CADWALADER

Quorum
Insights Into Corporate Governance, M&A and Securities Law

After Referral from CFIUS President Biden Prohibits the Purchase of Wyoming Real Estate and Cryptocurrency Facility

By **Jodi Avergun**
Senior Counsel | White Collar Defense and Investigations

By **Edward Ernst**
Associate | Corporate

On May 13, 2024, President Biden, acting on a transaction referred to him from the Committee on Foreign Investment in the United States ("**CFIUS**"), took the unusual step of ordering the prohibition of a real estate acquisition two years after it closed (the "**Order**"). The Order requires a relatively rapid sale of the land to a third-party, among other interim obligations. This transaction and the resulting presidential action is another indication of the U.S. government's scrutiny of foreign investment in both U.S. real estate and U.S. business. Moreover, it offers a case study for transaction parties on the need to carefully consider the pros and cons of making a voluntary disclosure to CFIUS prior to entering into binding documentation with respect to, or closing, cross-border transactions.

The Order requires the foreign acquirers to divest a parcel of real estate located near the Francis E. Warren Air Force Base in Wyoming, a strategic missile base. Public statements from the Departments of the Treasury and Defense cited proximity of the land to the base as well as the addition, post-close, of cryptocurrency mining equipment as factors that gave rise to the national security risk. In addition to a forced sale, the Order also requires the owners to remove all equipment and improvements made on the property within 90 days. The divestment transaction is also subject to CFIUS approval, and the Order imposes monitoring measures in excess of what is customary for CFIUS mitigation.

The transaction raises several important lessons with respect to closing and post-closing risk for those engaging with foreign investors.

- *Advantages of voluntary CFIUS filings in certain circumstances*. The Foreign Investment Risk Review Modernization Act of 2018 ("**FIRRMA**") imposed limited mandatory filing requirements for certain foreign investments but largely left intact the voluntary filing approach that had historically characterized the CFIUS regulatory regime over acquisitions of U.S. businesses. FIRRMA extended this voluntary approach to CFIUS jurisdiction over certain acquisitions of U.S. real estate.

Here, the parties elected not to file with CFIUS voluntarily, which decision in the end resulted in potentially costly interim mitigation measures, potential losses on the initial investment through a forced sale process and potentially unwanted publicity in connection with the Order. While a transaction party's hesitancy to

voluntarily submit to an additional regulatory regime may be understandable, the potential for a burdensome investigation or a deal-disrupting outcome should be balanced against the possible benefits of confidentially obtaining the regulatory certainty that comes with pre-closing CFIUS review – or at least knowing CFIUS concerns before a transaction closes. Similar value-related concerns can easily arise if CFIUS were to take post-closing mitigation action after an acquisition of or investment in a U.S. business.

- *CFIUS's efforts to identify transactions not voluntarily disclosed can be expected to focus on those transactions that have higher potential to raise national security concerns*. As stated in the Department of the Treasury's release, the blocked transaction was identified through a public tip, which resulted in outreach from CFIUS staff to request the parties file the transaction. CFIUS here was acting on its authority to gather transaction information and request filings from transaction parties that chose not to voluntarily alert CFIUS of a transaction that falls within the scope of its jurisdiction. As discussed in the May 2024 Quorum, a proposed rule, if implemented, would expand CFIUS's information collection authority with respect to transactions not voluntarily filed with CFIUS.

CFIUS has disclosed in its Annual Report that the transactions that it targets with non-notified inquiries are some of the more complex transactions that CFIUS reviews and that such transactions often require mitigation. Consequently, should CFIUS reach out about a transaction that parties have elected not to voluntarily disclose, transaction parties could reasonably anticipate that such transaction has raised some interest among CFIUS staff and leadership.

- *Mitigation of national security risk is not always feasible*. CFIUS is authorized to negotiate and enter into agreements to implement, or to unilaterally impose, conditions on transactions that fall within its jurisdiction to mitigate identified national security risk. However, as demonstrated by and suggested in the Order, mitigation is not always feasible. Risk arising from proximity of real estate to a government facility is naturally difficult to overcome, but the infeasibility of mitigation can arise in any context. As shown by the Order, parties cannot be certain that CFIUS regulatory risk to a deal can always be addressed later with mitigation measures.

Moreover, even if CFIUS identifies feasible mitigation measures, the conditions that it seeks to impose on business operations might be so expensive, or so significantly impact deal rationale, that mitigation is economically infeasible from the perspective of one or more transaction parties. Pre-closing, such circumstances can cause a deal to fail, with unwelcome but limited consequences. Post-closing however, the stakes are vastly higher. A buyer may be required to conduct an accelerated post-closing sale or could be faced with an action similar to the Order imposed in this transaction.

The foreign acquirers of the Wyoming real estate have 120 days from the date of the Order to divest the property.