

WEBINAR

# The Growing Power of the Committee on Foreign Investment in the United States

PRESENTERS  
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# Background of the Committee on Foreign Investment in the United States (“CFIUS”)

# Overview of CFIUS

- Interagency governmental committee
- Evaluates national security implications of foreign acquisitions of, and investments in, U.S. businesses
- Members of the Committee are the heads of the following departments and offices:
  - Dept. of Treasury (Chair)
  - Dept. of State
  - Dept. of Justice
  - Dept. of Energy
  - Dept. of Homeland Security
  - Office of the U.S. Trade Representative
  - Dept. of Commerce
  - Office of Science & Technology Policy
  - Dept. of Defense
- Certain White House offices, the Director of National Intelligence, and the Secretary of Labor participate, as appropriate
- President may suspend or block a transaction if no other laws apply and if there is “credible evidence” that the transaction threatens to impair the national security

# History of CFIUS

- Established by Executive Order of President Ford in 1975
- Original intent was to dissuade Congress from enacting new restrictions on foreign investment
- 1975 – 1980: Committee met only 10 times and seemed unable to decide whether it should respond to the political or the economic aspects of foreign direct investment
- 1980 – 1987: Committee investigated several foreign investment transactions, largely at the request of the Dept. of Defense
- 1988: Fear of Japanese investment and national security concerns led to Exon–Florio Amendment, which empowered CFIUS to reject proposed transactions
- 1992: Byrd Amendment required CFIUS to investigate proposed transactions where the acquirer acts on behalf of a foreign government and national security concerns exist



# History of CFIUS continued...

- September 11, 2001: The terrorist attacks placed greater scrutiny on the Committee's review procedures by Congress and the public
- 2006: Concerns about the proposed and actual purchase of commercial port operations in six U.S. ports by a Dubai entity led to criticism of CFIUS and its operations
- 2007: Foreign Investment and National Security Act ("FINSA") maintains the scope of CFIUS solely on transactions that could result in foreign control of a U.S. business
- 2018: Foreign Investment Risk Review Modernization Act ("FIRRMA") made several changes, including expanding scope of CFIUS jurisdiction even further and mandating filings for certain transactions

# Scope of CFIUS Jurisdiction

# Prior Scope of CFIUS Jurisdiction

- Under FINSA, CFIUS had the authority to only review certain transactions:
  - Foreign entity gaining control over a U.S. business
- Filings were voluntary and could have led to a safe harbor from the President's authority to block or unwind a transaction
- Jurisdictional analysis was less substantive concerning national security, and largely legal:
  - Did the investor's ownership structure make it a "foreign person"?
  - Could the investor's governance rights result in "control"?
  - Did the target company or assets constitute a "U.S. business"?
- Substantive national security concerns typically considered when deciding whether to voluntarily file and potential risks where jurisdiction was clear

# Current Scope of CFIUS Jurisdiction

- Under FIRRMA, CFIUS has the expanded authority to review:
  - Foreign entity gaining control over a U.S. business, greater than 10% (retained from FINSA)
  - Certain non-controlling, yet non-passive, investments (“Covered Investments”) in U.S. businesses involved with critical technology, critical infrastructure, or sensitive personal data (“TID Business”)
  - Certain real estate transactions
- Jurisdictional analysis for non-controlling transactions requires greater substantive review of national security concerns
- FIRRMA legislation went into effect in 2018, implementing regulations went into effect February 2020



# Covered Investments

- Relevant scope: Certain non-controlling, yet non-passive, investments (“Covered Investments”) in U.S. Businesses
- A Covered Investment must give the foreign person certain rights:
  - Access to material non-public technical information;
  - Membership or observer rights on the governing body of the business or the right to nominate an individual to a position on that body; or
  - Any involvement, except voting of shares, in substantive decision making regarding certain aspects of the TID business
- Exceptions apply to Covered Investments (“Excepted Investors”)

# TID Business: Critical Technologies

- Produce, design, test, manufacture, fabricate or develop “critical technologies”
- “Critical Technologies” includes defense articles and defense services included on the United States Munitions List; certain items included on the Commerce Control List; certain nuclear-related facilities, equipment, parts and components, materials, software, and technology; certain agents and toxins (including certain items under the Export Administration Regulations); and emerging and foundational technologies controlled for export pursuant to the Export Control Reform Act of 2018
- Critical Technologies concept dovetails with ECRA
  - Emerging Technology and Foundation Technology Controls still being produced
  - Non-intuitive controls under ECRA can bring investments into scope and can trigger mandatory declarations

# TID Business: Critical Infrastructure

- Own, operate, manufacture, supply, or service “critical infrastructure”
- “Critical Infrastructure” includes certain telecoms, power, oil and gas, water, finance, defense industrial base, airport and maritime ports, and more (28 categories total)
- Was a factor in mandatory declarations for investments, but the rule has recently changed
  - Still relevant for jurisdiction analysis
  - Still relevant for weighing vulnerability side of the scale
  - Still relevant for mandatory declaration analysis for foreign state investors

# TID Business: Sensitive Personal Data

- Maintain or collect “sensitive personal data” of U.S. citizens
- “Sensitive personal data” includes:
  - Certain identifiable data (e.g., financial data that could be used to determine an individual’s financial distress or hardship; data in a consumer report; data relating to the physical, mental, or psychological health of an individual, etc.)
  - Certain results of an individual’s genetic tests
- PatientsLikeMe
- Grindr
- TikTok
  - 2017 transaction where ByteDance bought Music.ly (became TikTok); 2019 investigation; 2020 divestiture

# Real Estate

- Purchase or lease by, or concession to, of certain real estate:
  - Within or functioning as part of certain air or maritime ports
  - Within close proximity (1 mile) or certain military installations
  - Within extended range (100 miles) of certain military installations
  - Within certain counties or geographic areas associated with missile fields and other areas
  - Within any part of certain offshore military operating areas
- That affords the foreign person at least three of the following four rights to: (1) physical access, (2) exclude others from physical access; (3) improve or develop; or (4) attach fixed or immovable structures or objects.
- Exceptions apply
- Pre-FIRRMA: Ralls Corp. wind farm forced to divest

# CFIUS Procedures



# Voluntary and Mandatory Filings

- CFIUS remains primarily a voluntary process
- Mandatory filings for transactions:
  - Resulting in the acquisition of a substantial interest (25% or more) in TID Business wherein the national or subnational governments of a single foreign state (other than excepted foreign states) have a substantial interest
  - That are covered transactions involving a TID U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies for which a U.S. regulatory authorization would be required for the export, reexport, transfer (in-country), or retransfer of such critical technology to certain persons
- Excepted Investors
- Goal: Filing, if successful, may lead to a safe harbor wherein post-acquisition government cannot order a divestment
- Civil penalties up to value of the transaction; unwinding; mitigation

# Filing Fees

<b>TRANSACTION VALUE RANGE</b>	<b>FEE AMOUNT</b>
\$0 to \$499,999.99	\$0
\$500,000 to \$4,999,999.99	\$750
\$5,000,000 to \$49,999,999.99	\$7,500
\$50,000,000 to \$249,999,999.99	\$75,000
\$250,000,000 to \$749,999,999.99	\$150,000
\$750,000,000+	\$300,000

# National Security Priorities in a New Administration

# Executive Orders Shed Light on Priorities

- Securing the Information and Communications Technology and Services Supply Chain (ICT Supply Chain EO).
  - Rule seek to create a broad framework to mitigate, prohibit and unwind information and communications technology and services transactions involving “foreign adversaries.”
    - WeChat/Tencent
- Executive Order on Securing the United States Bulk-Power System

# Deal Diligence & PE Considerations

# Effect on Deal Diligence

- Transactions potentially within the purview of CFIUS jurisdiction require greater scrutiny
- If subject to jurisdiction, a review as to whether filing is mandatory or voluntary must be made
- If mandatory, submit
- If voluntary, conduct a risk assessment
- Steps:
  - Target analysis
  - Buyer analysis
  - Threat vs. Vulnerability scale
  - Coordinate efforts
  - Mitigation Strategies
  - NISPOM/DCSA Concerns



# PE Considerations

- Does the fund have any, direct or indirect, investors that are foreign national or foreign governmental actors?
  - If affirmative:
    - Do any exemptions, including Excepted Investors, apply?
    - Can the investments be structured such that exemptions do apply?
  - Absent exemptions, does the transaction fall within the scope of CFIUS jurisdiction?
    - Recall, FIRRMA expanded jurisdiction to encompass even non-controlling foreign investments in U.S. business with certain industries
    - If yes, is filing voluntary or mandatory?
- Broadcom blocked acquisition of Qualcomm

**Questions?**

## SPEAKERS

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Christopher B. Monahan is a member of Winston & Strawn's White Collar, Regulatory Defense & Investigations Practice in the firm's Washington, D.C. office. Chris' practice focuses on the U.S. regulation of international trade, including export controls and sanctions. He primarily counsels clients on compliance with the International Traffic in Arms Regulations (ITAR), the Export Administration Regulations (EAR), the sanctions programs administered by OFAC, and also advises on compliance with the FCPA.

Chris oversees internal investigations, audits, and compliance assessments and prepares disclosures and responses to government agency inquiries related to violations of the ITAR, EAR, and OFAC administered sanctions programs. Chris advises on the international trade-related risks associated with corporate mergers and acquisitions, including to numerous private equity funds. He counsels clients on legal questions related to complicated international transactions, global sourcing models, and corporate compliance structures. He represents and assists clients in responding to inquiries from government agencies such as the U.S. State Department, Office of Defense Trade Controls Compliance (DTCC), the Office of Export Enforcement (OEE), DOJ, Federal Bureau of Investigation (FBI), Homeland Security Investigations (HSI) and the Naval Criminal Investigative Service (NCIS). Chris also regularly assists clients in matters determining the jurisdiction and export control classification of their products and technology. He drafts and helps implement compliance policies and procedures.

## SPEAKERS

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Amanda Simpson has experience in import trade regulation, including customs and trade remedy laws. She regularly advises clients on a variety of substantive matters, including, but not limited to, tariff classification, valuation, product marking and labeling, country of origin, antidumping and countervailing duties, intellectual property issues at the border related to trademark and copyright infringement, steel and aluminum tariffs under Section 232 of the Trade Expansion Act of 1962, tariffs on solar cells/panels and washing machines under Section 201 of the Trade Act of 1974, and the additional tariffs on products from China and the European Union under Sections 301 to 310 of the Trade Act of 1974. She has in depth knowledge of the challenges faced by importers from an internal compliance perspective as a result of performing several customs compliance reviews both as an attorney and a consultant; participating in numerous due diligence reviews in mergers and acquisition deals; and having been seconded to the trade legal department of a major global online retailer to address day-to-day import and product compliance issues.