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Top 10 Practical Tips for CFIUS Practice



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IN SHORT

The Situation: During the last few years, the CFIUS process has evolved and potential significant changes are on the horizon.

The Result: CFIUS remains an important consideration for foreign parties looking to invest in the United States.

Looking Ahead: With potential significant changes to the CFIUS process on the way and against a backdrop of uncertainty and unpredictability, these 10 tips provide guidance regarding CFIUS and the CFIUS review process.

The Committee on Foreign Investment in the United States ("CFIUS"), which currently has jurisdiction over transactions that could result in foreign control over a U.S. business, remains an important consideration for foreign parties looking to invest in the United States. During the last few years, the CFIUS process has evolved and potential significant changes are on the horizon. Against this backdrop of unpredictability and uncertainty, provided below are 10 practical tips relating to CFIUS and the CFIUS review process.

- 1. Change is Coming.** Changes to the jurisdiction of CFIUS and the CFIUS review process are coming. Unfortunately, the timing and scope of any such changes are difficult to predict. In November 2017, Congress introduced the Foreign Investment Risk Review Modernization Act ("FIRRMA"), which seeks to modernize and strengthen the CFIUS process and potentially broaden the scope of transactions within the jurisdiction of CFIUS. In May 2018, the Senate Banking and House Financial Services Committees unanimously advanced updated FIRRMA bills that differ from one another and include changes to certain provisions of FIRRMA. Given the broad bipartisan support for the legislation, we expect some form of CFIUS-related legislation will pass, possibly as early as this year. Moreover, on May 29, 2018, President Trump threatened restrictions on Chinese investment in "industrially significant technology" to be announced by June 30, 2018.
- 2. CFIUS is (Currently) Voluntary.** Although the CFIUS process is voluntary, certain transactions would trigger a mandatory filing under FIRRMA. Also, CFIUS monitors announced deals closely, inquires about transactions not notified to CFIUS, and can request that parties submit a CFIUS notice for a transaction not notified to CFIUS.
- 3. Plan for More Time.** CFIUS is extremely busy and the CFIUS process is complex. Parties should plan for at least four to six months from start to finish. This includes gathering and compiling the information necessary for a CFIUS filing, allowing CFIUS to review and comment on a draft filing, and the formal CFIUS review process. In 2017, nearly 70 percent of transactions filed with CFIUS required the additional 45-day investigation period. Also, both revised versions of FIRRMA extend the CFIUS review timelines.
- 4. Data is Important.** Recently, access to bulk personally identifiable information and health information relating to U.S. citizens by foreign persons has become an area of intense interest for CFIUS. The U.S. government's concern with foreign access to such data primarily relates to the ability of foreign persons to piece such information together and use it for strategic purposes. Thus, this is an area that parties engaging in transactions within the jurisdiction of CFIUS must now consider.
- 5. More and Different Mitigation.** CFIUS uses a variety of mitigation measures to address national security concerns associated with transactions reviewed by CFIUS. Companies should proactively consider and negotiate what, if any, mitigation measures they are willing to accept as a condition of obtaining CFIUS clearance.
- 6. Export Control and Economic Sanctions Issues.** Understanding the export control status of the U.S. business's products is critical to evaluating the nature and extent of CFIUS risk. Also, CFIUS clearance is not a license to export controlled technology or products to the country of nationality of the foreign buyer. In addition, CFIUS regularly requests information regarding a foreign buyer's business dealings with U.S. sanctioned countries and entities. Gathering such information can be challenging and not providing information relating to all relevant business may result in CFIUS rejecting the filing.
- 7. CFIUS Does Not Always View Limited Partners as Limited.** The CFIUS regulations require that parties provide information regarding all investors with a greater than five percent interest in the

foreign acquirer. In addition, CFIUS routinely requests information regarding limited partners and their control rights, especially when they are foreign government-controlled entities (regardless of the size of their investment). In so doing, CFIUS may not always view limited partners as limited.

8. **Understand Ties to the U.S. Government.** CFIUS is interested in all contracts, purchase orders, sales, grants, and authorizations between the U.S. business and the U.S. government. A U.S. business must understand its relationship with the U.S. government, including indirect ties, such as sale through distributors that may supply the U.S. business's products to the U.S. government.
9. **Team Telecom.** Foreign parties looking to invest in telecommunications infrastructure or provide international telecommunications services involving the United States, or invest in U.S. businesses that maintain licenses or other authorizations issued by the Federal Communications Commission may be required to provide extensive disclosures to, and enter into a network security agreement with, Team Telecom, which is an inter-agency task force led by the U.S. Department of Justice.
10. **Other Foreign Direct Investment Regimes.** Mergers and acquisitions by multinational companies require attention to foreign investment controls around the world, and such controls vary widely. For example, requirements for determining whether such controls apply, the areas and industries of focus, and the notification and review processes differ by jurisdiction. In addition, potential significant changes to foreign investment controls are looming.

TWO KEY TAKEAWAYS

1. Foreign investors must continue to be mindful of CFIUS, how the process has evolved, and potential significant changes on the horizon.
2. Although it seems certain that the CFIUS process and the jurisdiction of CFIUS will change in the near term, such changes are uncertain and unpredictable.



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