The coronavirus outbreak has hindered many operations of the federal government, including the US review of mergers and acquisitions for potential national security threats. Due to a work-at-home workforce and scarce resources, the government is struggling to keep pace with this review process and comply with statutorily mandated deadlines.

The Treasury Department chairs the Committee on Foreign Investment in the United States, or CFIUS, which is responsible for assessing the potential national security implications of certain foreign investments (both control and non-control) in certain US companies. Because the Treasury Department is also playing an instrumental role in the implementation of the CARES Act (particularly, the Paycheck Protection Program), it is simply unable to devote as much of its resources to CFIUS. Additionally, nearly all of the members of the CFIUS staff are working from home, where they cannot access classified files. This combination of limited resources and reduced access to classified files has impeded the national security review process, at least in those cases that present some facial security issues.

Statutory Deadlines

Although progress has slowed, it has not stopped. The reason is that the statutory timeline for CFIUS review of a transaction remains in place. Section 721 of the Defense Production Act (the "DPA") permits CFIUS to suspend its review when the government shuts down because Congress has failed to approve an appropriations bill. Relying on this authority, CFIUS halted its review of all pending transactions during the government shutdown last year. While Congress has amended the DPA numerous times, including most recently in August 2018, the statute still does not contemplate a situation in which the government is operating, but has sent its workers home for an extended period of time. Accordingly, CFIUS cannot toll the statutory review process during the COVID-19 pandemic.

Though CFIUS cannot pause the clock on its reviews of transactions, it can manage its caseload by slowing its own process. Following the 2018 amendments to the DPA, companies may choose to file a short, five-page "declaration" of a pending transaction in a case where the businesses believe they should obtain swift approval. The government has 30 calendar days from the date of filing to approve the transaction, request a full filing, or do nothing at all. CFIUS can "slow walk" this declaration process by providing no response at the end of the 30 days, leaving the parties to close the transaction without a clearance letter. Because the clearance letter serves as a safe harbor, companies usually find this legal uncertainty unpalatable. Consequently, they will often refile their paperwork, thereby restarting the review process.

Alternatively, companies can file a "notice," which is longer and more detailed than a declaration. Once CFIUS decides that the notice filing is complete, it accepts the notice and initiates the review process, which is statutorily mandated at 45 days. Notably, CFIUS can delay the beginning of the notice review process by spending more time confirming the completeness of the filing with rounds of questions to "fine tune" the notice. When the 45 days have expired, CFIUS can then transition into an investigatory phase, which spans an additional 45 days.

Balancing these considerations, if the transaction is simple and presents little to no national security risk, the parties may consider it prudent to proceed with a filing. As stated above, CFIUS is working with
lesser resources, but the same time constraints. In addition, CFIUS is well aware that some businesses are pursuing foreign investment as a means of staying solvent. The Treasury Department wants to aid this economic activity wherever possible.

**Corporate Regulatory Compliance Covenants**

Where the acquirer is foreign, the M&A Purchase Agreement often includes covenants requiring the parties to obtain CFIUS approval. The parties could agree to waive this clause and close without national security clearance, but this tactic can be fraught with risk. While the merging parties may wish to close quickly because of worries about access to credit or economic factors caused by COVID-19, a failure to obtain CFIUS approval (despite a waiver by the parties) could result in CFIUS exercising its statutory power to unwind the transaction, even well after the closing, if it subsequently finds sufficient national security concerns.

**Current Status**

Presently, it appears that CFIUS is processing filings that contain few, if any, national security concerns relatively quickly. At the same time, it is slipping into “slow rolling” for those filings that raise potential security risks. Companies that are currently in the process of a review that has revealed security concerns are in the most troubling position. In reviewing these transactions, CFIUS may require additional time and manpower to develop and implement a mitigation strategy, permit the deal to close, or block the deal altogether. In these cases, CFIUS is within its rights to request that the companies withdraw and then refile their notice. Of course, if the companies comply with this request, the review clock will restart. Accordingly, the companies may simply refuse the request. At that point, CFIUS would consider whether to approve the transaction notwithstanding its concerns or attempt to block the transaction. Another alternative, given the current state of the U.S. economy, is that CFIUS may refrain from interfering with a transaction that promises substantial economic benefits.

Your regular Locke Lord contact and the authors of this article are happy to help you navigate the CFIUS review process as it relates to your business.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

Stephen P. Murphy | 202-478-7376 | steve.murphy@lockelord.com
Brandon Curtin | 617-239-0335 | brandon.curtin@lockelord.com

Please visit our [COVID-19 Resource Center](#) often for up-to-date information to help stay informed of the legal issues related to COVID-19.