NORTON ROSE FULBRIGHT

Global Rules on Foreign Direct Investment

United States

The foreign investment review landscape in the United States continued to evolve over the past twelve months as the Committee on Foreign Investment in the United States (**CFIUS**) continues its multi-year effort to implement the Foreign Investment Risk Review Modernization Act (**FIRRMA**) and expand its enforcement tools and resources.

Major Recent Developments

On July 1, 2022, Paul Rosen was confirmed to the key role of Assistant Secretary of the Treasury for Investment Security, the senior government position responsible for overseeing the work of CFIUS. The position has been unfilled for an unusually long period of time and the appointment of Mr. Rosen will undoubtedly have an impact on the administration of the Committee.

On September 15, 2022, US President Joseph Biden issued the first Executive Order (**EO**) since CFIUS was established in 1975 providing Presidential direction on priority national security issues. In particular, the EO identified the following priorities for the Committee to consider in evaluating covered transactions:

- **Critical supply chain resilience**: a covered transaction's effect on supply chain resilience and security, both within and outside of the defense industrial base. Considerations under this factor include the degree of diversification through alternative suppliers across the supply chain, supply relationships with the US government and the concentration of ownership or control by the foreign person in a given supply chain;
- **Critical and emerging US technologies**: a covered transaction's effect on manufacturing capabilities, services, resources or technologies relating to microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy, climate adaptation technologies and elements of the agricultural industrial base that have implications for food security;
- **Aggregate-industry investment trends**: the impact of a covered transaction in the context of previous transactions, particularly in the context of multiple acquisitions or investments in a single sector or related sectors;
- **Cybersecurity**: whether a covered transaction may provide a foreign person, or their relevant third-party ties, with access to conduct cyber intrusions or other malicious cyber-enabled activity;
- **US persons' sensitive data**: whether a covered transaction involves a US business with access to US persons' sensitive data, and whether the foreign investor or related parties have sought or have the ability to exploit such data.

On October 20, 2022, CFIUS issued its first-ever enforcement and penalty guidelines (the **Guidelines**). The Guidelines describe what conduct may constitute a violation of the CFIUS regulations, how enforcement actions will proceed, and what factors the Committee will consider when evaluating whether to impose penalties.

Potential grounds for penalties include: (i) failure to file a mandatory notification; (ii) non-compliance with CFIUS mitigation requirements; and (iii) submitting filings to CFIUS with material misstatements, omissions, or false certifications. Depending on the violation, potential penalties can include the greater of $250,000 per violation or up to the value of the transaction.

The issuance of the Guidelines suggests that CFIUS may now take a more aggressive enforcement posture regarding potential violations of FIRRMA requirements which, until now, has been quite limited.

Trends:

Based on the latest statistics provided to Congress this year, CFIUS reviewed a record number of transactions in 2021, including 161 declarations (up from 126 in 2020) and 272 notices (up from 187 notices in 2020). CFIUS' focus, moreover, continues to be on transactions involving the technology sector, particularly emerging technologies, as well as critical infrastructure, and personal data. For example, in 2021 CFIUS reviewed 184 covered transactions involving acquisitions of U.S. critical technology companies. To that end, the Department of Commerce continues its efforts to implement new rules identifying certain emerging and foundational technologies that will have a direct impact on what transactions are subject to CFIUS' jurisdiction and will be of interest to it.

CFIUS also maintains its focus on Chinese investments (including investments with indirect Chinese interests) as well as any other attempts by China, Russia, or other non-allied nations to target U.S. businesses involved in critical or emerging technologies or infrastructure. For example, Chinese investors submitted 44 notices in 2021 (up from 17 in 2020), representing, for the first time, the country with the most submissions followed by foreign investors from Canada (28) and Japan (26).

As anticipated, CFIUS continues to evidence a stronger commitment to the formal interagency process and consensus than was exhibited under the prior Administration. The return to a more process oriented approach has seemingly resulted in a more traditional and balanced analysis of the economic benefits of the proposed transaction in comparison to any national security concerns. As a result, the CFIUS has also appeared more open to solving issues through the imposition of mitigation measures, rather than by prohibiting the transaction or forcing divestments.

Other trends of note:

- Parties continue to increasingly relying on short-form declarations in lieu of full notifications (an increase from 126 in in 2020 to 164 in 2021);
- Declarations are increasingly being cleared by CFIUS (73% in 2021 vs 64% in 2030);
- CFIUS' review of non-notified transactions continues to increase with 135 non-notified transactions in 2021 representing a 13% increase from 2020;
- The rate of notices cleared with mitigation measures remained fairly constant in 2021 (10%) to that in 2020 (9%);
- Notices in the finance, information, and services sector in 2021 almost doubled from 2020;
- Real-estate transactions are only rarely being notified (only 6 such notifications in 2021).

Comment

Given the increased jurisdiction of CFIUS and resources devoted to enforcement, parties considering foreign investment in the United States are encouraged to evaluate potential CFIUS implications as early as possible and, if necessary, lawful mechanisms to structure the transaction so as to mitigate potential CFIUS risk.

By **Stefan H. Reisinger**, Partner, Washington D.C.

NORTON ROSE FULBRIGHT

Law around the world

nortonrosefulbright.com