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Client Alert: Recent Changes to the Committee on Foreign Investment in the United States (CFIUS) Review Process

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CLIENT ALERT | 10.25.2018

Introduction

The Committee on Foreign Investment in the United States (CFIUS) recently established a pilot program (to take effect on November 10, 2018) that will result in significant changes to the CFIUS review process. The pilot program will apply to acquisitions and certain investments by foreign persons in U.S. companies involved with “critical technologies” within 27 identified industry groups (listed here). The pilot program will implement the following two fundamental changes to the CFIUS process:

1. CFIUS filings (which have always been voluntary) will now be mandatory for all transactions covered by the pilot program. A failure to submit the required CFIUS declaration can result in penalties up to the value of the transaction.
2. CFIUS jurisdiction has been expanded by the pilot program to cover non-controlling investments by foreign parties in U.S. businesses in the 27 identified industries if the foreign investor will obtain material nonpublic technical information, board or board observer rights, or any rights in decision making regarding the use, development, acquisition or release of “critical technologies” of the U.S. business.

Background on CFIUS

CFIUS is an interagency committee with authority to review foreign investments in the U.S. and make recommendations to the president, who has the authority to block or unwind a foreign investment if the transaction could threaten U.S. national security. Historically, CFIUS review authority has been limited to transactions that could result in control of a U.S. business by a foreign person.

CFIUS filings have always been voluntary. The parties to a transaction involving the acquisition of a U.S. business by a foreign person can elect to make a filing with CFIUS to foreclose the risk that the president

could ultimately conclude the transaction could threaten U.S. national security. The CFIUS filing requires the disclosure of detailed information about the parties to the acquisition, and the target business to allow the committee to assess any potential national security issues. Once a filing is accepted by CFIUS, it triggers a tiered review process which can either result in the clearance of a transaction to proceed, a request for further information, or the initiation of an investigation. Each of these steps has a prescribed time limit and, at the conclusion of the process, if the transaction is cleared, it cannot later be blocked or unwound based on national security concerns.

Changes to CFIUS

On August 13, 2018, the Foreign Investment Risk Review Modernization Act (FIRRMA) was enacted. FIRRMA authorized the following modifications to the CFIUS process.

- FIRRMA expanded CFIUS jurisdiction to allow CFIUS to review any non-passive foreign investment (regardless of whether it results in control) in a U.S. company that produces, designs, tests, manufactures, fabricates or develops “critical technology”.
- FIRRMA expanded the definition of “critical technology” (discussed below)
- FIRMMA authorized the mandatory CFIUS filing requirement for certain transactions involving “critical technologies” based on criteria to be developed by CFIUS.

FIRMMA authorized CFIUS to undertake rulemaking or conduct pilot programs to roll out these modifications on an expedited schedule. The first pilot program will take effect on November 10, 2018.

Pilot Program

The CFIUS pilot program applies to non-passive investments in or acquisitions of U.S businesses that produce, design, test, manufacture, fabricate or develop “critical technologies,” but only if those “critical technologies” are used or designed for use in connection with 27 identified industries (pilot program industries). A list of the pilot program industries and their North American Industrial Codes (NAICS) is available [here](#).

“Critical Technologies” include the following:

- Defense articles or defense services included on the United States Munitions List.
- Certain “dual use” items included on the Commerce Control List that are controlled for national security, weapons and nuclear proliferation, missile technology, regional stability or surreptitious listening grounds.
- Nuclear facilities and certain specially designed nuclear equipment, parts and components, materials, software, and technology.
- Certain agents and toxins.
- Emerging and foundational technologies to be defined by the Bureau of Industry and Security.

If a transaction is covered by the pilot program, the parties to the transaction must either file a CFIUS mandatory declaration or a full voluntary CFIUS notice. Although the intent of the pilot program is that declarations are to be “abbreviated notices,” the required content is not substantially different from that required in a full voluntary CFIUS notice. The declaration requires the submission of detailed information about the parties to the acquisition (including their organizational structure, ownership, management, etc.), the target business (including its “critical technologies,” government contracts, etc.) and the transaction (including its sources of financing).

Declarations must be filed at least 45 days prior to closing of the transaction, and CFIUS has the authority to suspend the closing for a transaction under review or investigation. CFIUS has 30 days from the date that it accepts the declaration to conduct its initial review (although, as a practical matter, it may take weeks for the filing to be formally accepted by CFIUS). After its initial review, CFIUS can take one of four actions (1) request the parties to file a full joint voluntary notice, (2) inform the parties that CFIUS cannot complete action unless a joint voluntary notice is submitted, (3) initiate a review of the transaction, or (4) clear the transaction to proceed.

It remains to be seen whether the pilot program will facilitate faster processing of the more straightforward transactions or simply result in a larger backlog and longer review for all transactions involving the pilot program industries. Considering the potential penalties for noncompliance (up to the value of the transaction), it is likely that the number of filings will increase substantially. Parties to transactions covered by the pilot program should build additional time into the transaction timeline. Additionally, the parties should consider submitting the full CFIUS voluntary notice in lieu of the mandatory declaration for those transactions covered by the pilot program that may ultimately raise potential national security issues.