

Thomson Reuters 4th Annual Midwestern M&A and Private
Equity Forum: Chicago, Illinois

Acquisitions by Foreign Companies:
Export Controls and
Compliance with Anti-Trust Laws

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Acquisitions by Foreign Companies: Export Controls

Acquisitions By Foreign Companies : Export Controls

Impact on Acquisitions by:

- Export Controls (International Traffic In Arms Regulation, in this example)
- Committee on Foreign Investment in the United States
- The existence of a Facility Security Clearance (FSC) facility at the Target Company.

Acquisitions By Foreign Companies: Export Controls

Export Controls :

Pre-Close:

- Directorate of Defense Trade Controls (DDTC) Registration of U.S. Acquisition Entity
- 60 Day ITAR Pre-Close Notice to DDTC
 - DDTC determines whether to require license or authorization prior to transfer of certain items

Acquisitions By Foreign Companies: Export Controls

Post-Close:

- 5 Day ITAR Post-Close Notice to DDTC
 - Changes in DDTC Registration, Export Control Licenses and DDTC-Approved Export Control Agreements (e.g., Technical Assistance Agreements, Manufacturing License Agreements, etc.)
- 60-65 Day ITAR Post-Close Notice
 - Provide DDTC with Amendments to DDTC-Approved Export Control Agreements, or Voided

Acquisitions By Foreign Companies: Export Controls

Impact of CFIUS :

- CFIUS = Committee on Foreign Investment in the United States
- Covered Acquisitions include “Critical Infrastructure” and “Critical Technologies”
 - Defense Articles subject to ITAR Export Controls
- Identification of Covered Acquisitions

Acquisitions By Foreign Companies: Export Controls

- CFIUS Review Process
 - 30-Day CFIUS Day Review
 - 45-Day CFIUS Investigation
 - 15-Day Presidential Determination

Post-Close:

- 5 Day ITAR Post-Close Notice to DDTC
- 60-65 Day ITAR Post-Close Notice

Acquisitions By Foreign Companies: Export Controls

- Existence of a Facility Security Clearance (FSC) facility on Acquisitions of U.S. Businesses:
- National Industrial Security Program (NISP)
- Contractor Receipt of U.S. Government Classified Information
- Defense Security Service (DSS)
- National Industrial Security Program Operating Manual (NISPOM)
 - Foreign Ownership, Control, or Influence security (FOCI)
 - FOCI notice requirements for foreign acquisitions

Acquisitions By Foreign Companies: Export Controls

Impact of Export Controls, CFIUS, FSC on Acquisitions of U.S. Businesses:

- Conduct of Tailored Due Diligence
- Control of Access to Data Room for Controlled Technologies/Technical Data
- Control of Access to Locations with U.S. Facility Security Clearance (FSC)
 - Tailor provisions in Acquisition Agreement
 - Definitions
 - Seller Representations and Warranties
 - Conditions to Purchase
 - Pre-Close and Post-Close Covenants

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Compliance with Anti-Trust Laws

Compliance with Anti-Trust Laws

Compliance with Hart-Scott-Rodino Act (when a “Hart-Scott filing” is required): to prevent anti-competitive combinations

- Size of Person Test
 - One Party: amount greater than \$156.3 million sales or assets
 - Other Party: amount greater than \$15.6 million sales or assets
- If Size-of-Person Test met, apply Size of Transaction Test
 - Amount below \$78.2 million: no HSR filing needed
 - Amount between \$78.2 - \$312.6 million : HSR filing required
 - Amount over \$312.6 million: HSR filing required --regardless whether Size-of-Person test met
 - If test met, Hart Scott filing must be made

Compliance with Anti-Trust Laws

Early Termination or Expiry of Waiting Periods after HSR filing made:

Waiting Times:

- Negotiated transactions --waiting period: 30 days
- Open market purchases, non-cash tender offers and other acquisitions of voting securities --waiting period: 30 days
- Cash tender offers -- waiting period: 15 days
- Reviewing Agency (DOJ or FTC) may grant early termination of Waiting Period
- Waiting Period Expires without a “Second Request”

Compliance with Anti-Trust Laws

Second Request: extends Waiting Period for 30 days after compliance with Second Request

- Usually two to four month process
- Parties seek to narrow scope to expedite review
- “Pull and Refile” – to avoid Second Request

Compliance with Anti-Trust Laws

STATE ANTI-TRUST ENFORCEMENT

- Usually domain of State Attorney General
- Multistate Antitrust Task Force of National Association of Attorneys General (NAAG)
- Coordinated with federal enforcement

Compliance with Anti-Trust Laws

NON-U.S. ANTI-TRUST FILINGS

European Union:

- Phase I = 25 working days
- Phase II = 90 working days
- “One Stop Shop” – no notifications to Member States

Non European Union countries:

- Must be made to specific country

Regulatory Issues: Acquisitions by Foreign Companies: Export Controls and Compliance with Anti-Trust Laws

For additional information:

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