Will CFIUS stand by as US trophy assets come up for sale?

Blog post by Director, Global Counsel US Erin Caddell, 20 March 2020

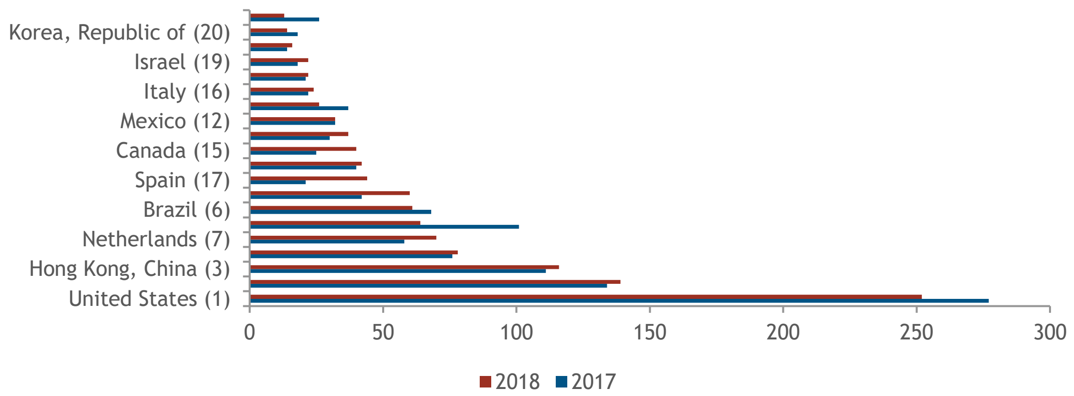
Like many government institutions, the Committee on Foreign Investment in the United States (CFIUS) normally goes about its business in relative obscurity, tasked in its case with reviewing proposed investments by foreign entities in US assets important to national security. Chaired by the US Treasury Department, CFIUS is comprised of representatives of other federal agencies that oversee national-security issues, including the departments of state, defense, energy and homeland security.

However, belying its typically low profile, **CFIUS may well play an important role in the next phase of the US economic and market shock that has been sparked by the covid-19 outbreak.** With another big selloff on March 18th, the S&P 500 is now down nearly 30% year-to-date; plenty of stocks (Boeing!) have been cut in half or more just this month as markets have grappled with the economic disruptions caused by virus outbreak. Similar turmoil has rippled through the US bond markets.

Sovereign-wealth funds and other foreign operators and investors will surely be interested in acquiring some of these distressed assets. Indeed, with the White House circulating a stimulus package that might reach $1 trn or more to combat the virus' economic effects, some policymakers might welcome foreign investment to offset the burden on the US taxpayer. But in an era of rising protectionism and outright xenophobia in the US as well as in much of the developed world, would CFIUS welcome or shun foreign investment?

The question is not merely academic. Foreign direct investment in the US totaled $250 bn in 2018 (see below) a meaningful figure even in a roughly $20 trn economy.

FDI inflows, top 20 host economies
$bn, 2017 and 2018



Source: UNCTAD, FDI/MNE database (www.unctad.org/fdistatistics).

I do think bids for US assets will be forthcoming from foreign investors in the coming months. With some parts of the world recovering more quickly from the virus outbreak than others, long-term non-US investors will be willing to take a bet that the world's largest economy will right itself. **Further, I think that CFIUS will be open to approving such deals.** Despite the "America First" policies of the current administration, CFIUS, and Treasury in general, over multiple administrations overseen by both political parties a mandate to encourage foreign investment in the US – and vice versa.

It is important to note that the large majority of transactions that come before CFIUS are approved, though the committee requires modifications to the transactions in some cases. CFIUS reported that from 2009 through 2017, only 16% of the 1,179 cases that came before the committee were withdrawn (usually withdrawal occur before the case reaches a final decision; only three deals were rejected by the president). While CFIUS has blocked some high-profile deals, it approved a controversial transaction just this month, ok'ing the acquisition of Cypress Semiconductor by Germany's Infineon Technologies.

For those foreign investors considering a US investment that could be subject to CFIUS review, what lessons can be learned from the past? We'll look here at a few precedents:

- **NTT Communications' (Japan) acquisition of Verio (2000).** Verio was a web hosting business that agreed to be acquired by Japan's NTT at the height of the internet bubble. The deal drew the attention of the Justice Department, the Federal Bureau of Investigation (FBI) and Congress because the Japanese government owned a majority of NTT, sparking concerns Japan could access classified US data. NTT agreed to establish a separate division staffed only by US citizens to handle any work in support of government investigations, smoothing the path to CFIUS approval.

- **Acquisition of IBM's server business by Lenovo (China) (2005).** Having bought IBM's PC business about a decade before, China's Lenovo offered to buy IBM's server business, sparking worries that Lenovo could pass sensitive information back to the Chinese government and leading to a CFIUS review. The concerns were allayed by the fact that Lenovo's prior investment had made it a well-known brand in the US, and that the server business Lenovo was acquiring was relatively low-end.

- **JSC Atomoredzoloto's (Russia) acquisition of a controlling interest in Uranium One (2010).** The target here had 20% of US uranium extraction capacity. CFIUS asked for the opinion of the US Nuclear Regulatory Commission (NRC), which determined that the US subsidiaries of Uranium One would retain the licenses, and that neither entity held an NRC export license, so no uranium could be exported.

- **China Oceanwide's proposed acquisition of Genworth (2018).** One of the longer CFIUS review processes as it was withdrawn and re-proposed by the parties, China Oceanwide is a conglomerate with ties to the Chinese government that has bid for Genworth, a financially troubled provider of long-term care insurance in the US (the deal is still ongoing as the parties seek approval from other government entities). To win CFIUS approval, China

Oceanwide agreed to cordon off Genworth's customer data in a US-based entity managed by a third party and not accessible by the parent.

The point of these examples is that even in cases that on the surface would appear to be deals that CFIUS would not approve (a Russian company buying US uranium assets?), mitigation strategies offered by the buyer can make a difference. A bid for Boeing by a foreign buyer? We'll save one that for another post.