

5 Tips For Ensuring A Smooth CFIUS Review

By **Chelsea Naso**

Law360, New York (November 10, 2015, 3:54 PM ET) -- With foreign buyers increasingly setting their sights on U.S. targets, more deals are landing in front of the Committee on Foreign Investment in the United States, where an improperly handled review can derail a transaction, experts say.

Deal advisers must consider the CFIUS from the start, keeping the potential risk of real or perceived national security threats in the back of their mind as they guide a cross-border acquisition targeting a U.S. company.

And while the review serves to determine the risk posed by the buyer and the sensitivity of the target, the process itself can trip up even experienced regulatory attorneys.

Here are five tips for getting through a CFIUS review unscathed.

Anticipate Issues Before Inking the Deal

Ensuring a smooth CFIUS review begins with structuring a deal while keeping potential national security concerns in mind, said Skadden Arps Slate Meagher & Flom LLP partner Ivan Schlager, head of the firm's CFIUS practice.

"You really need to be able to see around corners and think it through," Schlager said. "You have to respect the process and take it seriously and think about the issues from a government's perspective. The key is to eliminate surprises during the review period."

That starts with the early deal due diligence, including going through the company to better understand the full scope of its assets, its technology, and any projects developed through a government partnership or grant, noted Robert LaRussa, a Shearman & Sterling LLP counsel in the firm's international trade and investment practice.

"The truth is that you have got to identify and flag potential CFIUS issues very early on in the deal process through due diligence," LaRussa said. "You can not have a call from someone in your law firm or another law firm a week before closing and asking, 'Should this go through CFIUS?'"

Identifying potential issues early can allow the parties to structure the deal in a way that mitigates perceived risks before even bringing a planned transaction to the CFIUS.

“You can identify the potential issues and come up with mitigants that you can structure into the deal itself and into the deal documents so you correctly allocate the risk associated with the transaction,” Schlager said.

Start Discussions Early With CFIUS

The CFIUS has the authority to review a transaction even after it closes, so it is important to ensure the agency is comfortable with the deal before completely tying the knot, explained Anne Salladin, former senior adviser counsel to the CFIUS and special counsel at Stroock & Stroock & Lavan LLP.

Unwinding a deal once it has already closed is often a more costly and time-consuming process, she noted.

“The No. 1 mistake — I’ve seen it from the perspectives of both the government and private practice — is the failure to carefully consider whether a deal poses national security considerations before closing the transaction,” Salladin said. “If the deal is ultimately brought in by CFIUS and mitigation is required, it will quite often be more onerous than it might have been had the deal been filed with CFIUS prior to closing.”

Although there are certain acquirers that have traditionally been viewed as more sensitive than others in terms of national security concerns, U.S. ally-based cross-border buyers should be careful about assuming they will not pose a security risk, Salladin said.

The safest approach is to informally reach out to the CFIUS from an early stage, explained Laura Fraedrich, a Jones Day partner based in Washington, D.C.

“Before you know you are going to sign an agreement, call ahead and start the dialogue,” Fraedrich said. “You can explain the transaction, and sometimes they can give you an idea of things they are particularly interested in.”

Build the Best CFIUS Team

Pulling together a team to head up the CFIUS review process is key, particularly when it comes to having a designated person who can accurately answer questions within the CFIUS’ tight, 72-hour deadline.

“It’s important for parties and their counsel to know who at each of the parties is going to be the principal contact person, who knows enough about the notice or knows where that information is derived from to be able to take questions that arise from the CFIUS and answer those questions in a very rapid way,” said Simeon Kriesberg, aMayer Brown LLP partner.

Having someone designated to keeping an open dialogue can also work both ways, according to Fraedrich. As the CFIUS reviews more and more transactions, certain deals can sometimes find their way to the bottom of the pile.

“CFIUS is very busy right now, and sometimes they don’t get to your filing as quickly as you would like them to,” Fraedrich said. “I think periodically checking in will remind them that you are there and willing to answer any questions they have.”

While every team should include a designated CFIUS attorney, certain foreign acquirers may need to

enlist even more support to help advance their transactions, noted Baker & McKenzie LLP partner Sylwia Lis.

For some, this will mean securing lobbyists to smooth out potential political issues, and maybe even a public relations team to help frame the discussion surrounding the transaction.

"That [team] would include CFIUS counsel for the CFIUS process, but the larger team, in appropriate cases, may also include lobbyists to address political risks that a transaction may trigger," Lis said. "A public relations strategy and a public relations team may also be needed."

Take Advantage of Prefiling

The CFIUS allows foreign acquirers to submit a draft filing, a process that can help ensure that all the relevant information is accurate and included. But it can also be an opportunity to begin educating the CFIUS on the relevant technology or assets being targeted in the acquisition, according to Schlager.

"On complex transactions, it's going to take longer for the agency to understand the technology, the vulnerability or the potential risk, so use the prefiling period to educate them on what the company is and educate them on what the technology isn't," Schlager said.

Doing so can also help ensure that the acquirer is ready to kick off the 30-day review process and can help reduce the likelihood of having to withdrawal and refile to restart the clock, according to Salladin.

"What you don't want is to file, have the 30-day clock start, and then realize you have some problem under another legal authority that you have to address and that is going to take a fair amount of time," Salladin said.

At the end of the day, it is important to be patient with the process and ensure each document filed is complete and accurate to help keep the review moving forward, according to Kriesberg.

"The objective is not necessarily to be the earliest filing of the CFIUS notice, but the earliest completion of the CFIUS process," Kriesberg said. "Sometimes, that means one takes a little bit of extra care to be sure that the notice that is filed really anticipates questions that CFIUS staff may have and is very complete and accurate."

Don't Skimp on Details

Foreign acquirers should stray away from trying to play "gotcha" with the CFIUS or attempting to not disclose certain bits of information using their own interpretation of the CFIUS' scope, or all credibility could be lost, explained David Wolber, a Gibson Dunn attorney based in Washington.

"You may decide there is certain information you'd rather not disclose and perhaps you can wordsmith the definitions in the regulations or find loopholes that suggest technically you might not have to disclose, but at the end of the day, once you are in the review process they can request whatever information they want," Wolber said.

He said he finds it's often best to start off the review process with a clear story of the deal, the reasoning behind it and why the companies feel it will not pose a national security risk. Doing so, he explained, can give the CFIUS a more clear lens for looking at the vast amount of information concerning

the transaction.

“What we try to do in our CFIUS filings is we try to tell a story. If you just answer the questions that are in the regulations, it can be a little dry,” Wolber said. “We try to set forth a road map as to why we think this transaction won’t cause any problems.”

When it comes to not skimping on the details, one of the most important places to really paint the picture for the CFIUS is when it comes to the ownership structure of the foreign acquirer, Kriesberg explained.

A main source of delay for wrapping up a CFIUS review is a focus on who the actual owners are, making laying out all the principal stakeholders an essential aspect of the process.

“It’s certainly worthwhile to try to lay out the ownership structure as clearly as possible, because it can very often be a major source of delay for CFIUS to try to understand a company’s ownership structure and figure out what the ultimate parties of interest might be,” Kriesberg said.

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