Potential Pitfalls in the Acquisition of U.S. Companies
An acquiror seeking to purchase a business organized and operating in the U.S. faces a variety of potential pitfalls. If not identified in due diligence and properly addressed, such pitfalls can slow down the acquisition as well as impair if not destroy the value of the target business. The following is a non-exhaustive list of such potential problem areas:

Successor Liability
- Even where the transaction is structured as an asset acquisition with the Buyer expressly disclaiming any assumption of Seller liabilities, the Buyer may nonetheless be held responsible for some or all of such liabilities. This unhappy turn of events can occur as a result of the following:
  - Under various legal theories of successor liability: de facto merger, continuation of enterprise, the product line doctrine
  - If the transaction is found to be a fraudulent transfer
  - Under certain statutes: e.g., ERISA (employee benefits), tax laws, environmental statutes

Non-Assignability of Valuable Contracts
- Certain contracts of the target company may contain language expressly barring assignment or triggering termination upon a change in control of the target company. A reverse triangular merger where an acquisition subsidiary merges with the target and the target survives may provide a solution.

Deficient Terms for the Sale of Goods/Services
The target company may have failed to adequately document the terms of sale under which its goods and services are regularly marketed and sold:
- Lack of clarity on warranties—some warranties are imposed by law unless disclaimed
- Failure to have the customer waive indirect and consequential damages
- Failure to specify when title to goods/risk of loss passes
- Failure to set any terms whatsoever, thereby subjecting the sale to terms provided on the customer’s purchase order
Intellectual Property Vulnerabilities

- Seller’s software may incorporate so-called open source software, thereby potentially requiring Seller to then make its own proprietary programs freely available.
- The Seller may be highly dependent upon custom software developed by an independent contractor. If that contractor was not required to grant exclusive rights to the Seller, the contractor might enjoy an unfettered right to license it to others.
- If the Seller has not adequately protected its intellectual property (including insistence on employees and contractors signing confidentiality agreements), the seller may be handicapped in defending their protected proprietary nature.
- The enforceability of employee of non-competition agreements varies widely from state to state (e.g. in California they are generally unenforceable except in connection with the sale of a business; in Massachusetts they are generally enforceable if “reasonable”)
- Formal registration of patents, trademarks, and copyrights is critical to securing full rights and protections as a holder of the intellectual property in question

Employment – Related Landmines

- Some companies attempt to characterize some of their workforce as independent contractors rather than as employees, thereby avoiding the need to withhold taxes and provide full benefits. State and Federal tax authorities are aggressively challenging such arrangements unless they meet certain prescribed tests.
- The federal and state authorities are aggressively seeking out illegal immigrants in company workforces. Violations can trigger significant fines and penalties.
- While the U.S. generally treats employee relationships “at will,” terminations based on discrimination, arising from plant closings or that violate highly technical rules relating to pension plans and other employee benefits can all result in serious exposure.

Foreign Corrupt Practices Act (FCPA)

- The FCPA, which bars the payment of bribes and other questionable payments to governmental officials and government-owned enterprises, is being aggressively enforced by the U.S. authorities.
- Mere failure to maintain the records mandated by the statute can trigger substantial fines and penalties.
Areas of Service

• Alternative Dispute Resolution
• Banking & Financial Services
• Bankruptcy & Creditors’ Rights
• Business & Corporate
  - Commercial Lending
  - International Trade & Transactions
  - Mergers & Acquisitions
  - Securities Law
  - Small Business
  - Tax
• Construction
• Criminal Defense, White Collar & Government Enforcement
• Employee Benefits & Executive Compensation
• Energy
• Environmental
• Family Law
• Franchise & Dealership
• Government & Public Relations

• Health Care
  - Health Technology
  - Life Sciences
• Higher Education
• Hospitality
• Intellectual Property
• Labor & Employment
  - Immigration
• Litigation & Trial
  - Commercial Disputes
  - Product Liability & Mass Tort
• Maritime
• Nonprofit & Tax-Exempt Entities
• Private Clients & Fiduciary Services
  - Probate Litigation
• Real Estate
• Sports
• Telecommunications
• Timberlands
• Water & Wastewater Utilities