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Foreign Investment Laws Can Impact Deals

By Ilene Knable Gotts & Lori Sherman

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Cross-border transactions have become commonplace in today's global economy. More than 30% of global M&A in 2013 involved acquirors and targets in different countries, including $134.5 billion of acquisitions in the U.S by non-U.S. acquirors. In the first half of 2014 alone, $127 billion worth of acquisitions in the U.S. were made by non-U.S. acquirors.

Large transactions often require pre-consummation review and approval by competition agencies in multiple jurisdictions. Depending upon the nature of the business, other regulatory approvals may be necessary or advisable. Under current U.S. law, the Committee on Foreign Investment in the United States (CFIUS) has authority to review transactions in which non-U.S. acquirors could obtain "control" of a U.S. business that raises "national security concerns", a term that is broadly applied to include investments in U.S. infrastructure, technology or energy assets, or facilities that are in close proximity to U.S. military or critical infrastructure facilities. Although filings with CFIUS are voluntary, CFIUS also has the ability to investigate transactions at its discretion, including post-consummation. In addition, acquisitions of U.S. government contractors with classified information access/technology, are subject to mandatory pre-consummation approvals. Transactions in which a state-owned enterprise or sovereign wealth fund is, directly or indirectly, involved may be subject to heightened scrutiny. Moreover, cross-border transactions may face foreign investment reviews in multiple jurisdictions.

To date, relatively few transactions have actually been blocked (or subject to divestiture) in the United States; the practice has been, however, for transaction parties to enter into mitigation agreements to address any national security concerns. Non-U.S. acquirors should be willing to consider a variety of alternative transaction structures in strategically or politically sensitive transactions (including, use of no/low-governance/minority position sand involvement of a U.S. company or management with a U.S. source of financing) to alleviate these concerns.

It is important, therefore, that transaction parties undertake a comprehensive analysis of such foreign investment reviews *before* entering into the definitive agreements in order to (1) prepare for such reviews, (2) gauge the risks of non-consummation, timing, and potential conditions that could be imposed under foreign investment laws, and (3) negotiate and allocate the risks to the transactions and costs to the parties presented by those foreign investment laws in the agreements. Moreover, given these risks, transaction parties should consider engaging regulatory counsel (and, if the reviews are likely to be contentious, possibly public relations and lobbying firms) prior to announcement of the transaction to properly assess and manage the process.

Some practical suggestions for dealing with foreign investment reviews are as follows:

1. *Ignorance is not bliss; go into the deal discussions with your eyes open.*

Given the complexity and potential serious ramifications for a transaction posed by foreign investment reviews (and the impact that foreign ownership can have on business operations under many laws and regulations), it is important to, early in the process, identify where these issues might arise.

2. *Not all Deal Issues Carry the Same Importance*

In every transaction, there are typically some trading of issues and risks among the transaction parties. Assess whether the foreign investment reviews will be perfunctory or potentially deal outcome determinative and then act accordingly.

3. *Posture is important.*

Foreign investment reviews can complicate the position of the foreign

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acquiror in auction (including bankruptcy) settings, putting that bidder at a disadvantage vis-à-vis domestic bidders. In such situations, an acquiror may need to consider what steps it can take not to alleviate some of the additional issues it raises from a timing and risk standpoint. Also, in a hostile deal, foreign investment laws can potentially be used as a foil against the foreign bidder, again, depending on the nature of the target's business and the identity of the buyer.

4. *Provisions of the Agreement Can be Impacted*

It is important to think through the impact of foreign investment reviews on the transaction agreements, and how these provisions impact buyers and sellers differently. Representations and warranties typically include which regulatory approvals are required prior to closing. Consider in advance and then negotiate accordingly whether to include not only "required," but "appropriate" filings to cover foreign investment reviews which are "voluntary but desirable" to provide buyer comfort. Similarly, consider whether the "efforts" provision should include "voluntary" foreign investment reviews, and, if so, what level of commitment (if any) the buyer will be obligated to undertake to obtain those "approvals. At times, rather than upfront agreeing to undertake certain actions, the buyer will agree to pay the seller a "break fee" if the deal does not happen. At a bare minimum, consider including in the efforts clause an obligation to cooperate in any government investigation involving the transaction.

In the closing conditions, consider whether to make approval or clearance of various foreign investment reviews a closing condition, and if so, a mutual condition or a condition on buyer's obligations. Also consider whether the parties should be obligated to close if a foreign investment investigation remains pending.

Foreign investment reviews can be unpredictable as to timing and likelihood at the outset of a transaction. Specifying a shorter termination date but providing for additional time (e.g., three months) if one or both parties agree allows the parties to assess whether the approvals are likely to be obtained with additional time or a more fundamental problem exists such that additional time will not resolve.

5. *Make New Friends but Keep the Old*

Developing and implementing a communications plan is critical. Consider having the U.S. target and/or acquiror contact government customers to discuss why they should not be concerned with the transaction and/or what safeguards will be taken. Meet with reviewing CFIUS staff before filing. Build support with local officials, customers, unions, and employees by assuaging concerns about the deal. Public relations firms can help to ensure that communications are closely coordinated and consistent.

Conclusion

In cross-border transactions, parties must consider the applicability of foreign investment reviews and their impact. With careful advanced planning and implementation, the chances for success can be maximised and obvious pitfalls avoided.

Ilene Knable Gotts is a partner in the New York City law firm of Wachtell, Lipton, Rosen & Katz, where she focuses on antitrust matters, particularly relating to mergers and acquisitions. Recent transactions in which Mrs. Gotts advised include Level 3/tw telecom, Charter/Comcast, Essilor/PPG Industries, Deutsche Telekom/MetroPCS, ConAgra/Ralcorp, PPG Industries/Georgia Gulf, Aetna/Coventry, International Paper/Temple-Inland, CenturyLink/Savvis, Publicis/Rosetta, Google/Nortel, Simon Properties/Prime Outlets, Altegrity/Kroll, Publicis/Razorfish, and CenturyTel/Qwest. Mrs. Gotts is regularly recognized as one of the world's top antitrust lawyers, including being recognized in the 2006-2014 Editions of The International Who's Who of Business Lawyers, as one of the top 5 global competition lawyers, in the first tier ranking of Chambers USA Guide, and the "leading individuals" ranking of PLC Which Lawyer Yearbook.