



Kobre & Kim's Government Enforcement Defense Contacts

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5 Ways to Plan Ahead as the U.S. Moves to Curb Foreign Investment

In recent history, investments originating from China have accounted for nearly a quarter of CFIUS reviews, with investments from the UK, Japan, Hong Kong, Israel and South Korea also among the most reviewed. Understanding the risks of U.S. government subpoenas or regulatory inquiries and how to prepare for them is important for companies operating in these regions.

In recent history, investments originating from China have accounted for nearly a quarter of CFIUS reviews, with investments from the UK, Japan, Hong Kong, Israel and South Korea also among the most reviewed. Thus, counsel and clients located in these regions need to know the risks and how to prepare for any U.S.-driven regulatory inquiries or subpoenas:

Be mindful of the CFIUS's broad authority.

CFIUS has the ability to review any investment in which a "foreign person" acquires or otherwise gains control of a U.S. business. The range of transactions that CFIUS can review has been interpreted very broadly and includes any transaction with any foreign person which could result in control of a U.S. business by a foreign person. This has been interpreted to include foreign acquisitions as well as nonmajority-stake investments in U.S. businesses. The definition of "foreign person" is broadly interpreted to include any foreign national, foreign government or foreign entity, or any entity over which control is exercised or exercisable by a foreign national, foreign government or foreign entity.

Expect increased scrutiny.

On June 27, the U.S. announced that it would forego the imposition of separate restrictions on China and intends to rely on CFIUS to control and monitor foreign investment in the United States. In addition, pending legislation to extend the scope of transactions subject to CFIUS review is set to pave the way for increased enforcement. President Trump previously has said that he intends to direct CFIUS officials to "enforce [the legislation] rigorously, with a view toward addressing the concerns regarding state-directed investment in critical technologies."

Consider voluntarily filing with CFIUS.

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Although there is no legal requirement to notify CFIUS of a contemplated transaction, because of growing uncertainty about the reach of CFIUS and the high stakes involved, parties that might be implicated should carefully weigh the costs and benefits of filing a voluntary notice with CFIUS. Submitting a transaction for review will result in a company incurring additional attorneys' fees and could potentially delay the transaction while CFIUS completes its review. However, a company also must consider the potential risks of nondisclosure. CFIUS can intervene and review a covered transaction even in the absence of a voluntary filing, and even if that transaction already is complete. It should be noted that the proposed CFIUS reforms include a provision under which it would be mandatory to file a declaration for certain types of transactions.

Identify means to mitigate the appearance of national security concerns.

CFIUS counsel can work with the transactional lawyers involved in a contemplated investment or acquisition to try to minimize the likelihood that a particular transaction will draw CFIUS's attention or, if it does, to ensure that sufficient steps are taken to mitigate those concerns. In so doing, experienced counsel -- and especially those with a background in national security matters -- can conduct diligence to identify factors that may give rise to national security concerns and propose pre-emptive measures to mitigate those concerns. CFIUS counsel can work closely with transactional lawyers to allocate potential CFIUS risks consistent with the parties' interests. This risk allocation can be accomplished in a number of ways, including representations and warranties, covenants, and conditions precedent, as well as practical measures taken by the buyer or seller such as the development and implementation of protective measures to limit exposure of potential national security information to foreign investors. For example, if the target company has sensitive assets or access to sensitive information that will raise concerns of U.S. regulators, one way to reduce the risk would be for the target company to divest itself of those assets, exclude those assets from the transaction, or to institute internal controls that would prevent a foreign buyer from accessing the sensitive information.

Consult experienced counsel.

While CFIUS is largely a voluntary regime, it is important for foreign investors considering potential implications of an investment in, or the purchase of, a U.S. company. Companies and transactional lawyers should consult counsel with former U.S. prosecutorial and enforcement experience involving matters related to national security. Such lawyers will be best positioned to understand whether the transaction is subject to CFIUS review, evaluate the potential risks and benefits of a voluntary disclosure versus nondisclosure, and determine how to structure the investment or acquisition to mitigate risk.

About Kobre & Kim's Government Enforcement Defense Team

Kobre & Kim is an Am Law 200 law firm that focuses exclusively on disputes and investigations does not have a transactional practice or ongoing institutional relationships, and thereby maintains its ability to serve as a zealous and independent advocate in disputes involving the U.S. government or virtually any private litigant.

Our government enforcement/national security defense team is comprised of more than 20 former U.S. government lawyers, many of whom have extensive experience in national security matters involving economic sanctions, export controls, cybersecurity, and counterterrorism, among others.