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## CFIUS: How U.S. National Security May Affect Transactions Between Non-U.S. Parties

Foreign investments in the United States may be subject to national security review by the Committee on Foreign Investment in the United States (“CFIUS”). CFIUS has broad powers and a mandate that extends across industry sectors. It even may apply to a transaction between two non-U.S. entities if the transaction involves the transfer of U.S. assets, irrespective of the size of the transaction, as is illustrated by the failed attempt of Royal Philips, a Dutch entity, to sell its lighting components business spread across 30 countries to a consortium led by GO Scale Capital, a Chinese entity. This transaction was ultimately abandoned earlier this year, as CFIUS declined to give clearance for the transfer of the U.S. assets included in the deal. In another recent development, on CFIUS’ recommendation the U.S. President prohibited the acquisition of U.S. assets of Aixtron SE, a German chip equipment manufacturer, by a Chinese owned entity. As a result, the transaction for the acquisition of the German parent company was unsuccessful.

### When is CFIUS Scrutiny Triggered?

CFIUS is an inter-agency U.S. government committee, chaired by the Treasury Department. Its members include, among others, representatives from the Defense Department, the Justice Department, the State Department and the Commerce Department. CFIUS has extensive authority to review, from a “national security” perspective, foreign investment which results in “control” of a business in the United States by a foreign investor. “National security” and “control” are both interpreted broadly, with the result that CFIUS review can be triggered in a wide variety of cross-border transactions.

Given this broad mandate, CFIUS has over the years reviewed foreign investments in a number of sectors, including manufacturing, finance, technology, information and services, mining, utilities and construction, wholesale, retail and transportation. CFIUS has not prescribed a bright line test for determining “control” and, generally, looks at all relevant facts to ascertain if the foreign investor has the power to decide matters affecting U.S. business. Nonetheless, an acquisition of ten percent or less of voting interests, solely as a passive investment, will not trigger CFIUS review.

### The CFIUS Scrutiny Process

The parties to a transaction may voluntarily elect to undergo CFIUS review. To do so, the parties must file a notice with CFIUS and provide certain information relating to the transaction, including the purpose and value of the transaction and the identity of the foreign parties and their ultimate owners. Nevertheless, regardless



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whether voluntary review is pursued, CFIUS may at any time undertake review of a transaction on its own initiative.

CFIUS generally concludes its review within a 30-day period; however, at the end of the 30-day period, CFIUS may initiate an additional 45-day investigation. Such an investigation is mandatory for transactions involving a state-owned foreign investor or the acquisition of “critical infrastructure” in the U.S. Following the applicable review period, a CFIUS clearance provides a safe harbor barring any subsequent review of the transaction, unless there are impugning circumstances, such as submission of false or misleading material information.

As a condition for clearance, CFIUS may impose certain restrictions, including reducing non-U.S. ownership or control or restricting access to critical technology. Nonetheless, if security concerns persist, CFIUS may recommend to the U.S. President that the acquisition be blocked or that a completed transaction be unwound. In the event CFIUS declines to give clearance, the ability to seek relief from U.S. courts is limited.

### **Conclusion**

Recently, certain members of Congress requested that the U.S. Government Accountability Office (“GAO”) review the powers of CFIUS to determine if they should be expanded, specifically in light of increased investment activity by state-owned Chinese and Russian entities. The GAO acceded to the review request and, accordingly, the broad powers of CFIUS may be further strengthened in the future.

Any sale of a U.S. business, even if entirely between non-U.S. parties or where the transaction may not have an apparent nexus to U.S. national security, may trigger CFIUS scrutiny. CFIUS may block a transaction, impose a wide range of conditions or may require that a closed transaction be unwound. Thus, it is critical that cross-border transactions involving U.S. assets be evaluated for potential CFIUS scrutiny and be structured accordingly.

