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Expert Analysis

September CFIUS Roundup: Lessons and Things to Watch

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The Committee on Foreign Investment in the United States (CFIUS), an inter-agency committee of the U.S. government empowered to review transactions that could result in control of a U.S. business by a foreign person (covered transactions) in order to evaluate the potential effects of such transactions on U.S. national security, has played an increasingly significant role in cross-border transactions in 2017. Here are certain key CFIUS developments and related takeaways for boards and deal professionals:

On September 13, President Trump blocked the acquisition of Lattice Semiconductor Corporation (Lattice) by Canyon Bridge Capital Management, L.P. (Canyon Bridge), a California-based fund backed by a Chinese asset management firm.

The Lattice transaction was initially announced in November 2016. Weeks later, a bipartisan group of 22 Members of Congress led by Robert Pittenger (R-N.C.) authored a letter to then-Secretary of the Treasury Jack Lew, Chair of CFIUS, urging CFIUS to block the acquisition. Lattice and Canyon Bridge met with CFIUS in advance of signing and submitted the deal for CFIUS review three times, but were unable to negotiate sufficient mitigation with CFIUS to achieve clearance.

China continues to be in a "category of one" for CFIUS risk.

Historically, most parties that receive notification from CFIUS that CFIUS intends to recommend that the President block the transaction have chosen to walk away from the deal. However, Lattice and Canyon Bridge elected to have the transaction reviewed by President Trump.

President Trump's executive order blocking the transaction reflects just the fourth time in CFIUS' history that the President has exercised authority to prohibit or unwind a transaction. In each such case, the acquiring party was Chinese.

Takeaway #1: China continues to be in a "category of one" for CFIUS risk. Risk may arise from straightforward mergers or acquisitions of U.S. assets by Chinese buyers, but also from participation by Chinese co-investors and limited partners, syndication to Chinese investors, and use of Chinese banks or other Chinese funding sources for transaction financing.

Takeaway #2: While it is no secret that CFIUS is interested in reviewing transactions that may contribute to Chinese domestic semiconductor capabilities, even less-sensitive technology may elevate national security risk. U.S. government policy and political stakeholders

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have expressed heightened anxieties regarding China's advancement of domestic strategic priorities through M&A. In this connection, Sen. John Cornyn (R-Tex.) has noted that Chinese acquisitions of U.S. technology companies reflect "*China's long-term strategy, to leap-frog ahead of us by investing as much in U.S. technology as possible, leading to the degradation and eventual loss of our country's military technological edge*." *See Foreign Investments and National Security: A Conversation With Sen. John Cornyn*, Council on Foreign Relations (June 22, 2017).

On September 19, CFIUS released its long-awaited annual report for CY2015, along with several aggregate statistics for CY2016 filings.

In general, the data contained in the annual report were not unexpected, and reflect developments which have become familiar to members of the CFIUS bar.

For the fourth year in a row, notices from Chinese acquirers constituted the largest single class (by country) of filings reviewed by CFIUS. The proportion of cases that entered an incremental, up to 45-day investigation phase following the initial 30-day review period mandated by statute increased from 35 percent to 46 percent in CY2015 and CY2016.

Takeaway: Investigations and prolonged transaction review timelines are now normal. Transaction parties must ensure that deal arrangements (e.g., outside dates, financing arrangements) account for the likelihood of an extended CFIUS review. This is true even if the acquiring party has received CFIUS clearance following an initial 30-day review period for one or more previous covered transactions. (In other words, past CFIUS performance does not guarantee future results.)

On September 26, NavInfo, Tencent, and GIC abandoned a $330 million offer to acquire 10 percent of Dutch mapping company HERE, after CFIUS told the parties that it would refer the case to President Trump for his decision.

The transaction was initially announced in December 2016. Under its terms, NavInfo, Tencent and GIC would acquire 10 percent of NavInfo from its current shareholders, German car manufacturers AUDI AG, BMW AG and Daimler AG.

The transaction also contemplated the formation of a joint venture by HERE and Beijing-based NavInfo in China to collaborate on the development and deployment of digital mapping capabilities and related solutions (e.g., for self-driving cars). HERE and NavInfo have stated that they intend to proceed with the joint venture, which does not include U.S. assets subject to CFIUS' jurisdiction.

Takeaway #1: CFIUS may hold outsized relevance for acquisitions of non-U.S. companies with U.S. assets. CFIUS strategy and tactics should be a key element of initial planning for such deals, even if U.S. revenue is limited or ownership of the U.S. business is not the primary strategic rationale for the transaction.

Takeaway #2: CFIUS is interested in reviewing minority investments and other types of transactions that do not result in a complete change of control for the target company. Sen. Sherrod Brown (D-Ohio) highlighted potential risks from such transactions at a recent Senate Banking Committee hearing on CFIUS, stating, "*We have seen an increase in smaller private investments to obtain access to new technological know-how*."

CFIUS' jurisdictional remit may change in the near to medium term.

There is growing bipartisan support for reforming and strengthening the CFIUS process. Sen. Cornyn is expected to propose a bill that would enhance CFIUS' ability to review investments from certain "countries of concern" (e.g., China), codify CFIUS' assessment of the proximity of a business' U.S. facilities to sensitive U.S. government and military sites, and empower CFIUS to review new types of joint ventures and licensing arrangements.

Takeaway: Buyers and sellers will need to consider these new and different aspects of a transaction in evaluating whether to notify CFIUS of their transaction as well as how best to advocate for CFIUS clearance.

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