

Locke Lord QuickStudy: Recent Presidential Order Unwinding ?Real Estate Transaction Reinforces CFIUS' Heightened ??Enforcement Regime

Locke Lord LLP

WRITTEN BY

Stephen P. Murphy | Brandon Curtin

On May 13, 2024, President Biden issued an order (the “Order”) prohibiting the purchase and requiring the divestment of certain real estate operated as a cryptocurrency mining facility located within one mile of Francis E. Warren Air Force Base (“F.E. Warren AFB”), a strategic missile base and home to Minuteman III intercontinental ballistic missiles. The Order also required the removal of certain improvements and equipment at the property owned by MineOne Partners Limited, MineOne Cloud Computing Investment I L.P., MineOne Data Center LLC and MineOne Wyoming Data Center LLC (collectively, “MineOne”). The Order reinforces the heightened enforcement regime administered by the Committee on Foreign Investment in the United States (“CFIUS”). This regime is supported by the ongoing efforts of CFIUS’ non-notified team, which is tasked with investigating transactions that are not notified to CFIUS pursuant to the formal filing process that the team uncovers through market research, including announcements by the publicly traded companies.

MineOne acquired the subject property in June 2022 and then made improvements to enable its use for specialized cryptocurrency mining operations in Cheyenne, Wyoming. Initially, MineOne did not file a notice regarding the transaction with CFIUS. Upon receipt of a public tip, CFIUS’s non-notified team investigated the transaction pursuant to 31 C.F.R. Part 802, prompting MineOne to file a notice with CFIUS. Following its review of the notice, CFIUS determined that the transaction posed a threat to national security. CFIUS based its determination on several factors, that MineOne is majority owned by nationals of the People’s Republic of China, the presence of specialized and foreign-sourced equipment capable of surveillance and the cryptocurrency mining facility’s close proximity to F.E. Warren AFB, which is a highly sensitive U.S. military nuclear ballistic missile base.

Notably, CFIUS is authorized to negotiate and enter into agreements or take other actions to mitigate the national security risks associated with transactions. CFIUS occasionally determines that mitigation of the national security risk is inadequate, and that the President should therefore prohibit the transaction. In the MineOne situation, CFIUS determined that it would not be possible to enter into a mitigation agreement with MineOne that would sufficiently address the national security risk, so CFIUS referred the transaction to the President for a final decision. The Order represents the President’s final decision and substantially adopts CFIUS’ national security risk analysis. In a press release from the Treasury Department, Secretary Yellen remarked, “Today’s divestment order underscores President Biden’s steadfast commitment to protecting the United States’ national security. It also highlights the critical gatekeeper role that CFIUS serves to ensure that foreign investment does not undermine our national security, particularly as it relates to transactions that present risk to sensitive U.S. military installations as well as those involving specialized equipment and technologies.” This remark highlights CFIUS’

focus in recent years on real estate transactions that involve real estate located near U.S. military bases, particularly where the acquirers of the real estate are Chinese nationals.

The issuance of the Order emphasizes CFIUS' increasing reliance on its non-notified team. Backed by a consistent flow of appropriations from Congress, the non-notified team is able to leverage its resources in search of transactions that the transaction parties failed to notify CFIUS. Additionally, the non-notified team also relies on public tips, whether from competing businesses or concerned citizens. The combination of resources and public tips portends continuing scrutiny of foreign investment, especially when the foreign investors hail from countries of concern, such as China, Iran, Russia and Syria.

Moving forward, parties to a transaction that falls under CFIUS' jurisdiction need to consider carefully whether to submit a formal notice filing to CFIUS. Although CFIUS' regulations may not mandate such a filing, the parties may elect to make the filing to avoid a fate similar to that of MineOne, particularly if the transaction poses a possible risk to national security. In the present case, it was difficult, if not impossible, for MineOne, a company of Chinese origin, to argue that acquiring real estate next to a military base with intercontinental ballistic missiles did not pose a potential threat to national security. CFIUS is extremely sensitive to the possibility of a foreign person using surveillance technology and equipment to spy on the U.S. military. CFIUS' sensitivity only intensifies when the possible source of espionage is controlled by, or otherwise affiliated with, Chinese nationals. Even if Chinese nationals are not at issue, transaction parties, in consultation with counsel, should analyze whether any real estate involved in the transaction is located in close proximity to any U.S. military installations identified in 31 C.F.R. Part 802. If so, the parties may wish to file with CFIUS. Otherwise, the parties may find themselves in MineOne's situation, forced to unwind a transaction almost two years after its consummation.

RELATED INDUSTRIES + PRACTICES

- Antitrust
- Debt Finance
- Mergers + Acquisitions