



A GUIDE TO NAVIGATING THE
CFIUS REVIEW

Process, Strategy and Communication Considerations



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INTRODUCTION

Transnational mergers and international investments in U.S. based companies are a common and important part of U.S. economic activity. These transactions allow companies to make critical investments, expand capabilities and geographic presence, and offer added value to shareholders. These investments also bring billions of dollars into the U.S. economy and help spur a broad array of economic activity, including new investments in infrastructure, production technology, operational improvements, facility renovations, and other investments that can boost productivity.

Historically, the largest number of transactions in which a foreign entity takes control of a U.S. asset (“covered transaction”) has involved U.K.-based acquirers; however, Chinese-based companies overtook U.K.-based companies for the number of covered transactions in 2012. Companies based in China were involved in 24 covered transactions in 2014, the last year with available reporting data, compared to 21 companies based in the United Kingdom.¹

Such investments can have significant national security implications, especially when the domestic system or asset being considered for foreign investment provides a critical service to the

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U.S. government or controls technologies or assets vital to U.S. national security. To ensure national security is not impacted by foreign investment, the U.S. Federal government has the power to review such investment transactions, a power initially outlined in a series of executive orders and later codified by Congress in the Foreign Investment and National Security Act of 2007.

This review, undertaken by the Committee on Foreign Investment in the United States (CFIUS), determines if a transaction has national security or critical infrastructure implications. In cases where a transaction is determined to have such an implication, CFIUS can block the transaction or request changes to the transaction in order to mitigate the national security concerns. This committee also has the authority to review closed transactions and order their unwinding if they determine the transaction to have a negative impact on national security. CFIUS decisions are not subject to appeal.

Most transactions involving foreign companies are not reviewed by CFIUS as the majority of transactions do not have national security implications meriting CFIUS review, nor do they give the foreign investor full control of the company. For example, a 2012 Mergers and Acquisitions report cited by the Congressional Research Service reported 1,055 instances of mergers and acquisitions involving non-U.S. firms acquiring U.S. firms. Of these transactions, only 111 were reviewed by CFIUS.² However, the Committee’s ability to single-handedly scuttle a transaction makes it an important consideration for any company who has transactions involving foreign investment with a U.S.-based company where operations could be considered vital to national security.

¹ See the Committee on Foreign Investment in the United States Annual Report to Congress for the Reporting Period CY 2014, Published in February 2016 by the Department of the Treasury (Available at <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Annual%20Report%20to%20Congress%20for%20CY2014.pdf>)

² See the Committee on Foreign Investment in the United States Annual Report to Congress for the Reporting Period CY 2013 and James K. Jackson’s report entitled The Committee on Foreign Investment in the United States (CFIUS), published on March 6, 2014 by the Congressional Research Service (Available at <http://fas.org/sgp/crs/natsec/RL33388.pdf>)

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The Committee's impact on commercial transactions in the U.S. has been clearly demonstrated over the past decade. In fact, CFIUS has requested changes to dozens of transactions to mitigate concerns, and blocked or unraveled a number of high-profile deals. Examples of this action include Huawei's attempted acquisition of 3Leaf Systems in 2011, which was scrapped following a CFIUS recommendation that Huawei give up on its attempts to acquire the company due to suspected links between the company and the Chinese People's Liberation Army, and a 2012 order from CFIUS requiring Ralls to halt further investment in an Oregon windfarm project, a case that we discuss in further detail later in this report.

Even deals initially approved by CFIUS have stirred controversy driven by national security concerns. One of the most notable transactions involved the proposed transfer of U.S. port management contracts to Dubai Ports World in 2006. Under the deal, Dubai Ports World, a United Arab Emirates-based port operator owned by the government of Dubai, would have gained the rights to operate six major U.S. ports, including terminals in New York, New Jersey, Philadelphia, and New Orleans. Dubai Ports World would have gained these operating rights through the acquisition of the incumbent operator of the affected ports, Peninsular & Oriental, an operator headquartered in Singapore. The deal had already received approval from regulators in other countries, including the United Kingdom, where Dubai Ports World would assume port operations.

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Despite receiving CFIUS approval, the deal faced a significant public relations backlash. Commentators, members of Congress, and other public officials expressed concerns

that the company could have connections to terrorism and cited the participation of two Emirati citizens in the 9/11 attacks as further grounds for concern.³ Lawmakers also expressed concern over the possibility of an Emirati company and its employees having unfettered access to major U.S. port facilities. Ultimately, Dubai Ports World changed course and chose to sell the operating rights of the affected U.S. ports to American International Group, as they were unable to overcome considerable opposition expressed by Congress, the media, and the American public.

The ability to reject or disavow transactions demonstrates how important it is for companies to consider the CFIUS process and potential CFIUS concerns early in the transaction process. These examples illustrate that failure to consider CFIUS early in the process could necessitate costly changes to a transaction or kill it altogether.

In addition to legal issues important to the transaction and proper filing requirements, there are two additional areas of importance for companies to consider with regard to potential CFIUS engagement:

- Process and Strategy
- Communications

Each of these areas cannot be underestimated and often require additional assistance above and beyond in-house capabilities to successfully anticipate and navigate the CFIUS process.

This paper, prepared in joint collaboration by The Chertoff Group and Edelman, discusses each of these elements and what companies should consider when managing a transaction that would be considered necessary for CFIUS review. It also explains the importance of public perception and outreach in this process and the potential consequences that can result when stakeholders are left uninformed of the

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facts or benefits of this transaction to the U.S. We trust you will find the following information helpful to understanding CFIUS and ways to mitigate potential risks for future transactions involving foreign investment in the U.S.

CFIUS PROCESS AND STRATEGY

The current CFIUS review process was established in 2007 as part of the Foreign Investment and National Security Act of 2007 (FINSA). The process is designed to review the potential national security impact of “covered” transactions, that is mergers, acquisitions, or takeovers which result in foreign control of a company engaged in interstate commerce in the U.S. Foreign control of a company is defined rather broadly. FINSA defines control as the power to determine, direct or decide matters affecting an entity including, but not limited to, the sale, lease, pledge or other transfer of the company's assets, the dissolution of the company, or the closing or relocating of research and development facilities.⁴ Control can be demonstrated through majority ownership of a company, a dominant minority of a company, voting proxies, or other contractual arrangements. As such, a large number of transactions involving foreign entities could be considered by CFIUS as “covered” based on FINSA's provisions.⁵

“National security” is also a very broad term in the context of CFIUS review; in fact, “national security” is not actually defined in the FINSA statute. Instead, the government reserves the right to interpret national security interest broadly, while FINSA includes provisions explicitly defining critical infrastructure facilities and critical technologies as part of U.S. national security interests. The Department of Homeland Security maintains a list of 18 critical infrastructure sectors, including telecommunications, energy, financial services, water, transportation, and others, in which a covered transaction would likely have national security interests.⁶

The Committee itself consists of representatives from nine Federal agencies or offices including:

Department of Treasury (Chair of the Committee), Department of Commerce, Department of Defense, Department of Homeland Security, Department of Justice, Department of State, Department of Energy, the Office of the U.S. Trade Representative, and White House Office of Science and Technology. Additional organizations including the Office of Management and Budget, National Council of Economic Advisors, National Security Council, and National Economic Council observe CFIUS proceedings and participate in the process as appropriate. The Committee also has two ex-officio members, the Director of National Intelligence and the Secretary of Labor, whose roles are defined by statute.

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⁴ See CFR Title 31, § 800.204, Available at <https://www.law.cornell.edu/cfr/text/31/800.204>.

⁵ A number of law firms specializing in CFIUS transactions share this point-of-view, See “A Guide to Demystify the CFIUS Process,” Baker Botts LLP, Available at http://www.bakerbotts.com/~media/files/brochure-attachments/cfiusbookletenglishversion_000.pdf?la=en

⁶ For additional information on the CFIUS process please see James K. Jackson's report entitled The Committee on Foreign Investment in the United States (CFIUS), published on March 6, 2014 by the Congressional Research Service.

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Under FINSA, the Secretary or head of each of the above departments, agencies, or offices can serve as that organization's representative; however, most designate someone at the Deputy or Under Secretary level to represent the organization on the Committee. Individuals who serve in these roles are almost always political appointees. CFIUS also maintains a staff of career civil servants who aid the Committee in the review process.

Formal CFIUS review of a transaction can be initiated in two ways:

1. Voluntary filing by the parties of a forthcoming transaction; or
2. CFIUS-initiated review, generally started at the urging of a Committee member.

The vast majority of reviews conducted by CFIUS are initiated by voluntary filing. Companies will generally file voluntarily to take advantage of a more flexible process, which can aid them in addressing any national security-related concerns raised by the Committee while also allowing the Committee to declare the transaction as not requiring action from CFIUS. Voluntary reviews are often completed prior to closing in order to determine if the deal is in fact a "covered" transaction. Reviews can also be initiated by the CFIUS committee, both during a transaction and after a transaction has closed. In the case of transactions that have already closed, CFIUS can force a company to enact mitigation remedies, up to and including divestiture of assets.

Once a filing is made and determined to be complete, a process that usually takes 7 to 14 days, the filing will be circulated among the CFIUS members. The CFIUS committee has 30 days to review and respond to the filing. For each case, the Treasury Department will assign a "lead" agency to the case, generally selecting the agency thought to have the strongest understanding of the transaction's potential security implications. During this 30-day review, the Committee may request additional information regarding the transaction. At this stage, the Director of National Intelligence (DNI) also conducts a review of the national security implications of the transaction. Upon conclusion of the 30-day review period, members of the Committee will either approve the transaction or opt for an additional investigatory period for up to 45 days.

Any member of CFIUS can initiate the investigatory period, during which the Committee may offer suggested changes to the transaction designed to address its national security-related concerns. At the conclusion of the 45-day investigatory period, members will either determine that all of their concerns have been addressed or, in exceedingly rare cases where the Committee's national security concerns have not been adequately addressed, prepare a final report for the President. If a final report is sent to the President, the President has 15 days to either permit or block the transaction. Practically speaking, it is difficult to envision a scenario in which the President would approve a transaction that had not adequately addressed the national security concerns of CFIUS.

30-DAY REVIEW

- Review period begins when Treasury has verified that the submission is complete
- CFIUS reviews the materials submitted by the filer
- DNI conducts a national security review
- At the conclusion of this period CFIUS either approves the transaction or initiates a 45-day investigatory period

45-DAY INVESTIGATION

- Only initiated if CFIUS is unable to approve the transaction after initial 30-day review
- This investigation can be triggered by the request of any single CFIUS member
- Often used to suggest remediation options to the filer
- CFIUS either approves the transaction or submits a final report with recommendation to the President

15-DAY PRESIDENTIAL REVIEW

- Only initiated if CFIUS does not approve the transaction and submits a final report to the President
- Rarely occurs as CFIUS generally tries to resolve any national security concerns before this stage
- President has 15 days to permit or block transaction once report is received

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While the entire CFIUS review process can take up to 90 days, most reviews do not last this long. CFIUS offers certain accommodations to ease this process and enable companies to fully prepare. These include:

- Informal consultation with the CFIUS committee prior to official submission of a transaction filing, enabling parties to determine if the Committee may have national security concerns and potential remedies.
- Allowing parties to withdraw their filing during the 30-day review or 45-day investigatory period, permitting parties to make changes to the transaction and re-file, which resets the formal review process.

COMMITTEE MEMBERS AND INTERESTS

Each agency with membership on CFIUS has a unique perspective on the national security interests of the United States. For example, the Department of Homeland Security is likely to have a much higher degree of concern regarding a transaction involving a major power plant, water facility or port than the Departments of Commerce or Justice. Similarly, the Department of Defense is likely to have a much greater national security concern relating to a foreign acquisition of an infrastructure asset bordering a military base than the United States Trade Representative or White House Office of Science and Technology. As such, it is important that filers have a clear understanding of the CFIUS member most likely to have concerns relating to a transaction and be prepared to address these concerns and accommodate certain mitigation members to overcome possible CFIUS objections.

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The internal dynamics of the Committee can also play an important role in CFIUS proceedings, as some members of the Committee tend to have a perspective in line with one or two other members. The Departments of Defense and Homeland Security both have a tremendous focus on national defense and security and share

similar perspectives for many reviewed transactions. The Department of Commerce and United States Trade Representatives, in contrast, are typically more focused on facilitating the country's economic activity and may place more emphasis on these considerations. Other unique perspectives, such as those from the Departments of State and Justice, may take into consideration diplomatic relations with other countries involved in a transaction or the prevalence of corrupt practices in the home country of the proposed investor. As a result of these dynamics, many filers may find themselves needing to focus on the concerns of one or two Committee members with the greatest level of interest in the transaction.

MITIGATION MEASURES

Often the CFIUS process will lead companies to adopt a variety of mitigation measures designed to address the national security concerns of Committee members. These legally binding measures are often included in the transaction at the request of CFIUS, although companies can include mitigations in

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their initial filings with CFIUS in anticipation of the Committee's concerns. These mitigations range from relatively nonintrusive actions, such as limiting foreign national access to critical infrastructure facilities, to the more disruptive, such as establishing a separate U.S. board of directors to oversee activities involving sensitive technologies. In its 2014 report to Congress, the Committee made available a list of the most common mitigation measures, including:

- Requiring a subsidiary with sensitive technology or classified contracts to have a separate and independent board of directors composed of U.S. citizens.
- Requiring the board of directors to establish a security committee composed of independent directors who are U.S. citizens and have independent authority over security compliance.
- Restricting the type of information that can be provided by the U.S. subsidiary to the foreign parent and the identity/number of parent company employees who are allowed access to the information.
- Restricting access by non-U.S. citizens to critical infrastructure.
- Requiring the screening of employees and contractor personnel with access to sensitive or classified information.
- Requiring firms to obtain prior approval of seller contracts for certain goods or services where the seller is foreign-owned.
- Requiring firms adopt and implement network and IT security policies.

The Chertoff Group has worked with companies in the past to help develop appropriate mitigation plans that meet CFIUS requirements without damaging the overall value and business case for the transaction.

The Committee has implemented procedures, often in cooperation with other government departments or agencies, meant to ensure companies involved in reviewed transactions adhere to agreed-upon mitigation measures. Failure to adhere to agreed-upon mitigation measures could invite further CFIUS or legal action.

The Chertoff Group has worked with companies in the past to help develop appropriate mitigation plans that meet CFIUS requirements without damaging the overall value and business case for the transaction. The Chertoff Group and its staff have extensive knowledge of the CFIUS process.

Members of our staff have served on the CFIUS Committee during government service and later as members of security committees and boards created through the CFIUS process in order to ensure compliance of companies who have completed covered transactions. By serving in these roles, The Chertoff Group is very familiar with how a company can best address

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the national security concerns of CFIUS while also understanding what would be acceptable from an investment perspective and what would require reconsideration for the overall transaction.

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CASE STUDY: GULFTAINER SEEKS 35-YEAR LEASE FOR PORT CANAVERAL

Transaction:

In September 2014, Gulftainer, a United Arab Emirates-based port operator, received approval to proceed with its 35-year lease of Port Canaveral, a strategic port facility in Florida. The terms of the lease obligated Gulftainer to invest at least \$100 million in infrastructure improvements for the facility with the intention of dramatically expanding the port's cargo volumes. This port is one of the busiest cruise terminals in the United States and is in close proximity to the Trident Turning Basin, which is used by the U.S. Navy to support ballistic missile submarine operations.

CFIUS Engagement:

Gulftainer voluntarily submitted a filing to CFIUS after securing the lease, although some members of Congress, including Rep. Duncan Hunter (R-CA) had also publically asked for CFIUS to review the transaction.^a Concerns over the deal centered on Emirati control of a major U.S. port facility, which is considered a piece of critical infrastructure by both FINSA and the Department of Homeland Security. These concerns were reminiscent of the failed Dubai Ports World deal, which collapsed in the face of Congressional opposition to foreign ownership of a U.S. port facility. Critics of the Gulftainer deal cited this example in their calls for CFIUS review of the transaction. In contrast to the Dubai Ports World deal, the Gulftainer agreement with Port Canaveral was a long term lease for the operation of the port, an important distinction for FINSA and CFIUS.

Result:

Ultimately, the Treasury Department determined that the transaction did not require further security review by the Committee. This decision was made due to the transaction being a long-term lease of the port facility rather than an asset sale, meaning that the transaction did not rise to the standard of transferring control of the port to a foreign entity. As such, the deal was not considered a "covered transaction" under FINSA and thus not subject to CFIUS review. This determination allowed Gulftainer to move forward with the transaction.

This deal is demonstrative of how important deal structure is to the CFIUS process. In this instance, the nature of the lease did not constitute a transfer of control of the port facility to Gulftainer, allowing the deal to forgo CFIUS review.

^a See Chris Dupin, "Congressman asks for review of Gulftainer-Port Canaveral deal," American Shipper, July 31, 2014, Available at http://www.americanshipper.com/Main/News/Congressman_asks_for_review_of_GulftainerPort_Cana_57925.aspx.

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COMMUNICATIONS STRATEGY AROUND A CFIUS REVIEW

There are significant communications challenges for foreign-based acquirers of U.S. assets if the transactions raise concerns about national security. The events of September 11, 2001, and continued warfare in the Middle East and other parts of the world feed American concerns about foreign companies taking control of critical U.S. assets. In addition, rising cybersecurity attacks by infiltrators overseas further exacerbates these concerns.

Notwithstanding, foreign companies are investing more in the U.S. A May 2016 report from S&P Global Market Intelligence reveals that foreign investors have spent \$224 billion buying American companies (year-to-date 2016), nearly double the level of the prior year. This level of foreign investment in U.S. acquisitions accounted for 40% of the \$560.9 billion in announced U.S. M&A in the same 2016 period, a significant increase from the 21% of 2015 U.S. deal value that was attributable to foreign acquisitions of U.S. assets.⁷

Foreign companies wishing to make strategic acquisitions in the U.S. that may have national security implications must think carefully about the communications and public affairs aspects of their potential transaction. As we have seen in many previous cases, public and political reaction has the potential to undermine the viability of a deal, even if the purchase price is right and shareholders grant approval. As described earlier, it is important to anticipate and develop a strategy to lessen concerns around potential issues the CFIUS committee and the public may have with a transaction. Essential to this strategy is to create a preventative narrative with tangible proof points to reassure the public and their political representatives that the concerns are unfounded or adequately addressed.

The following pages briefly discuss two additional case studies of CFIUS reviews to illustrate the reputational risks and communications aspects of a transaction involving national security concerns. Following the case studies we provide specific strategies a company can pursue to increase the chances of success or potentially avoid a CFIUS review altogether.

CASE STUDIES

Ralls: Forcing Greater Transparency of CFIUS Decision Criteria

In 2012, Ralls, a U.S. entity owned by two Chinese nationals, purchased four private companies that were to build wind farms in an area of Oregon near restricted airspace used as a bombing and training range by the U.S. Navy. Unsurprisingly, the press immediately questioned the motives of the Chinese in seeking to own wind farms near such a sensitive military location.

To make matters worse, the Chinese decided against voluntarily seeking a CFIUS review, which raised suspicions of a possibly nefarious motive. There could not have been a more perfect scenario on how to get government agencies roiled up against such an environmentally friendly investment.

Under pressure from CFIUS, Ralls finally filed its notice and over the next 75 days the Committee determined that the deal did in fact pose a security threat to the activities of the U.S. Navy. The



⁷ Peterson, Richard, "Foreign Acquisitions in the U.S. On Track For A Record Year," S&P Global Market Intelligence, 05, 23, 2016, Available at <https://www.spcapitaliq.com/blog/foreign-acquisitions-in-the-u-s-on-track-for-a-record-year>

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President issued a directive backing the Committee and ordered Ralls to divest their interest, but without revealing its evidence for the rejection.⁸

Ralls went to federal court and got an order stating that the President had acted “without due process of law.” Ralls appealed the ruling by CFIUS citing that the Committee was obligated to explain why they blocked the plan and give the company a chance to review and rebut any non-classified evidence federal officials relied upon in making their decisions. The U.S. court system ruled that CFIUS had violated Ralls due-process rights, but only after a significant amount of public discourse and press coverage raising the possibility that Ralls was “threatening national security”. It was the first time a U.S. court heard a case against the U.S. president and CFIUS. The legal decision paved the way for foreign entities taking part in acquisitions of U.S. assets to request more information about the CFIUS review process and the evidentiary basis of their decisions.

Safran: Using the CFIUS Process to Get a Transaction Approved

In 2011, Safran, a French aerospace and defense group whose majority shareholder is the French government at approximately 22%, planned to acquire L-1 identity solutions, which makes biometric and face recognition software. This software is used in the production of government identity cards, making the transaction of particular interest to the U.S. government due to the limited number of companies capable of producing such software. Safran voluntarily submitted the transaction to a CFIUS review after announcing the deal publicly. During the process, Safran withdrew their review twice based on the Committee’s feedback and resubmitted with further information and clarification. The Chertoff Group advised Safran during its CFIUS review process and the deal was ultimately approved by the committee.

It’s especially noteworthy that they pulled their review twice before reaching final verdict. Safran used the CFIUS review process to hear the concerns of the Committee and then make adjustments to their ownership plan to address these perceived concerns before moving forward with the deal.

Importantly, as a part of their narrative, Safran illustrated how the acquisition fit into their overall business model, reducing suspicions of an ulterior motive and emphasizing the understandable goal of simply growing the company aligned with their business strategy, which included providing government customers with high quality ID protection, biometrics, credentialing, and enrollment services. The company also highlighted their role as a trusted partner with U.S. cities, states, business, local communities, and the U.S. government for more than 40 years as well as the thousands of jobs that would be created by the company.

STRATEGIC COMMUNICATIONS TO SUPPORT CFIUS ENGAGEMENT

Companies that envision a possible acquisition in the U.S. must consider the possibility that their own reputation, their home country’s reputation, or the details of the transaction may raise national security concerns and therefore spur a CFIUS review. There are a variety of communications strategies that can be employed to mitigate these potential concerns and risks, as described below.



8 See Ivan A. Schlager, John M. Beahn, Malcolm Tuesley, Joshua F. Gruenspect, and John P. Kabealo, “Court Finds CFIUS Violated Ralls Corporation’s Due Process Rights,” Skadden, Arps, Slate, Meagher & Florn LLP, July 17, 2014, Available at <http://www.skadden.com/insights/court-finds-cfius-violated-ralls-corporations-due-process-rights>.

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I. Preempting country/company overhang

Before a transaction is contemplated, potential foreign-based acquirers must dedicate time and resources to building a favorable reputation in the U.S. so there is a positive pre-determination about the company before they pursue an acquisition. This is especially relevant for companies based in countries like China or Russia, which often carry negative reputational baggage and can prompt suspicion among U.S. audiences.

There is little downside to building a favorable reputation in advance and making sure key stakeholders become aware of the company, understand the company's mission and corporate culture and learn about the potential benefits of the company doing business on U.S. soil.

Companies can pursue a program of periodic visits to Capitol Hill or directly with selected members of the administration to provide an overview of the company and its products. This process will serve to establish relationships with Congress and the government, forming a foundation of understanding and ideally creating early advocates. Key to this process is building trust through transparency—companies need to be prepared to answer questions regarding corporate ownership, governance structure, and other details relevant to U.S. national security concerns.

An Edelman Intelligence survey of elite policy-makers in Washington D.C. underscores this strategy: “If you are an unknown in the policy community, if you are known not to engage, if no one has seen you before, it is always harder to get attention in a time of crisis. You have to work at it assiduously and early.”⁹

II. Build a strong case for the benefits of the transaction

Once a transaction is in sight, companies must thoughtfully anticipate concerns and build a strong case for why the deal is beneficial for U.S. stakeholders, whether through increased investment, more jobs or other possible benefits. Surprisingly common is a situation in which the acquirer is so focused on finalizing the agreement and announcing the transaction that they do not consider or communicate the benefits the deal brings to local constituencies.

It is important to identify which aspects of the transaction present the greatest opportunities or obstacles from the perspective of key local stakeholders – and then to develop strategies to address them accordingly. Potential strategies to aid this process may include:

- Define the transaction in terms of societal contributions through storytelling that highlights jobs and economic contributions, and acts of corporate social responsibility.
- Monitor issues of importance to the industry and region so that the campaign can be appropriately focused and calibrated to ensure messages resonate and motivate.
- Create a storytelling framework to distinguish the company's positioning and capture a favorable view among key audiences.
- Once the core message is defined, build the communications tools that will enable the company to share the story in specific ways with target audiences to affect policy changes.
- Tailor the content to the varied formats and platforms the company's audiences will utilize.

III. Advance reconnaissance

Companies can also conduct advance reconnaissance by visiting government officials to discuss the possibility of theoretical partnerships or investments and obtain their view on whether concerns would be raised. To avoid breaching confidentiality, these reconnaissance conversations can revolve around general, unspecific scenarios in order to gauge reaction from government officials.

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For example, a potential acquirer could send representatives to meet with government staff members in targeted areas of the country to learn their priorities for their region and also inquire about their views on certain kinds of investments and related issues. Similarly, a company could send lobbyists or other representatives to speak to staff members on certain government or industry committees to get their perspective on matters that would arise around potential partnerships or corporate collaboration.

IV. Proactively seek an informal CFIUS review

CFIUS provides an opportunity for companies to seek a preliminary “informal” review, which they instituted as an incentive for companies to prepare for and agree to a formal review. An informal review entails approaching a select number of CFIUS committee members to discuss the case before subjecting the transaction to a formal review following the official public announcement.

The advantage of seeking an informal review is it provides a clear sense of the information CFIUS will need and their likely areas of concern. It also provides CFIUS with additional time to work through complicated issues that could potentially expand beyond the standard 30-day CFIUS review period. Seeking this input will provide valuable insight and raise any potential red flags early in the process. The most important objective is to determine what type of reaction there might be to an announced deal, and develop an action plan for resolving the concerns.

V. Submit a voluntary notice to CFIUS

Recent deals have shown that potential acquirers should consider proactively notifying CFIUS of potential national security concerns. This entails a voluntary notification to CFIUS. Failure to notify CFIUS of a transaction with potential concerns involves significant risks to the investor given the possibility of CFIUS delaying or derailing the transaction.

We acknowledge that there is a cost to taking a proactive approach, namely related to fees for lobbyists, strategic advisors and lawyers, among other costs. However this upfront cost is insignificant in comparison to the possible costs associated with unwinding an acquisition and the reputational damage caused by a CFIUS review that raises concerns about a foreign-based company's intentions in the U.S.

VI. Assemble third-party support

As part of an announcement strategy, it is critical to build alliances with local legislators, influencers and institutions who can advocate for a company and the benefits of a transaction. This entails developing a list of potential allies and a view on who can provide favorable public support for the transaction.

This strategy could be focused in a number of areas. This could include meeting with a local mayor in a geography that is important to the target company, with the goal of helping them understand how their community would see job opportunities created as a result of the deal. If the message and potential outcome is viewed favorably, these local legislators could then become proponents of the transaction. As another example, if the target company is involved in supplying the military, it may be advisable to proactively visit the Pentagon once the deal is announced to discuss the ongoing relationship and benefits for the government. If the transaction involves an energy company, alliance building could entail working with scientists in advance who specialize in the energy industry, who might be willing to talk about, for example, how the transaction would protect the power grid in the U.S. A company may also engage an independent think tank to commission a study that could support the benefits of the deal.

The company's workforce (both of the acquirer and target) are likely to be the best resource and ally; empowered employees take action and can help inform and sway public opinion. As a result, internal communications strategies that underscore the benefits for employees can create additional support.

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Third parties speaking favorably on your behalf are one of the most effective ways to tame the media in a controversial environment.

VII. Aggressive messaging and media relations

Upon announcement of the transaction, it can be expected that media will speculate and critics will be vocal. The press is eager to emphasize the dangers to national security in order to inspire public debate and raise concerns among their audience as well as incite public figures to join the debate.

The acquiring company must be in a position to aggressively disseminate its messaging and activate third-party support to ensure the company's proof points are heard. As a part of this, it is essential to understand the media's priorities and prepare spokespeople to tell the company's story clearly and persuasively. It is also essential to meet with influential journalists to deliver messaging in person and be responsive to questions.

An Edelman Intelligence survey conducted in late 2014 illustrates the importance of the strategies described in the pages above. This research ranks the most important drivers of a strong reputation.

Effective Reputation Drivers	Total	Democrat	Republican
Building strong grassroots support outside the beltway	48%	49%	50%
Developing messaging, framing the issue to their advantage, and owning the vocabulary used to discuss the issue	45%	43%	47%
Building a large and diverse coalition of like-minded groups inside the Beltway	42%	37%	46%
Having a strong media relations team	35%	37%	33%
Having a well-designed, data-driven strategy	33%	33%	33%
Having a strong government relations or lobbying team	31%	28%	33%
Developing studies that support their goals	23%	24%	23%
Having a compelling or well-known spokesperson	18%	20%	16%
Targeted advertising	14%	18%	13%

Source: Beltway Barometer, Sept. 2014

CONCLUSION

There is no doubt that foreign investment in the United States can bring many economic benefits. However, companies engaging in these transactions must never underestimate the role of CFIUS and whether future transactions will come under a CFIUS review. It is better to plan ahead and execute a strategy to mitigate any concerns that may come about, before you get too engaged and disrupt a transaction of significant value.

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