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Chinese Investment in the United States Remains Subject to Scrutiny by CFIUS but Advance Planning Can Lead to a Successful Outcome

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Over the last few years, a security review committee for foreign investments into the United States has become almost a household name. Indeed, the Committee on Foreign Investment in the United States—or CFIUS—has even been referenced on popular TV shows such as Succession. Through previous alerts we have provided background on the CFIUS process and developments. Recent media coverage has focused on how CFIUS treats Chinese investments. The short version is that Chinese investment into the United States is still met with substantial scrutiny particular for advanced technology. This scrutiny is not expected to ease any time soon, so this alert provides practical guidance on steps to take during the deal process to improve the chances of a successful security review by CFIUS.

The first, and perhaps most important point, is that CFIUS considerations should be baked into deal planning as early as possible. A deal involves many moving parts and sometimes regulatory considerations take a back seat to business and operational considerations. If you are involved with a deal involving foreign investment, particularly from China, you need to involve your regulatory teams as soon as possible. This planning will allow the parties to manage their expectations and identify the challenges likely to surface during the CFIUS process.

Once your regulatory teams are involved, next you will need to work through the regulations to determine whether your deal requires a mandatory filing. As we have previously explained, CFIUS now requires mandatory filings for certain transactions. Determining whether your deal will be subject to mandatory filings requires looking at the technology of the U.S. target. For a greater discussion of when a filing is mandatory, look at previous alerts available here. If a mandatory filing is not required, examine carefully whether a voluntary one is still advisable given the current business environment. Making a voluntary filing and obtaining clearance allows the parties to have peace of mind that the deal will not be disturbed in the future.

Once you have decided that a filing is necessary or advisable, the deal team should work hand-in-hand with the regulatory team to identify the numerous pieces of information required for CFIUS filings. One common mistake that slows down the CFIUS process is failing to provide complete information, such as providing information on parents but not the ultimate parent of the U.S. target and/or the potential investor. Carefully considering and checking the information when preparing the notice will help drive the process.

Another consideration is engaging CFIUS early and often. Opening a dialogue that allows CFIUS to understand the parties and the deal involved will help CFIUS put any security risks in the proper contexts. Additionally, if

your own assessment is that the deal is likely to pose security risks, consider affirmatively proposing mitigation such as carving out certain divisions or technology. Other potential mitigation can include technology control plans, third-party monitors to demonstrate compliance with agreed-upon mitigation, and third-party audits. Tailor the potential mitigation to address the specific risks.

In sum, while the regulatory environment remains challenging with respect to Chinese investment in the United States, early planning and concrete steps during the review process can help shift the odds in favor of a CFIUS clearance.