

# Common Regulatory Hurdles to Foreign Investment in the United States—HSR and CFIUS Explained

By Brent Connor, Brian K. McCalmon, Elizabeth G. Silver and Catherine A. Johnson

October 28, 2021

Several U.S. regulatory schemes can affect the ability of foreign investors to acquire an interest in or control of U.S.-based companies. Parties considering cross-border investments should think early and often about how to steer their deal through relevant agencies and how to allocate the risk of regulatory delay or challenge. In this article, we focus on Hart-Scott-Rodino (“HSR”) and Committee on Foreign Investment in the United States (“CFIUS”) filing requirements, and examine how they can impact the risks and timelines of investment transactions.

## Overview of HSR Antitrust Filing Requirements

HSR antitrust merger reviews, which are conducted by the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended,<sup>i</sup> require parties to large acquisitions or mergers (currently, those valued above \$90 million) to notify the DOJ and FTC of the transaction so that the agencies can assess—prior to closing—whether the transaction may lessen competition in a line of commerce within the United States.<sup>ii</sup> Many other countries have a similar requirement that is triggered by some combination of party size, deal size or sales turnover.<sup>iii</sup>

In the United States, the transaction cannot close until at least 30 days after all required HSR filings have been made.<sup>iv</sup> If the reviewing agency has significant concerns prior to the expiration of the waiting period, it will request that the parties provide information voluntarily and will work to resolve its concerns quickly. If serious issues remain as the waiting period nears expiration, the agency can issue a large document request colloquially known as a “Second Request,” which tolls the expiration of the waiting period until 30 days after the parties have certified substantial compliance with it.<sup>v</sup> The agency can then let the waiting period expire or can sue in federal court to enjoin the transaction.<sup>vi</sup>

As a practical matter, parties facing a substantive investigation from FTC or DOJ staff—especially in transactions with significant competitive overlaps between the parties—can face an uphill climb to resolve significant competitive concerns within the initial 30-day waiting period. When a Second Request issues, it requires at least several weeks, if not months, just to certify substantial compliance. Parties hoping for a negotiated settlement to avoid protracted litigation can face closing delays ranging from five or six months to more than a year.

## Overview of CFIUS National Security Filing Requirements

CFIUS review can be a similarly lengthy process. CFIUS is a U.S. federal interagency body that is authorized to review certain foreign investment transactions in the United States that pose a threat to national security under section 721 of the Defense Production Act of 1950, as amended, and Regulations Pertaining to Certain Investments in the United States by Foreign

Persons.<sup>vi</sup> Transactions that may trigger CFIUS review include, for example, those in which the United States target deals in certain critical technology, critical infrastructure or sensitive personal data.<sup>viii</sup>

There are several mechanisms by which a transaction may be brought before CFIUS for consideration of potential national security implications. In some instances, the parties to a transaction are required to notify CFIUS via a “short-form” declaration,<sup>ix</sup> and obtain approval before the transaction may proceed. In other instances, notifying CFIUS is voluntary, either through a short-form declaration or a longer submission called a notice.<sup>x</sup>

The timeline for a CFIUS review varies depending on the type of filing. Whether a proposed transaction is subject to the mandatory declaration requirements or the parties opt to submit a declaration or notice voluntarily, the submission must be filed before the transaction closes, and in the case of a declaration, no later than 30 days before the completion date of the transaction.<sup>xi</sup> For notices, CFIUS is entitled to a 45-day review period,<sup>xii</sup> and if CFIUS identifies a national security threat, it must conduct an investigation, which can last an additional 45 days.<sup>xiii</sup> If there are “extraordinary circumstances,” CFIUS can add another 15 days to a notice’s review period, for a total of 105 days.<sup>xiv</sup> However, there is no guarantee that a review will be completed within the statutory period. In fact, the process can take much longer if CFIUS rejects a declaration, allows parties to withdraw and re-file (restarting the clock), requires a resubmission, or requires parties that submitted a declaration to subsequently file a full notice. In the worst case scenario, if parties initially file a declaration and then are ordered to file a notice, then the notice is ordered to be withdrawn and refiled, *another* 105 days could be added. Thus, for particularly complicated CFIUS reviews that require multiple submissions, a CFIUS review can last longer than 270 days, or nine months.

## Key Implications for Your Transaction

Notwithstanding the distinct regulatory concerns underlying HSR and CFIUS, U.S. regulators are aligned in deepening their regulatory oversight of foreign investment in the United States. Recent enforcement trends make clear that parties to foreign investment transactions must be mindful of antitrust and national security regulatory requirements, or risk substantial delays or lost business opportunities. Promptly identifying potential regulatory hurdles, negotiating risk allocation and mitigating risks through transaction terms, deal structuring and business structuring are key strategies to protect your transaction.

## HSR Risk and Mitigation Strategies

A number of recent and pending developments have increased the risk that antitrust issues will complicate cross-border investment into the United States, and may add time to any transaction investigation. The FTC recently announced a significant expansion of the information it will require parties to provide in order to comply with Second Requests, and it has begun an aggressive push to expand antitrust review of acquisitions beyond the traditional scope of consumer price and quality effects.<sup>xv</sup> According to the FTC, Second Requests will cover a broader range of information from the parties than previously, including “how a proposed merger will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete.”<sup>xvi</sup> Filing parties whose transactions are reviewed by the FTC may find themselves in the unprecedented position of defending their post-transaction labor and ESG practices and plans in order to obtain the FTC’s consent to proceed.

In addition, the FTC recently withdrew its approval of the Vertical Merger Guidelines (“VMGs”) issued jointly with the DOJ in 2020. Citing concerns that “vertical mergers” (mergers of companies at different levels of the distribution chain, or that make complementary products) may foreclose one party’s competitors from obtaining or selling competitively important component products, the FTC announced that it would begin more heavily scrutinizing transactions that—although they do not directly combine competing companies—could raise rivals’ costs of operation or entry. The FTC also criticized the use of information firewalls and other conduct remedies to alleviate competitive concerns, stating that it would focus on divestiture as the preferred remedy in vertical as well as horizontal mergers.<sup>xvii</sup> Cross-border acquisitions or mergers involving companies at different levels of a distribution chain, or that make complementary inputs for another industry (even if not competing products), may face greater scrutiny going forward, the transactions may take longer to clear and covered transactions may face an increased risk of divestiture as the price of approval.<sup>xviii</sup>

HSR risk generally falls into two categories: Second Requests and challenges to the agreed transaction. The first risk is that a reviewing agency will issue a burdensome Second Request, derailing the parties' hopes for a quick review and possibly causing them to miss negotiated financing dates or agreement termination dates. Not all HSR-reported transactions carry significant risk for deal timing. Because HSR filings are triggered by the sizes of the parties and the transaction, most HSR waiting periods expire without, or with only minimal, investigation because the parties are not competitors. In FY 2019, only 61, or three percent, of the 2,089 filed transactions received a Second Request.<sup>xix</sup> However, 38 of those 61 transactions were challenged by the investigating agency and either abandoned, enjoined or allowed to proceed once restructured or with agreed divestitures.<sup>xx</sup> Accordingly, whether a transaction is at significant risk of delay or an agency challenge depends in large part on whether a Second Request is likely. This is a primary focus of the parties when determining "HSR risk."

The second category of risk is a challenge to the agreed transaction. The threat of a challenge carries four possible outcomes: abandonment in the face of delay and mounting expense with the prospect of an uncertain outcome; restructuring to remove assets or lines of business from the transaction to alleviate alleged competitive concerns (colloquially called a "fix-it-first" remedy); an agreement to divest assets or lines of business as a remedy to a buyer approved by the investigating agency; or a successful or failed attempt by the agency to obtain injunctive relief barring the transaction entirely (usually in federal district court).<sup>xxi</sup>

Accordingly, parties must plan and allocate between them the risk of delay as well as the risk that substantial amounts of expected earnings—or even the entire deal—may be forfeited through divestitures or injunction. For an acquiring party, divestitures may threaten the economic benefit that made the deal attractive. For an acquired party, a challenge would send it back to square one with a reduced number of suitors, perceived by the market as weakened. For both parties, significant delay can deteriorate the competitiveness and value of the acquired company as morale declines and personnel begin to leave in the face of uncertainty. For any of these events as may occur, one of the parties will bear at least some portion of the cost. Allocating these risks is key to any transaction that may result in a Second Request.

One of the most effective ways to address HSR risk is to set a termination date far enough out that an extended investigation and negotiated settlement process is possible without triggering termination rights. This assures both parties—and any investigating agency—of their mutual commitment to the transaction even in the face of a protracted investigation. Beyond this, various deal terms can assign and mitigate risk. These include, among other options, efforts clauses, by which the parties agree on how committed the buyer must be to consummate the transaction even in the face of a challenge (with maximum commitment colloquially known as a "hell or high water" commitment to close no matter what divestitures may be required); specific divestiture commitments, defined by a ceiling on divestiture asset earnings or by specific assets to be divested if necessary; litigation and appeal commitments in case of agency challenge; and break fees and reverse break fees paid by one party to the other for backing out of the transaction early.

## **CFIUS Risk and Mitigation Strategies**

The transaction risks arising from CFIUS reviews have some similarities and some distinctions from those arising from HSR. The first major distinction from HSR is that the complex determination of whether a CFIUS filing is needed presents a risk. At the outset, unlike the clear threshold for filing under HSR, parties must initially account for the risks associated with determining whether or not to file with CFIUS. Whereas the HSR threshold is a relatively straightforward valuation exercise, in the context of CFIUS, the parties must make a legal determination whether the target is a regulated business that deals in critical technology, critical infrastructure or sensitive personal data, and then whether the intended foreign investment satisfies the criteria that trigger CFIUS filing requirements, which is a multi-factor test requiring the assistance of counsel.

Although the volume of CFIUS filings has grown substantially in recent years, many transactions with national security implications are proceeding without the proper CFIUS filings. Due to the complex and changing regulations, parties are often unaware their transaction should be reported to CFIUS. FIRRMA significantly expanded CFIUS's authority to review transactions to include even certain non-controlling transactions and investments by foreign persons,<sup>xxii</sup> and the regulations reach up the supply chain in their consideration of which businesses manufacture critical technologies.<sup>xxiii</sup>

CFIUS has the authority to identify non-notified transactions and assert jurisdiction over them. The passage of FIRRMA resulted in increased attention to the ongoing identification of non-notified transactions by requiring that CFIUS establish a process to identify them.<sup>xxiv</sup> CFIUS has built a team that scours the trade press, databases and other sources to identify non-notified transactions that potentially pose a national security threat.<sup>xxv</sup> In 2020, Thomas Feddo, then the Assistant Secretary for Investment Security at the U.S. Department of the Treasury, stated that “Treasury, with help from our interagency partners, is actively monitoring investment activity and contacting parties when we identify a non-notified transaction that may raise national security considerations. This work is important—particularly now—and we remain vigilant.”<sup>xxvi</sup> In 2020, CFIUS identified 117 non-notified transactions, and requested a complete CFIUS filing for 17 of them.<sup>xxvii</sup> Failing to file when required under the regulations may result in not only a post-closing review, but also penalties of up to \$250,000 per violation,<sup>xxviii</sup> and, in extreme circumstances, a forced divestiture.<sup>xxix</sup>

Even if parties are certain that no mandatory declaration will be required, there are circumstances where they might consider the filing of a voluntary declaration or notice to obtain greater certainty. Even where a filing is not required, the risk remains that CFIUS could assert jurisdiction over the transaction, find a national security risk and force a divestiture.<sup>xxx</sup> To complicate matters further, there is no statute of limitations on CFIUS’s ability to review a transaction, leaving the deal open to CFIUS risk after its completion.

Aside from the clear risks associated with a possible post-closing review by CFIUS, there are risks associated with the timing and possible delays in the CFIUS review process that parties must account for, similar to those in the HSR process. As detailed above, a standard CFIUS review could take only 30 days, or extend to a period exceeding nine months, with the ability to hold up a transaction. For transactions subject to mandatory filing requirements that have clear national security implications, one strategy to shorten this process is filing a long-form notice and skipping the mandatory declaration altogether.<sup>xxxi</sup> Parties considering a voluntary filing can likewise evaluate the risk that CFIUS may request a complete notice and choose to file a long-form notice in the first instance instead of a short-form declaration.

In all cases where a filing is submitted to CFIUS, parties must be prepared to negotiate with CFIUS where it identifies national security threats and requires measures to mitigate them. Understanding the potential national security implications early on in the deal will allow the negotiation process with CFIUS to proceed more smoothly. Mitigation measures might include structuring the transaction to avoid foreign control of a nature that triggers CFIUS concerns, where possible, assurances that only authorized individuals will have access to certain technology, removal of sensitive assets from the transaction, or the implementation of business procedures or oversight measures designed to minimize access to the sensitive aspects of the target business. To minimize CFIUS-related delays and complications, parties therefore must plan early to carefully assess the national security implications of their transaction, account for the potential delays from CFIUS regulatory approval in the deal timeline, and devote the necessary resources to mitigate any concerns identified by CFIUS.

## Conclusion

As the regulatory and enforcement arena is expected to remain active, parties contemplating a transaction that includes foreign investment will be well served by considering the potential regulatory requirements early in the process and engaging in careful planning to minimize risks and transaction delays.

If you have any questions about the article please contact **Brent Connor** at +1 (202) 312 3363, **Brian K. McCalmon** at +1 (202) 312 3334, **Elizabeth G. Silver** at +1 (202) 312 3012, **Catherine A. Johnson** at +1 (202) 312 3367 or any other Vedder Price attorney with whom you have worked.

[vedderprice.com](http://vedderprice.com)

---

<sup>i</sup> 15 U.S.C. § 18a.

<sup>ii</sup> 15 U.S.C. § 18. HSR filings are most often required for acquisitions of interests in United States entities (whether by domestic or foreign acquirers), as acquisitions of assets located outside the United States and of interests in foreign entities are often exempt. 16 C.F.R. §§ 802.50, 802.51.

- 
- iii See, e.g., Council Regulation 139/2004, art. 2(3), 2004 O.J. (L 024) (EC); Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), [http://english.www.gov.cn/archive/laws\\_regulations/2014/08/23/content\\_281474982987358.htm](http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987358.htm).
- iv 16 C.F.R. § 803.10(b). Cash tender offers and some acquisitions out of bankruptcy carry a 15-day waiting period instead of 30. *Id.*
- v 16 C.F.R. § 803.11.
- vi 15 U.S.C. § 25.
- vii 31 C.F.R. Part 800.
- viii 31 C.F.R. § 800.401(b).
- ix See 31 CFR §§ 800.401, 800.407.
- x See 31 CFR § 800.402 and 31 C.F.R. Part 800, Subpart E.
- xi 31 C.F.R. § 800.401(g). See also 31 C.F.R. § 800.405(b).
- xii 31 C.F.R. § 800.503(b). The 45-day period is triggered when CFIUS formally accepts the submission, which can occur up to 10 business days after the notice is filed. See, e.g., 50 U.S.C. § 4565(b)(1)(C)(i)(II)(aa); 31 C.F.R. § 800.503(a).
- xiii 31 C.F.R. § 800.508(a).
- xiv 31 C.F.R. § 800.508(e).
- xv FTC staff has reportedly begun asking parties to provide information on unionization, franchising, and environmental, social, and governance (“ESG”) issues. Brian Koenig, ‘Nontraditional Questions’ Appearing in FTC Merger Probes, Law360 (Sept. 24, 2021), <https://www.law360.com/articles/1425218/-nontraditional-questions-appearing-in-ftc-merger-probes> (paywall).
- xvi Holly Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave*, Fed. Trade Comm’n: Competition Matters Blog (Sept. 28, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined>.
- xvii *Statement of Chair L. Khan, Comm’r R. Chopra, and Comm’r K. Slaughter on the Withdrawal of the Vertical Merger Guidelines*, Fed. Trade Comm’n (Sept. 15, 2021), <https://www.ftc.gov/public-statements/2021/09/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca>.
- xviii Although the DOJ has not withdrawn support for the current VMGs, it committed to examining them in light of the FTC’s withdrawal, and specifically with respect to several of the factors cited by the FTC in the withdrawal. Press Release, U.S. Dep’t of Justice, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines>.
- xix FTC and DOJ, *Hart-Scott-Rodino Annual Report for FY2019* at Appx. A, Fed. Trade Comm’n (July 2020), <https://www.ftc.gov/reports/hart-scott-rodino-annual-report-fiscal-year-2019>.
- xx *Id.* at 2.
- xxi In addition to the federal agencies, states have standing to seek to enjoin unlawful acquisitions. 15 U.S.C. § 26. This adds additional actors to the process but does not add additional categories of risk, although the parties should keep in mind that the federal antitrust agencies and investigating states do not always agree on remedies or whether a transaction should be challenged.
- xxii See generally Foreign Investment Risk Review and Modernization Act of 2018 (FIRRMA), H. R. 5515-538; 50 U.S.C. § 4565.
- xxiii See 31 C.F.R. § 800.248.
- xxiv 50 U.S.C. § 4565(b)(1)(H).
- xxv See, e.g., 50 U.S.C. § 4565(b)(1)(D).
- xxvi Press Release, U.S. Dep’t of Treasury, Keynote Remarks by Assistant Secretary Feddo at the American Conference Institute’s Sixth National Conference on CFIUS (July 20, 2020), <https://home.treasury.gov/news/press-releases/sm1067>.
- xxvii Committee on Foreign Investment in the United States, *Annual Report to Congress, Report Period: CY 2020* at 48, U.S. Dep’t of Treasury (July 2021), <https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf>.
- xxviii 31 C.F.R. § 800.901.
- xxix See, e.g., Christina Farr & Ari Levy, *The Trump administration is forcing this health start-up that took Chinese money into a fire sale*, CNBC (Apr. 4, 2019), <https://www.cnbc.com/2019/04/04/cfius-forces-patientslike-me-into-fire-sale-booting-chinese-investor.html>.
- xxx See 31 C.F.R. § 800.701(a).

---

<sup>xxxii</sup> See 31 C.F.R. § 800.401(f) (allowing parties to submit a notice instead of a mandatory declaration).