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Reform May Mean More CFIUS Filings in Cross-Border M&A Transactions

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One aspect of implementing a cross border merger or acquisition transaction is the possibility that a filing with the Committee on Foreign Investment in the United States (CFIUS) may be required.

CFIUS is a cabinet-level committee that reviews investments in national security sensitive U.S. businesses and determines whether they should go forward. CFIUS operates under the direction of the President and is chaired by the Secretary of the Treasury. It includes the heads of the Commerce, Defense, Energy, Homeland Security, Justice, and State Departments, as well as the U.S. Trade Representative and the Director of the Office of Science and Technology Policy. Several other offices also contribute: the Council of Economic Advisers, the Homeland Security Council, the National Economic Council, the National Security Council, and the Office of Management and Budget. In addition, the Director of National Intelligence and the Secretary of Labor are nonvoting members.

While the legislation establishing CFIUS was enacted in 1975, the requirement to file a notice of an investment was more theoretical than actual for many years. There have been a number of legislative fixes to CFIUS over the years that have strengthened CFIUS, almost all in reaction to some perceived threat to the security of the United States at the time. Over the summer, the Foreign Investment Risk Review Modernization Act (FIRRMA) was passed by Congress. FIRRMA amends the process used by CFIUS to assess national security-related concerns about foreign investment in the United States. Before FIRRMA, only controlling investments were required to be notified to CFIUS. Now, with the Trump administration's attention hyper focused on China and foreign acquisitions of U.S. technology and business in general, FIRRMA is the latest legislative fix. It has placed a determination of whether to file notice of an investment with CFIUS front and center and requires all investments, whether controlling or not, to determine if a filing is necessary .

In order to determine whether a CFIUS notification is required, several aspects of a proposed acquisition need to be considered.

Initially, is the investor the type of investor covered under CFIUS? Is it a “foreign investor?” Just because it is a U.S. entity does not mean it cannot be a foreign investor. A U.S. fund with foreign limited partners or general partners may be deemed a foreign investor for the purposes of CFIUS. If a foreign investor is a part of the U.S. investment entity, if the structure grants the investor some type of control rights or the investor is more than a passive investor, the entity may be deemed a foreign investor for CFIUS purposes.

If the investor is deemed a foreign investor, is the investment going to be made in a target business covered by what FIRRMA denominates as a “pilot program industry?” These pilot program industries are companies in sectors deemed critical to U.S. national security. There are 27 industries that have been specifically identified such as biotechnology, telecommunications, aviation, and defense.

In the event that an investment is to be made in an industry that is part of the pilot program, it is mandatory that a CFIUS filing be made no less than 45 days before a closing is to occur. If the investment is not in a pilot program industry, a filing is not mandatory. The benefit of filing is that once an investment is approved, approval cannot be revoked absent false, misleading or incomplete information having been supplied. If a filing is not mandatory, unless some national security implication is present as a result of the transaction, often no notification is made. CFIUS could theoretically invalidate such a non-notified investment at any time but generally such investments are never reviewed.

There is a lot more to CFIUS and filing determinations than can be provided in this short article. Whether or not to file is a judgment call that investors should discuss with their counsel.

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