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Telecommunications Law Update

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CFIUS AND GLOBAL CROSSING

For months, a proposed purchase of bankrupt telecommunications giant Global Crossing sat on hold while the Committee on Foreign Investment in the United States (CFIUS) debated its approval. Reportedly, CFIUS was concerned about the possible ties to the Chinese government of co-purchaser Hong Kong based Hutchinson-Whampoa. CFIUS's ultimate decision to open a formal investigation into the proposal put the acquisition in serious doubt and finally convinced Hutchinson to drop out.

CFIUS, originally established in 1975 and strengthened in 1988, is a U.S. government national security watchdog committee composed of 12 representatives from several executive branch agencies. The Secretary of the Treasury chairs the committee, which also seats the secretaries of the Department of State, Commerce, and Defense, along with the Attorney General, the National Security Adviser, and the U.S. Trade Representative. Also included are the White House Office of Management and Budget, the Office of Science and Technology Policy, and the Assistants to the President for National Economic Policy and National Security Affairs. In late April 2003, President Bush added Tom Ridge, Secretary of Homeland Security, as another member, possibly portending a tougher stance on foreign investment.

Despite its relative obscurity, CFIUS has a key role in reviewing investments that result in foreign control of U.S. companies. CFIUS may review or investigate any acquisition by or with a foreign person that "could result in control by a foreign person of a U.S. person or persons engaged in interstate commerce in the United States" where "there is credible evidence to support a belief that the foreign interest exercising control of the U.S. person to be acquired might take action that threatens to impair the national security." With the sole responsibility for discerning such threats to national security, CFIUS may be willing to carry a big stick to protect the nation in the post-9/11 climate.

On paper, the process by which CFIUS acts is relatively simple. Private parties are not required to notify CFIUS of their proposed business transactions. Failure to do so, however, leaves such acquisitions open to possible divestiture at some later time if CFIUS, on its own initiative, decides to investigate. On the other hand, parties seeking safe harbor may file a voluntary notice of an acquisition with CFIUS. Thirty days after such filing, CFIUS must decide whether or not to investigate. If CFIUS decides not to investigate further, the process ends at that point, and the parties may proceed with their planned business arrangement without risk of future forced divestiture. However, if any member of CFIUS indicates concern and CFIUS decides to commence an investigation, then CFIUS has 45 days to review the deal. Upon notification of a CFIUS decision to investigate, most parties withdraw their proposed acquisitions. If the parties choose not to do so, CFIUS continues its investigation and, sometime before the end of the 45 days, presents a report and recommendation to the President. The President then announces his decision no later than the fifteenth day after the CFIUS investigation is completed. If there is credible evidence leading the President to believe that the foreign interest exercising control might threaten national security, he may suspend or prohibit any acquisition.

CFIUS's most recent, highly publicized activity involves the potential purchase of Global Crossing, a battered US telecommunications company struggling to emerge from bankruptcy. Global Crossing began its discussions with CFIUS last summer when Hutchinson and Singapore Technologies Telemedia Ltd. (STT) won the public auction to purchase Global Crossing. Each company agreed to pay $125 million for a combined 61.5 percent stake in the reorganized company. The sale of control would have enabled Global Crossing to avoid liquidation. The U.S. Bankruptcy judge in New York, presiding over the bankruptcy, along with regulators from the United Kingdom and the European Union, all approved the deal.

CFIUS, however, expressed concerns. The Department of Defense and the FBI reportedly presented the toughest opposition to the transaction. They feared that possible ties between Hutchinson and the Chinese government would compromise Global Crossing's 99,000-mile fiber-optic network, some of which carries telecommunications traffic for the U.S. government. Some CFIUS members apparently wanted to secure access to the network for government intelligence services. The Singapore company presented no real security issues for CFIUS.

In attempts to discourage a CFIUS investigation, Hutchinson offered to name four U.S. citizens, to be approved by the U.S. government, to sit on Global Crossing's 10-person board. Despite these efforts and after months of informal talks, CFIUS finally met in late April and by letter dated April 28 said that it was initiating a 45-day investigation. Upon learning of the CFIUS decision, Hutchison relinquished its bid, ceding its share to its Singapore partner.

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