THE M&A JOURNAL

THE INDEPENDENT REPORT ON DEALS AND DEALMAKERS Volume 18 Number 2

CONTENTS

DECEMBER, 2017/JANUARY 2018*

*The M&A Journal is published approximately every six weeks, with ten issues per volume. The sequence of issues is therefore tracked by volume and issue number, rather than by month.

The Trump Effect

It has become a platitude to describe the first year of the Trump Administration as "unprecedented." But what does that actually convey? To mark the anniversary of the inauguration, lawyers from Mayer Brown recently set out to examine what that term might mean to the business of M&A as we enter the second year of this presidency.

In a series of seminars, the Chicago-based firm's tour d'horizon included many topics. In this issue, we present their thorough analysis of four important elements that could be in flux and therefore of importance to dealmakers, targets, acquirors, corporate development officers, and all others involved the transaction business. The quartet is as follows: sanctions; antitrust; the Foreign Corrupt Practices Act; and CFIUS.

Here are descriptions of the experts who led the discussions.

SANCTIONS

Charles Salem Hallab: A corporate and securities partner in the Washington, D.C. office, Mr. Hallab focuses on M&A, joint ventures and other cross-border transactions. He is the chair of Mayer Brown LLP's Middle East practice and a leader of the International Joint Venture & Strategic Alliance practice group.

Tamer A. Soliman: Head of Mayer Brown's Export Control & Sanctions practice, Mr. Soliman is a partner in the firm's Washington, D.C. and Dubai offices. He advises clients on international trade issues governing cross-border investments, joint ventures as well as the development of emerging technologies.

Simeon Kriesberg: Mr. Kriesberg is a retired partner of Mayer Brown LLP. For over three decades, he helped clients in the U.S. and abroad address legal issues arising from international trade in goods, services, technology and capital. His practice encompassed counseling on corporate compliance and governance, international transactions, international litigation and trade policy.

ANTITRUST

Paul C. de Bernier: Formerly head of the firm's US corporate and securities group in the London office, Mr. de Bernier works on cross-border deals, media/entertainment and clean energy transactions and is co-chair of Mayer Brown LLP's India practice and a member of the China and East Asia groups as well.

Mark W. Ryan: Head of the firm's Global Antitrust & Competition, Mr. Ryan is a partner in the Washington, D.C. office. He has

Trump Effect ➔

"Miss Kessler is our poison pill here at Tolan, Merle & Fender."

Trump Effect

continued

long represented clients before the Antitrust Division of the Department of Justice on M&A transactions

William H. Stallings: A 17-year veteran of the DOJ's Antitrust Division, now at Mayer Brown LLP's Washington, D.C. office, Mr. Stallings advises clients on competition and consumer protection issues, including DOJ/FTC merger compliance and litigation.

FCPA

William Michael, Jr.: Co-chair of the firm's White Collar Defense & Compliance practice, co-chair of the Global Anti-Corruption practice, and a member of the Health Care group. He is a trial attorney with more than 100 jury trials in state and federal courts and was recently inducted into the American College of Trial Lawyers, one percent of the top trial lawyers in the U.S.

William R. Kucera: Mr. Kucera is co-chair of Mayer Brown's M&A practice in the Americas, concentrating on M&A. He also leads Mayer Brown's practice representing underwriters in issuing representation and warranty insurance and other types of transaction insurance.

CFIUS

Jennifer L. Keating: Co-head of the firm's corporate and securities practice in the Chicago office, Ms. Keating focuses her practice on M&A, joint ventures and other strategic transactions and is co-chair of Mayer Brown's global chemicals industry group.

Timothy J. Keeler: In the Washington, D.C. office, Mr. Keeler advises clients on the consistency of various legal regimes, CFIUS filing on proposed foreign investments in the U.S., and international trade organizations. He is an attorney in the Government Relations & Public Law and International Trade practices.

Simeon Kriesberg: Mr. Kriesberg is a retired partner of Mayer Brown LLP. For over three decades, he helped clients in the U.S. and abroad address legal issues arising from international trade in goods, services, technology and capital. His practice encompassed counseling on corporate compliance and governance, international transactions, international litigation and trade policy.

Sanctions

Charles Hallab: Our discussion today will focus on sanctions developments affecting M&A transactions. As an M&A attorney, when I hear the word sanctions, it tends to send a chill down my spine, particularly if I'm on the buyside of the equation. We'll hear from you both today on sanctions with respect to four important jurisdictions: Cuba; Iran; Russia; and Venezuela. Before we get started, I was hoping that one of you would give us a little basic context for our discussions. Briefly, what are sanctions and why are they so relevant to M&A practitioners?

Tamer Soliman: Thanks Charles. I should note at the outset that we're assuming a certain basic level of knowledge regarding economic sanctions laws. These laws broadly restrict trade (whether in goods, services or financial dealings) with certain countries, entities and individuals on the basis of national security and foreign policy. The lead regulatory and enforcement agency is the Treasury Department. Depending on the circumstances, the State Department and other agencies in the national security apparatus may also be involved.

That said, it's useful to keep in mind a few things with respect to these laws. When we're talking about sanctions laws, we're talking about a complex and varied array of programs. Those range from comprehensive sanctions restricting trade generally with a country like Iran, or Syria, to more targeted sanctions which may be more focused on certain dealings in particular sectors, individuals and entities.

In addition, there is a distinction between primary and secondary sanctions. When we talk about primary sanctions, we're talking mainly about sanctions that have traditionally focused on and applied to US persons, entities and individuals, as well as in some cases, their foreign affiliates. Secondary sanctions, which we're seeing more use of in recent years, have targeted non-US dealings with certain sectors of other countries, Iran being an example, and we'll hear more about Russian as well. And then finally, from a practical enforcement perspective, the environment is one in which we've seen a number of major cases against non-US parties. So even in the primary sanctions context, the reality is that the US has been both aggressive and quite successful in pursuing and reaching enforcement settlements and penalty cases against non-US parties.

From an M&A perspective, this means that the breadth and reach of these laws is such that the target's dealings may create liability for the parent or the acquiring company. Several of the trends we'll be discussing today highlight a rapidly changing regulatory environment and the traps for buyers who do not account for these issues both before and after closing.

Mr. Hallab: Thanks Tamer. Let's dive right in into what some of those changes have been under the Trump administration. Simeon, maybe you could start us off on Cuba.

Simeon Kriesberg: Thank you, Charles. In the waning years of the Obama administration, steps were taken to relax the long-standing embargo against Cuba by the United States. President Trump, upon taking office, made very clear that he did not agree with a number of those changes and as a result, about a month ago, the US Treasury, Commerce and State Departments announced amendments to the Cuba sanctions and Cuba export controls to scale back some of the changes that had occurred during the Obama administration. A number of changes were made that affect individual travelers to Cuba, but from a business standpoint certainly the most significant change was the establishment of a so-called Cuba Restrictive List, a list of entities that are controlled by the Cuban military, intelligence, and security services that are now out of bounds for US business dealings. This Cuba Restrictive List includes government ministries, holding companies that are state-owned, numerous hotels, tourist agencies, marinas, stores, main attractions, among many others.

This Cuba Restrictive List clearly is going to reduce the Cuba-related opportunities for US businesses. In particular, the new restrictions prohibit US parties from entering into agreements with the listed entities, even if those agreements are contingent upon obtaining appropriate US licenses. Such contingent agreements had previously been permitted. In addition, transactions that are ordinarily incident to authorized activities are also prohibited if they involve these listed entities. The financing of exports by US banks, which was previously authorized in most cases for permitted business activities, is now prohibited if the financing involves any of the listed entities. Dealings to establish a business or a physical presence in Cuba that had been permitted for certain categories of business under prior Obama changes are now authorized only for a narrower range of business. So, over all, these changes clearly limit significantly what had been an opening to Cuba under the Obama administration.

Two other changes affect business dealings in Cuba from the United States. First, the definition of officials of the Cuban government has been expanded. Such officials previously had been limited to the very highest level of national officials, but under the new regulations there are many much lower level officials and officials at the provincial level, officials at state-owned media enterprises, unions, and various other organizations that are now also considered prohibited officials with which US persons can't have any dealings. Secondly, there are some additional export control restrictions. In particular, applications for export licenses are likely to be denied if they relate to any parties on this restricted list.

From an M&A standpoint, I think the overall impact of these changes is that parties have to be extremely careful about targets that have Cuba dealings. The United States is the only country in the world that has sanctions imposed on Cuba and accordingly targets from any other country would generally not have to be concerned about business conducted with Cuba, but any US buyer would now need to be concerned about the target's Cuba business because under the regulations not only US parent companies are subject to the Cuba but also any foreign subsidiaries. This is the only sanctions regime in which foreign subsidiaries are just as restricted in their activities in Cuba as the US parent companies are.

With that, let me turn it over, Tamer, to you for changes in the Iran sanctions.

Mr. Soliman: Thanks Simeon. Iran is another example where the Trump administration has, at an early stage, articulated policy goals that suggest a significant shift in direction from the prior administration, and associated legal risk for acquirers whose targets may have direct or indirect dealings with Iran. The announced intention of the Trump administration has been to terminate the Iran nuclear deal. Indeed, candidate Trump made several statements making clear that that was his intention prior to taking office.

Sanctions ➔

Charles Salem Hallab
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Tamer A. Soliman
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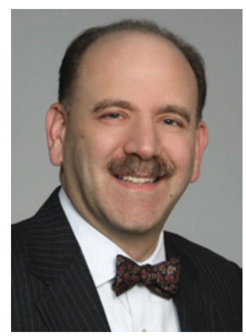

Simeon Kriesberg
Mayer Brown

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To be clear, the president has always had and continues to have the authority even under the Iranian nuclear deal to directly impose primary sanctions for reasons that have nothing to do with the nuclear program, and in fact both the Obama administration and the Trump administration have imposed such sanctions with the backdrop of the nuclear deal intact. But with respect to the nuclear deal that has been the Administration's focus and it has undertaken a review to find a way essentially to back out of the deal or renegotiate new terms.

What has really happened is the administration has essentially punted to Congress. In October of this year, the president announced his determination that it was not in the US national security interest to maintain the deal, but he stopped short of using his authority to impose sanctions or to take further action. Essentially, he punted to Congress under an existing law that allowed Congress to take advantage of special procedures to reimpose sanctions. The deadline for Congress to do so passed in December. This was an opportunity for Congress to push through a re-imposition of sanctions under special procedures. Congress essentially punted back to the president. That deadline passed, and so now the ball is back in the administration's court.

Where does that leave us in terms of the sanctions landscape for potential buyers in an M&A context? Essentially, the law is unchanged from when the president took over in terms of its overall structure. There have been some additional sanctions imposed against parties and entities but the overall architecture of the sanctions against Iran remains the same in terms of restrictions on US persons and possibilities for non-US persons. However, there is a significant risk of re-imposition of sanctions. It remains unclear what the administration will do and how far they will push to achieve their goal of renegotiating or walking away from the deal, including unilateral action. This leaves a very complex risk profile for buyers. It's important to understand that there are many non-US companies, as well as in some cases foreign subsidiaries of US companies, that have been pursuing Iran business in the framework established by the nuclear deal and there are a lot of traps for the unwary in doing that. So, due diligence, particularly for companies that may have indirect dealings, can be very important, given the legal exposure as well as the reputational risks around Iran right now.

Simeon, I'll turn it over to you to talk about Venezuela.

Mr. Kriesberg: Sure. Given the deterioration in both the economic and political situation in Venezuela, the Trump administration in August 2017 significantly escalated the use of sanctions against Venezuela, particularly focusing on the Venezuelan government and various forms of fund raising by the government, including both debt and equity. The new sanctions prohibit US persons from dealings of any kind in new debt with a maturity greater than 90 days issued by or for the benefit of PDVSA, the state-owned petroleum enterprise, and new debt with a maturity of greater than 30 days for new equity issued by or for the benefit of the government of Venezuela other than PDVSA, as well as bonds issued by the government of Venezuela pre-dating August 25, 2017, payments or other distributions of profits to the government of Venezuela from any entities owned by the government, and securities purchases from the government, including PDVSA.

Several general licenses were issued at the same time, including General License 2 that carved out a number of transactions with CITGO, the Venezuelan state-owned enterprise that has extensive business dealings in the United States, and also General License 3 that listed a number PDVSA and other government of Venezuela bonds with which US persons are permitted to have some dealings. But notwithstanding those general licenses, the impact of these new sanctions is quite extensive. The new sanctions are not blocking sanctions. They do not prohibit US persons from all dealings with the government and PDVSA, but they do restrict dealings in debt and in equity, and, importantly, they cover any entity owned 50 percent or more by the government of Venezuela and they also cover any extensions of credit to the government of Venezuela of over 30 days or extensions of credit to PDVSA of over 90 days. Those limitations and the inclusion of extensions of credit are significant because both the government of Venezuela and PDVSA have a history of paying at a very slow pace and therefore it's very difficult to have extensions of credit that are as short as those now permitted under these sanctions. In addition, US persons are prohibited from providing "services in support" of prohibited new debt.

In terms of the M&A context and the implications of these sanctions, I think one of the important things to understand is that, although these sanctions are focused on Venezuela, because they cover entities that are 50 percent owned by PDVSA or the government of Venezuela more broadly, it is quite possible that a target that has business operations outside of Venezuela could be affected by these sanctions. For example, we had a client recently that came to us with a problem. It had a significant part of its business in a third country, not in Venezuela, but because the principal customer in that country was owned by PDVSA or another government of Venezuela entity, it was subject to the restrictions under these sanctions, in terms of the kind of credit extensions and other dealings that it could have. So it is certainly important in light of these new Venezuela sanctions for acquirors that are either in the United States or that have US dealings be alert to not only the target's business operations in Venezuela itself but also other operations elsewhere that may be affected by these Venezuelan sanctions through the ownership of customers or vendors or other counterparties.

Mr. Hallab: Tamer, talk to us about Russia developments.

Mr. Soliman: Russia poses a unique set of developments and challenges. We've seen significant changes that in many ways mean we've entered new territory from a sanctions perspective. Candidate Trump made clear during the campaign his interest or an intention to ease if not totally lift the sanctions. Instead, what has happened in recent months is that we have new legislation with strong bi-partisan support—in fact, nearly unanimous in the Congress —that has resulted in a doubling down on sanctions as well as a significant expansion in the nature and reach of the sanctions against Russia.

Russia is still not a comprehensive sanctions regime. In other words, dealings with Russia are not necessarily off the table. But they are increasingly complex from a sanctions compliance perspective and pose a lot of traps for companies. The most significant feature of that legislation is the secondary sanctions aspect of the legislation, which essentially means that now non-US entities are directly targeted by the US sanctions regime, in terms of their dealings with certain sectors of the Russian economy or certain kinds of activity that ranges from certain energy activities, like assistance with Russian gas pipelines coming out of the country, to privatization of Russian state assets, which could impact a number of transactions.The bottom line from an M&A perspective is that we're looking at a picture in which direct or indirect dealings with Russia pose an increasingly complex compliance profile and risk profile.

In addition, the politicization of these sanctions with Congress now having a role in the sanctions picture that is relatively unprecedented means that management and boards should not just be thinking about Russia in terms of legal risk, but reputational issues as well, because there is a real risk of becoming a political football with respect to Russia-related dealings, given what is going on between the administration and Congress. Finally, understanding how a target's potential footprint in dealings with Russia and how it is managing those issues can be critical for a buyer in light more complex landscape.

Mr. Hallab: Thank you Tamer and thank you Simeon. You both paint a picture of a very dynamic sanctions landscape. In the few minutes that we have remaining, we could talk more specifically how these developments, these issues, these ambiguities, might affect an M&A attorney's approach to a deal. What are the implications for M&A practitioners? It seems to me there is potential relevance at every stage of an M&A transaction from the very beginning planning stages all the way to post-closing. Simeon, if you can, talk to us a little bit about the pre-closing affects that sanctions or sanctions developments might have on an M&A deal.

Mr. Kriesberg: Sure, Charles. Let's start at the very beginning with the planning and structuring of the transaction. One of the important aspects of the sanctions regime across all the different sanctions areas is that a US person is prohibited not only from dealing directly with sanctions targets but also prohibited from facilitating any non-US person's dealings with sanctions targets. What this means is that it's very important in thinking through how to plan a transaction what relationship the acquirer will have with the target company after closing. Will the target be essentially an autonomous subsidiary that will make all its own decisions and will not need to rely on any credit or financing or legal or IP support or other kinds of decision-making authorization from the parent company, or will it depend to some degree on other kinds of parent-level activities? To the extent that the parent company in the United States will have a key role in the business operations or board decision-making with respect to the foreign subsidiary, then it is quite possible that the foreign target, once acquired, may not be able to do business with sanctioned parties after closing because there will be prohibited facilitation by the new parent company.

In addition, as I mentioned in the case of Cuba, foreign subsidiaries, regardless of any facilitation, are going to be subject to compliance with the Cuba sanctions. So it's very important at the very earliest stages of planning a transaction,

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to consider the relationship between the parent and the subsidiary and to determine whether that relationship is one that will require some elimination of sanctions-related business dealings by the target.

When you go to the next step of an M&A transaction, to due diligence, clearly from what Tamer and I have been saying, sanctions is a very dynamic area of law, and it's very important to be sure that due diligence has been expanded to include new sanctions, such as sanctions against Venezuela, but also secondary sanctions such as the sanctions that apply not only to Iran but also now under the Trump administration to Russia. We should say in passing that there are also some secondary sanctions with respect to North Korea that are probably less important to anybody with respect to North Korea as a target, but more important because they could extend, for example, to Chinese entities that may be viewed as supporting North Korean business. So it's important even where the two parties to an M&A transaction have no nexus to the United States for them at least to consider the implications of the secondary sanctions which apply even to parties that do not have a US nexus.

Finally, when you think about drafting the M&A agreement, it's very important, if you're using a standard form that was used the last time around, that you be sure that it's still accurate because, as we've been describing, things have changed just in the last year. It's quite possible that reps and warranties and other sanctions-related provisions may no longer be correct. One of the sanctions-related drafting that I have found parties sometimes overlook, is the area of sectoral sanctions. Very often, historically because the so-called blocking type of sanctions, the ones that prohibit absolutely any dealings, have long been in place, the forms that people are using cover those, although they sometimes need to be updated to reflect the correct sanctions targets. But the sectoral sanctions, those against Russia and now against Venezuela, are very often not treated, and it's important for parties to reflect on what might be the implications for the transaction by reason of these sectoral sanctions so that they can be treated in the M&A agreement as well.

Mr. Hallab: Thanks, Simeon. Tamer, how about closing and post-closing issues?

Mr. Soliman: It's very important to take a holistic view of the transactions and recognize that the nature of these laws is such that you are dealing with both legal and reputational risk that can be very significant for a company. And so you have to consider at the deal planning stage what happens once the deal is done in terms of managing these legal, operational and reputational issues? How comfortable are you that the target can manage these issues?

In many cases, the target may be a non-US entity that is not as experienced in these areas. And to the extent you can think about that before a deal closing, all the better. So, you should think about things like what compliance policies and procedures and controls need to be in place? How are you going to get comfort that if an issue arises that it will come to the attention of the management or the board of the entity?

And what conditions of closing should there be? To the extent you've done due diligence on the target and you've found that there are supply chains, revenue streams, or other touch points that mean potential violations have been occurring, we often have to work with clients to mitigate those issues and the buyer sometimes requires a voluntary disclosure as part of a condition to closing to manage that process. There may be other conditions relating to licenses or authorizations that need to be put in place in order to address ongoing business and revenue streams. All of those issues have timing implications and it can be critical to incorporate them into the deal planning.

Mr. Hallab: Thanks Tamer. Thank you Simeon as well. From listening to you both, I sense that our antennae should be higher rather than lower in light of recent developments and in the context of M&A in particular, our approach, our documents, our policies at a minimum should be refreshed and updated and fully informed by sanctions developments and sanctions experts such as yourselves. So thank you very much again for your thoughtful analysis and perspectives.

Antitrust

Paul C. de Bernier
Mayer Brown

Mark W. Ryan
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William H. Stallings
Mayer Brown

Paul C. de Bernier: What are the initial reactions to the new Trump administration, specifically in the context of mergers and acquisitions and antitrust? What does an M&A lawyer or a general counsel with the same considerations need to know?

William Stallings: Probably the most important takeaway is that merger review is alive and kicking. Merger enforcement in general is one of those areas that continues relatively the same from administration to administration. While substantively there may be some differences around the edges, there is general agreement on the economic and legal framework for these types of reviews. And, the staff reviewing the transactions will be the same. I think general counsel need to know that they should expect to receive an extensive inquiry from the agencies for any deal that raises competition issues.

Mark Ryan: I agree with Bill on that. I think when the election results came in, back in November of 2016, there was a lot of speculation in the antitrust bar that merger enforcement might be drastically cut back in the Trump administration. That, so far, is not the case. They have challenged mergers and they've investigated very thoroughly several deals. I haven't seen anything that is remarkably different from what I think would have occurred in the Obama administration. So, deals are getting thorough reviews. If anything, the review process, the second request process, is becoming even more involved. Staffs at both agencies are taking a long time to look at deals and I think there is a mindset that has been carried over from the enforcement mentality of the Obama administration that they are in the business of bringing lawsuits and that's the way they are approaching some of the big deals that we're all familiar with.

I think, of course, the AT&T/Time Warner litigation is the big headline right now. Everyone will be watching that with a great degree of interest. No matter how it comes out, it will inform us quite a bit as to not only the law of vertical mergers but also, if the government wins that case, I suspect it will whet their appetite for additional cases, and, if they lose the case, I wouldn't be surprised if they take a step back and evaluate what they will do going forward.

Mr. de Bernier: Thanks, Mark. That headline litigation is obviously very topical. A lot of people are watching it very keenly to see how it comes out. I think some of those insights about staff are very practical. On the subject of staff, looking at one administration changing to the next—and obviously the president has his or her individual views—sometimes you look at the "machine" moving from one administration to the next administration. Given the expression that "personnel is policy," is there anything that we can tell about appointees—the antitrust team—in this administration that may or may not make things different from the previous administration?

Mr. Stallings: I'll take a first stab at that. It took awhile for the team to get into place for various reasons, largely due to the appointment process and confirmations. But, the team is pretty much there now, particularly on the DOJ side. They are an impressive group. Makan Delrahim and Andrew Finch previously served in the Division during the Bush II administration. I worked with them when I was at DOJ. Both are highly capable and very well regarded in terms of antitrust experience. Makan brought in strong legal deputies. In addition to Andrew, they have Roger Alford, who has an impressive international policy background, to serve as the "international deputy." International issues raised by merger enforcement is an area that I think will be very important to this administration and to the leaders of the agencies. Another deputy is Don Kempf, who is a well-known litigator, but was also a general counsel, so he understands the impact of antitrust reviews from a general counsel's perspective. He has so far been vocal that these reviews need to be tighter, more focused, and shorter. We'll see how that gets implemented. And, Barry Nigro provides a distinguished antitrust background, from both private practice experience and service at the FTC. So, at least from the DOJ perspective, I think there is a good solid team in place with institutional knowledge and the capability to carry out their objectives.

Mr. Ryan: And then at the Federal Trade Commission, the administration has nominated Joe Simons to be the chairman of the FTC. Joe is a highly experienced and well known antitrust lawyer. He comes out of a Wall Street practice so he is very familiar with deals, how deals get

Antitrust ➔

Antitrust

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done, and how important expeditious reviews of deals are to companies. He's had government experience. He was previously with the Federal Trade Commission. He has written on antitrust law. So he has both practical experience in private practice, government experience, and he's a bit of an antitrust thinker as well. I think it's fair to say that Joe likes the subject matter and he particularly likes the economic side of antitrust. Two of Joe's principal deputies, so to the speak, at the Commission will be Bruce Hoffman and Ian Connor. Bruce is the director of the Bureau of Competition, where enforcement decisions and recommendations get made to the Commission, which is a very important position. And then Ian Conner is Bruce's deputy. These are both experienced antitrust lawyers who come to the Commission straight from major law firms. Each of them has, like Joe, substantial mergers-and-acquisitions experience.

Mr. de Bernier: That's very interesting to hear. Sometimes things can look pretty opaque so it's fascinating to hear some of those very personal insights and observations that you have of people you've worked with. These folks are obviously important decision-makers. Just thinking back to the election—and I can't believe it's already been a year since the election—does a look-back at that twelve-month period tell us anything about M&A policy from this administration's enforcement decisions? Have they done enough to glean anything as to what we can anticipate or compare with the past?

Mr. Stallings: We actually have quite a few tea leaves to read. Normally, a year for antitrust is not all that long, but there have been quite a few important events during the past year. Some have been under-reported, some maybe have been over-reported, but the tea leaves—I think Mark said it well—suggest that we have not, so far, seen any major actual enforcement decision that is different than what likely would have occurred under Obama. For example, the cases in the pipeline that were being litigated when this administration took over have all kept going. There would have been an opportunity for the new administration to pull back. They did not. Examples include the two big healthcare mergers in which the government obtained injunctions. And, there was the nuclear waste merger litigation in Delaware that the Division continued to litigate (and win).

One I had some personal involvement with was the Division's suit to block Deere's acquisition of a technology company from Monsanto [Precision Planting]. We represented a complainant. In 2016, the Division sued to block the deal. Soon after the November 2016 election, the parties asked the judge to put off the upcoming trial. The judge did so. That gave the parties time to lobby the new front office to drop the case. Far from dropping the case, the new administration continued to pursue it. The parties abandoned the deal about two weeks before trial was about to start, and the Division issued a press release that was very enthusiastic about the importance of blocking anti-competitive mergers. Andrew Finch, the principal deputy (at that point Makan Delrahim was not yet confirmed), said: "The companies' decision to abandon this transaction was a victory for American farmers and consumers. The Antitrust Division will remain vigilant to ensure that competition in agricultural markets is not thwarted through illegal transactions." That is a very firm, flag-waving statement that shows they remain in the business of blocking anti-competitive deals.

The new administration has also taken steps that were somewhat unprecedented. If you look at the Parker-Hannifin transaction [for Clarcor], the parties had obtained HSR clearance. Notwithstanding that, the Antitrust Division sued to unwind the deal. The parties had actually gone through and received early termination of an HSR filing and closed the deal yet still were subject to a lawsuit.

The FTC also has been aggressive, including suing to block mergers such as the Draft Kings-Fan Duel transaction. I think what's important about that one is that the FTC alleged narrow "relevant markets", in antitrust terms. That's important because many deals may have some discrete overlaps. The FTC sent the message that they're going to continue to remain vigilant about looking at those types of narrow markets to make sure there are no anti-competitive effects from a deal.

Mr. Ryan: I think one place where we may have seen a difference in emphasis in antitrust enforcement—and this is surprising at least to me and I think to some others in the antitrust bar—the head of the Antitrust Division, Makan Delrahim, came out a few weeks ago with a speech that said we don't believe in behavioral remedies to fix mergers. Now what does that mean? When you look at a merger, it's common for the enforcement agencies to say that if only a part of a merger is problem, let's see if we can address that part and let the remainder of the deal go through. One way to do that is with a structural remedy—a divestiture—“structural” means you just sell off the overlapping aspects to a different firm so that competition remains the same essentially in the marketplace—that’s the idea. But there are also behavioral remedies where instead of requiring a divestiture, the government may say we want you to enter into a consent decree, an agreement with us that will be overseen by the court, that will regulate your conduct going forward in certain respects, to fix the problem. While I think it’s fair to say that in the Obama administration, there was a heavy preference for structural remedies over behavioral remedies, that speech that Mr. Delrahim gave was a real laying down of a marker that there are not going to be behavioral remedies in the Trump administration. His view is, look, if there is a problem because of the merger, you don’t allow the unlawful merger to go forward and then try to regulate a party’s conduct. We’re not regulators. We at the Justice Department are enforcers. So we’re going to insist on structural rather than behavioral remedies.

Two points about that: That surprised me and I think it surprised a lot of people whose instinct was the Republicans will work more closely with the private sector to allow more deals to get done. This is a way of saying, no, there are certain things we, the new administration, will not do when it comes to helping you fix your deals. Second, we’ve seen this play out now. Since Makan’s speech, the government has sued to block the AT&T/Time Warner deal. There has been a lot of attention given to the fact that that’s a vertical merger, as opposed to a horizontal merger. But I think, as we’ve seen in some of the press reports so far, the parties in that deal had offered some transactional conduct or behavioral remedies as a compromise to allow the deal to get done and I think we’re seeing that the Division’s policy that we’re not going to have behavioral remedies is now a real point of contention. That taking a hard line on how deals will be fixed and how they will not be fixed in the new administration is a very interesting development.

Mr. de Bernier: Thanks Mark. Speaking of court enforcers and the administration’s attitude to certain things, Bill, can you discuss the global aspects of merger enforcement? Today, obviously many deals involve cross-border issues. Indeed, Mayer Brown is a global firm, and, as M&A lawyers, we are looking at an increasing number of deals that span many countries around the globe. So, parties to such deals are always concerned about having to deal with a labyrinth of different agencies conducting reviews. How does this administration fit in that global context? Any thoughts in connection with cross-border deals?

Mr. Stallings: Absolutely. I was at the Division for 17 years and without a doubt the biggest change over that time involved international cooperation. When I was first at the Division, if a global deal came in front of us, we would look at it from a US perspective and we would conduct our review basically in isolation from the rest of the world. Frankly, we really didn’t care about what was going on in the rest of the world during that review. It is diametrically different now. Today—and this is something that general counsel absolutely have to be aware of—the enforcers cooperate extensively. So whenever a deal comes in front of the agency now, the agency immediately finds out where else it’s being filed, and from Day One, there is a behind-the-scenes discussion among the different agencies about the transaction. The US agency will basically “ask” the parties to waive confidentiality so they can talk with the other agencies. (It’s not really an “ask,” it’s an expectation.) That allows the agencies to talk with each other about the evidence, about the theories, about what the parties are saying. When I was at the Division, there were plenty of times that parties told us one thing and then we found out from another agency that they were telling something a little bit different to the other agencies. We would take note of that. And, it is equally important to recognize how the inquiry might be different at different agencies. Regardless of what happens in the US under the Trump administration, a global deal will still need approval in different areas around the world. Think about the EU right now. Just recently, in the Bayer/Monsanto deal, the CEO of Bayer said, “The EU review has gone into unimaginable depths in terms of the amount of information requested and the theories being pursued.”

Makan Delrahim (who is now head of the Antitrust Division) previously served in the Division during the Bush II administration. He focused on international merger coordination issues. His speeches emphasized the importance of sound enforcement worldwide. I would expect him to continue to stress that theme, and maybe even more aggressively use the bully pulpit of his new position to discuss good and bad practices in terms of transparency and soundness of enforcement principles. He hired, as I mentioned, Roger Alford, to be a deputy focused entirely on international concerns. So I think the international area is going to be critically important and a key area to keep track of as the admin-

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istration develops.

Taking a step back more inward, in the US obviously the federal agencies—the FTC and the DOJ—are most important when it comes to merger review, but we cannot ignore state antitrust enforcement. When it comes to mergers, state involvement usually is not as critical because states don't have the ability to hold up a deal while the merger review is pending, unlike the federal agencies. But they can still take action. We just recently saw a lawsuit where the state of California litigated in federal court to block the Valero/Plains pipeline deal after the FTC had cleared it under HSR. The federal judge blocked the deal. So parties are going to have to be mindful of the fact that you can't simply ignore state enforcement.

Mr. de Bernier: That's a very interesting additional layer that you don't normally think about. This could be one final thought. You used the phrase "unimaginable depths." Talk a little bit about the burden, and the uncertainty and the contingency planning, that goes into these antitrust reviews. Clearly for clients there are significant time, money, effort and execution concerns. There has been some chatter about the federal agencies acknowledging the need to dial back some of the time and burden that goes into these M&A reviews. In practice, have there actually been any changes? Will there be? Are they going to work to get things more streamlined and efficient?

Mr. Ryan: Let me offer an observation. Over the years, we hear regularly from each of the two federal enforcement agencies that they want to make their review process more efficient, less of an unnecessary burden on private parties, and reduce the scope of second request investigations. In my view, the one consistent aspect that we see is that they don't deliver on that promise. I think that the process, if anything, has begun to stretch out some. If you're the staff attorney investigating a deal, you're not in a hurry to get your review done. If there is going to be a lawsuit, you want to make sure you've got every conceivable fact in hand before you file the lawsuit. So if reforms are going to be made—and I think there is room for reforms—they ares going to have to come from the top. The leaders of the two agencies are going to have to really get in there with their staffs and decide we don't need fifty custodians to produce documents, we don't need nine months to conduct the second request review; instead, let's focus and do things more quickly. I wish I could say that I was optimistic that that will be the case. If a deal doesn't raise much of an issue, like the Amazon/Whole Foods deal—a big deal, lots of publicity, but no antitrust issues, then the agencies are typically good about finishing the review quickly. But on deals that raise issues, I think the agencies — and the private bar working with the agencies — have a lot of work to do to figure out ways that you can expedite the process and the government still can get what it needs to conduct its investigations.

Mr. Stallings: Following up on that, I remember back during the Bush administration, there was a real push for the merger review process initiative. One of the trade-offs that was talked about was let's have a shortened second request period in exchange for the parties agreeing that if the government sues to block the deal, the parties will agree to a long discovery period post-complaint. That never really took off for a host of reasons. But I could imagine some outside-the-box thinking like that coming back.

Mr. de Bernier: Mr. Delrahim apparently had some announcement about reviewing old decrees. Is that right? Is there a risk that they go back and open up and change things? What does that mean in the real world?

Mr. Stallings: There are two different issues here when talking about old decrees. First, there are lot of old decrees on the books that are totally irrelevant. In the past, whenever things were somewhat slow at the Division, you would try to go back and clean up the old, irrelevant ones by filing motions to terminate them. That situation is no longer much of an issue because about fifteen or twenty years ago, the Division automatically put sunset clauses in the decrees. They automatically go away. So, the universe of truly old decrees is shrinking.

Now, what he also might be talking about is that there are a couple of very important media-related decrees—the Paramount or the ASCAP/BMI decrees – that are old but have conduct provisions that are still in force and still have an impact. Mr. Delrahim does have a background in media and it might be that he wants to take a fresh look at those to see if they're still relevant in today's new media marketplace.

Mr. de Bernier. That's helpful to know. So Mark and Bill, thanks a lot for your thoughtful and valuable perspectives.

Foreign Corrupt Practices Act

William Michael, Jr.
Mayer Brown

William R. Kucera
Mayer Brown

William Michael Jr.: I want to give a brief background on the Foreign Corrupt Practices Act. The FCPA really is the number one worldwide law enforcement technique that is being used throughout the globe to focus in on global corruption, whether or not that's with respect to U.S.-based companies or foreign companies. It's a law that was passed quite a while ago, back in 1977 with some updates. It focused in on the fact that bribing foreign officials created an unfair advantage to companies. The U.S. Congress enacted the legislation in order to create an opportunity to try to equalize the economy and business practices throughout the globe.

One of the concerns that the FCPA addresses is bribery, as I just mentioned, and it is bribery of foreign officials. It is not a broad bribery statute. It doesn't focus in on what's often referred to as commercial bribery, like the UK Bribery Act does. It focuses in on the payment of bribes to foreign officials. It also requires issuers, that is, companies that trade on the U.S. stock exchanges or are required to file forms with the SEC, to maintain accurate books and records and to devise and maintain systems and internal accounting controls.

Realistically, what goes on is there are two ways that this statute can be enforced, or two agencies that look at it. Generally, the civil aspect of this, that is, such as the books and records and internal controls, are looked at through the enforcement arm of the SEC. The criminal aspects of this statute are addressed through the fraud section, which is part of the criminal division of the Department of Justice.

For quite a while, the only guidance that was given to companies came about as a result of enforcement actions. The SEC and the Department of Justice were relatively quiet about their policies and procedures and what they wanted and what they expected from companies. The only way that companies could determine what it was that they needed to do—not just from a legal aspect but from a practical aspect—was to either (a) look at the statute, or (b) look at enforcement actions that had taken place. That was true until November of 2012, when the DOJ and the SEC issued joint guidance. It's often referred to as the Resource Guide, probably because the title of it is A Resource Guide to the US Foreign Corrupt Practices Act.

This addressed many things, but for purposes of today, it also addressed some issues concerning M&A transactions and the acquisition due diligence required for deals, what was expected of companies that were on either side of an acquisition. It talked a little bit about liability and successor liability, and how it is that a company could continue to face investigation and potential prosecution for acquiring a company's bad acts, if you will. It also provided some practical tips in order to reduce FCPA risk in this area. There is some guidance issued about companies being able to go through an opinion procedure which is a rather formalistic approach. But also, without going through that formal approach, they talked about some options that a company could do, including conducting thorough FCPA and anti-corruption due diligence, ensuring that the acquiring company's code of conduct compliance and anti-corruption policies and procedures are implemented as soon as possible, and ensuring that proper anti-corruption training occurs for all the employees, vendors, agents, business partners, et cetera.

Obviously, during the due diligence stage, there are practical concerns. Sometimes, you get access to full information right away, and sometimes you don't and only get access to it post-acquisition. And so, if in fact you only get access to some information post-acquisition, there are certain steps that you ought to be considering on day one. Also, in the Resource Guide, they address self-disclosure and potential benefits of that self-disclosure. Without getting into too much more detail by me about the actual due diligence from both the buyer's perspective and the seller's perspective, I turn that subject back over to Bill.

William Kucera: Now that Bill has explained the FCPA groundwork, I'm going to tie the discussion back to M&A and look at things a little deeper, first from the perspective of the buyer in an M&A transaction and then provide some thoughts from the perspective of the seller.

The first question from the buyer's perspective is why should the buyer care about the FCPA and all other anti-corruption issues. The answer is probably obvious based on what you heard

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from Bill, but suffice it to say that the downsides of a buyer acquiring a company with FCPA or anti-corruption issues are substantial. These range from significant monetary penalties, even potential criminal charges, to the less tangible but equally damaging reputational harm.

Moreover, I assume everyone listening to this works for or with companies who have strict policies against doing business via bribes or other corrupt activities. The last thing a buyer would want is to acquire a company in which such activities exist and then have such activities continue under the buyer's ownership. So there are clearly very good reasons for buyers to care about these issues in looking at a deal, and there are plenty of well-publicized examples around the world of buyers getting caught up in an anti-corruption mess on account of an acquisition.

So we've established that buyers have very good reasons to care about anti-corruption issues in the context of a deal, and now the question is what to do about it. Though there is no one-size-fits-all approach to addressing anti-corruption issues, in the context of most cross-border transactions, it would be prudent to do at least some due diligence in FCPA and other anti-corruption issues. There are many good reasons for doing this, including that if, despite efforts to identify issues prior to closing, there are ultimately issues that arise post-closing. Bill mentioned that buyers will tend to be in a better position with regulators if they can show that they made a good-faith effort to discover potential issues prior to the transaction.

Now the diligence itself can be somewhat involved and in certain instances it may be prudent to involve experts such as Bill to help sort out the issues. In conducting this diligence, it's important to keep in mind who is gathering this information and how it is shared among the broader deal team. Given that there very well may be violations of law underlying this investigation, it is important to proceed with a measured plan and to consider things like legal privilege surrounding the information that is gathered. In this vein, again it may be prudent to involve a litigation or other compliance expert who is likely more familiar with these types of issues than your typical member of the M&A deal team. Things like a common interest agreement may also make sense and, again, this is a document that is not often thought of in the M&A context or in the M&A document check list.

In addition to conducting an appropriate diligence review, a prudent buyer should also ask for an appropriate representation from the seller with respect to FCPA and other anti-corruption issues. Such a rep would do three things. First, it would serve as an extension of the diligence process. Asking the seller to make a rep would hopefully flesh out any remaining issues that were not discovered in diligence. Second, obtaining such a rep provides the buyer with further good faith cover for regulators if, again despite buyer's efforts, there turns out to be an issue that's not discovered until after closing. Lastly, in the context of a private deal, where sellers typically provide buyers with some sort of post-closing indemnification or recourse, seeking and obtaining such a rep may provide the buyer with post-closing recourse against the seller if anti-corruption issues are discovered after the closing. Now, I note that with the explosion of representation-and-warranty insurance, such anti-corruption reps are now often covered by insurance so that may be another reason such a rep may provide recourse under the insurance that a buyer procures.

Now if, pursuant to some combination of diligence review and a representation that you ask for, the buyer discovers that there is in fact some sort of anti-corruption issue with the target company, the next question is what to do about it. This is in the context of before you sign the deal. Now, the first option would of course be to walk away from the deal. There could be many reasons for reaching this conclusion, including legal issues, cultural or reputational issues—again, the buyer just chooses not to be associated with the company that has potential corruption issues and wants no part of it, and so walks away.

There are also business issues. For instance, what if one of the more valuable assets of the company you're considering buying are other contracts or business arrangements and it turns out that those were procured through bribes or other illegal means. Those assets may very well go away or are not apt to have the same amount of value, which will cause the buyer to perhaps want to walk away from the deal. Purely in an anti-corruption vacuum, walking away from the deal may be the easiest and obvious thing to do. But deals are not done in a vacuum and there are likely to be many competing reasons that point towards going ahead with the transaction.

As deal professionals, our job is to appropriately scope that risk for the decision-makers and to present to the decision-makers the options for dealing with the risks. Those options include various contractual tools that are available to help buyers and sellers address potential anti-corruption issues in order to sign the agreement and move forward with the transaction. These are largely the same as in other M&A contexts. For one, the agreement could include some sort of closing condition or termination right that effectively would allow the buyer not to close unless and until it was comfortable with the anti-corruption risk. This solution may be appealing to buyers because it provides the buyer with considerable control over the situation. It may be a tough sell for sellers because the seller would potentially be left both with a broken deal and now an exposed anti-corruption issue. Not a fun place for the seller to be in.

The other approach would be to have the buyer close the deal notwithstanding the anti-corruption issue but have the seller provide the buyer with some sort of closing indemnification related to any lawsuit that might arise out of the issue. This approach has the benefit of allowing the deal to close but it may not be acceptable to the buyer. Not only would the buyer have to get comfortable with the typical issues surrounding indemnity—the ability to collect, credit risk, et cetera—but also the buyer would still be exposed to the reputational issues and other aspects of being involved in an anti-corruption that cannot be quantified for purposes of an indemnity.

One complicating aspect of a typical contractual solution to an anti-corruption issue is what to do with the information once it's known. In many instances, there may be a legal obligation to report the information to regulators. Even if there Is not a legal obligation, a buyer may want to report the information so as to be able to scope the problem and start a cooperative open dialogue with the appropriate regulators. Now, the obvious problem with reporting such information is that the buyer's interest and the seller's interest may not be aligned in this regard. So this is definitely a tricky issue that may need to be addressed in the the drafting of a contractual solution.

Lastly, and briefly, I'll flip over to the seller's side and in that regard my primary message is act like a Boy Scout and be prepared. In preparing for a sale transaction, take the time to do some internal diligence and determine if there are any anti-corruption issues. Ask the same questions that the buyer will be asking. If there are issues, get out ahead of the buyer. Disclose them up front along with your plan for mitigating them. Be proactive rather than reactive. You do not want to be in a situation in which you are gathering information about an issue alongside the buyer. Buyers, by their nature, will take a worst-case scenario approach to issues and behave in the context of negotiations accordingly. As a seller, you want to be out in front of any anti-corruption issues and manage them through the sale process.

That's a bit of tie-back FCPA to M&A and with that I'm going to turn it back over to Bill so he can talk about how he views the impact of the new administration on these issues.

Mr. Michael: So before I get into the issue about the new administration, let me just add one thing with respect to a practical issue concerning due diligence on an M&A transaction. Oftentimes there are a lot of people who are looking at documents in the deal room and not everybody is fully engaged and fully aware of the potential red flags that may arise as a result of reviewing documents from the seller. So what I would strongly suggest is that prior to that process going forward, the whole deal team sit down and go through, in essence, a quick training session on red flags to be looking for. What this does is creates, in essence, a force multiplier. You now have more than just the litigation or the FCPA lawyers looking for red flags, but you have the whole deal team trying to spot issues. That is something that is crucial as we go through this process because of the increased attention that's being focused on anti-corruption worldwide.

So, with that, let me now get to the heart of the matter. Is the change in administration likely to impact FCPA enforcement? First, let's take a look at the numbers. We're now in November of 2017 and if you look at the number of criminal enforcement actions this year so far, there have been only nine of them. In fact, five of those were in January of this year. You could look at this and say, "Well, 2017 is significantly lower than the previous couple of years." For instance, in 2016, there was a total of 27 criminal enforcement actions, and in 2015, there were 16 criminal enforcement actions.

But don't look at the numbers in any one year as definitive with respect to whether or not enforcement is up or down. The reasons for that are several. These things take a long time. As I like to say, having been at the Department of Justice for over a decade, DOJ often works at a glacial pace. The timing of these investigations can take years. When you look at how an FCPA case goes in essence from cradle to grave, you have some sort of allegation. Maybe that's an allegation that comes about from the media. Maybe it's an allegation that comes about only internally to a company. Maybe it's an allegation during the M&A transaction that you identify.

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There is going to be some period of time where a company is going to do some sort of investigation and there is going to be an investigation by the authorities—maybe the Department of Justice, maybe in cooperation with the SEC, maybe in cooperation with one or more other countries' investigative agencies. It takes a long time. Because of that, you can't look at one year's numbers as definitive as to whether or not the law enforcement is increasing in scope or decreasing in scope. Just be mindful that numbers sometimes don't tell the true story.

Secondly, let's take a look at a program that was put in place in April of 2016 that the Department of Justice called "The Pilot Program." If you think about this from a practical standpoint, oftentimes it's difficult for the Department of Justice to enforce cases that happened overseas. The reality is they have less evidence-gathering techniques. It's difficult to obtain the evidence. People don't have to cooperate nearly to the same extent as they do within the United States. So the Department of Justice often requests and expects and hopes for companies to basically self-investigate and self-disclose. One of the problems with that is the Department of Justice was indicating that in fact companies would get a benefit for self-disclosure but companies really weren't sure what that benefit was for self-disclosing. It wasn't transparent.

So as a result of that, under a lot of pressure from the defense bar and from the corporate entities, the Department of Justice issued this Pilot Program. As part of that, they turned around and did a number of things. One, they increased their own resources to look at anti-corruption. They bumped up the number of prosecutors by fifty percent and they created three more teams in the FBI to look at these things. In addition, they indicated that they were increasing their global cooperation with other countries. That allows for the sharing of information and also for the gathering of information overseas in an easiest fashion. They set out a standard that companies could now expect certain benefits. In essence, it's a carrot and a stick. If you meet the criteria, you can get a benefit. If you don't meet the criteria of the Pilot Program, you don't get the benefit and you may in fact get a penalty. So, without spending a lot of time on what the Pilot Program is, it basically requires voluntary self-disclosure. You've got to go forward prior to the government learning about these incidents. You have to be reasonably prompt from when you and the company learn of them and disclose them within a reasonable time frame. And you have to disclose all of the facts. Once you do that, you're expected to fully cooperate; that is, disclose all the facts and provide as much cooperation on an on-going basis as possible. In addition, you have to provide timely remediation of that problem. If you do that, then in fact you can receive a reduction in the fines and penalties. You may in fact not have to have a corporate monitor imposed on you. And the best benefit of all is a potential declamation of criminal charges. In the last year, there have been seven declinations under the Pilot Program. It was originally a one-year program. It was set to expire in April of 2017 and the department has extended it another year. So, you've got a focus now by the Department of Justice on, again, creating incentives, formalized incentives, to companies to continue to cooperate.

There is another reason that I don't think there is really a lot of change under the new administration that we have to be concerned about. When we look at what has happened over the course of this administration, irrespective of your politics, I think it's a fair recitation to say that this administration hasn't always been consistent in its messaging. So, whether you believe that this administration is pro-government or pro-business, whether you believe that they're going to continue to enforce or not, I think you have to be concerned that in fact there is inconsistent messaging at times. One of the reasons I think you need to be mindful of this is the statute of limitations. The statute of limitations is generally five years on criminal and five years on civil enforcement of the FCPA. However, there are many ways to extend that, and five years is into another administration potentially, or certainly beyond another election period.

Lastly, I think one thing that you have to be very mindful of is that there is a much more aggressive worldwide enforcement of the anti-corruption laws. While there is in fact increased cooperation among the DOJ and the SEC with other countries, those other countries are operating independently as well and they are enforcing the criminal sanctions against companies for anti-corruption as activities. So the mere fact that the U.S. may or may not increase its aggressive approach to FCPA is in many ways irrelevant because we have a worldwide enforcement effort underway. As a result of that, time will tell whether this administration continues the aggressive enforcement of anti-corruption matters as other administrations have done. But the reality for the companies is if you operate globally you have to have a continued emphasis in this area.

Mr. Kucera: Thanks a lot Bill. It sounds like FCPA diligence and related issues is here to stay in M&A for the foreseeable future.

Jennifer L. Keating
Mayer Brown

Timothy J. Keeler
Mayer Brown

CFIUS

Jennifer Keating: I'll start with some background and an overview of CFIUS and the review process and its impact on M&A. I will then turn to Simeon and Tim, who will talk about current developments and trends with respect to CFIUS under the Trump administration, as well as recent legislative developments that have the potential to change how CFIUS reviews are conducted and to potentially expand CFIUS's mandate.

First, some background. CFIUS, or the Committee on Foreign Investment in the United States, is a multi-agency U.S. government committee that is charged by statute with ensuring that national security assets aren't sold to foreign interests without the approval of the U.S. government. The Treasury Department chairs the committee and its members include the Departments of Homeland Security, Justice, Defense, Commerce, State and Energy, among others. In terms of the committee's jurisdiction, it doesn't review all proposed foreign investments in the United States. Instead, it has the right to conduct national security reviews of covered transactions, which are transactions that could result in "control" over a U.S. business by a foreign person or entity. I should note that, not surprisingly, a U.S. subsidiary of a foreign entity would also be considered a foreign entity for purposes of CFIUS, assuming that the U.S. sub is under the control of its foreign parent. So it's important to remember that you are not outside the realm of CFIUS for a deal simply because the direct acquirer may be a U.S. entity.

So CFIUS has the authority to review covered transactions to determine their effect on national security. This scope of review is particularly broad because the term "national security" was left undefined in the relevant regulations. This was done deliberately to give CFIUS some amount of flexibility as it conducts its reviews. CFIUS itself does not have the authority to block a transaction. It can, however, impose broad mitigation measures if it determines that these can effectively address national security issues. If a transaction can't be resolved through mitigation measures, CFIUS typically recommends that the parties commit to abandoning the transaction and withdrawing their filing. If they do not do so, CFIUS can then recommend that the president block the transaction. The president has the right to exercise his authority to block a transaction in his discretion, and his decision is not subject to judicial review.

I'll talk now for just a little bit about how CFIUS can impact the M&A process. First, under the current regulations, CFIUS is technically a voluntary filing process. There is no mandatory filing requirement. So, why would a buyer make a voluntary filing? The reason is because making a CFIUS filing is essentially a way of ensuring deal certainty from an M&A perspective. If a voluntary filing is made and CFIUS approves the transaction, then the U.S. government doesn't afterwards have the ability to challenge the deal. If, on the other hand, a transaction is not submitted for review to CFIUS and is challenged after the fact, the buyer may be required to unwind the transaction, sell certain assets or take other actions that are designed to address any national security concerns that CFIUS has identified. It is this threat that motivates foreign buyers to proactively do their own analysis and to voluntarily seek review where there are potential national security concerns. It is really a risk determination of the foreign buyer, with the key questions being (i) is this a covered transaction, and (ii) is it likely to raise national security concerns in the eyes of the government?

One thing that makes CFIUS very different from other regulatory processes, and which often surprises clients in my experience, is the almost complete lack of transparency in the process. As I mentioned before, the term "national security" is not defined in the regulations and there isn't a great deal of clarity on how it will be interpreted in any given case. In addition, the CFIUS process itself is confidential, so while CFIUS has to publicly announce any decision to block a

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transaction, the rest of the process is confidential. CFIUS doesn't make materials publicly available, it doesn't issue a written summary of its decisions, and FOIA, the Freedom of Information Act, does not apply.

Finally, in terms of timing, which is always important in considering transaction timelines, in the past it has taken, generally speaking, around 30 to 90 days to complete the CFIUS review process and receive a determination from CFIUS. There is an initial review period that is 30 days, which can result in clearance, or CFIUS can then decide to undertake a second-stage investigation which takes place generally over a 45-day period. Then, if national security concerns haven't been or can't be resolved, there is a further period during which the president considers what action he will take.

So that is a brief overview of CFIUS and the timeline for a typical CFIUS process. Now I will turn to Simeon and Tim, who will talk about the current administrative and legislative developments and their impact on M&A transactions.

Simeon M. Kriesberg: Thank you. As you mentioned, the president does under the law have the authority to block transactions that would appear to threaten national security. Probably the highest visibility for CFIUS during the Trump administration to date has been the decision by the president in September of this year to block a transaction involving the Chinese acquisition of a semiconductor manufacturer by the name of Vladis. The decision by the president was described by the Treasury Department afterwards as being based on several considerations including, and I'm paraphrasing here, the potential transfer of intellectual property to the foreign acquirer, the Chinese government's role in the transaction, the importance of semiconductor supply chain integrity to the U.S. government, and the use of Vladis products by the U.S. government. So, at least in this instance, the clear message was that the CFIUS process is going to be particularly sensitive for Chinese and possibly by implication other foreign government-aided transactions, transactions in the semiconductor industry, which have traditionally been very sensitive, and transactions in which there is some supply to the U.S. government of the product that the target is manufacturing.

Now, it's important to note that President Trump's action in this regard was the fourth time in which a president has blocked a transaction. Two of the other three happened during the Obama administration. So it's certainly nothing new in the actions by the Trump administration to block a transaction and the formal blocking by the president, while relatively rare, has been supplemented by a number of instances where parties decided to withdraw transactions as a result of indications by CFIUS that the transactions were not going to be approved.

In addition to this fairly high visibility development, however, I think what both Tim and I have noticed is that there have been some changes in the way in which the CFIUS process has been working on a practical level. Early in 2017, there were some significant delays in the processing of CFIUS transactions, partly due to delays in the appointment of political appointees at various CFIUS agencies that ultimately need to make the decisions with respect to CFIUS clearances. That has resulted in a somewhat longer-term backlog of CFIUS cases that are in the pipeline. But I think, in addition to this possibly relatively short-term phenomenon in terms of political appointments, there has been over the recent past a lengthening of the CFIUS process and a management of the caseload at CFIUS that has resulted in delays for the parties. So, for example, there have been longer time periods for review of draft notices that are typically submitted to CFIUS for comment before a final notice is submitted. There have been delays in the formal acceptance of final notices, the acceptance actually beginning the initial 30-day review period. There have been an increasing proportion of CFIUS cases that have gone to an investigation phase beyond the 30-day review period. So I think in all of these aspects of the CFIUS process, we've seen a prolongation of the CFIUS process itself.

Timothy J. Keeler: Let me add to what Simeon described as an acceleration of some trends that we have seen in CFIUS the past few years. As Simeon noted, there have been other presidential blockings of transactions, including at the end of 2016 President Obama blocked a proposed Chinese acquisition of the German company, Aixtron , which had significant assets within the United States. This was also done in coordination with the German government and their review of the transaction.

Simeon also noted that presidential blockings of transactions are rare and usually don't happen, because the parties themselves walk away before forcing the president to do a very public blocking. What we've seen accelerate under this administration, or perhaps decelerate is the more apt term, particularly with some high-profile proposed transactions from China, is that the parties are announcing publicly that they are withdrawing their filing and restarting the clock in order to gain more time. What's not clear right now is if this is being done for purposes of negotiations with CFIUS, or if it's being done because the Trump administration is trying to determine whether they are going to block or attempt to scuttle indirectly even more proposed investments from China into the United States.

As Simeon mentioned, some of it can be explained by the lack of political appointees in position in the administration, but I think that's becoming less and less of a reason. It may be that what's happening is that the sectors where CFIUS is blocking Chinese investments across the board, semiconductors being the most obvious one, are extending into the financial sector, including such areas as insurance and money transfer.

Mr. Kriesberg: I think what we're seeing is a combination of factors beyond just the problem of the lack of political appointees, which was severe in the early part of 2017. We are seeing an increasing number of CFIUS transactions as more and more parties are deciding to submit their transactions to the CFIUS review process. The publicly available data, which does not include 2017 data, suggest a significant increase in the number of covered transactions that CFIUS has been reviewing over the last three or four years. We have every reason to believe that 2017 will continue that trend.

In addition, I think we've seen an increasing scrutiny on a case-by-case basis of transactions that are being reviewed. You see an interjection of delay at the various points in the process, as I mentioned earlier, but it's reflective of a greater intensity of examination by the CFIUS agencies of the transactions that are submitted. So between the impact of the increased number of transactions that are being reviewed and the increased intensity of each review, you have the makings for, of course, longer CFIUS examinations of these transactions and that can sometimes result, as Tim was describing, in the decision by parties, often at the suggestion of CFIUS, to withdraw transactions and refile to give the process even more time to reach a conclusion.

I think there has been, over the years, and certainly this year, a broadening of CFIUS's scope of review in the sense that it views, and I think parties increasingly view, more and more economic sectors as being relevant to national security. As we've seen from the latest two rejections, the semiconductor industry is particularly sensitive, but Tim and I have also seen an increased concern with acquisitions that relate to companies that may have personal consumer information, for example, given the recent history of cyber hacking and thefts and concern over the security of Americans' personal information that might result from foreign acquisitions. So I think there is an increasing range of transactions that CFIUS is particularly concerned about. I think it goes beyond just the Chinese acquirers, although they are certainly sensitive, particularly when the government is involved. More broadly, there are sectors now that have some potential risks for foreign investors from many countries.

Tim, do you want to talk about some of the latest legislative developments we're seeing?

Mr. Keeler: Sure. So, recently there was legislation introduced by the leadership in the Senate and in the House, with members of both parties co-sponsoring, and with the apparent support of the Trump administration, including at a very technical level. The legislation would broaden the scope of CFIUS's jurisdiction. Under current law, as we've described, CFIUS has jurisdiction over covered transactions when a foreign person gains control of a U.S. business. Now under current law, regulation, and practice, CFIUS defines "control" at a very low threshold, much lower than most market participants usually assume. For example, CFIUS could determine anything above a 10 percent voting share interest could constitute "control." In fact, any type of active investment could constitute "control." But it's been limited to a U.S. business; that is, an entity, or asset sufficient to constitute an entity, within the geographical limitation of the United States and interstate commerce. The bill that has been introduced would expand that scope by including, beyond just what I mentioned, any other investment, other than passive investment, by a foreign person in any U.S. critical technology company or U.S. critical infrastructure company, both of which are defined in the bill, subject to additional regulations to be prescribed by CFIUS.

What that means is that, if the target company falls under the definition of a critical technology or critical infrastructure company, then any level of investment could mean that CFIUS could review that type of investment. CFIUS could also determine that the investment is passive, but I think we can assume that "passive" would be merely buying shares and doing nothing more than voting whatever rights come with those shares.

Secondarily, the bill would also extend CFIUS review to a contribution by a U.S. critical tech-

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continued

nology company, other than through an ordinary customer relationship, of both intellectual property and associated support to a foreign person through any type of arrangement such as joint ventures subject to regulations to be prescribed by CFIUS. What that means is that CFIUS could review a transaction that was NOT an investment within the United States. The U.S. company could form a JV with a foreign company or person and contribute intellectual property and associated support and CFIUS could have the power to review and recommend to the president that that transaction be blocked. You'll note that I said this pertains to a U.S. critical technology company other than through an "ordinary" customer relationship. That is an undefined term right now. I think the legislation, if it is passed, will probably go through changes from here, but I think the trends that I've pointed out here indicate that if there is no legislation, they are likely to move in that direction; that is, expanding CFIUS's jurisdiction to go beyond its current laws and not requiring control to review an investment in the United States, but something less than control and more than a passive investment. What's more, CFIUS's jurisdiction could also capture transactions where there is technically an investment outside the United States but where certain U.S. companies have contributed intellectual property and associated support.

Critical technologies do have some salience under the current regulations. But to give you an example of what the statute envisions, critical technologies could include defense articles and defense services on the U.S. munitions list, items that are subject to either the Commerce Department's or the State Department's export control lists for military use, nuclear facilities and equipment and material, select agents and toxins and other emerging technologies that could be essential for maintaining or increasing or gaining technological advantage over countries of special concern with respect to national defense, intelligence, or other areas of national security. The bill defines a country of "special concern" as a country that poses a significant threat to the national security interests of the United States.

CFIUS is not required to maintain a list of such countries but I think it's fairly clear that Congress would expect China to be considered by CFIUS to be such a country of special concern. But also note that the bill highlights critical infrastructure as a sensitive area as it is under current law, and it would ask CFIUS to further define it beyond even "systems and assets, whether physical or virtual, so vital to the U.S. that the incapacity or restructure of those systems and assets would have a debilitating impact on national security."

If a bill is enacted, some of the things that I've mentioned might not be exactly what ends up in the final legislation, but I think there are significant U.S. companies that have a lot of concerns about the legislation as introduced. If the legislation is enacted, I think the direction is clear: that is, broadening the scope of CFIUS to cover not only investment in the United States but also, and for the first time, transactions that are actually occurring outside the United States.

Mr. Kriesberg: Tim, I think it has to be said that, as this kind of legislation wends its way through, whether or not it is ever enacted, it sends a signal to CFIUS about some of the concerns Congress has with the way in which the CFIUS process is currently working. That, combined with messages coming from the White House about unfair trade relationships and the United States market being very open while other markets are not reciprocating, undoubtedly is going to put more pressure on CFIUS to intensify the trends we've already described: taking longer to look at transactions before they're cleared, and examining more and more transactions. I think we'll see these kinds of trends continuing.

When we take a look at the impact on the M&A world from these sorts of trends, I would identify a few things that I think we can expect. One, in terms of valuations, is that there will likely be a greater concern on the part of U.S. sellers about selling to certain foreign acquirers, particularly if they are government-related, and in the auction context probably requiring some kind of a premium on valuation if it's going to be a foreign acquirer versus a U.S. acquirer. We would anticipate also that there is going to have to be more consideration given to the timing of closing, and, particularly if a near closing is very important to the seller, whether that is going to be feasible if the acquirer is foreign. We also would anticipate greater attention to the possibility of mitigation agreements imposed by CFIUS requiring some restructuring of transactions or having various kinds of compliance requirements for the ongoing operation after closing.

Finally, I think there will be greater attention to conditions of closing in M&A agreements and the need to ensure that, particularly from a buyer's standpoint, that there not be artificial deadlines for CFIUS clearance imposed as conditions of closing, and, from a seller's standpoint, the importance of so-called hell-or-high-water provisions in which the buyer is required to accept virtually any kind of mitigation agreement that CFIUS might impose, and possibly to pay termination fees in the event of an unsuccessful CFIUS process.

Mr. Keeler: One other thing that is in the draft legislation that I think would be likely in any final legislation and is of note is they could start requiring filing fees. This could be something like the lesser of one percent of the total value of the transaction or 300,000 U.S. dollars, which would be adjusted annually for inflation. That would be, obviously, a significant change, especially for small transactions, some of which do get filed.

One last thing I think is worth noting. All is not doom and gloom. I think most of our discussion has described what have been accelerating trends of difficult CFIUS enforcement, particularly for Chinese transactions. At the same time, what Simeon and I have both seen in 2017 under this new administration is that CFIUS has approved certain transactions, including in the IT space, in the transportation sector, among others. If an investor has doubts about what is possible, I think it's important to note that every deal is governed by the particular facts and circumstances of that deal. One shouldn't make broad brush assumptions about what is possible and what is not without first pursuing a detailed and thorough CFIUS evaluation.

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"If you prick a corporation, does it not bleed? If you tickle it, does it not laugh? If you poison it, does it not die?"


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THE INDEPENDENT REPORT ON DEALS AND DEALMAKERS

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A long-sealed tomb of M&A riches.

Despite Qualms, Dealmakers Plunge on After a Complicated Trillion Dollar Year

"It's like fine wine. You should just enjoy it."

With M&A transforming global business, dealmakers are racing from transaction to transaction, but they still can't help puzzling over how long it can all last. Will the stock market crash? Will interest rates rise? Will liquidity evaporate? Will Asia topple the market? Will some other political crisis spoil the party? Will corporations run out of targets? Or will it all end just because nothing lasts forever?

The year 1997 was without question the year of the unexpected: the eclipse of cash as the ruler of deals; the wide spread of multiples between target and acquiror; the spread of hostile bids in Europe; the emergence of a real estate company as the new owner of venerable ITT; WorldCom's sudden power in telecommunications; and, above all, the pandemic of transactions across virtually every sector of the economy. "You see consolidation in industry after industry. One or two pebbles roll down the hill. People snap to attention. Before long, you have a landslide," says Michael Carr, co-head of M&A at Salomon. Adds Gerald Rosenfeld, head of investment banking at Lazard Frères: "Huge waves of consolidation are washing over industry after industry at the same time. It's pretty staggering. And that won't stop. The continuation of this massive consolidation will be the story of 1998."

Cravath's Alan Stephenson points to another unusual feature of 1997, one he has rarely seen in his 27 years in M&A. Typically, when a corporation would announce a major acquisition involving substantial dilution to existing stockholders, the acquiror's stock price would drop. "It was frequently the case that the acquiror's stock price would be off five to ten percent, in part because of arb activity," he says. "Now, we see many large deals where the stock of the acquiror actually goes up. When business executives see others doing these bet-your-company deals and their stock goes up, they say, 'Why shouldn't I be doing these transactions?'"

Bringing comfort to those who worry about a sudden slump is the sudden discovery of such hitherto virgin territory as real estate M&A. High technology deals are also likely to roil on. Says one prominent investment banker: "There are companies out there in high tech that I've never heard of doing billion dollar deals." Insurance is yet another vast landscape waiting for the dealmakers to arrive at its shores. "I think we will see a wave of consolidation in the insurance industry. That could be the next area to catch fire," predicts Casey Cogut, head of the M&A practice group at Simpson Thacher & Bartlett. "It is now where banks were five to six years ago." Adds Mr. Rosenfeld of Lazard: "The insurance world has been ignored. It will break out soon."

Of the forty-five senior dealmakers interviewed for this article, twenty-one believe that even if the stock market were to go down—

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Orders & Subscriptions: For individual subscriptions, discounted multi-copy institutional subscription rates, or additional copies, please call 215-309-5724 or fax 215-309-5724.

THE M&A JOURNAL

the independent report on deals and dealmakers

Editor/Publisher **John Close**

Design and Production **John Boudreau**

Senior Writers **Gay Jervey, R. L. Weiner**

Writing/Research **Frank Coffee, Jeff Gurner, Terry Lefton**

Circulation **Dan Matisa**

Web Production **John Boudreau**

The M&A Journal, 1008 Spruce Street, Suite 2R, Philadelphia, PA 19107