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**Committee on Foreign Investment in the United States**

**This is What the U.S. Government Thinks About CFIUS: Four Takeaways From the GAO's Report on CFIUS**



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On March 16, 2018, the U.S. Government Accountability Office (the “GAO”) publicly released its long-awaited report on the Committee on Foreign Investment in the United States (“CFIUS”) (the “Report”). The Report responds to a September 2016 letter (the “Letter”) from a bipartisan group of sixteen Members of Congress which called on the GAO to examine whether recent high-profile acquisitions by Chinese acquirers of U.S. companies across a broad range of sectors warranted enhancements to CFIUS’ authority. The Letter highlighted particular concerns about acquisitions involving foreign government-controlled buyers, particularly those from China and Russia, and suggested that CFIUS take a closer look at acquisitions in sectors that have not historically been deemed “sensitive” but were important to U.S. “soft power” (e.g., entertainment).

The Report primarily concludes that the Department of the Treasury, chair of CFIUS, “should coordinate member agencies’ efforts to better understand the staffing levels needed to address the current and projected CFIUS workload associated with core committee functions.” While the Report’s conclusions and associated assessments do not create any legal obligation for CFIUS member agencies, the Report offers a unique

view of how U.S. government stakeholders view sea changes in foreign direct investment (“FDI”) that have taken place over the past few years, and helps lay the policy groundwork for construction of a better-configured, better-resourced CFIUS review apparatus—a priority widely shared among Congress and the Trump Administration.

**The View From Washington**

It is no secret that CFIUS has become increasingly important to cross-border dealmaking in the eighteen months since the Letter was released. The national security themes that prompted the request for the GAO study have become even more prominent within the growing policy and political debates over how best to balance foreign investment with protection of U.S. national security. The U.S.-China economic relationship is increasingly turbulent, and a number of other countries have taken steps to adopt enhanced measures for reviewing transactions on national security grounds. By way of example, in the time between the Letter and the release of the Report:

- Three transactions have been prohibited by Presidential order, and well over twenty additional public transactions have been frustrated, abandoned, or delayed due to CFIUS concerns.

- A bipartisan group of Members of Congress introduced the Foreign Investment Risk Review Modernization Act (“FIRREA”), which would overhaul the CFIUS process for the first time in over a decade.

- President Trump directed the Secretary of the Treasury to propose potential investment restrictions to counteract investment in U.S. companies “directed or facilitated by China in industries or technologies deemed important to the United States.

*Given these and other recent developments, it would be difficult to understate the potential importance of CFIUS to foreign investors considering acquiring U.S. businesses in whole or in part (e.g., through co-investment or syndication). It is also at least as important to U.S. boards weighing exit options, particularly for competitive assets.*

We offer below four key takeaways from the GAO report for boards, bankers and investors to consider.

### **1. CFIUS’ workload has increased dramatically in recent years, which has made longer CFIUS review timelines the new normal.**

The Report outlines certain factors that impose greater demands on CFIUS’ resources and require more time to review a transaction, and indicates that such factors have become more prominent in many recent CFIUS cases. These include:

- The acquirer’s ownership chain is complex and non-transparent;

- The transaction requires analysis of the parties’ business relationships (e.g., joint ventures, memoranda of understanding, etc.) that may create “indirect threats”;

- The transaction involves “complex technology”; and

- The transaction involves technologies that are frequently used by the U.S. government (e.g., semiconductors);

*Takeaway:* Parties to complex transactions should prepare for CFIUS reviews well in advance of submitting a draft joint voluntary notice, and should be prepared to provide fulsome disclosure on their transaction under review as well as their commercial and other relationships with third parties.

### **2. CFIUS’ back-office intelligence support function actively monitors non-notified transactions in the U.S. and abroad.**

The Report makes clear in its discussion of CFIUS’ allocation of staffing resources that Committee member agencies actively monitor transactions that could be subject to CFIUS’ jurisdiction, but are not notified to CFIUS. One member agency identified and assessed over 2,600 such transactions in 2016. Moreover, several member agencies indicated that they would like to have additional resources to assess and, potentially, make inquiries into such transactions.

Of note, many of these non-notified transactions would likely have closed before CFIUS’ inquiries simply due to the passage of time. Mitigation measures imposed in connection with closed transactions may be meaningfully disruptive to the operations of a business, and CFIUS may even require that U.S. assets be divested.

*Takeaway:* Going forward, parties to non-notified transactions should assume a non-trivial possibility of

receiving questions from CFIUS about such transactions—including about transactions that have already closed.

### **3. Given CFIUS’ current broad construction of “national security,” no sector of the U.S. economy is a “safe harbor” from potential CFIUS scrutiny—even if it has not historically been considered sensitive.**

The Letter requested that the GAO examine whether the national security factors that CFIUS reviews when evaluating a covered transaction should be expanded to include additional factors. Common proposals for potential new factors include food security, access to personal identifier information (e.g., Social Security Numbers), and “soft power” (e.g., media).

The Report indicates that CFIUS member agencies generally appreciate the flexibility of leaving “national security” undefined in the CFIUS regulations. Because national security risks are constantly evolving, the absence of a discrete definition empowers CFIUS to take a broad view, and assess how such risks may arise across subject-matter contexts without being held to a potentially restrictive regulatory demarcation.

*Takeaway:* Transaction parties should not expect that CFIUS will not perceive potential indicia of national security review in their transaction, even if the transaction does not implicate conventional risk factors (e.g., supply to U.S. government and military customers).

### **4. The Report suggests that CFIUS member agencies generally do not favor expansion of CFIUS’ evaluation of a covered transaction to include assessment of economic factors.**

From time to time, Members of Congress and other stakeholders have floated proposals that would require CFIUS to take into account the potential economic impacts of a transaction. The Letter specifically requested that the GAO study whether CFIUS assessment of national security risk should include a “net economic benefit” test. However, the GAO found that CFIUS member agencies generally agreed that inclusion of such a test in the factors that CFIUS assesses would not be advisable.

*Takeaway:* In advocating before CFIUS for clearance of a covered transaction, acquirers and sellers are unlikely to see a meaningful benefit in grounding their advocacy in arguments relating to potential economic benefits (e.g., job creation) of a transaction.

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