Since 1988, the Committee on Foreign Investment in the United States (CFIUS) has reviewed, for national security purposes, about 2,500 proposed purchases of American assets by foreign parties, granting a green light in the vast majority of cases. Since 1988, US presidents, to whom the committee issues recommendations, have blocked only a handful of deals. But two of those rejections are recent: one by President Obama in December 2016, another by President Trump in October 2017. Does this portend greater difficulty for foreign acquirers? Offering insight is Group Chief Executive Officer of Brunswick, Neal Wolin, a former Deputy US Treasury Secretary who for five years chaired CFIUS.

WOLIN ON CFIUS

Group Chief Executive Officer of Brunswick, **NEAL WOLIN,** chaired CFIUS for five years. He shares his views on the regulatory process today

HOW CFIUS HANDLES A PARTICULAR TRANSACTION depends on the facts and circumstances of the deal. Increasingly there are transactions before CFIUS that originate in countries that have a tendency to pose more national security complexity than the set of countries whose companies have historically populated the committee's docket. Previously, there were many transactions from the UK, from Canada and from other NATO allies. And increasingly there are now transactions that originate from other countries that have more complicated national security relationships with the US.

CFIUS publishes an annual report, of which there is a classified and an unclassified version. If you look at the last five or six public reports, they give summary statistics about the origin of the acquirers in these transactions that come before CFIUS. As recently as 2009, there were four deals – out of a total of 65 – where the acquirer was Chinese. By 2015, 29 of 74 deals on the CFIUS docket involved Chinese acquirers. If once you had transactions coming mostly from the UK, Canada and France, and now you have a larger number coming from China, it is not surprising that a committee concerned with national security is going to arrive at a slightly different place.

The kinds of assets and companies being purchased have also evolved. Transactions involving dual-use technologies or artificial intelligence or semiconductors or big sets of personal data are more frequent than they were 10 years ago or even five years ago. And those transactions have tended to raise greater national security sensitivity.

If CFIUS determines there is no national security concern, then the transaction can proceed. If, on the other hand, CFIUS decides there are national security concerns, they are obliged under the statute to try to mitigate those concerns, which is to say to work to address them. Sometimes that will take the form of leaving certain assets out of the deal. Other times, there will be changes to post-transaction governance, or a set of protections concerning who has access to what information or what intellectual property or which data. There can be a substantial middle space between deals that have no national security issue at all and those that seem so incontrovertibly problematic that the government says, "We don't ever imagine getting to yes."

Under the statutory provisions that govern CFIUS, the only person who can actually block or undo a deal is the US President. What ends up happening with some frequency is that when CFIUS views itself as having a national security problem that cannot be mitigated, it will communicate to the parties that it will recommend to the President that he block the transaction. Most parties in that circumstance will pull their deal from CFIUS and not proceed with the transaction because they prefer to avoid the President publicly blocking the transaction with an explanation as to why he has concluded that there are unmitigable national security issues. There are some deals that get "blocked" this way on a *de facto* basis without actually going to the President.

If the parties pull out of their deal, the government will not make that public, so it becomes public only if one of the parties decide to disclose what has happened. There are a fair number of deals that do not go forward under the circumstances I have described, but only some portion of those will become publicly known.

Under President Trump, I do not think there has been a 90-degree or 180-degree turn in the way the current CFIUS views transactions. I think there has been further development of the idea that transactions that originate in certain geographies or that involve certain kinds of technology will be scrutinized very carefully. Those perspectives began during the Obama Administration. For example, the Obama Commerce Department put out a report in 2016 saying the US government was quite concerned about the extent to which the Chinese government was focused on closing the gap relative to the US in their basic set of capabilities around semiconductors, essentially saying the US ought to be more protective of its technology and manufacturing advantage in semiconductors, which can be relevant to national security. This line of thinking has to some extent further intensified, in terms of the range of sensitive technologies and capabilities that give the US pause. But it is not a sea change. It is more of a movement further down that path.

During the Obama Administration, we spent a lot of time working hard to get to yes on these deals. The statute and implementing regulations are constructed in a way that CFIUS is meant to try to get to yes. If there is a national security issue, the committee is to try to mitigate that issue and get to a place where the deal can be approved with modifications. The basic policy judgment of the Obama Administration, and of many administrations before it, was favorably disposed to inward foreign investment because it is good for the US economy. Democratic and Republican

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ILLUSTRATION: KATHERINE STREETER

administrations have long supported foreign capital contributing to the creation of US jobs.

In the current CFIUS, my impression is there has been perhaps a bit less energy directed toward that getting-to-yes effort. This is reflective of an ambivalence among some in the Trump Administration about whether inward investment from places like China is a good thing or a bad thing. On the one hand, you hear some in the Trump Administration talk about bringing in foreign investors that will create US jobs. But others in the Administration are allergic to the idea of Chinese companies buying assets in the US that will give them access to sensitive US technology or that will allow them to compete more successfully with US companies. My sense is these perspectives are in tension and result in not quite as much effort being applied by CFIUS into this "getting to yes" dynamic.

President Trump and Treasury Secretary Steven Mnuchin and Commerce Secretary Wilbur Ross have said things publicly that could be fairly understood as a reaffirmation of support of inward foreign investment. But they have also expressed support for legislation now pending in Congress that would expand CFIUS's jurisdiction, and tighten up the standards by which it makes its judgments.

Another question that has been asked is whether CFIUS limits itself to national security issues. How susceptible is it to political pressure? The influence of Congress? The influence of trade groups or competitors or other kinds of judgments that might be seen as something other than a straight-up, merits-based judgment about the national security interests of the US?

Although the people who populate CFIUS are human beings who read the newspapers and are exposed to public discussion and public debate, the process is remarkably well-insulated from politics. CFIUS will not disclose – not to the public or even to Congress – that a transaction is pending before it. Sometimes deal parties will have put in their securities disclosure or in a public press release that they are seeking CFIUS approval, but CFIUS will not confirm or deny or comment on the question of whether a transaction is in fact pending before it. This confidentiality helps protect business-sensitive information, but it also helps insulate CFIUS from political pressure as it considers the national security implications of transactions.

NEAL WOLIN

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EUROPEAN COMPETITION COMMISSION: DO'S & DON'TS

EUROPE HAS BEEN DEVELOPING its competition (antitrust) policy since the 1950s. The European Commission is the institution responsible for investigating and deciding cases, subject to judicial oversight by the European Court of Justice. The European Union's merger regulation is only a quarter of a century old.

But in that time it has gained a reputation as a complex but efficiently run set of rules, administered in coordination with the competition authorities of the member states of the European Union. Globally, competition agencies often look to Brussels for a lead in international M&A cases.

So it would be useful to understand the structures and a few do's and don'ts for dealing with the European Commission. The political leader is the Competition Commissioner, currently Margrethe Vestager,

former Danish Minister of Economic Affairs and the Interior. The department is known as DG Comp (short for Directorate General for Competition).

In all cases, companies involved in or seeking to challenge a merger will need specialist advice on law, economics and communications. Tell the truth and be prepared to provide compelling evidence.

DO demonstrate advantages for customers and final consumers; explain the expected positive impact on price, quality, innovation and employment; stress the competitive and expanding nature of the market; and present consistent legal, economic and communications cases across all jurisdictions.

DON'T forget that the EU is concerned to create or, where it exists, maintain a seamless single market across all its members. So don't present national or regional markets within the EU as separate without very good arguments and evidence.

Wherever possible, refer to previously decided cases and **DON'T** present your case as requiring or representing a new policy departure.

However strong the pressure or temptation, **DON'T** claim that some other public policy goal you think you meet is more important than competition.

DON'T underestimate or antagonize the Commissioner or DG Comp.

DON'T indulge in personal arguments; you are addressing political leaders, highly trained lawyers and economists.

DON'T rely on political connections or personal relations to influence or accelerate the regulatory process.

DON'T use the media to make your case, but **DO** respond to their questions with a coherent narrative about your business and its prospects.

Sir Jonathan Faull is chair of Brunswick's European Public Affairs team, and is based in Brussels. He was a senior member of the European Commission.