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CFIUS expert: Cos. should consider FDI issues “very early” in process



Laura Fraedrich, senior counsel in the Global Trade & Policy group at Lowenstein Sandler.

As part of our ongoing coverage at the intersection of national security and foreign investment, we regularly speak to experts for their insights and perspective on a variety of topics. This week, we sit down (virtually, of course) with Laura Fraedrich, senior counsel in the Global Trade & Policy group at Lowenstein Sandler. Previously a

partner at Jones Day and Kirkland & Ellis, Laura has deep expertise in foreign direct investment requirements, and in assisting with CFIUS filings and mitigation negotiations.

Laura, before we start, we always like to ask interviewees how they and their families have been faring during the pandemic. Everyone okay?

Thanks for asking. Yes, everyone is well. As difficult as this year has been, there have been several silver linings, including the upcoming birth of a new grandson and the ability to spend lots of quality time with family.

Congratulations! That’s fantastic news. And what was it like to transition to Lowenstein during a pandemic? Is the firm largely remote still?

The transition has been easy. Lowenstein has been terrific. Our profession has adapted quite well. We’ve known from experience for a while that lawyers can work from anywhere.

We’re big fans of Doreen [Edelman] and she actually made our Top Advisors 2020 list. Will you be working with her in your new role?

I, too, am a big fan of Doreen. She is the main reason I decided to join Lowenstein and we will be working very closely together.

Okay, let’s jump in. Our perception is that it’s “All Quiet on the CFIUS Front” right now. We’ve have been tracking filings and actions, and activity seems to be very low. Is that an accurate perception?

Given the uncertain nature of the global economy during the pandemic, deal activity has been slower than usual this year. Thus, CFIUS filings have been lower than in recent years. As best I can tell, we are at about 180 notices and about 115 declarations so far this year. With the changes in the law these numbers would have been higher than normal in the absence of the pandemic. However, CFIUS practitioners are still busy on many fronts. First, we are working to understand and adapt to the new rules for critical technology mandatory filings, following the development of new export controls for emerging and foundational technologies, and responding to increased inquiries from CFIUS about non-notified transactions. With FIRRMA, Congress provided more resources to CFIUS to review non-notified transactions and we have seen CFIUS asking questions about transactions that occurred three and four years ago.

You've said that you "expect changes in the United States' approach to foreign trade." What are you anticipating?

I anticipate that the United States will return to a more multilateral approach, rather than the unilateral approach espoused by the Trump Administration. Specifically, I think we will see a return to a

cooperative effort to restoring the dispute settlement arrangement at the WTO and to the negotiation of multilateral trade agreements.

How else do you think CFIUS's approach might change under the Biden administration?

I don't anticipate that there will be significant changes in CFIUS's approach under the Biden Administration. The concerns that led to the passage of FIRRMA were bipartisan concerns and that will not change. However, on the margin, there might be a few changes in how certain of the CFIUS member agencies view certain transactions since personnel responsible for the review will change.

Let's talk about CFIUS mitigation agreements, as our readers have been asking about this topic. Are there certain mitigation instruments you've seen employed with more frequency recently?

In my experience during the past five years, the majority of mitigation agreements have related to preventing access to data or technology by the foreign investors. This may include limits on physical or electronic access and can vary

from an agreement without monitoring up to regular monitoring and reporting to CFIUS.

On a related note, DoJ Assistant Attorney General for National Security John Demers recently spoke about the importance of complying with mitigation agreements, noting that — when companies fall down — it's because of a failure to appropriately resource and support their compliance obligations. Have you found that to be the case also?

Luckily, I have not worked with any companies that have fallen down on compliance with mitigation agreements. But a lack of resources could certainly explain such events. The tension between regulatory compliance and available resources has been a constant for years in business and provision of the needed resources usually occurs only after significant enforcement actions, as we have seen in the areas of anti-corruption and economic sanctions compliance. I think we will see this history repeat itself when it comes to CFIUS mitigation compliance.

So, based on that, do you have any recommendations for companies as they look to ensure they have the

right resources, controls and procedures in place?

Companies should carefully consider where the national security concerns may lie and determine the cost potential mitigation arrangements when negotiating. This is because certain mitigation requirements might impact the benefit of the bargain and thus valuation. Finding this out after the deal has been struck can create a difficult situation.

Global regulatory regimes seem to be changing on a weekly basis, with the UK being the latest to update their foreign investment review process. Do you expect that trend to continue?

Yes, I expect more countries to establish foreign investment review processes and for those countries where they already exist to review and update the regimes. We are learning new things every day about how national security can be compromised and keeping up with the changes requires revisions to the laws. I think we saw this in the change to the mandatory critical technology filing requirements. CFIUS learned that using NAICS codes as a basis for the requirement did not work to capture the deals they were seeking to capture.

Got it. Any final thought or recommendations for our readers?

My best practical advice to businesses is to consider foreign direct investment issues very early in any transaction discussion. Mandatory filing requirements are complicated and no one wants to be penalized up to the value of the transaction for failing to make a required filing. Also, parties should consider that CFIUS might have jurisdiction even when it does not seem that there are foreign parties involved. A company organized in the United States might be a foreign entity if there is foreign ownership and control. A joint venture that is organized in a foreign country might be subject to CFIUS jurisdiction if a U.S. business has been contributed. The new rules for private equity funds are complicated and if fund managers are not careful a U.S.-organized fund can be a foreign person. Thus, parties should carefully consider these issues early in any transaction negotiations.

Perfect. Thanks Laura.

Laura Fraedrich is Senior Counsel in the Washington, D.C., office of Lowenstein Sander. She can be reached at 202-753-3659 or lfraedrich@lowenstein.com.