

Firms Vie For CFIUS Attys As 'Black Box' Panel Extends Reach

By Justin Wise

Law360 (July 23, 2021, 4:09 PM EDT) -- An interagency government committee that conducts national security reviews of foreign investments has played an increasingly active role in recent years, fueling a battle among top Washington, D.C., practices for attorneys versed in working with the panel, which has a reputation for operating in a "black box."

The efforts are largely tied to a surge in demand from businesses that could face scrutiny under the greatly expanded authorities the Committee on Foreign Investment in the U.S. gained following passage in 2018 of the Foreign Investment Risk Review Modernization Act, a group of attorneys and legal recruiters told Law360 Pulse.

The legislation, which took full effect last year, expanded the scope of transactions under CFIUS' purview, including areas like foreign real estate transactions near government facilities, emerging technologies and minority investments. It also provided for more resources to be directed at the committee, which it's using to hire more staffers as it maintains a sharp focus on investment from countries like China.

The committee's involvement in transactions associated with social media app TikTok and Magnachip Semiconductor LLC shows it's taking a more active role than it did five years ago, said Richard Sofield, a Wiley Rein LLP partner who formerly oversaw the U.S. Department of Justice's participation in CFIUS reviews.

CFIUS in June ordered the hold of a Chinese investment firm's acquisition of Magnachip, a South Korean firm that trades on the New York Stock Exchange, to review it.

Yet unlike with other practices, the stock of top-level experts who know the panel's inner workings hasn't caught up to the demand, leading to a messy recruiting arena.

"We tend to see a food fight over this type of candidate," said Lauren Drake, a Washington partner at legal recruiting firm Macrae.

Those "food fights," Drake noted, began after the passage of FIRRMA, and the high demand for a limited supply of attorneys has remained steady ever since.

Among the winners in this recruiting hunt are Winston & Strawn LLP, which in March hired Tyler McGaughey, a former deputy assistant secretary for investment security at the U.S. Department of the

Treasury who managed CFIUS matters. McGaughey is developing a specialty CFIUS practice within its litigation department, the firm said.

Freshfields Bruckhaus Deringer LLP, Weil Gotshal & Manges LLP, Davis Polk & Wardwell LLP, Latham & Watkins LLP and Wiley are also among the major firms to make additions in the area just in the past year. Some of the hires include former top government officials with CFIUS experience, which attorneys said can be invaluable given the panel's complex nature and generally opaque operations.

While some can develop expertise on the private side, former CFIUS officials said nothing stands in for experience working with the panel.

Companies "really want to know that the firms have people on their bench who have been at these government agencies and deeply enmeshed in these issues and understand them," said Jeffrey Lowe, the managing partner of legal recruiting firm Major Lindsey & Africa's Washington office.

Beyond the notable firm hires, other industry activity shows it's a growing practice area within broader national security and corporate confines. Washington-based Crowell & Moring LLP has doubled its bench of CFIUS experts over the past five years, said Deborah A. Feinberg, a senior director of practice group business development and management. Overall, Lowe said, the number of CFIUS experts in private practice has probably doubled over the last decade.

Jump In CFIUS Risk Analysis

CFIUS, which is chaired by the U.S. Treasury secretary, has a mandate to scrutinize foreign investment in the U.S. for potential national security risks. The committee can require mitigation measures or recommend that a deal be blocked or unwound. And the risk of facing its scrutiny has never been higher, according to experts.

In addition to broadening the panel's purview, FIRRMA now requires businesses to notify CFIUS of transactions involving foreign investment in certain critical technologies and infrastructure. With an increased budget and staff, the panel is also now scrutinizing more non-notified transactions, where businesses did not voluntarily notify CFIUS of a pending deal. The process for notifying CFIUS of transactions remains largely voluntary.

These factors are contributing to an environment where "nearly all corporate transactions that have foreign acquirers or investors now merit some CFIUS risk analysis," said Caroline Brown, a Crowell & Moring partner and former DOJ official who sat on CFIUS. That risk analysis is geared around whether a filing is mandatory "or whether CFIUS might pay attention to the deal," she said.

Deals involving China remain a key focus, but it's clear that businesses from other countries will face scrutiny when investing in areas identified as critical infrastructure, said Freshfields Bruckhaus Deringer LLP partner Aimen Mir, who joined the firm in 2019 after serving as the Treasury's deputy assistant secretary for investment security, where he helped run CFIUS investigations for a decade.

"There's increased focus on shoring up vulnerabilities, whether it's weaknesses in U.S. infrastructure, exposure of sensitive personal data or protection of industries that are viewed as critical to the future of U.S. national security," Mir said. "All of those are considerations that have to be factored into the analysis of CFIUS risk."

So far, the aggressive posture from CFIUS has not made a dent in foreign investment in the U.S., Sofield said. He noted that foreign investment ramped back up in the fourth quarter of 2020 following a lull during the pandemic.

The United Nations has projected that foreign investment in the U.S. will grow by 10-15% in 2021, and President Joe Biden in June announced a "commitment to open investment."

"There were questions regarding whether CFIUS' more aggressive approach would negatively impact foreign investment," Sofield said. "It has not."

Winston & Strawn responded to an "explosion" of work when it hired McGaughey, said Carie Stinebower, a partner in its international trade practice.

"A lot of it is driven by what clients are asking for; [CFIUS analysis] became a component of any inbound investment," Stinebower said. She added that McGaughey's hire followed an extended search and that his practice is expected to grow once he gets established in the role.

CFIUS Expertise Part of Package

CFIUS continues to clear most transactions it reviews, though it's also giving more scrutiny to a certain segment of deals. Recent trends show the committee is placing a sharper focus on economic security, said Colin Costello, a former top foreign investment official in the Office of the Director of National Intelligence who joined Freshfields as a CFIUS client adviser last fall.

"One of the trends you saw in the Trump administration was this conflation of the concept of national security and economic security. You have some general continuity there with the Biden administration, particularly with the supply chain executive order," Costello said, referring to the order for a sweeping review of critical supply chains in areas like tech and medical supplies.

Notable cases from the Trump administration include when CFIUS in 2018 recommended blocking Singapore-based Broadcom's attempted takeover of U.S. semiconductor company Qualcomm, which raised national security concerns over it possibly hurting U.S. leadership in a sensitive area of technology.

Law firms are pursuing experts with insights like Costello's, though some are coming up empty. Drake, the Macrae recruiter, said her firm has only placed a handful of CFIUS experts in recent years, even as a number of shops actively look for them.

Mir said the supply-demand problem in part stems from the history of CFIUS.

"There just isn't enough history of having lawyers leave the committee to meet that demand [in private practice]," Mir said. "And to the extent that there are some people leaving, the scope and depth of their experience varies considerably."

Freshfields now has a CFIUS team including a core partner, counsel and group of associates, Mir said. But he stressed that the push to build that group is just one layer of the firm's work around global transactions.

"It is no longer enough just to have a strong CFIUS practice," he said, pointing to other countries that are

strengthening their foreign investment review. He also invoked practices like exports, controls and sanctions and data privacy that can be critical to this area of work.

Attorneys with CFIUS expertise from a member agency can stand out, Feinberg said. However, she noted that it's important for that expertise to be part of a broader skill set.

"When we look for people with CFIUS experience, CFIUS should be one component," Feinberg said. "You want to have people who have a well-rounded view of" key regulatory areas, such as exports, controls and sanctions, which can go hand-in-hand with CFIUS.

And as the committee becomes a crucial consideration for certain cross-border deals and foreign businesses show an appetite for big investments, it's clear that CFIUS expertise is now in higher demand.

--Additional reporting by Benjamin Honey, Chelsea Naso. Editing by Marygrace Murphy.