CFIUS in the Face of a Prolonged Government Shutdown: What It Means for Deals

Skadden

01 / 15 / 19

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

Four Times Square
New York, NY 10036
212.735.3000

1440 New York Ave., N.W.
Washington, D.C. 20005
202.371.7000

As has been widely reported, the U.S. federal government partially shut down at midnight on December 22, 2018. While the shutdown continues to impact numerous government agencies and related constituencies, a key shutdown for dealmakers has been the offices within the Department of Treasury (Treasury) that chair the Committee on Foreign Investment in the United States (CFIUS). With no clear end in sight, global companies, strategic investors and their outside counsel must carefully consider the ongoing impact of the shutdown on deals at all stages, from initial consideration and negotiation through closing and performance.

Due to the shutdown, CFIUS is currently operating with limited staffing. Per furlough guidance published by Treasury, that staffing is limited to certain "caretaker functions" listed as those functions related to (i) cases for which the review or investigation stage was initiated prior to the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA)[1] and (ii) CFIUS-related "national security exigencies." Other CFIUS activities, including reviewing new filings, providing comments on drafts, accepting notices and negotiating mitigation, generally are suspended for Treasury employees.[2]

The following are a few considerations for dealmakers evaluating the impact of the shutdown and its potential impact on current, future and pending deals:

- **Review Your Transaction Documents.** Many transaction documents provide outside dates for deals that are calculated from a number of business or calendar days after a fixed event, such as signing an agreement, or making a filing. Because interim rulemaking that provided that any CFIUS-related deadlines or time limits (such as the timing of notices and declarations) are to be tolled during a lapse in appropriations became effective so recently — on November 11, 2018,[3] the vast majority of transaction documents in current deals do not contemplate the impact of a shutdown on the outside date. Accordingly, it may be unclear how the risk of an ongoing shutdown should be allocated.
  - For deals that already have been signed, evaluate whether extensions may be needed in light of the continuing shutdown and anticipated delays. Consider the range of reasonable approaches and whether it might be necessary to engage counterparties to implement a waiver or other modification. In certain cases, it will be advisable to consult outside counsel to better understand the deal sensitivity and the perspective CFIUS is likely to have of a chosen approach.
  - For deals under continuing negotiation, consider updating the agreement language to reflect guidance for CFIUS cooperation and approval in light of delays due to the lapse in appropriations. Also consider updating the agreement language to reflect potentially delayed filing times.
- **Mandatory Declarations During the Shutdown.** Under the pilot program published as part of the interim rules referenced above, certain investments now trigger the filing of a mandatory declaration with CFIUS. Parties contemplating or pursuing such a transaction must file a declaration at least 45 days prior to completing the transaction, or be liable for a civil penalty in an amount up to the transaction value. Importantly, parties may continue to file declarations (and notices) during the shutdown. However, the requirement for CFIUS to respond to new declarations in 30 days is tolled. Because

[1] FIRRMA was enacted on August 13, 2018. For more information about FIRRMA, please see our August 6, 2018, alert.

[2] A copy of the United States Department of the Treasury Departmental Offices Lapse of Appropriations Plan for December 2018 is available here.

[3] For a discussion of these interim rules, please see our October 10, 2018, alert.

the pilot program does not explicitly reconcile the requirement for advance notice from companies with delayed responses from CFIUS, it is not clear that parties should proceed with closing such transactions in light of the shutdown. This is one example of a gap in the terms of the pilot program, which should be addressed in final CFIUS rulemaking. In the meantime, outside counsel can contribute valuable insight to assessing the CFIUS risk on a case-by-case basis.

- **Continuation of Some CFIUS Activities.** Because the shutdown is not affecting the entire federal government, some CFIUS member agencies remain active during the shutdown.[4] These include the Department of Defense (DoD), which already has received its appropriation for the current fiscal year and remains open, and the National Security Division of the Department of Justice (DOJ), which has been deemed an essential function and continues to operate during the shutdown.[5] DoD and DOJ are parties to many CFIUS mitigation agreements, and both will continue responding to inquiries regarding compliance with such agreements. Therefore, companies operating under existing CFIUS mitigation plans should continue in full compliance and timely submit any required reports, even if replies from the U.S. government are delayed.
  - In the case of DoD, substantive reviews of pending CFIUS matters are continuing, and DoD personnel supporting CFIUS may be available to respond to queries regarding transactions that have not yet been filed.

[4] Although most of the Department of State is affected by the shutdown, the Directorate of Defense Trade Controls (DDTC), which handles matters relating to the International Traffic in Arms Regulations (ITAR), is funded by ITAR-related registration fees, and remains operational. As a result, pre-acquisition notices to DDTC required under ITAR continue to be processed normally.

[5] A copy of the United States Department of Justice's FY2019 Contingency Plan published on September 11, 2018, is available here.

- **Delayed Negotiation of New Mitigation Agreements.** As chair of CFIUS, Treasury leads the negotiation of mitigation agreements. Treasury staff are not expected to continue negotiating new mitigation measures during the lapse. This may affect parties' contractual requirements to enter into new mitigation agreements and, as discussed above, ultimately may cause conflicts with the deadlines for completing certain transactions. Companies should review all contractual obligations carefully before deciding how to act and consult outside counsel when there is uncertainty about mitigation-related obligations during the shutdown.
- **Expect Delays Beyond the Shutdown.** During a prolonged shutdown where dealmakers can continue submitting filings, CFIUS is expected to develop a backlog of notices and declarations. When the shutdown ends, staff can be expected to experience delays in responding to drafts and accepting formal filings. Furthermore, for pre-FIRRMA cases, CFIUS deadlines are not tolled. Despite the fact that the interim rules allowing for tolling were intended to alleviate some of the time pressures that resulted from earlier shutdowns, some cases that are already in the review or investigation phase (both pre- and post-FIRRMA) are less likely to clear within the time limits of their current stage because of the expected backlog — potentially causing cases under review to continue into an investigation stage, or cases in investigation needing to be withdrawn and refiled.

Companies considering entering into deals that will be subject to CFIUS review, as well as those currently navigating the CFIUS process, may benefit from consulting experienced CFIUS counsel to better understand the impact of the shutdown. Given the history of shutdowns both recently and in the longer term, it is quite possible that Congress may pass a continuing resolution to fund the government in the short term. However, future shutdowns may occur if the current disagreements are not resolved, and companies should consider the potential impact.

Contacts

Michael E. Leiter
Partner / Washington, D.C.
202.371.7540
michael.leiter@skadden.com

Donald L. Vieira
Partner / Washington, D.C.
202.371.7124
donald.vieira@skadden.com

Daniel J. Gerkin
Counsel / Washington, D.C.
202.371.7194
daniel.gerkin@skadden.com

Ivan A. Schlager
Partner / Washington, D.C.
202.371.7810
ivan.schlager@skadden.com

Jonathan M. Gafni
Counsel / Washington, D.C.
202.371.7273
jonathan.gafni@skadden.com

Michelle A. Weinbaum
Associate / Washington, D.C.
202.371.7113
michelle.weinbaum@skadden.com