

Foreign Investment and Acquisitions - CFIUS Considerations for Deals in 2017

JANUARY 26, 2017

Companies soliciting foreign investments or selling business lines to foreign entities have to manage a wide array of concerns. U.S. national security implications may be overlooked, especially if the deals involve foreign sellers, as well as investors or industries outside of military sales or defense. However, national security considerations are likely to continue to gain prominence.

Recent matters involving possibly unexpected CFIUS actions on national security issues include the following:

Aixtron

Recently, on December 2, 2016, President Obama issued an Executive Order effectively blocking the acquisition of German semiconductor manufacturer Aixtron SE, by Grand Chip Investment GmbH, another German company that is partially owned by Fujian Grand Chip Investment Fund LP, a Chinese partnership with some Chinese government ownership.

The order demonstrates the reach of the President's authority in transactions that implicate national security. Although the companies were both foreign, Aixtron, the target company, had U.S. business operations, which enabled an interagency national security panel—the Committee on Foreign Investment in the United States (CFIUS)—to examine the deal. Ultimately, CFIUS informed Aixtron that it recommended the parties abandon the transaction due to security concerns. Overwhelmingly, parties advised by CFIUS to abandon the transaction do so, not wanting the media attention that would come with a public statement by the government that they pose a national security risk. Here, however, instead of abandoning the deal, the parties took the unusual step of publicly stating that they would try to convince President Obama not to block the transaction; however, their efforts to convince the President to go against the recommendations of CFIUS were unsuccessful.

Consequently, companies involved in what may appear to be a non-U.S. transaction should be aware that the President and CFIUS may invoke jurisdiction if a deal even partially involves U.S.-based business activity.

Hotel del Coronado

A few months before Aixtron SE, another acquisition received scrutiny from CFIUS. A China-based insurance group planned to purchase a series of properties from a subsidiary of Blackstone Group LP. Among these properties were a series of resorts and hotels, including the Hotel del Coronado in Coronado, California, just outside of San Diego. Because Coronado is home to a U.S. naval base, an air station, and special operations units, among other assets, CFIUS reportedly objected to the deal. In the end, the deal ended up proceeding without the key property. Lately, siting and location concerns, such as in the Hotel del Coronado example, have become more prominent. A few years ago, the President blocked investment in a wind farm along the Oregon-Washington border for similar reasons. And several other deals have reportedly also been abandoned due to initially unknown siting concerns later raised by CFIUS.

What is CFIUS?

Headed by the Department of Treasury, the Committee on Foreign Investment in the United States is comprised of representatives from several government agencies, including the Departments of State, Defense, Justice, Commerce, Energy, and Homeland Security. CFIUS conducts reviews and investigations regarding foreign investment to advise the President and to recommend whether a transaction be blocked.

CFIUS attempts to work with the parties involved to mitigate any identified national security concerns. Parties can also suggest actions to mitigate a perceived threat. But in the end, if CFIUS does not believe the mitigation measures go far enough, it can make a recommendation to the President to block or unwind a deal.

Expectations for the New Administration

President Trump has stated an intention to revisit U.S. trade practices. There has been speculation in media sources that CFIUS, although it looks at foreign investment, may be a tool that the administration uses in this regard. This is in part because the President's national security authority is broad and practically unchallengeable in this circumstance. Potential developments include an enhanced use of mitigation agreements to obtain promises regarding U.S. production and jobs. The process may also become more politicized if the President uses it for leverage in other negotiations. Nevertheless, we would expect that the vast majority of foreign investments in the United States continue to be approved.

Investment from China will doubtless continue to receive scrutiny. In particular, the past year saw several warnings from politicians and others regarding Chinese acquisition of U.S. media companies. This is an area that, historically, has not been considered a national security priority. Dealmakers should be attentive to this development.

What should companies consider for foreign investment and M&A?

An important first step is to work with knowledgeable practitioners to determine whether CFIUS and the President have jurisdiction over a deal. The second step is a preliminary analysis of the business and the purchaser to see whether there are apparent national security risks or threats. Often, issues that surprise dealmakers with CFIUS concerns are ones not central to the business rationale of the deal, so they are overlooked. Certain issues to consider include:

- For foreign investors acquiring another foreign business—is there a U.S. business component to the foreign business?
- If necessary, could the U.S. business be divested? What technologies does the company possess?
- Are they controlled technologies?
- Are they otherwise critical technologies?

- Does the company supply the U.S. government with products or services?
- Does the company operate in a high-profile industry that might be considered critical to national security?
 - In addition to defense, manufacturing, energy, and communications industries, consider non-traditional industries, such as the media and scientific research.
- Does the U.S. business have physical locations with proximity to military or other sensitive government locations?
- Is the purchaser a state-owned enterprise or does it have ties to a foreign government?
 - What is the relationship of the foreign purchaser and its principals with the U.S. government?

Once this preliminary assessment has been made, parties to a deal can make an informed decision as to whether to dig deeper and whether to file a voluntary notification with CFIUS.

The majority of transactions submitted for CFIUS review do not pose problems. And the transactions that do concern CFIUS can typically be approved with conditions that mitigate the perceived security risk. Experienced counsel can assist companies in addressing these concerns with CFIUS.

Acquiring companies should consider clauses that condition the acquisition on a successful CFIUS resolution and be prepared for delays in complicated cases. Companies should also be prepared for CFIUS-requested conditions that might alter planned acquisition strategies.

4 Min Read

Related Locations

Charlotte

Chicago

Houston

Los Angeles

New York

San Francisco

Silicon Valley

Washington, DC

Related Topics

Foreign Investment

International Trade, Customs & Export Controls

International Mergers and Acquisitions

Related Capabilities

Transactions

International Trade

Private Equity

Mergers & Acquisitions

Related Regions

North America