

Foreign Investment Screening

United States

The foreign investment review landscape in the United States has, during the course of the past year, grown more complex as CFIUS has continued implementing new regulations under the Foreign Investment Risk Review Modernization Act (FIRRMA) and new enforcement tools and resources have been utilized.

Major Recent Developments

New regulations under FIRRMA were implemented in February 2020 that

- expanded the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) to include certain non-controlling investments in US businesses that have activities involving critical technologies, critical infrastructure, or maintain sensitive personal data of US persons;
- created new mandatory filing requirements for certain investments involving critical technologies or where a foreign government has a substantial interest in the foreign investor; and
- provided CFIUS jurisdiction over pure real-estate transactions where the target real-estate is located in proximity to sensitive U.S. government or military facilities.

The new regulations coincided with the creation of a new enforcement bureau within CFIUS and the provision of significant additional staff and other resources for CFIUS to utilize in investigating transactions that are not notified to it.

In May 2020, CFIUS imposed, for the first time, filing fees for full notifications to the Committee. The fees are tied to a graduated schedule with potential fees ranging from \$0 to \$300,000, depending on the overall valuation of the transaction.

Finally, in October 2020, CFIUS' mandatory filing requirements that were established in February 2020 were modified such that CFIUS abandoned the requirement that the U.S.

business operate in specified industries in favor of an analysis of whether the technologies or products developed, manufactured, or tested by the U.S. business would require an export license to the foreign investor or certain entities in its ownership chain.

All of these developments together significantly expanded CFIUS' jurisdiction and provided it with powerful new enforcement tools. CFIUS has, for example, already begun utilizing its increased enforcement resources to identify, review, and, if necessary, mitigate, non-notified transactions that it believes pose national security concerns. For example, according to the latest statistics, in 2020 CFIUS evaluated a record 117 non-notified transactions for possible national security implications. That number, which, according to CFIUS, is double that of 2019 and 2018 combined, is expected to grow this year and beyond.

CFIUS under the Biden Administration

CFIUS' focus during the first six months of the Biden administration has remained on the technology sector, particularly emerging technologies, as well as critical infrastructure, and personal data. For example, in 2020 CFIUS reviewed 122 transactions (out of a total of 313 transactions reviewed) involving acquisitions of U.S. critical technology companies. To that end, the Department of Commerce continues its efforts to implement new rules identifying certain emerging and foundational technologies that will have a direct impact on what transactions are subject to CFIUS' jurisdiction and will be of interest to it.

CFIUS also maintains its focus on Chinese investments (including investments with indirect Chinese interests) as well as any other attempts by China, Russia, or other non-allied nations to target U.S. businesses involved in critical or emerging technologies or infrastructure, or those that are suffering financial distress as a result of COVID-19. In addition, CFIUS continues to scrutinize investments related to an effective U.S. response to COVID-19 and any future pandemics, such as personal protective equipment, ventilators, vaccines, treatments or testing products.

As anticipated, CFIUS has evidenced a stronger commitment to the formal interagency process and consensus than was exhibited under the prior Administration. The return to a more process oriented approach has seemingly resulted in a more traditional and balanced analysis of the economic benefits of the proposed transaction in comparison to any national security concerns. As a result, the CFIUS has also appeared more open to solving issues through the imposition of mitigation measures, rather than by prohibiting the transaction or forcing divestments.

The key role of Assistant Secretary for Investment Security, which has a key responsibility over CFIUS matters, and other relevant political-appointee positions, however, remain unfilled. Having such key roles unfilled can, particularly in complicated CFIUS national security matters, result in delays and increased difficulty obtaining clearance. We expect some progress in filling these positions in the coming months and will have to see what impact, if any, they have in defining the CFIUS's priorities.

Trends

Based on the latest statistics released by CFIUS to Congress, several trends in notifications and how they are processed and treated by CFIUS are apparent:

- Parties are increasingly relying on short-form declarations in lieu of full notifications (a 25% increase in 2020 from 2019)
- Declarations are increasingly being cleared by CFIUS (64% in 2020 vs 37% in 2019)
- Increased resources have allow CFIUS to process filings faster (approximately two days faster in 2020 vs 2019).
- While notifications from allied countries account for a significant portion of filings (investors from the UK, Japan and Canada represented the top three number of filings in 2020), direct and indirect connections to China remain a focus of CFIUS.
- The number of transactions in which CFIUS imposes mitigation measures decreased slightly from 2019 (12%) to 2020 (9%) but remains fairly stable.
- Real-estate transactions are only rarely being notified (only 5 such notifications in 2020)

Comment

Given the increased jurisdiction of CFIUS and resources devoted to enforcement, parties considering foreign investment in the United States are encouraged to evaluate potential CFIUS implications as early as possible and, if necessary, lawful mechanisms to structure the transaction so as to mitigate potential CFIUS risk.