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■ ROUNDTABLE REPRINT June 2023

FOREIGN INVESTMENT AND NATIONAL SECURITY

Foreign investment can be a complex endeavour. With an increasing number of countries expanding their review regimes or establishing new systems, the regulatory tapestry is infused with national security sensitivities that pose significant challenges for transactions. Nevertheless, despite the risks there are opportunities. The ability of overseas acquirers to develop and implement an effective foreign investment review strategy could be a key differentiator between successful and abandoned deals. ■



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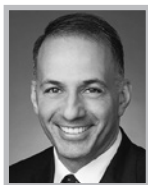
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FW: To what extent is the international foreign investment environment growing increasingly complex? What factors are creating risks and opportunities for businesses in the current market?

Baucum: The international foreign investment environment is growing increasingly complex in ways that make it difficult and awkward for global corporations to timely react and in ways that make corporate standard response difficult to articulate. Looking back, it was not long ago that the US viewed the concepts of national security mostly in the narrow channels of terrorism and military-centric silos. Most other countries were either similarly situated or far behind even this level of sophistication. As the global economy shifts to high-science and as artificial intelligence (AI) emerges, the potential for abuse of these new abilities and the power of controlling proprietary positions in these areas as first-movers are rapidly being recognised as the ‘battlefields of the future’. These facts are emerging at an increasing rate and governments rarely move fast. This leaves private initiative standing in the danger zone and on the front line. The danger is coming at those of us in the private sector from all directions and this is the essence of the ‘complexity’. The danger zone here is the fact that those who would abuse new advances in technology enjoy absolute freedom to operate, while those of us who sit in the seat of defence are burdened by government oversight and accountability, and the accountability that comes with owing duties to customers, third parties and shareholders. This very often places us in the squeeze-play where there are few clear answers and infinite threats.

Handler: The international foreign investment environment reflects broader geopolitical trendlines – with rising geopolitical tensions and complexity, we are seeing an increased number of foreign direct investment regimes, the strengthening of existing regimes and the emergence of new concepts such as outbound investment reviews. The sheer number of foreign investment regimes

and their different national security risk sensitivities make it increasingly difficult for cross-border transactions to successfully navigate multiple filings in jurisdictions. Despite the challenges and risks presented by this patchwork of global foreign investment requirements, there are opportunities for those who develop a global foreign investment review strategy that sets the strategic course while also responding to local nuances.

Kadel: Major economies around the world are looking to safeguard national security and maintain economic and technological capabilities. This has resulted in a proliferation of new national security review regimes, expansion of authorities and powers of existing national security review regimes, and an ever-expanding list of economic sectors and activities that are subject to real scrutiny. In a globalised world economy, foreign investment very often implicates a variety of jurisdictions, and the areas of national security focus will vary from jurisdiction to jurisdiction. Coupled with enhancements to competition reviews that also may differ across jurisdictions, regulatory complexity truly has escalated, and a growing list of deals need to navigate potential foreign direct investment (FDI) and national security concerns across a variety of jurisdictions.

McGaughey: The international foreign investment environment is growing substantially more complex – and quickly. More countries than ever now have FDI screening processes. If a target company has operations in more than one country – and most do – the transaction will likely fall under the jurisdiction of multiple FDI regimes. Not all FDI regimes are alike, so transaction parties must be familiar with the regulations in each country that could have jurisdiction. Asset managers and corporations that take the time to understand these FDI regimes will be better situated to evaluate and manage possible risks and potentially negotiate more advantageous terms for their deal. China is another significant factor in the current market. Buyers that have Chinese owners or investors, or substantial business ties to

China, will likely face significant challenges investing in companies operating in the US or allied countries. Buyers without those ties will likely have more opportunities.

Mancuso: In the first instance, the environment is growing more complex because of the geopolitical environment, which is more contested, and, in particular, the intensifying strategic competition between the US and China and their respective allies, partners and friends. Among other things, this intense competition is contributing to policy choices – ‘dual circulation’ in China – and regulatory responses – ‘outbound Committee on Foreign Investment in the United States (CFIUS)’ in the US – by each of the US, China and third countries that, in the aggregate, are materially reconfiguring the international investment landscape. But there are other factors too. For example, the experience of coronavirus (COVID-19) has independently made governments acutely aware of the fragility of global supply chains, a lesson which is separately prompting governments to elevate the importance of national industrial ‘resilience’.

Kaniecki: Over the last few years, countries around the world have expanded pre-existing FDI review regimes or established new FDI review regimes for the first time. This has created an increasingly complex environment for transactions involving companies with global subsidiaries and operations, particularly given the variation between FDI regimes. For example, although a local subsidiary is generally sufficient to trigger that jurisdiction’s FDI review regime, FDI review regimes take various approaches to whether local branch offices – without a local subsidiary – assets or operations, employees or sales are sufficient. Also, some FDI review regimes include valuation or ownership percentage thresholds or concepts of control or material influence, while others take into account the character, type and nationality of the foreign investor. In addition, there are not uniform definitions of national security or national interest and the definitions that

do exist populate a spectrum ranging from specific to opaque.

FW: How would you describe political and economic developments around national security issues? How are these shifts impacting foreign investment flows?

Handler: Political and economic developments have historically been closely integrated with national security issues. The relationship between these developments and national security has been strongly influenced by strategic technology competition. We are in a much more distributed environment today as it relates to how technology is developed and used to assert technological leadership – unlike during the Cold War, when the state and the defence industrial base had primacy. As a result, nation state strategic competition is playing out across a much broader landscape, much of that in the private sector, and that is creating broad flow-down effects. This is creating significant reverberations across industrial sectors, especially given the volume of geopolitical events occurring in recent years, from the pandemic to global supply chain challenges and cyber attacks.

Kadel: Foreign investment reviews for national security purposes are increasingly complex as screening regimes proliferate

and gain in authorities, powers and scope. These screening regimes often cast a wide net – with a broad jurisdictional nexus, which may capture even relatively small transactions and investments involving very limited governance and control rights. Increased complexity in screening regimes has the potential to impact foreign investment flows, but it is difficult to attribute shifts to any one factor. For example, although Chinese investment in the US in the 2020-22 period barely registered compared to the preceding years, US national security review of that investment is only a part of the story.

McGaughey: Countries are growing disillusioned with globalisation and focusing more on rising geopolitical tensions and supply chains. The US has responded to the economic threat posed by China by attempting to repatriate strategically important supply chains using subsidies and tax breaks and taking a more aggressive approach to Chinese investment. In the past, the goal was to maintain a technological advantage over China, which meant that Chinese investors could invest in US businesses, providing there was no reasonable risk that China would gain leading-edge capabilities. Now, the goal is to widen the gap, so Chinese investors cannot invest in any area regarded as strategically important, regardless of

whether the US business has leading-edge technology. Not only are foreign investments in areas like semiconductors, AI, quantum computing, biotechnology and aerospace essentially off-limits to Chinese investors, but they are also increasingly off-limits for any foreign investors with substantial business ties to China.

Mancuso: One of the particularly noteworthy aspects of the current environment is the extent to which national publics – globally, but especially in the US – have seized upon the issue of foreign investment. For example, in the US, the national security implications of inbound investment is no longer exclusively a federal or national issue. We have seen a number of US state and local governments become more active in independently evaluating foreign investment in their jurisdictions, usually through the impromptu exercise of general legal authorities, including the ability to issue development permits. We have also seen a number of US state legislatures introduce legislation that would prohibit or significantly condition the purchase of land by legal or natural persons from ‘adversary countries’. This shift is nascent but real, and it is starting to have follow-on effects, such as causing asset managers to evaluate their possible legal exposure to this legislation as well as think through non-market, strategic aspects of LP investor selection and profiles.

Kaniecki: Political, economic and geopolitical events often can impact areas of focus from an FDI perspective. For example, while many developments in the FDI space started before the pandemic, such developments were exacerbated by concerns identified during the pandemic, such as governments feeling the need to protect important biopharmaceutical and healthcare-related supply chains. Also, the list of more heavily scrutinised countries can change based on geopolitical events. For example, there has been and continues to be a focus on Chinese investments in the infrastructure and technology sectors. This is due, at least in part, to the ‘Belt and Road’ and ‘Made in China 2025’ initiatives previously announced by the

“COUNTRIES ARE GROWING DISILLUSIONED WITH GLOBALISATION AND FOCUSING MORE ON RISING GEOPOLITICAL TENSIONS AND SUPPLY CHAINS.”

J. TYLER MCGAUGHEY
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Chinese government. Also, transactions involving investors from Russia or Belarus, particularly investors tied to the Russian and Belarusian governments, are subject to higher levels of FDI scrutiny in the wake of Russia's invasion of Ukraine in 2022.

Baucum: The political and economic influence coming into the realms of national security often closely mirrors social waves across all of society. Today, even as we face largely unrelated threats, political response is often cast in terms of party politics or along lines of economic interests. For example, although US and European Union (EU) economic interests rely on the power of the West to invent and create new, proprietary opportunities that can sustain national economies into the near future, our increasingly polar political appetites seem to force public officials to position solutions in the context of serving a factious ideology. As an example, cyber attacks are often levied against corporate IT systems. An IT system is built and funded to serve a customer base and as a result of that service, to profit the corporation. However, a cyber criminal can breach a corporate system and the corporation can, as a result of being successfully attacked, be prosecuted based on a politically popular view that the corporation has the money. What kind of logic says to prosecute the victim of the crime? While this may make perfect, logical sense if there is a commercial standard against which a company should be held responsible, in the cyber breach world, the digital advances are so rapid that to come up with a standard for corporate cyber defence today would be ineffective because tomorrow the bad guys will just come up with a rather easy way around that standard.

FW: Could you highlight any recent or forthcoming regulatory changes which are likely to affect foreign investments? To what extent have you observed heightened scrutiny of cross-border transactions in general?

Kadel: What is on everyone's radar is the potential for a new outbound investment review regime in the US. Janet Yellen,

FOREIGN INVESTMENT REVIEWS FOR NATIONAL SECURITY PURPOSES ARE INCREASINGLY COMPLEX AS SCREENING REGIMES PROLIFERATE AND GAIN IN AUTHORITIES, POWERS AND SCOPE.

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secretary of the treasury, confirmed in a speech given on 20 April 2023 that the US is considering a programme to restrict certain US outbound investments in specific sensitive technologies with significant national security implications. All are watching to see the terms and approach of any such regime. But I would expect that it will have at least some impact on US outbound investment. And there is a real possibility that the European Commission (EC) could follow. Ursula von der Leyen, president of the EC, has noted that the EC is considering "a targeted instrument on outbound investment".

McGaughey: President Biden is expected to issue a new Executive Order (EO) that restricts outbound investments in Chinese companies. Moreover, US legislators recently introduced a bill that would give the Department of Commerce new authority to prohibit US businesses from acquiring information technology products from foreign adversaries. But perhaps the best indicator that cross-border transactions are receiving heightened scrutiny – at least in the US – is the number of withdrawals and refiles. The CFIUS review process takes up to 90 days, but CFIUS can ask the parties to withdraw and refile their application, giving CFIUS an additional 90 days to review the matter. A high number of withdrawals and refiles indicates that CFIUS is spending

more time on its reviews. In 2021 – the most recent year for which statistics are available – the number of withdrawals and refiles spiked to the highest number in CFIUS history.

Mancuso: The so-called 'Outbound CFIUS' EO, which at this point is yet to be issued, is expected to be released soon by President Biden, possibly concurrently with the next meeting of the G7 leaders in Japan. Whenever it is issued, the EO is expected to prohibit US investment in a relatively narrow set of "capabilities" with a clear nexus to national security, such as semiconductors, AI and quantum computing in adversary countries, and to establish a disclosure obligation for other investments. Notably, the EO would focus its attention on "capabilities", which would conceivably encompass a broad variety of commercial activities and not just "investments". Moreover, the EO is not only concerned about the contribution of capital to these identified capabilities, but also the contribution of "expertise" and "know how".

Baucum: The wisest advice in worrying about forthcoming regulatory changes or recent changes with little to no detail is to wait and watch the discussion but not panic until we see what becomes final. It is ideal if a company is in a position to influence

such regulation to align with common sense, but not everyone is in a position to bring influence or control to pending legislation or regulation. Take the position that proactive communication is preferable to a reactive response in these matters.

Kaniecki: FDI controls historically have been applied to inbound FDI, meaning investment inflow into a country. The tide is potentially turning, however, as the US seems ready to introduce an outbound FDI control mechanism within the next couple of months, whereby capital outflow toward certain countries and in certain sensitive sectors likely will be subjected to a screening and approval process. Similarly, the ‘European Commission 2023 Work Program’ indicates that the EC will “examine whether additional tools are necessary in respect of outbound strategic investment controls”. Similar to the impact that the proliferation of inbound FDI developments has had, the introduction of outbound investment regimes likely will have a significant impact on cross-border transactions and companies operating in certain countries of concern.

Handler: There have been several changes in regulatory FDI regimes, and more are expected to be coming soon, such as in The Netherlands. These regimes are increasingly scrutinising cross-border transactions,

especially transactions involving countries of concern. But I think the most anticipated change is this idea of reviewing outbound investments. FDI reviews like the CFIUS and the German FDI regime have been in place for upwards of five decades, recognising, of course, that they have evolved considerably. This concept of outbound investment review is a relatively recent development, and it is a reflection of the broader geopolitical tensions and move toward increasing protectionism. The quickening pace that we have seen over the last year is a real indicator of the perceived national security risk presented by outbound investment, not just in the US but also in Europe.

FW: In your experience, how important is deep local knowledge when evaluating foreign investment opportunities? What kinds of considerations need to be made with regard to investment screening, including national security concerns?

McGaughey: You can read CFIUS’s governing statute and regulations and still not really understand how CFIUS thinks or operates. How does CFIUS analyse an investment? What does it consider a threat? Which industries are strategically important? The answers are not obvious from publicly available materials – on CFIUS or other international FDI regimes.

Corporations and asset managers need people with real-world experience to help understand how these regulatory processes actually work in practice. One of the most important factors to consider when evaluating a cross-border investment is whether an FDI filing will be mandatory in any country that could have jurisdiction. For some transactions, an FDI filing is merely voluntary, but if the parties do not file, the regulator can call in the transaction after it closes. Deep local knowledge is helpful for understanding which transactions will trigger a mandatory FDI filing, and if not mandatory, whether a voluntary filing is prudent.

Kaniecki: Given the importance of FDI review regimes in the current environment, local knowledge and experience are critical to evaluating FDI-related issues, navigating the review processes and maintaining relationships with the authorities. In particular, given how broad in scope the various global FDI review regimes often are, having a local understanding of the types of transactions in which a particular FDI authority previously has expressed interest is crucial when determining whether to make a filing, projecting deal timelines and forecasting potential review outcomes, including the types and scope of mitigation measure that an FDI authority may impose as a condition to approving the transaction.

Baucum: Investment screening of target assets and entities is more important now than ever, given the recent publication of enforcement intentions. While the traditional reasons that justify the time and expense of third party due diligence still exist as they always have, we now have the added element of needing such proof of responsible management in defence of allegations of wrongdoing, should the government come calling. Do not underestimate the power of shareholder suits against public companies that fail to adequately address proprietary asset preservation. One challenge that continues to occupy my mind amid this shift is the lack of a published or fixed standard for exactly what constitutes ‘enough’ due

“FORTUNATELY, AN EXPERIENCED FDI ADVISER CAN QUICKLY DISCERN WHETHER A DEAL IS ‘DEAD ON ARRIVAL’ OR WHETHER IT IS FEASIBLE, INCLUDING WITH SOME PLANNING AND ADVOCACY.”

MARIO MANCUSO
Kirkland & Ellis

diligence. A vernacular has emerged in terms such as ‘desk-top’ due diligence, ‘aggregated list check’ due diligence, and ‘boots-on-the-ground’ due diligence, but there appears to be no formal minimum standard to this task.

Mancuso: Local knowledge is essential, and this goes well beyond understanding the technical legal rules of a given jurisdiction. Particularly with respect to national security screening of FDI, it is important to understand a given jurisdiction’s own sense of its national security risks, the institutional dynamics of how it assesses foreign investment, the particular agency practices related to administering the local legal regime, as well as the numerous other practical factors that may impact a regulatory review, such as agency staffing constraints. In the advanced industrial economies of the West, there is a high degree of convergence – not unanimity, however – with respect to the main security risks. However, there can be substantial variation in what national regulators feel is warranted to address identified risks.

FW: What challenges might foreign investors expect to face during a formal review of a proposed investment or transaction? What practical and procedural hurdles might they encounter?

Baucum: Any transaction, whether equity investment or control transaction, should include an assumption that challenges will arise. Time is always a concern to a deal team as they always want to close as soon as possible. Good due diligence takes a little bit of time, and if a declaration or notification to CFIUS or Hart-Scott-Rodino (HSR) Act becomes necessary or advisable, well, let us just say those actions are not built for speed. However, there are some things you can do to minimise the risks or impact from potential hurdles, starting with a commitment to thorough and complete work product on the front end. Have a way to preserve information that is hard to get but generally consistent from deal to deal, like the personally identifiable information on all officers, directors and managing directors for the business entities

“UNDERSTANDING THE KEY FOCUS AREAS AND HOW POLICY TRENDLINES ARE INFLUENCING REVIEWS IS CRITICALLY IMPORTANT IN DEVELOPING A SUCCESSFUL STRATEGY FOR THE TRANSACTION.”

STEPHENIE GOSNELL HANDLER

Gibson Dunn

in the upline control of the proposed transaction. Foreign investors have what can be oppressive barriers to obtaining this information in the first place – it can take weeks just to get workers council permission to ask for the information. In summary, communicate intentions early, often and with clear direction regarding the intended close date so that there is a universal understanding of the reality of that expectation.

Handler: There are a range of issues that foreign investment regimes look at, and understanding the key focus areas and how policy trendlines are influencing reviews is critically important in developing a successful strategy for the transaction. The framework for these reviews often follows a prescriptive process, but effective navigation of reviews depends much more on the ability to anticipate and respond to key concerns from the perspective of the government reviewers. For instance, CFIUS reviews transactions through the prism of three key risk areas: the perceived threat of the foreign person, the perceived vulnerabilities of the US business involved in the transaction and the potential national security consequences. Understanding this prism, that is shaped by underlying policy currents, enables anticipation and effective response to many practical and procedural hurdles.

Mancuso: The challenges foreign investors may face are varied. Some of the challenges are procedural: FDI rules which are not entirely prescriptive and, therefore, subject to agency discretion, voluminous disclosure requirements that may extend to sensitive company and personnel information, opportunities for third party, including local competitor, interference, or agency practices which are written nowhere but are part and parcel of how the FDI regulator reviews a transaction, to name just a few. Other challenges can have a more lasting impact. For example, national regulators may evaluate a given transaction in light of unrelated transactions in a given sector. Or a national regulator may seek to impose onerous conditions as a condition to regulatory clearance.

Kaniecki: Filing processes and review timelines vary dramatically across FDI review regimes. For example, some filings must be made pre-closing, while other filings can be made post-closing. Also, under some FDI review regimes, parties are not permitted to close a transaction until the relevant government approval is obtained. While some FDI review regimes, similar to CFIUS, have clearly established and predictable timelines, review timelines in certain jurisdictions can be long, are often extended and, in some cases, are uncertain. Also, parties going through

an FDI review process should expect very thorough diligence and questioning from FDI authorities, often with very short deadlines to respond or provide requested information. Further, the types of mitigation measures that can be imposed and the punitive actions that can be taken by FDI authorities vary substantially from jurisdiction to jurisdiction.

Kadel: In general, foreign investors need to be prepared to provide information to the reviewing body, and to respond quickly and accurately to any questions raised during the review process. Challenges that may be faced at the end of the process will depend on the powers afforded to the reviewing authority. In the US, CFIUS has broad authority to seek mitigation of any national security risks, and may even recommend that the investment be blocked or divested, if it was already completed. Concessions may be necessary in order to complete any transaction.

McGaughey: In the US, there are several challenges and hurdles. First, the CFIUS process can take months. Second, CFIUS's information requests can be incredibly broad and voluminous. Third, if CFIUS has identified a national security risk and wants to impose mitigation, it will often wait until the end of the investigation

period before informing the parties. If time is of the essence, the parties will have to weigh whether it is worth pushing back, or whether it is better to accept the decision and try to negotiate a mitigation agreement before the statutory deadline. Fourth, CFIUS's decisions, including decisions about jurisdiction, national security risk and mitigation measures, can push the limits of its legal authority, and there is virtually no opportunity for judicial review. Finally, CFIUS has begun to take more aggressive action toward investors that do not have Chinese ownership but who are located close to China or do business in China.

FW: What essential advice would you offer to foreign investors on navigating a transaction screening process? What steps they can take to prepare for and assist the process?

Handler: It is important to think strategically and engage early. Just as we are realising the importance of applying 'shift left' principles in the technology space to achieve better operational, security and regulatory outcomes, navigation of multiple FDI reviews for cross-border transactions requires a similar 'shift left' approach. Develop a cohesive and intentional strategy for FDI reviews early – early enough to adapt the transaction structure as needed to

ensure success or enable the development of mechanisms to overcome any likely hurdles. As with design principles, shift left does not mean the work is done once the strategy is developed, it just means we start engagement earlier and consistently maintain it throughout the transaction process. This intentionality will enable a more intentional, and ultimately more successful, navigation.

Mancuso: An asset manager should be thinking about FDI at fundraising and working with an experienced adviser to build a fund in a way that excludes, or at least minimises, FDI risk in light of their identified investment strategy. An assessment of strategic FDI risk should be high on the list of initial tasks because FDI risk can be a threshold, deal feasibility issue. Fortunately, an experienced FDI adviser can quickly discern whether a deal is 'dead on arrival' or whether it is feasible, including with some planning and advocacy. Beyond that, having an experienced team that can conduct a thorough national security assessment of the transaction, build-in appropriate provisions and risk allocation in the M&A documents, and can bring to bear deep, current experience in navigating these reviews in jurisdictions that are relevant is essential.

Kaniecki: It is important for parties to consider FDI-related issues as early as possible in the deal timeline and factor any filing requirements into the commercial analysis of a deal. The first step in a typical FDI analysis is to gather information regarding the countries in which a target company has subsidiaries, assets and operations, and the nature and extent of the target's activities undertaken in those countries, such as activities involving government contracts, dual-use or export-controlled items, or critical infrastructure. From there, parties typically can eliminate countries that either do not have an FDI review regime or have a more limited regime that would not capture the target's business and then focus on countries with broader, more active FDI review regimes to analyse whether the transaction either triggers a mandatory FDI filing or

“THERE ARE NOT UNIFORM DEFINITIONS OF NATIONAL SECURITY OR NATIONAL INTEREST AND THE DEFINITIONS THAT DO EXIST POPULATE A SPECTRUM RANGING FROM SPECIFIC TO OPAQUE.”

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otherwise potentially could be of interest to FDI authorities in those countries.

Kadel: Both investors and investees should undertake due diligence to evaluate potential national security regimes that are implicated by proposed transactions and investments. As part of that process, they should consider in what areas the authorities may identify national security risks and take steps to mitigate potential risks voluntarily before presenting transactions to regulators, or at least begin to think about the types of mitigation that may be acceptable to the parties commercially in case the regulatory authorities decide that mitigation may be needed. Contractual protections in the investment agreement also are important – think about which party will bear the risk of national security disruption of the investment transaction and how far the investor needs to go to obtain regulatory approval.

McGaughey: Foreign investors should carefully evaluate whether an FDI filing is mandatory. If not, they should consider whether it is better to finalise the transaction and take the risk that government regulators will subsequently request a filing, or to voluntarily disclose the transaction before closing and risk that regulators will delay the transaction or demand mitigation measures that appear unreasonable to the parties. This is particularly true for transactions where the foreign investor is not buying 100 percent of the target company. In the US, when a foreign investor makes a minority controlling investment and submits a filing, the foreign investor forces CFIUS to speculate about whether the investor could pose a national security threat in the future if that investor were to acquire a larger stake in the target business. Thus, by submitting a filing, the foreign investor invites CFIUS to draft mitigation agreements based upon speculative risks.

Baucum: The first advice I would give any first-time foreign investor on preparing to navigate a CFIUS and other foreign investment regime-relevant transaction

“ONLY TIME WILL TELL WHERE FUTURE REGULATION WILL TAKE US IN THE EXPANDING CONCEPT OF SECURING NATIONAL SECURITY, BUT I SERIOUSLY DOUBT IT THROTTLES BACK ANYTIME SOON.”

SCOTT BAUCUM
Bayer US LLC

screening initiative is to hire a qualified consultant with a subject matter expert attorney to guide the process while someone in the company takes notes and observes the process. Those entering the practice area are going to need some seasoned guidance and a budget to learn from the best. Doing a good job in this area requires a legal consideration and an operational consideration and, frankly, I do not know too many lawyers or firms that are efficiently effective at operationalising a process within corporate cultures – that takes project management and process standardisation.

FW: Looking ahead, what are your predictions for cross-border investments and screening processes? What trends do you expect to see when it comes to blocking or permitting inbound foreign investment?

Mancuso: The longer term trend is for more regulation of inbound and, in due course, outbound investment, at least in the US and the advanced industrial democracies. Over the last decade, many nations have implemented or upgraded their FDI screening mechanisms. I expect those legal regimes and institutional practices to grow incrementally more restrictive and mature over time. There may, of course, be exceptions to this, but

that is the general trend I foresee. I also foresee outbound investment restrictions in the US. These will be modest to begin with, but will become incrementally more restrictive over time. With respect to outbound screening, the debate in Europe has yet to really begin in earnest, though what happens in the US will have a powerful impact on developments in Europe in this regard.

Baucum: Only time will tell where future regulation will take us in the expanding concept of securing national security, but I seriously doubt it throttles back anytime soon. I anticipate there will emerge a governmental realisation that protection can only be a matter of degree and not something to actually be achieved. Those who threaten others will grow in their prowess to effectively pull off their craft and those who protect against such threats will have to lift their game. It has been this way since Cain killed Abel and there will always be wolves and lambs, it is the nature of things. Those of us who are sheepdogs must remain vigilant and ‘on-the-wall’ and learn to view foreign investment oversight and structure in partnership with national governments rather than as an adversarial competition.

Kadel: Foreign investment offers significant benefits, and US policy has

welcomed and continues to welcome foreign investment. Although national security concerns have led to greater review and mitigation – and in some cases blocking – of foreign investment, there is a risk that imposing burdensome restrictions on FDI inflows could inspire retaliatory policies by other nations and hamper outbound investment, which also has numerous benefits. So, there is a balance that must be struck. I expect that the balance is still being recalibrated toward a greater weight on national security concerns in 2023, as the enhancements that have come over the past few years are not finished yet. But a balance will remain, and foreign investment will continue to be approved in many cases.

McGaughey: We do not see the US changing its aggressive posture anytime soon. In the near term, it will likely remain difficult for foreign investors – and not just Chinese investors – to negotiate the CFIUS process in a timely and predictable manner for all but the most benign, straightforward transactions. Following the US's lead, other countries will likely wield their own investment-security regimes in a more aggressive fashion. US investors who want to invest in foreign countries should expect increased difficulty in getting their transactions approved, and their deals may

be subject to mitigation measures similar to the mitigation measures used by the US – such as equity standstills, supply assurance agreements, data security agreements, technology transfer firewalls, and security directors and officers. It appears that certain types of US businesses are becoming off-limits to foreign investors. Pretty soon, those same types of foreign businesses may become off-limits to US investors.

Kaniecki: FDI review regimes have become a significant regulatory issue for most cross-border transactions. There is every indication that the global FDI review landscape will continue to be active and evolve going forward, with key jurisdictions continuing to reform and expand their FDI review regimes and actively using their authorities to scrutinise, and in some cases ultimately prevent, transactions they deem objectionable. This, coupled with potential outbound investment regimes on the horizon in the near future, means that cross-border investments will continue to face more and different types of screening processes in the future. The focus of those screening processes likely will change with economic, political and geopolitical developments.

Handler: We can expect increased complexity and more potential for outcomes that impact the viability of a transaction. The rapidly evolving geopolitical landscape and derisking trendlines are having significant impacts, particularly as states increasingly see critical technology as a key national security issue and lean toward modern industrial policy. The result of this increased geopolitical complexity is that we expect foreign investment reviews to become thornier, particularly for certain countries of concern. The patchwork of review regimes that may impact a cross-border transaction raises the stakes as well, given the need to ensure appropriate focus is given to the various reviews to achieve optimal outcomes in each of them. We expect this complexity to grow in the near future, and the ability of companies to successfully develop and implement a global foreign investment review strategy has real potential to become a strategic business differentiator. ■

*This article first appeared in the June 2023 issue of
Financier Worldwide magazine. Permission to use this reprint has
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