Tips For Increasing The Chances Of CFIUS Approval

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For several decades, the U.S. government — through a multi-agency body known as the Committee on Foreign Investment in the United States — has been evaluating inbound foreign investments to determine whether they pose any national security risks to the United States. In rendering its decisions, CFIUS can take drastic actions that may impose tremendous costs on businesses. The committee can block proposed mergers and acquisitions, it can order the divestment of assets acquired by foreign companies in deals already closed, and it can direct the transacting parties to take other steps to mitigate the risks it had determined could arise in connection with the transaction.

Over the past year, CFIUS reviews have been front and center in several extremely large and highly public international bids for investments in the United States. These include the committee’s decision in June to block the sale of Philips’s lighting business to Asian buyers and its decision to approve a $43 billion bid by China National Chemical Corporation to purchase seed giant Syngenta AG, notwithstanding concerted public lobbying efforts by advocacy groups against that particular deal.

Congress as well has increased its focus on CFIUS reviews. In February, 45 lawmakers cosigned and made public a letter to the U.S. Treasury Department, which chairs CFIUS, urging it to undertake a review of a Chinese firm’s bid to acquire the Chicago Stock Exchange. In July, over 50 members of the House of Representatives co-signed and made public a letter to Treasury asking that it “thoroughly investigate” the pending transfer of a U.S. railcar manufacturer, Vertex Railcar Corporation, to two Chinese companies with ties to the Chinese government, the China Railroad Rolling Stock Corporation and Majestic Legend Holdings. And in late September, the Government Accountability Office agreed to a request from 16 members of Congress to review CFIUS to determine whether its authorities “have effectively kept pace with the growing scope of foreign acquisitions in strategically important sectors in the U.S., and to consider “where CFIUS authorities may need to be expanded, especially given the rise in state-owned enterprises and state-controlled enterprises from China and Russia.”

Additionally, members of Congress have variously over the past year called for legislation to not only expand the focus of the committee’s inquiries, but also to alter the legal standard that CFIUS uses in ways that would likely make it more difficult for deals to gain CFIUS approval. There have also been calls for adding additional U.S. government agencies to the default set of agencies that are tasked with reviewing transactions.

These trends have been playing out over the past several years. Many observers have expressed
concerns that CFIUS will become progressively more skeptical of inbound transactions, particularly those from Chinese investors. They believe the committee will use its authority more frequently to either block transactions or at least impose significant regulatory and operational costs on the parties as a means of mitigating perceived national security risks.

CFIUS remains a powerful regulatory body within the U.S. government and a necessary hurdle for international entities seeking to invest in U.S. industries. The lesson from these trends is not, as some have suggested, to retrench from engaging in inbound investment opportunities or to opt not to file a notice of a proposed transaction with CFIUS. Instead, companies should embrace the CFIUS process; they should adopt a proactive, transparent and collaborative approach with the Committee that demonstrates the parties’ absolute commitment to addressing the committee’s concerns while seeking approval for the transaction.

I make these observations from a position of direct experience and not just from a purely academic perspective — for several years, I worked within the U.S. government in different capacities on CFIUS matters. I served as a national security lawyer for the Director of National Intelligence, who oversees the activities of all agencies of the U.S. Intelligence Community and who serves as an ex officio member of the committee. I was also a senior policy adviser in the National Security Division at the U.S. Department of Justice, which is a voting member of the committee.

My advice for companies (and their lawyers) engaged in inbound investment opportunities is to take the following approaches in the course of their dealings with CFIUS. Doing so will help increase the chances that CFIUS ultimately approves the contemplated transaction, and that it does so under conditions that minimize business interruption to the parties.

What To Do

Be Proactive

In assessing whether a particular transaction poses any national security risks, CFIUS considers the intent and capabilities of the acquirer (to determine the threat posed by the transaction), the aspects of the U.S. business that could impact national security (to determine the vulnerability), and the consequences to national security should that vulnerability be exploited. The committee’s national security calculus is heavily influenced by a highly classified report prepared by the Director of National Intelligence, which assesses both the national security threats and vulnerabilities posed by the transaction. Essentially, national security risk is determined by CFIUS through a weighing of any perceived threats, vulnerabilities, and consequences.

While there are certainly times when the government’s concerns would not and could not be foreseeable to the parties, in many cases the issues are knowable. To identify these concerns, both the acquiring company and the acquiree should engage in a concerted due diligence exercise — distinct from the financial-focused due diligence common in large transactions — focusing on the types of issues of greatest concern to CFIUS. These issues include the technical sensitivity of the products and knowledge base of the U.S. acquiree, and the backgrounds, reputations, and level of ties to foreign governments of the contemplated acquirer. By being proactive, the parties can from the earliest stages of deal negotiations identify with greater fidelity the potential level of concern (if any) that the deal might face with CFIUS. In turn, this makes for better-informed decisions about whether to continue to pursue the transaction and, if so, whether to file with CFIUS. Armed with additional information (and with greater confidence in the accuracy of that information), companies can pursue the second of my
recommended approaches — be transparent.

**Be Transparent**

With greater information about the issues that CFIUS is likely to focus on during the course of its review, the parties are empowered to be fully transparent with the committee about any identified issues that may be of interest or concern to the committee. Doing so will provide the parties with two concrete benefits that will significantly enhance the likelihood that CFIUS will ultimately clear the transaction.

First, being transparent with CFIUS sends a clear message to its member agencies that the single focus of the companies is to pursue a business venture, and that they are absolutely committed to working with CFIUS, not against it, as it carries out its statutory responsibilities to undertake a national security review of the transaction. There is also little downside for doing so given that CFIUS leverages the vast resources of the U.S. intelligence community as it works to identify any potential national security concerns, and will thus inevitably learn the same information the parties provide. They only differences are when, and from whom, does CFIUS first learn of these issues — the parties (early on in the process while there is still plenty of time to address any issues), or the U.S. intelligence community (later in the process when less time remains for CFIUS and the parties to work toward a means for the transaction’s approval).

Second, through early transparency, the parties to the transaction can be proactive in discussing with the committee ways to mitigate the issues that they have surfaced to CFIUS. Far too often, negotiations with the committee become hurried as the statutory deadlines for a CFIUS decision approach. Early transparency affords the companies involved and CFIUS invaluable negotiating time to find a way forward that addresses the committee’s concerns and is acceptable to the companies from a business operations perspective. Which takes us to the last recommended approach addressed in this article — be collaborative.

**Be Collaborative**

In cases where CFIUS concerns relate to the exchange of sensitive information or product know-how from the U.S. company to the foreign investor, the committee may require (1) protocols and protections that essentially isolate the U.S. information from the foreign parent, and (2) a means for auditing compliance with those protocols and protections. Given the committee’s lack of direct insight into the business operations of the parties, its proposed mitigation terms could be difficult to implement from a business operations perspective. Moreover, once CFIUS has proposed mitigation measures — as is human nature — it will be less likely to consider alternative approaches.

So, to the parties to a transaction I say — be collaborative. In addition to providing CFIUS with additional information early in the process, initiate the dialogue with the committee, anticipate its concerns, and offer mitigation measures or controls that might address those concerns. By proactively offering well-conceived and auditable mitigation options to the committee, the parties will demonstrate their singular focus on the success of the transaction and willingness to adopt measures to satisfy U.S. government national security concerns. But perhaps more importantly, by providing proposed mitigation measures, the parties can set the baseline against which the discussion with the committee will begin. Better to work from your draft than from theirs. And they will appreciate the collaborative approach and head start.

There will always exist a small set of cases that CFIUS is unlikely to approve under any circumstances.
But the stated policy of the U.S. government remains its commitment to facilitating international trade, including inbound foreign investments, even as it seeks to protect its national security interests. And through the approaches outlined above, in a great majority of cases, foreign investors and U.S. sellers can improve their chances of getting CFIUS to yes.

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