel, and the proposal treats all class members equally relatively to each other.[14] The final fairness hearing is also an opportunity for members of the class to appear object to the terms of the settlement. In large cases, the parties may have to deal with "professional objectors."[15]

The process to secure final approval of a class settlement is slow — six to 12 months is fairly standard. But despite this drawn-out timeline, the benefits of a class settlement can be significant for defendants. A well-drafted release of liability will preclude every class member (who did not opt out of the settlement) from

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bringing claims against the defendant related to the subject matter of the lawsuit. A release will frequently cover a defendant's agents and affiliates as well.

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[1] Richard Levick, U.S. Plaintiffs' Bar Targets Foreign-Based Companies, *Forbes*, Feb. 20, 2018

[2] E.g., *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *Castano v. Am. Tobacco Co.*, 84 F.3d 34, 747 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995), cert. denied, 516 U.S. 864 (1995). The reality of these concerns has been challenged. See, e.g., Charles Silver, "We're Scared to Death": Class Certification and Blackmail, 78 N.Y.U. L. Rev. 1357 (2003).

[3] Class arbitration is permissible if explicitly authorized in the agreement *Lamps Plus Inc. et al. v. Frank Varela*, U.S. Supreme Court, Case No. 17-988 (April 24, 2019), but would generally not be a preferred venue to defend class claims because classwide arbitration would undermine the central benefits of arbitration — cost savings and streamlined procedures.

[4] There are some exceptions to CAFA jurisdiction, for instance, where the number of members of the proposed class is less than 100, cases solely involving certain securities-related claims and cases that are uniquely local in nature.

[5] Rule 23(c).

[6] Some jurisdictions require a 'placeholder' motion for certification to be filed shortly after the complaint, but those will typically be stayed pending resolution of the pleadings and some discovery.

[7] Most states have enacted class action procedures based on Rule 23. Which rules will govern is determined by whether a case is pending in federal or state court.

[8] *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997).

[9] The other factors include the interests of individual class members in controlling the litigation of their own claims, the extent and nature of any individual lawsuits that are already pending, and the desirability of concentrating all claims in the chosen court. Fed. R. Civ. Proc., Rule 23(b)(3).

[10] Fed. R. Civ. Proc. 23(f) (notice of appeal must be filed within 14 days of order).

[11] An article scheduled to appear in the next edition of Holland & Knight's China Practice Newsletter will explore the intricacies of the U.S. mediation process.

[12] Fed. R. Civ. Proc. 23(e) (emphasis added).

[13] In conjunction with some class settlements, the parties may also need to comply with notice requirements under the Class Action Fairness Act, 28 U.S.C. §§ 1711-1715.

[14] Fed. R. Civ. Proc. 23(e)(2).

[15] To the cynical practitioner, professional objectors file specious objections to class settlements and threaten frivolous appeals of the district court's approval solely to leverage payoffs from the parties eager to get their settlement approved. See, e.g., *Edelson PC v. The Bandas Law Firm PC, et al.*, U.S. District Court, Northern District of Illinois, Case No. 1:16-cv-11057.

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集体诉讼：一个独特的美国诉讼手段

原文作者: Ashley L. Shively

对进入及在美国市场运营的外国公司，需了解如何遵守 50 个不同的州及联邦政府的法律及规定一事是一个很大的挑战。但几乎所有的国际商业主管会说他们最怕的不是如何遵循各个不同法律，而是集体诉讼。[1]

美国的集体诉讼程序提供了一个让许多通常遭受的损失太小而不足以支付诉讼费用的个人能与其它处于类似情况的个人结合而以集体的方式进行追偿的工具。从司法体系的角度而言，集体诉讼提供了在时间上、人力投入上及费用上能达到经济效果并造成结果一致的保障。

其他国家也允许诉讼当事人代表其他不出席的集体成员提起诉讼。但唯有在美国这个程序令人感到那么畏惧。集体诉讼可含括各种类型的诉讼: 民权主张诉讼、复杂的反垄断及证券诉讼、产品责任、劳动、环保、不公平竞争、个人伤害及重大灾难、及消费者损害等。一个好打官司的公开及强而有力的原告律师组织意味着每一个在美国进行商业活动的公司，不论是在那一行业，都面临成为集体诉讼被告的风险。

集体诉讼被各方所批评 – 有人批评它限缩了个人参与他自身诉讼的权利、有人批评它是原告律师组织利用威胁做出和解以榨取令人感到愤怒的赔偿金额的武器。[2]那些批评是否有道理并不在本文所探讨的范围之内。但集体诉讼是且将继续成为一个在美国强而有力的诉讼手段。因此，企业应了解集体诉讼的过程而使他们能有能力评估风险，及在诉讼真的发生时能全力捍卫他们自己的权利。

本文将对美国的集体诉讼程序及规范集体诉讼的进行及和解的规则做出概要介绍。我们假定本文的读者对美国诉讼制度已有基础的认识。有关在美国进行民事诉讼的介绍，请参阅 Stacey Wang 在 2019 年 1、2 月份的 Holland & Knight China Practice Newsletter 上所发表的题目为*在美国解决民事争议*的文章。

当新的案件被提出时所应作的初期考量

假设受理案件的法院对外国公司（或其美国关联企业或子公司）有管辖权，被列为集体诉讼的被告应一开始查明两个主要问题进行调查。首先，应查明原告或预计成为集体的成员是否受仲裁条款及集体诉讼豁免的约定所约束。其次，应查明是否可将向州法院提出的集体诉讼从州的法院移转到位于该州法院所在地的美国联邦地方法院。

1. 原告（或推定的集体的成员）受到一仲裁条款及/或集体诉讼豁免同意的约束?

仲裁是另一种解决争议的机制。当事人通常是在合约中同意将争议提交给一个私人的仲裁人（通常为退休的法官）来解决，而不是在法院以诉讼方式解决。集体诉讼豁免是仲裁协议中规定当事人在合约中同意以个别方式解决争议而不提出或加入集体诉讼请求的条款。[3]仲裁因此成为一个降低集体诉讼风险及对集体诉讼进行抗辩（尤其是消费者及员工所提起的集体诉讼）的重要工具。企业应咨询其律师以拟定

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或修订仲裁约定以使其能在联邦仲裁法或类似州法下最有可能地被认定为有效的约定，并确保该约定的适用范围合适。

2. 在那里进行诉讼：州法院或联邦法院？

虽然每一个案件都有其独特之处，联邦法院通常是较受偏好来要求法院命令进行仲裁（或仲裁不可行时对集体诉讼进行抗辩）的法院。联邦法院一般较案件超出负荷的州法院会对揭露程序及案件管理加以更紧密的控制。且因为大部分的集体诉讼都是在联邦法院中进行，联邦法院法官对集体诉讼及其和解的特性较为熟悉。因此，当一个新的集体诉讼在州的法院中被提出时，被告应迅速地分析该事件是否可被移转到联邦法院。在大部分的案件，被告必须在 30 天内决定是否申请移转受理法院。

除其他之外，联邦法庭对 1）美国宪法及联邦法律所产生的案件及争议，及 2）涉及不同州的公民且争议金额超过 75,000 美元的争议具有管辖权（异籍管辖权）。2005 年的集体诉讼公平法案（CAFA）将异籍管辖权扩大而赋予联邦地方法院对“争议金额总和超过 5,000,000 美元”且至少存在最低限度的不同州公民的争议的大部分集体诉讼原始管辖权。即对 1）个人所提出的推定集体诉讼成员主张总计超过五百万美元（不计入利息及诉讼费用），及 2）所提出的集体诉讼的任何成员在地理上与任何被告不同的案件具有管辖权。[4]

将一个案件移转到联邦法院的程序因不同法院而有所差异，但通常需要被告提交一份列出依 CAFA 或其他法律主张由联邦进行管辖的理由的移转通知，及提交支持文件，例如向州法院提出的所有文件、公司揭露信息、及其他所需的行政文件。

集体诉讼确认前的程序及揭露

集体诉讼初期进行的程序与其他民事诉讼相似，但因为牵涉的利益大了许多，初期可能会产生许多激烈的法律争斗。尤其，当美国法院是否具有管辖权的问题不确定时，外国公司可能投入巨大资源以试图将其免于集体诉讼之外。在两家中国的电视及电脑映像管制造商被列为被告的一件现正进行中涉及反垄断价格操纵的集体诉讼案件（MDL No. 1917 *In re: Cathode Ray Tube (CRT) Antitrust Litigation* 加州北区美国联邦地方法院案号第 3:07-cv-05944 案件），最初被告并未对案件进行回应，而致不利他们的缺席判决作成。而当缺席判决被废除时，所有其他被告均已就诉讼达成和解。而现在该两家中国公司仍就“管辖权的揭露问题”进行激烈的抗辩，而为进行该等揭露程序的费用预估将介于 110 万到 180 万美元之间， 且他们在等待由地方法院法官对他们依外国主权豁免法案所提出的主张进行裁决。

对诉状内容的争议当事人也可能有相同激烈的法律争夺。被告经常以提出驳回诉讼的请求的方式来对原告的诉状的内容是否足够加以挑战。但即使法院同意被告的论点，法院可在同意允许原告对诉状进行修改的前提下驳回原告的诉状请求– 这意味原告将有另一次机会在修改的诉状中列出可行的请求救济主张。在路易斯安娜州东区美国联邦地方法院进行中的中国制造的石棉板产品责任诉讼案件，在诉讼最初被提出后将近 10 年，中国被告最近才成功地取得法院驳回路易斯安娜州居民所提出的过失、妨害行为、违反产品适用性担保及不当得利的主张， 且不允许原告再提出相同主张。

当诉状的内容成为争点时，当事人进行实体揭露程序。在某些集体诉讼中，法院可能将揭露程序分开以以下两个阶段进行： 1）关于联邦民事诉讼法第 23 条的问题及集体诉讼的确认，及 2）集体诉讼的主张的事实真相。在其他案件中，当事人可能同时进行集体范围及事实真相的揭露，并通常是为依联邦民

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事诉讼法第 56 条的规定提出即决审判的请求而作出。不论范围为何，集体诉讼的揭露程序通常是艰苦、耗费时间及昂贵的。通常数百万份电邮及电子文件记录需被收集、审阅及向对方提出。

联邦民事诉讼法第 23 条的要求

联邦民事诉讼法指示法院在“最早的可行时间”时作出是否确认可以提出集体诉讼的决定。[5]虽然明确的时间将视不同法院及个别法官而定，被告一般应可期待在一年内对集体诉讼是否能被确认的决定进行实质的答辩。[6]

向联邦法院提出的集体诉讼适用联邦民事诉讼法第 23 条的规定。[7]第 23(a)条列出了以下提出任何集体诉讼的前提要件：

- 集体的成员必须“是为数那么多而将所有成员通过诉讼合并的方式进行诉讼是不可行的”。集体诉讼在少于 35 个成员时也又被确认过，但正常的情况下，集体成员通常为数百、数千乃至数百万计。
- 必须存在“对集体共同的法律或事实问题。”
- 集体中的一个或数个成员，如他们主张或抗辩是集体的主张或抗辩的典型时，他们得作为集体的每一位成员的诉讼代表。
- 预计的代表“将能公平及充分地保护集体的利益。”

这四个要求通常被称为众多性、共同性、典型性及充分代表性的要求。虽然并不明确，大部分的法院会加上一个不明确的要求，即要求集体必须能足以被界定及可明白被确定的 – 即法院必须可以决定一个人是否属于预定的集体的一个成员。

除了第 23(a)条的要求，一个集体诉讼必须满足第 23(a)条三个类别中的一个要求。

第 23(b)(1)条的要求。如对个别的集体成员分别进行诉讼的话将造成如下风险的话，法院将确认同意集体诉讼的进行：(a) 对个别集体成员将产出不一致或不同的判决结果而将对该集体的对造造成不相称的行为标准； 或(b)对个别成员的案件的判决，将对不是该个别判决的当事人的利益产生决定性影响或将重大地影响或妨碍他们保护他们自己利益的能力。例如当用于支付请求的资产有限且不足支付所有请求时。

第 23(b)(2)条的要求。如被告以适用于集体的理由从事某种行为或拒绝进行某种行为，而以禁制令或声明判决加以救济对整个集体都合适的话，且任何金钱救济对该等禁制令救济而言都将属于附带性的救济的话，依本条确认为集体诉讼是合适的。

第 23(b)(3)条的要求。大部分寻求金钱损害赔偿救济的集体诉讼是依第 23(b)(3)条提出的。为依被本条确认为集体诉讼，原告必须满足两项要求。首先，原告必须展现对集体共同适用的问题相较其他影响个别集体成员的问题而言具有主导地位。这确保集体将“足够紧密以透过代表取得判决”。[8]其次，他必须说服法官集体的处理方式相较其他解决争议的可行方式是更好的方式。在决定更好的要求是

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否被满足时，法院必须考虑几个因素，而最重要的因素是“管理集体诉讼时将可能遇到的困难”或“可管理性”。[9]

对允许或拒绝集体诉讼的确认的裁定可以立即提出上诉。[10]

集体诉讼的和解一样复杂

被告有许多动机对以集体诉讼方式提出的诉讼进行和解。许多案件中可能产生大量的损害赔偿责任造成透过审判来进行诉讼的风险不可被接受。而在其他案件中，被告仅仅是寻求“购买和平”以得以继续往前。但当事人达成和解并不表示集体诉讼就此结束。[11]

“一经确认的集体的主张、争议或抗辩 –或一个为和解目的所提出待确认的集体 – 只有在取得法院批准后才得以和解、主动撤回或达成妥协协议。[12]

在当事人达成和解条件及签署正式和解协议后，该协议必须提交给法院以决定所提的和解是否公平及足够。原告（或有些情况下，当事人各方一起）对和解的公平性问题提出许多书状，且法院就初步同意和解一事召开听证以决定所拟和解是否“公平、合理、及足够”。

许多和解要求当事人在法院给与初步批准后向集体发出通知。[13]该等通知告知集体成员和解的条款及最终公平性庭审、集体成员应该作那些事（如有的话）以收到和解的利益、如何选择排除于和解之外、及如何提出反对。当事人经常聘用第三方的管理人来提供几发通知及回复集体成员询问的服务。管理人员的费用几乎都是由被告来支付，无论是直接支付或透过作为整体和解金额的一部而间接支付。

依 CAFA 移送的案件在和解时将须另外符合的通知程序（联邦民事诉讼法第 23 条所要求的通知要求之外）。在提出所拟集体诉讼的和解的 10 天内，每一被告必须向适当的州及/或联邦官员提出和解通知及相关支持文件，包括诉状、所安排庭审的详细信息、对集体成员所拟发出的通知及最后通知、及集体的律师及被告律师同时达成的任何协议、集体成员的姓名（如可行的话）、及任何最终判决或驳回通知。

当一项和解对集体成员产生拘束效力时，第 23(e)(2)条要求法院召开最后听证并作出明确决定确认和解为公平、合理及足够的和解。法院必须考虑是否: a) 集体代表及集体律师有充分代表集体; b) 和解提议系以与无关联方达成的方式作出，及 c) 向集体提供的救济是足够的，考虑到成本、风险及审判及上诉的时间耽搁、向集体分配救济的所拟方式的有效性、向集体的律师支付的律师费的条件、及向所有集体成员所提出对每一成员相同的提议。[14]最终听证也是集体成员出庭反对和解条款的机会。在大型案件中，当事人可能须因应“专业异议人”。[15]

取得对集体和解的最终批准的过程时缓慢的 – 一般须时 6 到 12 个月。不过即使须经此一漫长时程，对被告而言，和解的利益可为相当显著的。一份准备很好的责任免除文件将排除（未选择排除于和解之外）的每一集体成员再就与诉讼内容有关的事项向被告提出诉讼。免除协议通常也包括被告的代理人及关联方。

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[1] Richard Levick, *U.S. Plaintiffs' Bar Targets Foreign-Based Companies（美国原告律师组织针对外国公司）*, FORBES, Feb. 20, 2018
[2] *E.g., Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *Castano v. Am. Tobacco Co.*, 84 F.3d 34, 747 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995), cert. denied, 516 U.S. 864 (1995). The reality of these concerns has been challenged. (这些顾虑的真实问题受到挑战) *See, e.g.*, Charles Silver, "We're Scared to Death": Class Certification and Blackmail, ("我们吓死了"集体诉讼的确认及勒索，78 N.Y.U. L. Rev. 1357 (2003).
[3] 如协议明确授权的话，集体仲裁是被允许的 *Lamps Plus Inc. et al. v. Frank Varela*, 美国联邦最高法院第 17-988 号案件 (2019 年 4 月 24 日), 但一般这并非抗辩集体主张的偏好方式，因为集体仲裁将减损仲裁的核心好处 – 即节省费用即提高程序效率。
[4] CAFA 的管辖权有几个例外, 例如, 当所拟的集体成员人数少于 100 名时、案件仅仅牵涉某些证券相关主张时、及案件性质为独特地方性案件时。

[5] 联邦民事诉讼法第 23(c)条。
[6] 某些管辖区域要求在起诉书提出后很快提出"暂代"的集体诉讼确认的请求，但该等请求通常将被搁置到诉讼主张及部分揭露完成后。

[7]大部分的州有根据联邦民事诉讼法第 23 条制定集体诉讼程序规则，而那部规则将适用将取决于该案件是在联邦或州法院中提出。
[8] *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997)。

[9] 其他因素包括个别集体成员对自己的主张的诉讼控制的利益、多少个别诉讼已经被提出及该等诉讼的性质、及将所有主张集中于所选法院处理的意愿。联邦民事诉讼法第 23(b)(3)条。
[10] 联邦民事诉讼法第 23(f) 条 (上诉通知必须在裁定作出后 14 天内提出)。
[11] Holland & Knight's China Practice Newsletter 下期将会刊载一篇文章讨论美国调解的细节问题。
[12] 联邦民事诉讼法第 23(e) 条(特别强调)。
[13] 在某些集体诉讼的和解时，当事人可能也须遵守集体诉讼公平法案关于通知的要求, 28 U.S.C. §§ 1711-1715。

[14] 联邦民事诉讼法第 23(e) (2)条。
[15] 对愤世嫉俗的律师而言，他们认为专业的反对者对集体诉讼的和解提出是是而非的异议，并威胁对地方法院的批准提出浮滥的上诉的唯一目的是想从渴望取得和解批准的当事人上取得更多获得付款的影响力。*See, e.g., Edelson PC v. The Bandas Law Firm PC, et al.*, U. S. District Court, Northern District of Illinois, Case No. 1:16-cv-11057。

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有关本期刊

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本期刊所刊载的信息仅供我们的读者为一般教育及学习目的使用。本期刊并不是为作为解决某一法律问题的唯一信息来源的目的所设计，也不应被如此使用。此外，每一法律管辖区域的法律各有不同且随时在改变。如您有关于某一特别事实情况的具体法律问题，我们建议您向合适的律师咨询。美国霍兰德奈特律师事务所的律师能够对许多与中国相关的问题提出他们的看法及建议。

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