

Six Things for Dealmakers to Know About How COVID-19 Could Affect CFIUS

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The Committee on Foreign Investment in the United States (“CFIUS,” or the “Committee”) is currently maintaining its operations, despite the massive disruption caused by the social distancing guidelines implemented in response to the novel coronavirus (“COVID-19”). To date, CFIUS has issued no changes to its policies and procedures because of the pandemic, and CFIUS staff remain actively involved in the review of transactions that are currently pending before the Committee. Over the next few weeks, we anticipate that the most significant challenge for CFIUS will be managing timely on-site access to relevant classified information, which is critical to maintaining CFIUS’ ability to start new cases and conclude action on active reviews.

Consistent with our anecdotal observations over the last few weeks, recent economic data for March confirm that M&A activity has substantially declined as a result of the current market dislocation and ongoing volatility associated with the response to COVID-19. Despite this precipitous decline, CFIUS continues to be a gating issue for many cross-border transactions and potential delays in obtaining CFIUS approval have added even more uncertainty to transaction parties’ risk calculus.

Below are six things for dealmakers to know about how the COVID-19 pandemic may affect current and future considerations for transactions that may – or may not – be notified to CFIUS.

1. **CFIUS remains open, but some critical operations are slowing down.** In particular, CFIUS is taking more time to accept new cases and start its initial 45-day review of cases. The CFIUS regulations generally do not prescribe a timeline for when the Committee must accept a new case, unless the parties stipulate that CFIUS has jurisdiction to review their case. In such circumstances, CFIUS is expected to accept the case within 10 days – but the CFIUS regulations permit an extension under certain circumstances (e.g., resource shortages, etc.).

Accordingly, all parties to new CFIUS submissions need to allocate sufficient time for potential delay as CFIUS grapples with reduced office operations, and ensure that transaction documents properly account for such potential delays (e.g., through a potential extension of a transaction's outside date). Parties should still submit their new filings as soon as practicable because CFIUS will likely try to clear any backlog in roughly the same order as filings are submitted.

2. CFIUS continues to actively review and investigate its existing caseload.

While CFIUS regulations provide authority to suspend CFIUS' review of active cases when the U.S. government closes due to lapses in appropriations, there is no authority in the current regulations for CFIUS to suspend its reviews under the current circumstances. CFIUS, however, may utilize its discretion to push more cases into the second-stage investigation period to allow additional time to complete action on pending cases. Under these circumstances, parties – even foreign investors from closely allied countries who have previously obtained approval quickly – should be prepared for a possible second-stage 45-day investigation period.

3. CFIUS may temporarily change the way it resolves short-form declarations.

Pursuant to CFIUS regulations, the Committee can take one of four actions upon completing its review of a declaration: (i) issue an affirmative clearance indicating that CFIUS has concluded all action on the matter; (ii) issue a “no-action” letter explaining that CFIUS was unable to conclude all action on the basis of the declaration and inviting the parties to submit a voluntary notice if they want CFIUS to conclude action on the matter; (iii) request that the parties submit a voluntary notice; or (iv) unilaterally initiate a full review. To help allocate limited resources, CFIUS could stop providing affirmative clearances for declarations. Parties that have already submitted declarations, as well as those who are currently considering doing so, should consider the potential delays associated with receiving a no-action response or a request for a full filing if CFIUS is unable to conclude action on a declaration in the current environment.

4. The U.S. government's response to COVID-19 may prompt CFIUS to expand its notion of national security.

While CFIUS has long been concerned with the security of sensitive U.S. government supply chains, such concerns historically focused on protecting the defense industrial base and IT sectors. CFIUS has also been interested in reviewing transactions involving health care company targets, but its concerns in such cases have generally focused on the protection of U.S. citizens' sensitive personal data. The COVID-19 pandemic will likely push CFIUS to combine its concerns about the security of supply chains with an expanded focus on the health care sector. In addition, transaction parties should expect heightened political scrutiny at this critical intersection too. We anticipate that this expanded area of concern will likely last longer than the current pandemic.

5. **CFIUS will continue to review non-notified M&A activity and will likely increase scrutiny of foreign investment into companies experiencing financial distress as a result of COVID-19.** CFIUS will continue to monitor and track non-notified transactions even while working remotely because most of such efforts require no access to classified information. CFIUS could even further expand its efforts in this regard to utilize extra off-site capacity. Moreover, CFIUS may also subject foreign investments in sensitive U.S. businesses under distress associated with COVID-19 to additional scrutiny. As always, transaction parties should carefully assess the financial, reputational and other risks associated with a decision not to file voluntarily a transaction that is otherwise subject to CFIUS' jurisdiction (i.e., the risk that CFIUS could make a future inquiry, pre- or post-closing, and take potential action).
6. **Imposition of filing fees may be delayed.** On March 9, 2020, the U.S. Department of the Treasury published proposed regulations that would establish, for the first time ever, a filing fee for many voluntary notices submitted to CFIUS. While the proposed regulations remain subject to revisions, they will likely affect parties' risk allocation decisions and, as a technical matter, increase CFIUS scrutiny of the valuation of transactions subject to the new fees. In light of the current environment and the need to carefully allocate CFIUS resources, the implementation of these proposed regulations could be delayed.

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