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CFIUS in 2018: What Lies Ahead

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Last year was a breakout year for the *Committee on Foreign Investment in the United States* (CFIUS). While official statistics on CFIUS' 2017 caseload will likely not be published for at least another year, publicly available information easily confirms that 2017 was intensely busy, a year of policy transition, and a year pregnant with the possibility of profound reform. Consider, for example:

1. One transaction was elevated to President Donald Trump and subsequently blocked, marking just the fourth time in CFIUS' history that the President exercised his authority to block or unwind a transaction;

2. More than 240 notices were filed to CFIUS—about 100 more than in 2016, and the highest number ever for a single year;

3. According to public information, at least 15 deals were abandoned, delayed, or blocked as a result of CFIUS scrutiny; and

4. Multiple bills were introduced in Congress to reform the current CFIUS process.

We anticipate that 2018 will be no less significant for CFIUS. In just the first three weeks of 2018, another headline transaction collapsed—and Congress held three hearings on CFIUS reform.

Here are three key trends to watch in 2018.

1. Meaningful CFIUS reform is on the horizon.

■ There is a strong bipartisan consensus—across Congress and the executive branch—that CFIUS should be updated to account for developments in the macro policy environment.

■ On Jan. 24, 2018, the White House released a public statement of support for the *Foreign Investment Risk Review Modernization Act* (FIRRMA). At its introduction in November, FIRRMA was backed by 14 bipartisan co-sponsors, including House Intelligence Committee Chairman Devin Nunes (R-Calif.), Senate Intelligence Committee Chairman Richard Burr (R-N.C.), and Sen. Dianne Feinstein (D-Calif.). Since then, FIRRMA has attracted support from Attorney General Jeff Sessions, Secretary of Defense James Mattis, Secretary of the Treasury Steven Mnuchin, and certain other government and industry stakeholders.

■ Importantly, while there is strong support for broad concepts of CFIUS reform, Congressional debate continues regarding certain details in FIRRMA that would have significant practical impacts on CFIUS' jurisdictional reach and, by extension, transaction timing, feasibility, certainty, and costs. Several government and industry representatives have expressed anxiety that CFIUS' expanded jurisdiction under FIRRMA would duplicate existing export control authorities, resulting in over-regulation to the detriment of the U.S. economy.

2. CFIUS' perception of what is sensitive for 'national security' purposes is already broad and, under most proposed versions of reform, would get broader.

The absence of a definition of ''national security'' in the CFIUS regulations is no accident: the relevant legislative history makes clear that the term should be construed expansively. In 2018, we anticipate that two areas of focus in particular will take on greater importance in the policy and political discourse around U.S. national security and foreign investment:

(i) **Large quantities of commercially benign data:** Given the expanding capabilities of big data analytics, many U.S. government stakeholders increasingly perceive foreign access to otherwise non-sensitive data as a vector of national security risk. Testifying before the Senate Banking Committee in support of FIRRMA, the Assistant Secretary of the Treasury for International Markets and Development emphasized this view, noting that ''*the digital, data-driven economy has created vulnerabilities we've never before seen*.''

(ii) **Instruments of ''soft power,'' including entertainment:** The ability to influence public opinion in subtle but meaningful ways has taken on increasing importance in the debate over CFIUS reform. In this connection, Rep. Brad Sherman (D-Calif.) raised the prospect at a recent hearing that Chinese investment in the U.S. entertainment sector has flown under CFIUS' radar: ''*Do we have sufficient provisions in CFIUS designed to prevent [China] from controlling what movies are made in the United States*?''

3. Transactions with a nexus to China will continue to garner enhanced scrutiny, and retaliatory action by China is not out of the question.

■ It is no secret that 2017 was a tough year for Chinese investment worldwide. The aggregate value of newly announced Chinese investments in the U.S. dropped by over 90 percent compared to 2016 levels. Several high-profile public transactions failed to receive CFIUS clearance despite undergoing multiple CFIUS reviews and investigations (*e.g.*, Zhongwang USA's $3.2 billion acquisition of Aleris Corp., CEFC China Energy Co. Ltd.'s $100 million/19.9 percent investment in Cowen Inc.).

■ At this time, 2018 is not shaping up to be much easier for transactions with a China nexus. China continues to be in the Trump administration's crosshairs on a number of policy issues, and Members of Congress who have taken public positions on CFIUS reform have, with virtual unanimity, expressed deep skepticism of Chinese investment.

■ China has not yet undertaken any retaliatory action in response to increased CFIUS turbulence. However, this may change. After Ant Financial terminated its planned $1.2 billion acquisition of MoneyGram due to CFIUS' opposition, Chinese state news agency Xinhua sharply criticized what it called the U.S.' ''*zero-sum mentality*'': ''*China and the United States are about to ride a bumpy journey in trade in 2018 if the U.S. government goes its own way, and retaliatory measures by China could be on the table*'' (Liu Jie, ''Commentary: China-U.S. trade tension needs control,'' Xinhua (Jan. 3, 2018)).

Takeaways

■ Investors considering transactions that may fall within the scope of CFIUS' jurisdiction should carefully consider the CFIUS risk profile of their transactions early in the process, and factor any U.S. policy and political concerns in transaction planning and related CFIUS advocacy.

■ Boards evaluating exit scenarios for companies that may not have historically been considered ''sensitive'' (*e.g.*, e-commerce, industrial, software, etc.) should refresh the CFIUS analysis for the sale if it is anticipated that the buy-side may include foreign parties (*e.g.*, as direct acquirers, co-investors, or lenders).

■ While transactions with a direct or indirect nexus to China will likely remain challenging in the near term, many deal risks can often be managed with advance consideration and careful planning.

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