



2018 Saw Major CFIUS Reform. But What Does the Future Hold?

BY HARRY G. BROADMAN

The rules of the Committee on Foreign Investment in the US have become more transparent but with new requirements for foreign investors, BRG's Harry G. Broadman says

Harry G. Broadman has been immersed in the work of the Committee on Foreign Investment in the US (CFIUS) for decades, including as a CFIUS member in the early 1990s when he served in the White House as US Assistant Trade Representative. As the entity tasked with scrutinizing—and empowered to approve or block—foreign investors' purchase of or investment in US entities based on national security risk, CFIUS still remained relatively unknown for decades. In 2018, it took on a higher-profile role after passage of the Foreign Investment Risk Review Modernization Act (FIRRMA), which expanded the agency's jurisdiction and imposed new requirements on foreign investors.

Broadman, a BRG managing director and chair of its Emerging Markets practice, is based in Washington, DC. He offers his perspective on the changes to CFIUS and his predictions for what lies ahead.

Given your background, what was your reaction to the passage of FIRMMA last year and the new prominence it gave CFIUS?

HB: When I served on CFIUS in the early 1990s—when CFIUS was certainly not a household name, if it even is now—I would tell friends I couldn't go out for an after-work drink because I was caught up in a CFIUS case. They would joke with me and say, "A syphilis case? Just take some penicillin." That said, CFIUS has always been significant; it's just not well known. Often, when you see a story written about CFIUS, you'll see it referred to as a "highly secretive agency" within the White House. It might look secretive from the outside, but it operates confidentially because it's handling proprietary information.

Last year's law brought about two big changes. The first is that the statutory authority behind CFIUS has significantly expanded. That means Congress has a far more visible and strengthened role in how the agency works. Also, and significantly, the rules associated with CFIUS became much more explicit and transparent. The operations of CFIUS and the criteria involved are much more transparent and regularized. Previously, parties to a transaction were not required to notify CFIUS—but I used to counsel investors and parties to a transaction that they should pre-notify. That's because CFIUS, at any point, was free to investigate and perhaps unwind or force a change or a divestiture in a transaction. Those who didn't pre-notify might be at risk of a claw back from CFIUS five years after the transaction. That's no longer a worry, because of the mandatory pre-notification.

This change made things more complicated when it comes to national security approvals of M&A deals. How much harder is the deal process now?

HB: I don't think things have become more complicated in terms of the procedures, but it's perhaps become tougher to get a green light from CFIUS. That's because in addition to the new law, there's a far more proactive posture by the current administration in using CFIUS. That stance has been evolving in the executive branch—we've seen an increase in reviews over the past five to seven years—but I think this administration has adopted a very strong "lean-in" CFIUS approach.

There are two reasons for that. The Chinese account for a very large percentage of transactions reviewed by CFIUS, and that country is in the sights of many policymakers for a whole set of reasons, especially concerning the relationship between national security and US global competitiveness. I also think that the worldwide race in high technology has sped up. It's not all about technology—a deal involving the ports in Dubai was ultimately blocked, though it had little to do with technology.

Several years ago, a Chinese pork company—then named Shuanghui—proposed to acquire Smithfield Ham. People involved in the transaction could not imagine why that would be of any concern to CFIUS—it's pork, not a port or advanced technology. That was a bit naive. Indeed, the Senate Agriculture Committee ended up having a hearing about the transaction. Outsiders automatically went to "food supply and China." The transaction, which I discussed in my Forbes column last year, actually involved the Chinese procuring Smithfield pork to be sold in China. It had nothing to do with the US food supply.

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What made things more difficult for those involved was they did not pre-notify CFIUS early enough, and the media and eventually Capitol Hill got involved. It shows that with CFIUS, there's always going to be a political overlay, and not just when advanced technology is involved. But if you look at the sectoral focus from CFIUS, more and more they're aiming at advanced technology because that's uppermost in peoples' minds.

Next year, CFIUS will get the authority to scrutinize non-controlling investments into companies that maintain or collect personal data of citizens that “may be exploited in a manner that threatens national security.” Viewed against the authority already granted to CFIUS, is this new development a game changer?

HB: This is important—at least speaking as an economist who works on corporate governance disputes, especially in the context of cross-border transactions and investment. It's important to consider that it's not necessarily ownership in and of itself that generates control. There have always been gray areas around minority shareholders of a transaction or new venture and the weight and influence they might bring to bear, post-consummation. Just because they don't have majority ownership doesn't mean they can't be influential. If the idea behind CFIUS is about assessing the prospects for a transaction regarding national security, it would not be intellectually rigorous to rule a party out just because they're not a majority shareholder. As I have written, you want to assess how much of a threat a party to a transaction might actually engender, regardless of the size of their ownership.

Given all that's changed with CFIUS in the past year and the Trump administration's stance on trade, do you have any predictions for what will happen next?

HB: Between now and 2020, it would be foolish to think that CFIUS will not be increasingly proactive. Where we are headed with respect to CFIUS is probably along the lines of how the US enforces antitrust statutes, particularly in mergers and acquisitions. For years now, the US has specified certain market shares and other triggers about which firms could determine whether the combined market shares of a transaction would trigger a review by the Federal Trade Commission or the Department of Justice. The provision requiring that in the US is known as Hart-Scott-Rodino (named after the legislators who authored the statute). On a regular basis, the US government issues the Hart-Scott-Rodino thresholds, basically parameters that allow companies thinking about mergers, as well as the lawyers advising them, to make judgments about whether or not a particular deal will trigger an investigation.

I think, with CFIUS, we're beginning to go down that path. From both policymaking and investment-making perspectives, it's hard to argue against greater transparency. One may not agree with the Hart-Scott-Rodino thresholds or the so-called “pilot industries” and other parameters specified in CFIUS' regulations. But the worst enemy of economic and investment decision making is uncertainty. So having CFIUS become more transparent and articulated is helpful—whether or not you like the intensity of such oversight.

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