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Delaware Chancery Court Puts CFIUS Mitigation in Focus for Mergers and Acquisitions

Sevren R. Gourley and Eric R. Markus*

In this article, the authors review a recent court decision requiring Nano Dimension Ltd. to execute a national security agreement proposed by the Committee on Foreign Investment in the United States as a condition to clear a merger between Nano and Desktop Metal, Inc.

In a recent decision,[1] the Delaware Court of Chancery ordered Nano Dimension Ltd. to enter into a national security agreement in the form proposed by the Committee on Foreign Investment in the United States (CFIUS), finding that Nano materially breached the CFIUS clearance provisions of a merger agreement (Merger Agreement) entered into with Desktop Metal, Inc. on July 2, 2024.

The court's decision to require Nano to execute a national security agreement proposed by CFIUS as a condition to clear the Nano-Desktop merger sets an important precedent for understanding the meaning of regulatory approval covenants generally, and CFIUS clearance covenants specifically.

Background

According to the court's post-trial memorandum opinion,[2] Desktop is a Massachusetts-based company that makes industrial-use 3D printers that create specialized parts for missile defense and nuclear capabilities. Nano is an Israeli firm, and sought to acquire Desktop in a $183 million all-cash transaction. Under CFIUS rules, this is a "covered control transaction" and would therefore be subject to CFIUS review. To achieve the regulatory certainty that CFIUS would not later seek to force Nano to dispose of Desktop, the parties agreed to seek CFIUS approval on a voluntary basis as a condition to closing the merger. Given the national security implications of Desktop's business, the parties anticipated that

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CFIUS approval would be complicated and would likely require that Nano enter into a national security agreement.

Desktop and Nano included in the Merger Agreement a relatively standard "reasonable best efforts" provision with respect to resolving government objections to the transaction generally. In addition, the parties specifically agreed to take "all action necessary" to receive CFIUS approval, including "entering into a mitigation agreement" in relation to Desktop's business (a "hell-or-high-water" provision). Nano included a narrow carve-out that would allow it to refuse to agree to any condition imposed by CFIUS that would "effectively prohibit or limit [Nano] from exercising control" over any portion of Desktop's business constituting 10 percent or more of its annual revenue, with clarifications that certain common mitigation requirements (e.g., U.S. citizen-only requirements, information restrictions, continuity-of-supply assurances for U.S. government customers, and notification/consent requirements in the event the U.S. business exits a business line) would not impact the carve-out.

In effect, the CFIUS approval condition in the Merger Agreement preserved wide latitude for conditions imposed by CFIUS in a mitigation agreement notwithstanding the control exception negotiated by Nano.

As anticipated by Desktop and Nano in the Merger Agreement, CFIUS informed the parties that it identified national security risks arising from the transaction and proposed a mitigation agreement to address those risks. Specifically, the mitigation agreement would have imposed information restrictions preventing the integration of Nano and Desktop information technology infrastructure, restricted manufacturing locations for supply to U.S. government customers, limited remote access software for products supplied to U.S. government customers, required a U.S. citizen board observer, and appointed a third-party monitor. According to the court's recitation of facts, Nano's cooperation with CFIUS in negotiating the terms of the mitigation agreement ceased following a proxy contest that resulted in a turnover on Nano's board to a position opposed to the merger with Desktop. Desktop subsequently sued to enforce the terms of the Merger Agreement.

The Court's Decision

The court held that Nano breached its obligations under the "reasonable best efforts" clause, noting that this language has

been interpreted to require parties to take all reasonable steps and appropriate actions, which it found Nano failed to do. The court also noted that good faith is relevant and that a "reasonable best efforts" clause does not allow parties to use regulatory approvals as a way out of a deal. Given the facts recited by the court that Nano sought to use the CFIUS clearance condition as a way out of the deal, it is tempting to view the precedential weight of this part of the decision narrowly. However, "reasonable best efforts" provisions relating to regulatory clearances are commonplace and the court's discussion of this language merits attention. This is particularly true in the CFIUS context where remedies can be less predictable than those in other regulatory contexts due to the wide range of national security risks considered by CFIUS and the relative "black box" nature of CFIUS reviews.

The court's holding also provides important takeaways regarding the "hell-or-high-water" provision. These provisions are used to clarify "reasonable best efforts" in specific contexts and, as the court noted, represent hard commitments in a merger agreement with respect to regulatory approval. Moreover, these firm commitments are relatively rare in CFIUS or other regulatory contexts.

In this case, Desktop and Nano correctly anticipated that CFIUS would request a mitigation agreement and sought to identify a list of mitigation measures that would be acceptable. However, in the court's view, these mitigation measures were separate from the parties' effort to define control with reference to the target's financial performance. Rather, as CFIUS's proposed mitigation concerned information restriction, supply assurances and monitoring requirements (which were specifically excluded from consideration of the loss of control exit provision), Nano's ability to object to these requirements was quite constrained. The court therefore rejected Nano's argument that CFIUS's conditions would impact Nano's control over more than 10 percent of Desktop's revenue-generating business lines.

The court's remedy of specific performance also merits consideration. The Merger Agreement stipulated to specific performance in the event of a breach. The court's recitation of facts explains that, in order to achieve greater deal certainty, Desktop proposed that CFIUS clearance be subject to either a reverse termination fee or the "hell-or-high-water" provision backed by specific performance and that Nano opted for the latter. Transaction parties should note that generally, if a buyer needs greater flexibility to consider potential CFIUS mitigation given the unpredictability, a reverse

termination fee can be used to purchase more discretion in deciding whether CFIUS's proposed mitigation sufficiently erodes the value of the deal, provided that the parties carefully define the specific parameters of acceptable mitigation. Note, however, that the court's opinion with respect to the "reasonable best efforts" clause suggests that this does not simply allow a buyer to use mitigation as a pretext to refuse to go forward with the deal and transaction parties should carefully consider the degree of flexibility provided by regulatory approval conditions.

Conclusion

This case is a clear reminder that transaction parties should carefully consider the scope of regulatory approval conditions in negotiating merger agreements. No transaction party can predict exactly what mitigation measures CFIUS might require or even what national security risks it might identify, and parties will need to understand all possible mitigation remedies in order to successfully draft a CFIUS approval condition that effectively balances deal certainty with the flexibility necessary to turn down unacceptable mitigation requirements.

To illustrate this uncertainty, the National Security Memorandum on America First Investment Policy[3] issued by President Donald Trump in February 2025 indicates some of the conditions required by CFIUS in its proposed mitigation agreement in this case (for example, indefinite monitoring conditions) may not have been required if the present administration negotiated the mitigation agreement continued. Transaction parties should consider emerging CFIUS trends and policy developments as relevant to the scope of a "reasonable best efforts" clause.

Notes

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