

U.S. National Security Issues in Cross-Border Food, Beverage & Agribusiness Deals

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On October 28, 2021, a bipartisan group of U.S. Senators introduced the *Food Security is National Security Act of 2021* (the “Act”). Among other things, the Act would require the Committee on Foreign Investment in the United States (“CFIUS”) to consider the “potential effects of [certain foreign investment transactions] on the security of the food and agriculture systems of the United States, including any effects on the availability of, access to, or safety and quality of food.” In other words, certain foreign investment in the U.S. agricultural industry would be treated similarly to foreign investment in U.S. companies that hold critical technology or that collect and maintain sensitive personal data. Additionally, the Act would expand CFIUS from its current nine members to 11 members by adding the Secretaries from the U.S. Department of Agriculture (“USDA”) and the U.S. Department of Health and Human Services (“HHS”).

Despite the apparent bipartisan support for the Act, it is far too early to know if Congress will enact this new legislation into law. Moreover, CFIUS regularly reviews foreign investments and acquisitions in the food, beverage, and agribusiness sector (“FB&A sector”) even without such legislation. As detailed below, CFIUS already has the legal authority and established procedures for any concerned federal agencies to weigh-in on proposed foreign investments or acquisitions in the FB&A sector. In short, U.S. companies operating in the FB&A sector will likely not face a sea-change in CFIUS jurisdiction or practice even if Congress passes the Act or a similar proposal to ramp up CFIUS reviews on the basis of food safety or food security concerns.

Background.

Generally speaking, the term “food safety” refers to the principles to establish production, processing, and distribution environments that prevent contamination and food-borne illnesses in the U.S. food supply, and the term “food security” means the availability of sufficient food and the ability of U.S. households to access that food. As so defined, food safety and food security have been mainstays of U.S. agriculture policy for decades. Congress has long recognized the importance of these two concepts and has regularly

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provided and frequently updated authorities for both the USDA and the Food and Drug Administration (“FDA”) within HHS to ensure that these twin policy goals are met. In the past two years, the COVID-19 pandemic has had severe and dramatic effects on the health of essential workers in the nation’s food production, processing, and distribution systems, and that has only heightened public concerns about food safety and food security across the United States.

The President of the United States is authorized to investigate, and to suspend or to prohibit, certain transactions involving investment in or acquisitions of a U.S. business by a foreign person when he determines that such transaction threatens to impair U.S. national security and no other adequate and appropriate means are available to address that threat. CFIUS is an interagency committee chaired by the U.S. Department of the Treasury to which the President has delegated his powers of such national security reviews. The only way to “cut off” this enormous Presidential power is to make a filing with CFIUS and then to receive a CFIUS “clearance” of the transaction.

Historically, filings with CFIUS were entirely voluntary. However, Congress passed the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”) to expand CFIUS jurisdiction and to make certain kinds of transactions subject to mandatory reviews by CFIUS. Thus, since 2018, CFIUS has mandated filings in certain transactions involving critical technology, critical infrastructure, or sensitive personal data, including transactions that would not necessarily involve a change of control of such a U.S. business. Companies that fail to submit a required CFIUS filing for such a transaction risk penalties up to the value of the entire transaction. Whether a transaction comes to CFIUS on a voluntary or mandatory basis, when examining transactions within its jurisdiction, CFIUS customarily analyzes both the national or homeland security vulnerability posed by the U.S. business and the nature and extent of the threat posed by the foreign investor or acquirer.

The Act and Current CFIUS Practice.

The Act would formally add the Secretaries of USDA and HHS as full and regular members of CFIUS. Additionally, the Act would require CFIUS to consider the “security of the food and agriculture systems of the United States as a factor...when determining to take action with respect to foreign investment.” The full text of the Act can be found [here](#).

Congress has considered similar proposals in the past that ultimately failed to become law. It is still too early to tell whether the Act will be successful or will meet a similar fate to those earlier legislative efforts. Nevertheless, U.S. companies operating within the FB&A sector who may be seeking foreign investors or acquirers should understand that CFIUS has had a considerable history of reviewing foreign investments or acquisitions in the FB&A sector and, even without either the USDA or HHS Secretary being CFIUS members, CFIUS can and does regularly seek and receive input from USDA and FDA as appropriate in reviewing foreign transactions within the FB&A sector.

Furthermore, the U.S. Department of Homeland Security (“DHS”), whose Secretary is a

CFIUS member, has long considered the FB&A sector as one of its 16 critical infrastructure sectors “whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.” In fact, the Cybersecurity & Infrastructure Security Agency (“CISA”) within DHS, in conjunction with USDA and FDA, published a detailed sector-specific plan to strengthen and maintain secure, functioning, and resilient critical infrastructure within the FB&A sector. That FB&A sector-specific plan can be found [here](#).

CFIUS routinely requests assistance from other federal departments and agencies that are not full-members of CFIUS whenever appropriate. Such non-member departments and agencies provide needed expertise and experience to CFIUS and can thus play a crucial role when determining whether a specific foreign investment or acquisition threatens to impair U.S. national security. CFIUS also regularly considers if a regulatory agency’s existing authorities are sufficient to cope with any security risks associated with a given transaction subject to CFIUS review because that is a core mandate of the original CFIUS legislation. The Congressional intent was always for CFIUS to step in and act only when no other existing legal means are available and practical to deal with the identified security risk. For example, in transactions within the FB&A sector, CFIUS regularly consults with USDA and FDA and considers whether these agencies’ existing laws and enforcement powers are sufficient to adequately protect food safety or food security outside the CFIUS review process.

Historically, CFIUS has operated by consensus when evaluating each transaction within its jurisdiction. Each member department “approves” a transaction that is notified to CFIUS, usually through the vote of either an Assistant Secretary or Deputy Secretary from that department acting on behalf of that Department’s Secretary who is a formal member of CFIUS. Ultimately, if the Act were to add the USDA and HHS Secretaries as new CFIUS members, that could further complicate the CFIUS review and clearance process and would place additional responsibilities on USDA and HHS and FDA leadership, especially in transactions where there would be no clear nexus to those agencies’ core responsibilities or expertise. For that reason, even if the Act were to become law, CFIUS could consider revising its internal procedures to require participation by USDA and FDA only when appropriate for deals touching upon food safety or food supply issues, rather than requiring them to take part in every case under CFIUS review.

National Security Concerns within the FB&A Sector.

Within the last ten years, focus on CFIUS within the FB&A sector has changed dramatically. A decade ago, U.S. FB&A companies and their foreign investors or acquirers generally only considered voluntarily filing with CFIUS if the U.S. business had contracts with the U.S. Government or one of its agencies (e.g., providing food supply to a U.S. military base) or had property proximate to a U.S. Defense or Energy Department facility. In multiple states, FB&A companies own or lease property that is proximate to sensitive U.S. Defense Department facilities, and CFIUS has long been concerned about

such proximity issues and their impact on U.S. national security.

However, much has changed since 2010. Today U.S. companies from across all industries, including the FB&A sector, regularly assess whether to make CFIUS approval a condition of closing when seeking foreign investments or are undergoing a foreign acquisition. For example, in addition to adding mandatory filings to CFIUS in certain transaction, the 2018 FIRRMA amendments also authorized CFIUS to review certain U.S. real estate transactions for the first time. Because of the FIRRMA changes that added real estate transactions to CFIUS's jurisdiction, even if an FB&A company does not own or lease any property that is proximate to a U.S. Defense facility but does own or lease other U.S. real property that might be near another kind of key installation such as a dam, bridge, airport or seaport, a foreign investment in or acquisition of that company might now fall within CFIUS's jurisdiction.

Increasingly, U.S. FB&A companies may also be technology companies. Some of the technologies relied upon or developed by FB&A companies are, or may become, "critical technologies" controlled for U.S. export purposes. For example, U.S. FB&A companies' use of unmanned aerial vehicles and certain robotics continues to grow. The U.S. Department of Commerce has also been exploring whether to control various emerging technologies under its Export Administration Regulations ("EAR"). Many of the emerging technologies that the Commerce Department is considering controlling – such as biotechnology; artificial intelligence/machine learning; position, navigation, and timing ("PNT") technology; logistics technology; and robotics – are also technologies that are increasingly relied upon within the FB&A sector. CFIUS will thus continue to be keenly interested in foreign investments in or acquisitions of FB&A companies that work with such new technologies. As the FB&A sector continues to adopt such technologies to increase productivity, CFIUS will likely become more concerned about foreign investment in or acquisitions within the sector, particularly if the foreign persons are from countries that CFIUS views as U.S. adversaries.

Within the last five years, CFIUS's interest in protection of sensitive personal data and the impact of cyber-attacks on U.S. businesses has also increased dramatically. For example, the proposed foreign acquisition of StayNTouch (a hotel management platform company) ultimately had to be dropped because of CFIUS concerns related to data and potential cyber-attacks. The evolving business models of some FB&A companies now require them to collect significant volumes of sensitive personal data, bringing such data-driven FB&A companies within these CFIUS data privacy and security concerns. Furthermore, CFIUS could easily see the crippling effects of the spring 2021 cyber-attack on JBS, the world's largest meat processing company (measured by sales), which caused the temporary shutdown of JBS facilities that supplied roughly one-quarter of the total meat supply to American consumers. That attack again highlighted particular vulnerabilities of FB&A companies in terms of the nation's food safety and food security.

Through FIRRMA, Congress also placed greater emphasis on CFIUS reviewing transactions post-closing (that is, transactions that were not voluntarily notified to CFIUS before closing). As a result, in overseeing the work of CFIUS, the U.S. Department of

the Treasury established a new unit, the Office of Investment Security Monitoring & Enforcement (“Monitoring & Enforcement”). Monitoring & Enforcement watches for non-notified transactions (e.g., by media coverage of large business transactions) and regularly requests information about closed investments or acquisitions across all business sectors. Inquiries from CFIUS post-closing used to be rare, but now they happen regularly because this specific government unit was stood up to make such requests so that CFIUS would be better able to review any such foreign transaction within its expanded jurisdiction, months or even years after such a transaction has closed. During the COVID-19 pandemic, it has become painfully clear the impact that FB&A companies can have on the nation’s food supply and safety. Going forward, Monitoring & Enforcement will undoubtedly ensure that CFIUS will continue to be involved in foreign company investment in or acquisition transactions with U.S. companies in the FB&A sector, closed or otherwise.

Going Forward.

Regardless of whether the Act becomes law, leading members of Congress will likely continue to press CFIUS to consider food safety and food security issues in cross-border deals in the FB&A sector, and CFIUS will certainly continue to do so. Accordingly, both foreign and U.S. FB&A companies involved in such cross-border investments or acquisitions should consider the impact CFIUS may have on a proposed transaction and assess whether a mandatory filing is required or a voluntary filing is advisable and the impact of the whole CFIUS process on the closing timetable of such transactions.

If a CFIUS filing is mandatory, then the parties to such a transaction must file either a “declaration” or a “notice” with CFIUS at least 30 days before closing (and they may need to delay their closing if informed by CFIUS that it needs more time to review and clear that transaction). If a filing is only voluntary but the parties choose nonetheless to condition their closing upon a CFIUS clearance, that process could take anywhere from 60 to 120 days or more. Failure to consider such CFIUS issues early in the transaction process may result in unexpected delays and significant disruption to the parties and their business plans.