

Understanding CFIUS

Sheila CHESTON, Leon GREENFIELD and Nicole TELECKI outline the CFIUS process and strategic considerations.

Foreign acquisitions of US companies are now a routine fact of commercial life, and deals involving advanced technology with national defense applications are no exception. Although the US is generally open to foreign acquisitions, there are inevitably tensions between promoting open markets, free trade and competition, and ensuring US national security. Responsibility for resolving those tensions falls largely on the multi-agency Committee on Foreign Investment in the US (CFIUS).

In recent years, the focus of CFIUS's attention has grown well beyond the traditional defense sector to include, for example, companies with telecoms, computer, aviation and internet related assets. That trend has continued in the aftermath of 11th September, 2001. With increased attention to national security, there is concern among some in Washington that CFIUS should review more carefully a broader range of transactions. The most recent proposal, which would have made CFIUS filings mandatory in many cases, has reportedly been withdrawn. However, legislative efforts to strengthen the CFIUS review process have been, and will continue to be, considered. In light of this, it is increasingly important that foreign companies contemplating US acquisitions and their counsel understand:

- The basics of the CFIUS process.
- Some of the issues and strategic considerations that may arise.

What is CFIUS?

The Exon-Florio Amendment of 1989 authorizes the President to prohibit an acquisition when there is credible evidence that it will result in foreign control of the US business, and the foreign

interest exercising the control "might take action that threatens to impair the national security." The President's authority is extremely broad and is not subject to judicial review.

The President has designated CFIUS to assist in the exercise of this authority. CFIUS investigates transactions and makes recommendations to the President when it believes a transaction should be prohibited.

CFIUS is chaired by the Secretary of the Treasury; its members include the heads of the Departments of Defense, Justice, State and Commerce, the National Security Council, the National Economics Council, the US Trade Representative, and other executive branch agencies.

The CFIUS process

The CFIUS process is begun either:

- When the parties to a transaction submit a "voluntary notice".
- At the behest of a CFIUS member.

If the parties submit a voluntary notice, the filing itself is relatively straightforward and requires no fee. The entire CFIUS process is confidential.

Like the President, CFIUS has broad discretion to consider a wide range of factors when assessing a foreign acquisition. For instance, in a transaction involving US telecoms assets, it will consider whether foreign control of those assets could interfere with the Federal Bureau of Investigation's ability to use them to engage in electronic surveillance.

Strategic considerations

The first question for a foreign company making an investment in the US

is whether and when to make a voluntary filing. In reaching its determination, the parties should:

- Consider whether the transaction could in any way implicate US national security interests (as that term is broadly interpreted); and if so
- Weigh the potential benefits of a voluntary notice against the possibility that the filing might lead to a burdensome and expensive review process that could otherwise have been avoided.

A voluntary filing with CFIUS has the following advantages:

- If the acquisition receives CFIUS clearance, the company may then proceed with the assurance that the transaction will receive "safe harbor" protection from further scrutiny for national security implications.
- The foreign acquirer is conveyed as being a responsible company that is sensitive to the importance of the CFIUS process. As a result, it is more likely to generate goodwill and credibility with CFIUS, which may enhance the company's negotiating position.
- The acquirer does not expose itself to the risk of a post-closing investigation initiated by CFIUS. (If this happens and the President concludes that the transaction could threaten national security, he can require the foreign company to divest itself of the newly acquired assets.)

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