Proskauer

Published by Financier Worldwide Ltd

INDEPTH FEATURE Reprint February 2023

FOREIGN INVESTMENT & NATIONAL SECURITY

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in foreign investment and national security.

UNITED STATES

Proskauer Rose LLP

Respondent

JOHN R. INGRASSIA
Partner
Proskauer Rose LLP
+1 (202) 416 6869
jingrassia@proskauer.com

John Ingrassia is a partner at Proskauer Rose, advising on the full range of foreign investment and antitrust matters across industries, including chemicals, pharmaceutical, medical devices, telecommunications, financial services, consumer goods and healthcare. He is the first call clients make in matters relating to competition and antitrust, CFIUS or foreign investment issues. For more than 25 years, he has counselled businesses facing the most challenging antitrust issues and helped them stay out of the crosshairs, whether it is distribution, pricing, channel management, mergers, acquisitions, joint ventures or price gouging compliance.

Proskauer Rose LLP

Q. How would you describe recent foreign investment activity in the US? How are macroeconomic and geopolitical trends impacting the flow of inbound capital?

A. Today, foreign investment activity in the US functions within an enforcement climate of historically high levels of reviews, both of notified transactions, and of *sua sponte* investigations of transactions that were not subject to notification and filing requirements. There were over 100 transactions identified through the non-notified or non-declared process in the most recent Committee on Foreign Investment in the United States (CFIUS) reporting year that were put forward to CFIUS for consideration. Macroeconomic and geopolitical trends are also significantly impacting the flow of inbound capital into the US, though not uniformly. While significant investment from Canada and Western Europe continues apace and typically faces low to moderate levels of scrutiny, investment from China and other jurisdictions facing higher levels of scrutiny has declined substantially. The administration has said that "issues of geography, jurisdiction, [and] makeup of the investors… certainly go into… risk analysis", and that "some countries use foreign investment to obtain access to sensitive data and technologies for purposes that are detrimental to US national security".

Q. What key issues are dominating the regulatory climate around foreign investment? To what extent have national security concerns – actual or perceived – increased in the US in recent years?

A. President Biden issued a sweeping Executive Order (EO) on CFIUS enforcement and priorities in 2022, the first such EO since CFIUS was established in 1975. The EO expands the list of factors CFIUS considers when reviewing transactions for national security risks. While the EO did not change CFIUS jurisdiction or filing requirements, it is a manifestation of recent policy changes with respect to how foreign investment in the US is reviewed and scrutinised in the current regulatory and political landscape. Broadly, the following five factors are identified by the EO as key to CFIUS review of national security risk with respect to foreign investment in the US.

Proskauer Rose LLP

First, the effect on the resilience of critical US supply chains. Second, the effect on US technological leadership. Third, industry investment trends. Fourth, cyber security risks that threaten to impair national security. And fifth, risks to US persons' sensitive data. We expect continued and increasing attention to inbound investment and expanded review and investigations even to eclipse other regulatory review regimes, including antitrust.

Q. What impact are political agendas and foreign investment policies having on foreign investment screening programmes, including national security assessments?

A. Biotech has been identified by the current administration as a focus with respect to CFIUS reviews and enforcement, in addition to applying additional scrutiny with respect to cyber security and sensitive data sharing. The administration has also identified industries that are "fundamental to national security". These include microelectronics, artificial intelligence (AI), biotechnology and biomanufacturing, quantum computing, advanced clean energy, such as battery storage and hydrogen, climate adaptation technologies, critical materials, such as lithium and rare earth elements, and elements of the agriculture industrial base that have implications for food security. According to Janet Yellen, secretary of the treasury, who serves as chair of CFIUS, "Strengthening our supply chains and protecting against foreign threats enhances our national security". The administration has also identified aggregate industry investment trends as a factor for CFIUS to consider when reviewing transactions, akin to the scrutiny of roll-ups we are seeing with respect to enforcement under other regulatory regimes, namely antitrust.

Q. Have there been any recent regulatory reforms in the US worth highlighting? What are they likely to mean for foreign acquirers and domestic sellers going forward?

A. Expansions aimed at maintaining US technological leadership include proposed legislation to monitor outbound investment, so-called "reverse CFIUS". The most recent versions of the reverse or outbound CFIUS bills did not make it into legislation lawmakers aimed to attach it to – the Creating Helpful Incentives to Produce Semiconductors and Science Act of 2022 (CHIPS Act). Thus, while reverse CFIUS is not yet law, expectations are that there will be continued bipartisan support for such measures, and the White House has signalled its willingness to sign. Expect some form of reverse CFIUS requiring notification and review with respect to outbound investment to investment that enhances capabilities with respect to a 'national critical capability' in China and certain other countries. 'National critical capabilities' would likely implicate industries relating to semiconductors, large-capacity batteries, pharmaceuticals, AI and quantum computing. While traditional CFIUS inbound investment enforcement continues on an upward trajectory and should remain on the shortlist of regulatory and compliance items to address early and proactively in every transaction that may involve non-US funding, targeted outbound capital flows are likely to be the subject of additional scrutiny in 2023 and beyond, especially in light of a 2022 year-end spending bill that includes funding for programmes "to address the national security threats emanating from outbound investments

> *Funds that are managed or operated outside the US are becoming increasingly sophisticated with respect to their review of investment activities and the extent to which CFIUS filing requirements or risk assessment issues are implicated.*

Proskauer Rose LLP

from the United States in certain sectors that are critical for U.S. national security". Expect this to include the critical minerals sector and others.

Q. Could you outline the factors likely to trigger investigations and potentially result in blocks or conditions being placed on pending acquisitions? Which sectors and regions are more likely to give rise to national security reviews?

A. There were no presidential decisions issued in the most recent reporting year, compared to five in the prior five years. Impacted industries include emerging technologies such as semiconductors and robotics, and include financial services and software as a service (SaaS) businesses implicating sensitive personal data. China continues to lead the way on all measures with respect to enhanced CFIUS scrutiny, as do transactions implicating third-party relationships with nations subject to higher scrutiny. A more entangled relationship with China, for instance, could negatively impact review of companies domiciled in other countries.

Q. What advice and practical insights would you offer to foreign acquirers on navigating regulatory requirements in the US?

A. All transactions subject to CFIUS review now may take advantage of the newer short-form declaration filing. CFIUS is authorised to take the following actions after its assessment of submitted short-form declarations: request that the parties file a long-form submission, initiate a unilateral review or notify the parties that CFIUS has concluded all action. Parties are more willing to take the risk of a short-form filing where the risk profile of the buyer is lower, and it is a strategy we often recommend given the lower costs and other resources implicated, and the shorter timelines. Thus, most declaration filings are from allied countries. One hundred and sixty-four such declaration filings were submitted for the most recent reporting year. Of those, less than 20 percent resulted in requests for long-form filings.

Q. Looking ahead, what are your predictions for foreign investment levels in the US over the coming months? Do you expect to see a rise or fall in the

Proskauer Rose LLP

number of overseas acquirers targeting domestic assets?

A. While CFIUS now plays a prominent part in a significant swathe of inbound investment, we should expect a continuing steady flow of ex-US deal funding, especially with respect to investment funds. Funds that are managed or operated outside the US are becoming increasingly sophisticated with respect to their review of investment activities and the extent to which CFIUS filing requirements or risk assessment issues are implicated. Savvy fund managers are effectively managing CFIUS compliance without the need to forgo attractive opportunities. Likewise, US fund managers have built into their business model the ability to take on non-US investors while managing CFIUS compliance and not implicating potential foreign control of investment funds. ❑

www.proskauer.com

The world's leading organisations and global players choose **Proskauer** to represent them when they need it the most. With one of the largest global client rosters, you can be confident you will be in good company and represented by the best minds in the business. The firm's 800 strong top tier team of star trial attorneys, acclaimed transactional lawyers and exceptionally talented partners and associates have earned a reputation for the relentless pursuit of perfection and a dauntless pursuit of success.

JOHN R. INGRASSIA Partner
+1 (202) 416 6869
jingrassia@proskauer.com