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PRACTICE & TRENDS

CFIUS In Our New Era

The Due Diligence Step That Can No Longer Wait

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In cross-border M&A, national security review has moved from a closing formality to opening filter. Foreign investors who treat it otherwise are playing an increasingly expensive game.

Most acquisition processes follow a predictable sequence. Financial models get built. Management teams get interviewed. Legal teams negotiate representations and warranties. Somewhere after all of that, typically as the deal nears the finish line, someone asks whether the Committee on Foreign Investment in the United States might have something to say about it.

That sequencing made sense in a different era. It no longer does.

CFIUS has undergone a fundamental transformation over the past decade, expanding well beyond its original mandate to become one of the most consequential regulatory forces in U.S. deal-making. What was once a narrow mechanism for reviewing defense-sensitive transactions now reaches across a broad range of industries, ownership structures, and investment types. For foreign private equity firms and foreign investors pursuing U.S. assets, the question of CFIUS exposure is not a closing condition; it is a precondition to a sound deal strategy.

The Perimeter Has Moved

The conventional view of CFIUS risk- that it attaches to defense contractors, weapons manufacturers, and the like has been overtaken by events.

Consider what happened to Nippon Steel's bid for U.S. Steel. Two allied nations. A well-known industrial acquirer. A legacy American manufacturer producing a commodity product. By any traditional reading, this was not a national security transaction. Yet the deal was blocked, with regulators concluding that control of domestic steel capacity by a foreign entity, even a friendly one, carried risks to critical supply chains that underpin both civilian infrastructure and defense readiness. The target's product, not its secrecy, was the issue.

The TikTok situation illustrates a different dimension of the same logic. The national security concern did not arise because of military proximity or industrial capacity; it was data. Specifically, the behavioral data of hundreds of millions of American users is processed by algorithms controlled by a company with ties to a foreign government. A social media entertainment platform became a matter of national policy because of the information it held and the access that ownership conveyed.

These are not anomalies. They are indicators of where CFIUS scrutiny now concentrates: advanced manufacturing, artificial intelligence, semiconductor supply chains, cloud infrastructure, biotechnology, logistics networks, and any platform that processes sensitive data at scale. Investors focused on these sectors, which describe a significant share of private equity and foreign investor activity today, should assume regulatory exposure as a baseline, not an exception.

Equity Percentage Is Not the Right Question

One of the more persistent misconceptions about CFIUS is that it primarily concerns controlling acquisitions. The 2018 Foreign Investment Risk Review Modernization Act put that assumption to rest.

Under the expanded framework, minority investments can fall squarely within CFIUS jurisdiction when the deal terms grant the investor meaningful access to a board seat, observer rights, exposure to proprietary technical data, or any role in substantive operational decisions. The percentage of equity acquired matters far less than what that equity entitles the investor to see and do.

This creates a specific tension for private equity and foreign investors, whose standard deal documentation routinely includes exactly these kinds of provisions. Board representation and information rights are not aggressive asks; they are ordinary protective mechanisms that any sophisticated investor expects. Yet in a CFIUS context, those same provisions can be what converts a non-notified position into a reviewable transaction.

The practical consequence is that deal teams need to assess regulatory exposure at the level of the rights package, not just the ownership percentage. A 15% stake with a board seat and access to proprietary technology may carry more CFIUS sensitivity than a 40% stake in a business without those features. Deals structured without that distinction in mind create risk that shows up at precisely the wrong moment.

The Cost of Getting the Timing Wrong

When CFIUS analysis arrives late in the process, the consequences compound in ways that are difficult to unwind.

Valuation becomes unstable. Unresolved regulatory exposure is a variable pricing factor. Sophisticated buyers and their advisors recognize this and should include CFIUS regulatory risk as a standard part of their due diligence. It is important for buyers to identify regulatory risk that may affect their purchase price, especially if CFIUS approval is necessary before a transaction can become final. It is equally appropriate for the seller to raise the issue of CFIUS jurisdiction both to dispel questions about regulatory risk and to eliminate a regulatory surprise that may cause the buyer to lower its offering price.

Timelines become unpredictable. A voluntary CFIUS filing initiates a minimum 30-day review, which can extend to a 45-day formal investigation with extensions if the Committee requires more time. Mitigation negotiations, if required by CFIUS, where the parties and CFIUS work out the conditions under which a transaction can proceed, will add additional time. For fund structures operating against fixed deployment windows, or for sellers managing competing interests, open-ended regulatory timelines create real commercial friction.

Operational restrictions can follow the asset. When CFIUS approves a transaction subject to conditions; those conditions travel with the transaction. National Security

Agreements can mandate data governance protocols, impose restrictions on which personnel may access certain facilities or systems, require domestic sourcing for specific inputs, and establish ongoing audit and reporting obligations. These are not temporary inconveniences; they are structural features of the transaction that affect the target company's value and attractiveness to future buyers.

Deals can be blocked outright. The Nippon Steel outcome reinforces the outcomes of a transaction that the U.S. government deems to have unresolvable national security issues. CFIUS can recommend prohibition, and the President can act on that recommendation. When that happens after substantial time and capital have been deployed, the damage is not limited to the failed transaction; it affects deal team credibility, fund economics, and in some cases, the investor's ability to pursue future U.S. opportunities.

What Early Engagement Actually Looks Like

Integrating CFIUS into the front end of the deal strategy is not a defensive posture. Done well, it is a competitive advantage.

An investor who has assessed regulatory exposure before signing a letter of intent can make meaningful choices that a late-mover cannot. Voluntary filing before any governmental inquiry is far preferable to reactive engagement; the timeline is more predictable, the mitigation leverage is stronger, and the overall outcome is more likely to reflect the parties' commercial intent. Deal terms can be structured from the outset to reduce CFIUS sensitivity, such as: rights packages calibrated to what the investor genuinely needs rather than what is easiest to ask for; timelines that accommodate regulatory review without creating breach risk; and representations that honestly address the national security landscape of the target business.

Early engagement also signals something to counterparties. Sellers and their financial advisors are increasingly attentive to whether a foreign acquirer has done credible regulatory preparation. A buyer who can speak knowledgeably about their CFIUS posture, who has engaged national security counsel, who has mapped the target's exposure, and who has built the review process into their bid structure presents as a more reliable path to close. In competitive sales processes, that reliability is a meaningful differentiator.

Rethinking Where CFIUS Belongs in the Process

The version of M&A practice in which CFIUS surfaces as a late-stage legal item has become a liability. National security review now carries direct consequences for how transactions are priced, how they are structured, and whether they close at all. For foreign investors operating in the U.S. market, regulatory exposure is not something to be flagged by outside counsel in the final stretch; it is foundational information that shapes every material decision from initial screening onward.

The question for any foreign investor considering a U.S. acquisition is straightforward: Does this transaction carry CFIUS exposure, and if so, what does that mean for our approach? Answering that question in the first week of deal evaluation is an asset. Answering it in the final week before signing is a problem.

Firms that treat CFIUS as an integral part of deal origination, not an addendum to it, are positioned to move with confidence in a market where the regulatory terrain has permanently shifted. Those that do not will continue to encounter the same avoidable disruptions, on the same compressed timelines, with the same diminished leverage.

The adjustment is not complicated. But it has to happen at the beginning.

Disclaimer: This article is for informational purposes only and does not constitute legal advice. Investors in transactions with potential CFIUS implications should engage qualified national security and regulatory counsel.

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