

FOREIGN INVESTMENT WATCH

AUGUST 1, 2022

Experts: CFIUS should be a federal Commission on par with SEC, FCC

Two partners at the law firm of Morgan Lewis have crafted an intriguing proposal: That national security reviews of foreign investments merit a full-on Commission, not an ad-hoc Committee. “CFIUS is ready for its next evolutionary step,” they argue.

According to the authors, the proposed “Commission on Foreign Investment and National Security,” or CFINS, would be more robust, transparent, proactive, and effective than an interagency Committee. Here are all the details:

WHAT HAPPENED

In a 12-page, well-researched [document](#), Morgan Lewis partners Kenneth Nunnenkamp and Giovanna Cinelli propose a “foundational shift” for CFIUS from a “Committee” to a statutorily established “Commission” on par with the Securities and Exchange Commission or the Federal Communications Commission.

According to the co-authors, the proposal is particularly relevant given the heightened interest in establishing another “CFIUS-like committee” to review outbound investments. “Before Congress moves too much further on the creation of another committee structure,” Nunnenkamp told Foreign Investment Watch before the proposal

was released, “we thought it would be useful to consider a fresh approach to the overall review process.”

THE AUTHORS

Kenneth Nunnenkamp and Giovanna Cinelli are both partners in the Washington, D.C., office of Morgan Lewis. Both have extensive experience working on CFIUS matters, and are members of the firm’s CFIUS working group.

THE ARGUMENT

In the proposal, the authors detail the historical precedent for their argument, using the SEC and the FCC as “case studies” to explain how patchwork approaches to market challenges eventually matured into full federal Commissions.

We’ll let readers review the [full document](#) for details, but among the key arguments the authors make are:

- **Structure** – The current interagency Committee structure requires consensus among federal agencies with differing agendas, which “works against a unified federal approach to protecting vital national security interests”;
- **Efficacy** – The “black box” nature of the Committee “does not provide the certainty that investments require, and appears to fall short of adequately assessing and protecting U.S. national security threats and interests”;
- **Maturity** – CFIUS’s ability to identify, evaluate and manage national security risks “has consistently lagged behind the threats presented by foreign direct investment.”

THE COMMISSION

Again, we’ll let readers digest the [full document](#), but the authors believe that the classic Commission structure of the SEC and FCC can be also applied to foreign investment reviews. Characteristics of those Commissions include:

- **Commissioners** – Independent, objective Commissioners that are confirmed by the U.S. Senate, and serve for set terms;
- **SMEs** – Resident subject matter experts that are housed within the Commissions and their various bureaus;
- **Rules of Engagement** – Rigorous, time-based processes that govern engagement with the Commission; the authors note that both the SEC and FCC have “robust ‘rules of engagement’ akin to court-based rules of procedures”;
- **Transparency** – Commission decisions are made available to market participants “to prevent skewed or inconsistent decisions that undercut the certainty that is beneficial to financial transactions.”

WHAT'S NEXT?

According to co-author Giovanna Cinelli, the proposal has not yet been shared with Assistant Secretary for Investment Security Paul Rosen or members of the CFIUS staff, “although we are planning to discuss it with member agencies once it is published.”

Cinelli says that – should the Biden Administration or members of Congress show interest in the approach – the first step would be to “outline the contours of the Commission similar to what was done in the 1930s for the FCC and the SEC.” According to Cinelli, that would include topics such as the Commission structure, scope of authority, staffing, budgets, and more.

It would also be important to take an inventory of CFIUS-focused resources within relevant agencies so that Congress could understand what already exists. “Interestingly,” she says, “if one were to look at the FCC as a model, that Commission currently has around 1400+ employees and is self-funded through the fees charged.” Cinelli says that a new Commission to review foreign investments and national security “could likely function with a similar resource allocation, and

it may be possible to pull together that employee base from existing CFIUS resources among all the agencies that participate.”

MORE INFORMATION

The [full proposal](#) is available for download, and has been posted at [Morgan Lewis](#)’ web site as well.

Foreign Investment Watch is planning an upcoming webcast with the co-authors to discuss the proposal and get your reactions. Stay tuned, or contact editor@foreigninvestmentwatch.com if you have strong opinions on the proposal.

Co-author Kenneth Nunnenkamp can be reached at kenneth.nunnenkamp@morganlewis.com, and Giovanna Cinelli can be reached at giovanna.cinelli@morganlewis.com.