Public policy spotlight:
Committee on Foreign Investment in the United States (CFIUS)
August 2018

The issue: Legislation to strengthen CFIUS – a committee of US federal government departments and agencies chaired by the Treasury Department – was signed into law by President Trump on 13 August 2018 as part of a larger defense authorization bill. Charged with scrutinizing foreign direct investment that resulted in a merger or acquisition on the basis of national security, CFIUS will gain additional power and authority under the new law.

Why it matters: The business community should be prepared for and informed of these changes, which could broadly impact M&A, divestitures, joint ventures and other forms of investment. According to the US Government Accountability Office, CFIUS reviewed over 50% more transactions in 2016 than in 2011, a trend that is expected to continue. When enacted, the changes will subject more companies from a range of industries to CFIUS review, which could influence strategies for deal structures, increase costs and potentially slow the pace of deals.

As a result, CFIUS review should be built into the analysis of US investment strategies by foreign clients as well as US clients considering joint ventures with foreign partners.

This document looks at how the law will change CFIUS and what to expect as the rulemaking gets underway.

CFIUS today

- In recent years, the only transactions that would undergo CFIUS review are those (i) where the foreign investor obtains control of the US business, and (ii) that have a nexus to national security.
- When two companies decide they want to conduct a transaction, and they believe CFIUS is likely to be involved, they file a joint voluntary notice with the committee.
- CFIUS can approve the transaction, develop a contractual agreement with the filing companies to mitigate any national security risk they detect, or forward the transaction to the President with a recommendation to prohibit or approve the agreement (only the President can prohibit a transaction).
- Currently CFIUS looks at transactions that would result in foreign control, which is based largely on qualitative factors in the transaction, although a general "rule of thumb" has been a 10% stake in the target company.

How will the law change CFIUS?

- It expands CFIUS's mandate from examining foreign direct investment in which a foreign party obtains control of a US business to include:
  - i. minority position investments (a) where an investor does not obtain control but is not a purely passive investor, and (b) the business provides access to critical technology, critical infrastructure, or sensitive personal identifier information; and
  - ii. commercial real estate transactions proximate to sites important to national security, whether there is a business being acquired or not.
- Separately, the law calls for the establishment of an interagency process to identify new emerging critical technologies that are related to national security and not yet subject to export control that should be elevated so that a license would be required, at least, for targeted destinations. It also authorized the export-control regime for the first time in almost 20 years, as opposed to relying on emergency executive authority.
- CFIUS filings are expected to increase significantly, therefore; the law authorizes a fast track review process, and a longer, more comprehensive review on a case-by-case basis.
- The legislation calls for enhanced communication with foreign governments on cross-border investment issues.

What to expect next?

- Some provisions of the legislation, particularly process issues, are effective immediately, such as changing the timelines in filings slightly, while many others require rulemaking. The US government will need at least a year to develop the regulations to implement this bill comprehensively. It is anticipated that the rulemaking will be open for public comment.
  - Rulemaking will fill in many of the gaps left by the statute, including definitions for terms such as "critical technologies" and "critical infrastructure."
  - Treasury also will introduce a fee structure for filings to cover the growing need for additional resources.
- Treasury will reorganize to reflect the new CFIUS regime, including the establishment of a new Assistant Secretary for Investment Security, and additional staff to handle the larger caseload. Most of these hires will require security clearances, which could affect the pace of hiring.
- The law also authorizes CFIUS to create one-year pilot programs to implement any authority provided under the new law. These pilot programs may commence before the various rulemakings are final.
- The Department of Commerce will be required to issue a biennial report to Congress on the state of Chinese investment in the US.

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