RECENT ACTIONS BY CFIUS UNDERSCORE IMPORTANCE OF REVIEW PROCESS

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U.S. International Trade and National Security Law and Policy Alert

Earlier this month, the Committee on Foreign Investment in the United States ("CFIUS" or "the Committee") took two noteworthy actions that underscore the Committee's powerful role in reviewing foreign direct investment and broad authority to take action to block or unwind investments deemed to be a threat to U.S. national security. In particular, relying on CFIUS's recommendation, President Trump on March 6 issued an Executive Order directing the divestment of a Chinese company in a U.S. business based on concerns surrounding access to sensitive personal data. Additionally, relying on authority granted under the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), CFIUS on March 9 issued a proposed rule that would impose, for the first time, fees for filing of notifications with the Committee. These fees will help to fund and further build up CFIUS review and enforcement capabilities. We detail these developments in our alert.

I. DIVESTMENT ORDER AND RECOMMENDATIONS OVER NATIONAL SECURITY CONCERNS

On September 18, 2018, Beijing Shiji Information Technology Co., Ltd. ("Shiji"), a Chinese developer and distributor of hotel information system software, completed its acquisition of StayNTouch, Inc. ("StayNTouch"), a U.S. hotel management software company. Shiji had been a minority investor in StayNTouch since 2016 and acquired the remaining 77.4% shares in the company in 2018 for $33 million. The parties did not submit a voluntary notification to CFIUS to request review and clearance of either the initial or subsequent transaction. If CFIUS reviews and clears a transaction, then that same transaction cannot later be subject to review.

On Friday, March 6, 2020, President Trump issued an Executive Order ("EO") formally prohibiting the acquisition of StayNTouch by Shiji and requiring complete divestment by Shiji and its wholly owned Hong Kong subsidiary, Shiji (Hong Kong) Ltd. Such an order is a rare occurrence that thus far has only been used six times to prohibit a foreign person's acquisition of a U.S. business. The EO reflects President Trump's conclusion, following CFIUS's recommendation, that there is "credible evidence" that Shiji "might take action that threatens to impair the national security of the United States." The EO requires Shiji's divestment of all direct and indirect interest in StayNTouch within 120 days or as extended, and to comply with any written conditions that CFIUS may impose.

The EO is a clear indication of FIRRMA's expansion of CFIUS's review mandate into areas that traditionally have not been considered key U.S. national security concerns, including foreign access to and potential misappropriation of sensitive personal data of U.S. citizens. The EO specifically requires Shiji's divestment of not only StayNTouch, but also divestment of the company's assets, intellectual property, technology, customer data, and customer contracts, and bans Shiji from accessing hotel guest data until divestment has been completed. The EO requires Shiji and StayNTouch to provide weekly updates to CFIUS on compliance with carrying out the

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order and specifies that CFIUS is authorized to enact procedures necessary to verify compliance, including that government employees designated by CFIUS can access and inspect the U.S. business.

The StayNTouch order is the latest of a series of actions taken by CFIUS to order the divestment of interests in U.S. businesses that collect or manage large volumes of sensitive personal data of U.S. citizens. This month, Chinese gaming company Beijing Kunlun Tech Co., Ltd. announced an intended buyer for Grindr LLC ("Grindr"), a U.S. LGBT dating app, which CFIUS ordered divestment of last year. Also last year, CFIUS ordered the Chinese investment firm iCarbonX to divest of its ownership interest in PatientsLikeMe, a U.S. start-up that that provides an online service to help medical patients find people with similar conditions.

Apart from demonstrating that personal data is a focus of national security for CFIUS, the StayNTouch, Grindr, and PatientsLikeMe transactions share an additional common thread: the parties to the respective transactions decided not to notify the Committee and request review. CFIUS can review "non-notified" transactions at any time after the transactions have been completed and order foreign investors to divest long after the acquisition at issue. CFIUS recently indicated that it continues to add resources toward, and place importance on, review of non-notified transactions that present national security concerns. CFIUS therefore can request parties submit a notification of a transaction even years after closing and, if national security concerns cannot be properly mitigated, divestment by the foreign acquirer can be ordered.

II. PROPOSED RULE ON FILING FEES

On March 9, 2020, the U.S. Department of the Treasury (which chairs CFIUS) published a proposed rule that outlines fees for parties filing mandatory and voluntary notifications of transactions to the Committee. The assessment of fees is authorized under FIRRMA, which provides for the collection of fees up to the lesser of 1 percent of the value of the transaction or $300,000, as adjusted annually for inflation under rules to be issued by the Committee. CFIUS is currently accepting written comments on the proposed rule through April 3, 2020.

CFIUS's filing fee would be required for parties submitting full notifications (whether voluntary or mandatory) for "covered transactions" involving U.S. businesses subject to CFIUS's Part 800 regulations (31 C.F.R. Part 800), as well as voluntary notifications of "covered real estate transactions" subject to the new Part 802 regulations. (We covered the Part 800 and 802 regulations in our recent alert.) A filing fee would ***not*** be required for parties submitting a short-form declaration allowed as an alternative to a full notification under both Part 800 and 802 regulations. However, if at the close of the short-form declaration process CFIUS requests a full notification by the parties to the transaction (which occurs in a not-insubstantial proportion of cases), a filing fee would be required at that time.

The proposed rule provides the following fee structure for Part 800 and 802 notifications based on the value of the transaction:

Transaction Value[1]	**Filing Fee**
Less than $500,000	$0
Equal to or greater than $500,000 but less than $5,000,000	$750

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Equal to or greater than $5,000,000 but less than $50,000,000	$7,500
Equal to or greater than $50,000,000 but less than $250,000,000	$75,000
Equal to or greater than $250,000,000 but less than $750,000,000	$150,000
Equal to or greater than $750,000,000	$300,000

The applicable filing fee would be required to be paid prior to CFIUS's initiation of a review.

In determining the fee amount, the proposed rule states that value of the transaction "means the total value of all consideration that has been or will be provided in the context of the transaction by or on behalf of the foreign person that is a party to the transaction, including cash, assets, shares or other ownership interests, debt forgiveness, or services or other in-kind consideration." Detailed guidelines and examples for determining transaction values under both the Part 800 and 802 regulations are also provided, including where a U.S. transaction is only part of a much larger global transaction. Refunds of fees will not be permitted except where CFIUS determines that a transaction is not subject to its jurisdiction. This means that parties that file with CFIUS and later request to withdraw the notification will not be entitled to a refund of any of the fee.

III. OTHER UPDATES

CFIUS has also recently provided updates on development of its internal review and enforcement capabilities. In particular, CFIUS continues to increase its staff to accommodate the large number of filings resulting from implementation of the Part 800 and Part 802 regulations, and it continues to learn and spot issues for clarification as filings are submitted. CFIUS also stated that it is building a new information technology infrastructure for its case management, which will enhance the Committee's ability to spot trends and provide enforcement trends to industry. Finally, specifically regarding the Part 802 real estate regulations, CFIUS stated that it will soon be releasing a "mapping tool" that will allow specific real estate locations to be checked for proximity to U.S. military and intelligence assets covered under the rule.

IV. CONCLUSION

Follow K&L Gates as we continue to track CFIUS-related news and updates. Our international trade and U.S. national security law and policy group attorneys and professionals work closely with colleagues across all of our 45 offices to help our clients stay apprised of important updates and understand and manage risks in the pursuit of their business objectives. Contact any of the authors for additional information on CFIUS or other related topics.

NOTES:

[1] See a full description of how transaction value will be calculated in the proposed rule here.

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