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CFIUS in 2019: A Dealmaker's Roadmap

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Despite the passage of the sweeping [Foreign Investment Risk Review Modernization Act of 2018](#) ("FIRRMA") and the precipitous decline of Chinese investment during 2018, U.S. national security concerns about direct and indirect Chinese investment continue to grow.

We summarize below certain recent developments and things to watch in the months ahead, and offer related takeaways for M&A professionals.

Recent Developments

- **CFIUS Pilot Program.** CFIUS initiated a "[Pilot Program](#)" in November 2018 that creates a new mandatory obligation to provide a 45-day pre-closing declaration to CFIUS for foreign acquisitions of, or non-passive investments in, U.S. businesses with a nexus to one or more identified key industries that produce, design, test, manufacture, fabricate or develop a "critical technology."

Historically, CFIUS reviews have always been voluntary and involved no mandatory pre-closing waiting periods. CFIUS may apply severe penalties of up to the value of the transaction for non-compliance.

- **Increased CFIUS Caseload.** CFIUS' 2018 caseload generally remained at elevated 2017 levels, when it reviewed approximately 250 notified transactions, and there is reason to believe that its CY 2019 caseload will increase further. Less than 10 percent of the 2018 reviews likely involved mandatory declarations because the Pilot Program only became effective in mid-November, and CFIUS stopped accepting new filings during the government shutdown at year-end.
- **More Resources for CFIUS Reviews.** CFIUS member agencies are increasing resources for CFIUS reviews in anticipation of FIRRMA's full implementation –

including for monitoring non-notified transactions that could potentially affect national security.

What to Watch

- **New Criteria for Identifying National Security Sensitivities.** The U.S. Department of Commerce ("Commerce") expects to issue an Advanced Notice of Proposed Rulemaking ("ANPRM") for the criteria it will use to identify "foundational technologies" within the next few months. This likely will be similar in scope and form to the ANPRM it released in November that covered "emerging technologies." Commerce expects to issue a Notice of Proposed Rulemaking ("NPRM") for emerging technologies sometime this summer.
- **More Declarations From Lower-Risk Buyers.** CFIUS will review more declarations from lower-risk buyers for transactions that likely would not have been filed under the voluntary regime. Notably, certain non-U.S. pension plan investors cited this increase in declarations and resultant strain on CFIUS' resources as grounds for excluding "trusted" investors from CFIUS' jurisdictional scope in certain cases in their public comments on the Pilot Program.
- **Increasing Coordination With International Counterparts.** CFIUS is likely to substantially increase its international coordination with a goal of exporting its best practices to its international counterparts in U.S.-allied countries. We also expect that the [forthcoming EU-wide national security review process](#) may draw on CFIUS' best practices as well.
- **Continued Regulatory Uncertainty.** While FIRRMA made sweeping changes to CFIUS' jurisdictional scope, it gave CFIUS the task of defining through regulations certain key terms that are needed to fully implement the statute, including terms such as "critical infrastructure," "sensitive personal data" and "substantial interest." By law, CFIUS must implement all of FIRRMA by February 2020.

M&A Practice Points

- **Dig Deep, Early.** Early and deep due diligence is critical for buyers and sellers alike. With stiff penalties for non-compliance, parties to transactions involving a U.S. business that has any potential nexus to critical technologies in Pilot Program industries must engage in, for example, a sufficiently detailed technical analysis of the U.S. business' export control profile to determine if the transaction requires submission of a mandatory declaration. While legal penalties for failure to file a

declaration fall jointly on both parties, the target company will generally be better positioned to engage in this analysis.

- **Build in Sufficient Time for CFIUS Reviews.** If a transaction requires a mandatory declaration or warrants a voluntary filing, parties must ensure that transaction and financing documents appropriately allocate risk and are sufficiently flexible to accommodate the potential timing impacts of the CFIUS process.
- **Account for New and Emerging National Security Concerns.** CFIUS' notions of national security are evolving – quickly. The national security sensitivity of a target isn't always obvious and can sometimes be counterintuitive. Expert advice should be sought to determine whether a prospective transaction requires or warrants a submission to CFIUS.

Moreover, receipt by a non-US buyer of CFIUS clearance on a prior transaction does not insulate a foreign buyer from a future adverse result. Overreliance on historical precedents – even relatively similar or recent ones – can have dire consequences if emerging concerns are missed.

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Suggested Reading

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- [18 March 2019 Press Release Kirkland Represents The Jordan Company on Acquisition of Sabre Industries, Inc.](#)
- [15 March 2019 Press Release Kirkland Represents Ford Management III, L.P. in Formation of \\$1.0 Billion Ford Financial Fund III, L.P.](#)

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