

Far from a done DEAL

Brunswick's NEAL WOLIN and ALEX FINNEGAN share advice for foreign buyers of US assets

OFTEN MISUNDERSTOOD, THE Committee on Foreign Investment in the United States (CFIUS) has been thrust into the limelight with a spate of high-profile deals. An inter-agency committee of the US Government, CFIUS has the authority to review, for national security reasons, any transaction that would result in a foreign entity having control of a US asset. CFIUS has the power to investigate, modify or recommend that the US President block any transaction for which it judges national security concerns cannot be mitigated.

This review process is far from new; the Committee was created more than 40 years ago, though its membership and responsibilities have evolved. But recently, amid an uptick in M&A in the US, a number of CFIUS-reviewed transactions have been widely reported on, meaning that CFIUS has not been far from the public eye.

CFIUS reviews need not strike fear into the hearts of companies. How businesses communicate through a transaction will be crucial to its success.

1 DON'T underestimate the importance of educating all your stakeholders – investors, analysts, media, members of Congress – on the CFIUS process. Keep explaining it to them from announcement day through to the completion of the CFIUS review process. It takes time, especially for those unfamiliar with the process, to understand CFIUS and what constitutes a national security concern. Be proactive about educating them.

2 DO anticipate what might present national security concerns in the eyes of the US government. Working closely with outside counsel, prepare the appropriate responses for any concerns that could be raised publicly. It will not be hard for observers to discover where problems might lie or draw incorrect conclusions based on speculation. Don't be caught off-guard. Prepare for a range of scenarios and know what your response will be.

7 TIPS to navigate the review process

3 DON'T feel pressured to discuss the timetable for CFIUS review. News reporters will hold you to it and any delays will lead them to believe something is wrong.

4 DO brief and activate independent, third-party voices who can talk off the record to reporters and other stakeholders. They don't necessarily have to understand the specifics of your deal, but they can help the press and the public understand the process.

5 DON'T forget to make sure your outside counsel has briefed other CFIUS lawyers in Washington, DC as appropriate. It might help to ensure they understand the outlines of your deal and, in the process, minimize unnecessary speculation.

6 DO think holistically about your other stakeholders. Questions about CFIUS and national security can make employees, customers and suppliers just as anxious as investors and reporters. Make sure that you communicate the details, when possible, with these groups as well.

7 DON'T pretend the process doesn't exist. While the Committee may not speak publicly, *you* ultimately decide what you say and don't say in public. You may need to set the record straight if speculation arises or when you have a securities law obligation to do so. Coordinate early with CFIUS counsel and any other advisers so that you can anticipate potential issues and prepare the appropriate public responses. Ideally, this would take place prior to a deal announcement. Maintaining regular communication among counsel, communications advisers, and the company will help ensure that everyone remains informed and issues are kept contained.

The US remains a leading destination for foreign investment and CFIUS is a rigorous process that requires serious preparation.

However, the review is a normal part of any cross-border control transaction, and getting the communications right can make the entire process a lot smoother.

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