
Morgan Lewis
HOW DO THE NEW CIFIUS REGULATIONS AFFECT MY TECHNOLOGY COMPANY?
Carl A. Valenstein & Stephen Paul Mahinka
May 20, 2020
© 2020 Morgan, Lewis & Bockius LLP

Before we begin: Morgan Lewis and Global Technology

Be sure to follow us at our website and on social media:

Web: **www.morganlewis.com/sectors/technology**

Twitter: **@MLGlobalTech**

LinkedIn Group: **ML Global Tech**

Check back to our Technology May-rathon page frequently for updates and events covering the following timely topics:

21st Century Workplace	**Cybersecurity, Privacy and Big Data**	**Medtech, Digital Health and Science**
Artificial Intelligence and Automation	**Fintech**	**Mobile Tech**
COVID-19	**Global Commerce**	**Regulating Tech**

Morgan Lewis Coronavirus/COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to subscribe using the purple "Stay Up to Date" button.

Agenda

1. Introduction - Why Do Technology Companies Need to be Concerned with The New CFIUS Regulations?
2. Overview of CFIUS
3. Impact of Covid-19 National Emergency on CFIUS Reviews
4. Specific Concerns for Technology Companies

Introduction - Why Do Technology Companies Need To Be Concerned With the New CFIUS Regulations?

- If you are a US technology company considering a capital raise from foreign persons, the fund raising may be subject to CFIUS review before or after the transaction closes. If you have "critical technology" or if a significant investor is considered "foreign government-controlled," the transaction may be subject to mandatory CFIUS clearance before it closes. Even if no mandatory CFIUS clearance is review, if you are operating in certain sensitive areas, including having "sensitive personal data," you may be subject to a heightened risk of post-closing review.
- As a consequence, US technology companies need to understand early on how their technology is controlled for US export purposes and if it constitutes "critical technology" for CFIUS purposes, or if an investor is considered "foreign government-controlled.".
- Even when the investment is being made by a US person, these questions are being raised because of the concern with future access by the technology company to foreign capital or the ability to sell to foreign investors/buyers, which might limit the upside potential in a liquidity event. This applies not just to CFIUS but to how the technology company handles other international compliance issues, including export control, sanctions, and FCPA compliance.

Overview of CFIUS

- The US has a long history of reviewing cross-border investment (FDI) to assess the national security implications of these types of transactions. With over 20,000 to 40,000 cross-border investments a year, most transactions, however, occur outside the purview of US government review.
- The US maintains a robust and consistent process, managed by the Committee on Foreign Investment in the United States (CFIUS), to examine the implications of these types of investments. CFIUS began as an ad hoc Executive branch committee and has become an established, statutorily mandated review body.
- Congress amended the CFIUS process in 1988, 1993, 2007 and 2018. In each iteration, Congress further consolidated the Committee's authorities, expanded its jurisdiction, and identified the factors that matter to the US Government member agencies of CFIUS from a national security perspective.
- In August 2018, Congress passed and the President signed, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) as part of the National Defense Authorization Act - the first comprehensive reform of the US FDI process since the 2007 Foreign Investment and National Security Act of 2007 (FINSA) amendments. FIRRMA confirmed CFIUS' authorities, continued to expand some of its jurisdiction and left the regulatory implementation to the Department of Treasury, in coordination with the Department of Commerce.
- Treasury issued final regulations effective in February 2020. FIRRMA and the regulations established the first mandatory filing requirement for FDI and outlined additional requirements for mandatory filings, real estate transactions, non-controlling investments and critical infrastructure deals, and filing fees.

Reviews under the Defense Production Act of 1950, as amended

- FIRRMA is embedded in the Defense Production Act (DPA), a statute that includes a range of broad national security authorities. CFIUS has the discretion to review transactions but the statutory and regulatory focus revolved around ownership and control.
- FIRRMA expanded that focus to address ownership, control, bankruptcies, and other investments that are not considered controlling. Prior to FIRRMA, these reviews were based on voluntary submissions – the parties to a transaction could decide whether to voluntarily file a joint notice, although CFIUS has had the right to require review of other transactions.
- According to public sources, the authority to review non-notified transactions appeared to be used sparingly but, in recent years, CFIUS has moved more assertively to request filings, engage with parties while a transaction is under consideration and actively intervene.
- For the first time ever publicly announced, CFIUS intervened before closing to block an attempted Broadcom hostile takeover of Qualcomm through the use of its interim authorities.
- Before 2016, CFIUS had publicly blocked or required the divestiture of only a small number of foreign investments, principally involving Chinese State-Owned Enterprises (SOEs) generally with military connections. The number of blocked or withdrawn transactions involving Chinese investors increased in the Obama Administration and has continued in the Trump Administration – centered in part on the changing geopolitical framework, publicly articulated Chinese technology development policy, and the Section 301 Investigation by the USTR.

Reviews under the Defense Production Act of 1950, as amended

- The increased activity by CFIUS has also been reflected by other governments that have intervened or rejected cross-border investments based on national security considerations.
- This injects some uncertainty into the deal making process, calling into question the potential that completed deals may, nonetheless be subject to review.
- CFIUS examines each investment on a case-by-case basis, using a risk based evaluation process focused on threats plus vulnerabilities equal consequences.
- Deciding whether to file a notice to the CFIUS now requires consideration of the risks associated with not filing a voluntary submission but also the impact of failing to file a mandatory declaration. There are no penalties for failing to file a voluntary notice, but parties may be fined up to the value of the transaction (as well as face forced divestiture) for a failure to file a mandatory declaration.

The CFIUS 2018 Pilot Program Was a Game Changer for Technology Companies

- The CFIUS Pilot Program Regulations went into effect in November 2018. The Pilot Program introduced for the first time mandatory filings for controlling and non-controlling investments in selected industries with "critical technology". The Pilot Program was incorporated into the final CFIUS regulations effective in February 2020.
- The result was that many technology companies had to scramble to determine if they were covered by one of the 27 NAICS categories defining the selected industries and to classify their technology for export control purposes to determine if they had "critical technology" and if the investors would have access to it as defined under the Regulations.
- Although there was concern that this change would result in thousands of filings or abandoned investments, there was an underwhelming number of filings (approximately 100) under the Pilot Program, but CFIUS nonetheless opted to keep it in place in the final regulations adopted in February of this year.
- The explanation for the lower than expected number of filings is a combination of the restructuring of deals to avoid either an equity investment or an investment giving access to "critical technology," as well as the determination that only a small number of technology companies had "critical technology" as currently defined. As will be explained in more detail later, the feared expansion of that definition to include "emerging" and "foundational" technologies has not yet occurred.

How to Tell if a Technology Transaction is a Covered Transaction

A transaction coming within the definition of "critical technologies" is defined in two ways. One is whether the U.S. business comes within any of the 27 industries identified in the regulations by reference to the NAICS codes. Note that the NAICS codes are broad and prepared for statistical purposes and there is no agency charged with responsibility for a final determination if an industry is covered.

- Current NAICS Code Industries
  - Aircraft Manufacturing (336411)
  - Aircraft Engine and Engine Parts Manufacturing (336412)
  - Alumina Refining and Primary Aluminum Manufacturing (331313)
  - Ball and Roller Bearing Manufacturing (332991)
  - Computer Storage Device Manufacturing (334112)
  - Electronic Computer Manufacturing (334111)
  - Guided Missile and Space Vehicle Manufacturing (336414)
  - Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing (336415)
  - Military Armored Vehicle, Tank and Tank Component Manufacturing (336992)
  - Nuclear Electric Power Generation (221113)
  - Optical Instrument and Lens Manufacturing (33314)

How to Tell if a Technology Transaction is a Covered Transaction

- Current NAICS Code Industries
  - Other Basic Inorganic Chemical Manufacturing (325110)
  - Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing (336419)
  - Petrochemical Manufacturing (325110)
  - Powder Metallurgy Part Manufacturing (332117)
  - Power, Distribution and Specialty Transformer Manufacturing (335311)
  - Primary Battery Manufacturing (335912)
  - Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing (334220)
  - Research and Development in Nanotechnology (541713)
  - Research and Development in Biotechnology (except Nanotechnology) (541714)
  - Secondary Smelting and Alloying of Aluminum (331314)
  - Search, Detection, Navigation, Guidance, Aeronautical, and Nautical Systems and Instrument Manufacturing (3354511)
  - Semiconductor and Related device Manufacturing (334413)
  - Semiconductor Machinery Manufacturing (333242)
  - Storage Battery Manufacturing (335911)
  - Telephone Apparatus Manufacturing (334210)
  - Turbine and Turbine Generator Set Units Manufacturing (333611)

How to Tell if a Transaction is a Covered Transaction

"Critical Technologies" is further defined in the regulations as:

(a) technology covered by the International Traffic in Arms Regulations (ITAR);

(b) technology covered by certain destination-based controls under the Commerce Control List (CCL) of the Export Administration Regulations (EAR);

(c) controlled nuclear related technology;

(d) select agents or toxins (under certain FDA and PHS regulations); or

(e) "emerging or foundational technologies" to be added by the Department of Commerce, under the Export Control Reform Act of 2018, which definition will also be used by CFIUS.

Impact of the COVID-19 National Emergency on CFIUS Reviews

- CFIUS is still working, albeit remotely, and cases are still being cleared.
- Certain cases may take longer to clear because the remote working environment may slow down the internal review and approval process.
- Parties should expect greater scrutiny of transactions that involve a US business participating in the response to the COVID-19 crisis, such as manufacturers of ventilators or Personal Protection Equipment or engaged in drug research and development for vaccines or therapeutic treatments, and products subject to notification to FDA under the CARES Act of shortages of drugs or medical equipment, as part of the new focus on drug/medtech supply chains
- Given the circumstances, it is important to determine the role a US business may play in the COVID-19 emergency, the level of US government interest in, or supply chain concerns about, the US business, and any rated orders issued or other action taken under the Defense Production Act (DPA).
- Investors should also be aware that a US business that has accepted CARES Act funds, including healthcare product suppliers, thereby has become a "contractor" under the DPA, and is subject to the many restrictions imposed on US government contractors

Impact of the COVID-19 National Emergency on CFIUS Reviews

- The COVID-19 crisis has resulted in a decline of M & A and investment transactions, although there will likely be an increase in opportunistic M & A and investment transactions given the material adverse effects being experience by certain companies.
- The COVID-19 crisis has also raised the specter of a potential increase in bankruptcies or other business disruptions.
- FIRRMA expressly confirmed that CFIUS has the authority to review transactions in bankruptcy, including Section 363 sales in bankruptcy, which do not eliminate the CFIUS or other international compliance risks.
- The bankruptcy courts are working with CFIUS and other stakeholders to ensure that national security considerations are addressed in addition to creditors' equities.
- On May 1, the President issued a new Executive Order 13920 imposing restrictions on importing or installing "bulk power system equipment" from entities controlled by foreign "adversaries," which, together with the recent Executive Order 13873 on telecommunications equipment, may signal potential further use of such Executive Order authority to address other specific situations.

Specific Concerns for Technology Companies

- What are some of the impactful changes to the regulations on Technology, Infrastructure and Data ("TID") businesses?
  - Increasing focus on social media acquisitions involving sensitive personal data, including reviewing previously closed transactions not filed for review:
    - Beijing Kunlun / Grindr (sensitive personal data)
    - iCarbonX / PatientsLikeMe (personal healthcare information)
    - ByteDance / Musical.ly (TikTok) (personal information)
    - Beijing Shiji Information Technology / StayNTouch (personal information)
- Following COVID-19, increased focus on life sciences/healthcare investments and on food supply/agriculture investments.

Specific Concerns for Data Companies

- Sensitive Personal Data used in defining a "TID business" -- a new focus of CFIUS review.
- "identifiable data" refers to data that can be used to distinguish or trace an individual's identity
  - Aggregated or anonymized data will be treated as identifiable data if any party to the transaction will have the ability to disaggregate or deanonymize the data.
  - It does not include encrypted data, unless the U.S. business has the means to de-encrypt the data.
- Broad definition of sensitive personal data, focused on personal, financial, and healthcare information of U.S. citizens, including identifiable data that is:
  - In applications for insurance;
  - Non-public email or messaging among users of a U.S. business's products or services;
  - Biometric data;
  - Geolocation data; or
  - Personnel security clearance data.
- "identifiable data" will be treated as "sensitive personal data" if it is maintained or collected by a U.S. business that:
  - Targets or tailors products or services to U.S. security personnel including contractors; or
  - Has maintained or collected such data, or has a demonstrated business objective to do so, on more than one million individuals at any point in the preceding 12 months.

Specific Concerns for Data Companies

- Sensitive personal data also includes genetic data.
  - Genetic data is not subject to the above two limitations on security personnel or minimum size of data population.
  - In an attempt to narrow the scope of genetic data covered, following concerns expressed regarding the proposed rules, CFIUS limited the definition in the final rules to "the results of an individual's genetic test, including any related genetic sequencing data."
    - Genetic tests are defined by reference to the Genetic Information Non-Discrimination Act of 2008.
    - Genetic tests covered are limited to identifiable genetic tests.
    - Excludes any data derived from U.S. Government databases and given to third-parties for research purposes.

Specific Concerns for Life Sciences Companies

- Foreign investment in life sciences and medtech products and services entities has been significantly affected by the new focus on and definition of sensitive personal data, as well as by the focus on these entities as essential under COVID-19.
  - Many life sciences and medtech product developers and manufacturers will have or intend to have access to data of one million or more individuals.
  - Certain life sciences companies, particularly those developing or manufacturing biotechnology-derived products or services, will have access to genetic test data.
- Foreign investment in healthcare service providers, including hospitals and healthcare insurers also may be significantly affected by this new focus, in view of the likelihood of collection and retention of data on more than one million individuals as well as of genetic test data.
- Foreign investment in the U.S. food supply chain also likely will be affected by focus on these entities as essential under COVID-19.

Specific Concerns for Infrastructure Companies

- New, detailed definitions of critical infrastructure for determinations of covered control transactions and covered investments involving TID businesses.
- Two-step test: U.S. business
  - Must relate to certain types of infrastructure.
  - Must perform certain specified functions for that infrastructure.
- A list of types of infrastructure and functions relating to them is set out in detail in Appendices to the final rules
  - Critical infrastructure includes electric energy systems, financial systems, rail networks, public water systems, petroleum and natural gas facilities, telecom and information networks, securities and exchanges and financial networks, air and maritime ports.
  - Must consider both tests in making determinations (e.g., U.S. interstate natural gas pipeline owner/operator is critical infrastructure; but U.S. business manufacturing pipe or servicing the pipeline is not).

Specific Concerns for Telecom Companies

- Most telecommunications network and service providers are now considered part critical infrastructure.
  - Telecom transactions may be reviewed additionally by the Committee for the Assessment of Foreign Participation in the United States Telecommunications Sector, created by Executive Order on April 4, 2020 (superseding the informal Team Telecom process).
  - The CFIUS process does not substitute for the Telecom Committee's review, but a CFIUS filing (even if voluntary) may be helpful to expedite approval by the Telecom Committee.
  - The Executive Order is not expected to change the substance of prior Team Telecom reviews, but established new deadlines for the Telecom Committee's review (90 days after submission of responses to questions and a possible additional 90 days), which will have to be taken into account by filing parties in conjunction with CFIUS review timelines.
- The detailed list in the separate CFIUS regulations on real estate should also be consulted to determine if any of the facilities in the target U.S. business are in geographic proximity to military installations and other U.S. Government sites of security concern and not covered by any available exceptions.

Strategies for Addressing CFIUS Issues

- Is the buyer/investor a foreign person for CFIUS purposes? Is it possible to structure the investment so as not to involve foreign persons (e.g. use of investment fund exemption) that do not constitute evasion? Does the buyer/investor have a positive/negative track record with CFIUS?
- Is it possible to structure the transactions so it is not subject to the mandatory filing requirements or is a covered transaction? Examples include a license/collaboration agreement with no equity investment or a passive investment with no board/observer rights or access to "critical technology."
- If a mandatory filing is not required should closing be conditioned on CFIUS clearance because of national security risk profile (e.g., TID business, supply chain concerns, foreign investor identity, U.S. government nexus through contracts/funding)?

Strategies for Addressing CFIUS Issues

- Consider potential mitigation strategies to address any national security concerns. These could include adopting special security agreements, proxy control or a voting trust structure, or other national security agreement, or spinning off certain assets/contracts/product lines that present national security issues.
- Consider appropriate contractual provisions to allocate risk and cost of CFIUS filings and effect on timeline.
- Consider appropriate (proactive or reactive) PR/lobbying strategies to counter any opposition from interest groups or competitors. Strictly comply with FARA and LDA requirements.

Mandatory Filing Requirements

- What are the mandatory filing requirements under the regulations?
  - Mandatory filing of a Declaration under the former interim pilot program was incorporated in the new rules.
  - Retains list of 27 industry categories (by NAICS Codes) from the CFIUS Pilot Program Regulations.
  - Retains definitions of critical technologies, with a new exception for certain encryption technology eligible for License Exception ENC of the Export Administration Regulations (EAR).
  - Required for a covered investment where investor obtains a board/observer seat, or access to material non-public technical information, or substantive-decision making rights regarding critical technology, critical infrastructure, or sensitive personal data of the U.S. business.
  - CFIUS stated it anticipates issuing a separate notice that would replace the reference to NAICS Codes with a mandatory declaration requirement based on export control licensing requirements.

Mandatory Filing Requirements for Substantial Interest by Foreign Government

- New mandatory filing requirement for foreign government-controlled transactions, where a "substantial interest" is acquired in a U.S. business
  - If a foreign government-affiliated investor (from a single foreign state, combining investments by national, regional, and local government entities) would hold a 49% or more voting interest (direct or indirect) in the acquirer/investor.
  - And, the investment involves a 25% or more acquisition of a voting interest (direct or indirect) in a TID U.S. business.
  - In the case of an investment fund, only an acquisition of an interest in the general partner is considered (provided any limited partner interests do not confer control by the foreign investor).

Exceptions to Mandatory Filing Requirements

- What are the exceptions to the mandatory filing requirements under the new regulations?
  - Transactions by funds controlled by U.S. nationals, as discussed more below.
  - Investments made by "Excepted Investors" (*i.e.*, individuals, governments and private entities from an "Excepted Foreign State" -- currently Australia, Canada and U.K.).
  - An investor is exempt if:
    - It is organized under the laws of an excepted foreign state or in the US;
    - Such entity has its principal place of business in an excepted foreign state or in the U.S.; and
    - 75% or more of the members and observers in the board of directors or equivalent governing body of such entity are: (i) U.S. nationals; or (ii) Nationals of one or more excepted foreign states who are not dual nationals of any foreign state that is not an excepted foreign state ("Dual Nationals").

Exemptions to Mandatory Filing Requirements

- An investor is exempt if: (continued)
  - Any foreign person that individually, and each foreign person that as part of a group, holds 10% or more of the outstanding voting or equity interests of such entity is (A) a national of one or more excepted foreign states and not a Dual National; (B) a foreign government of an excepted foreign state; or (C) a foreign entity organized under the laws of an excepted foreign state and that has its principal place of business in an excepted foreign state or in the U.S.; and (D) the equity of such person is held by investors from that foreign state and who are not Dual Nationals.
  - Investors from excepted foreign states may be disqualified for previous violations of export control or sanction laws or for having committed federal crimes.
- Investments by foreign entities operating under a facilities security clearance, or subject to a mitigation agreement to address FOCI executed with the DCSA.
- Investments in TID Businesses that produce, design, manufacture, test, fabricate or develop one or more critical technologies that may be exported under license exemption "ENC" under the EAR (*i.e.*, most commercial encryption items).

Emerging and Foundational Technologies

- What is happening to the potential expansion of critical technology to include emerging and foundational technology?
  - It is currently unclear when and if the Department of Commerce will fill the currently empty buckets for "emerging and foundational technologies" included in the definition of "critical technology."
  - While the Department of Commerce announced in November 2018 an ANPRM for "emerging technologies," no proposed regulations have been issued yet.
  - While the Department of Commerce may publish soon an notice of "foundational technologies," that may not result in proposed regulations.
  - There has been heavy lobbying by various industries because of the concern of overregulation that will affect collaboration by introducing additional export control requirements.
  - Current interagency conflicts may further delay the proposed regulations and the Department of Commerce may choose to increase export controls without making it clear what the effects are on the CFIUS process, as it did recently in the case of geospatial imagery software.

Care In Structuring Transactions To Avoid Evasion

- Is it ok to structure the transaction to "avoid" being caught by the mandatory declaration process?
  - Care needs to be taken that any structuring of a transaction is bona fide and not done for the purpose of evasion.
  - That said, bona fide changes in a transaction, such as eliminating an equity investment, board or observer rights, access to material non-public technical information relating to "critical technologies," and no substantive decision making rights, may be done so that the transaction is no longer subject to the mandatory requirements or be a covered transaction for CFIUS purposes.
  - Care should be taken with multi-step transactions that the combination of steps does not render the entire transaction a covered transaction.

Considerations for Non-Mandatory Filings

- Assuming a transaction is not covered by the mandatory filing requirements and it is a covered transaction, how does one assess the pros and cons for filing a voluntary notice? What are the factors that should be considered when deciding whether to file a short form voluntary Declaraion or full Joint Voluntary Notice?
  - A voluntary filing is a risk assessment decision.

- Pro factors include:
  - Whether filing party's nation is of potential concern;
  - Technology involved;
  - If acquirer/investor is a foreign government-controlled or fiduciary entity (e.g., public employees' retirement fund); and
  - If target is geographically proximate to installations of security concern.

- Con factors include:
  - Time and expense of filing;
  - Potential closing delay;
  - Investment uncertainty; and
  - Potential for mitigation restrictions.

Considerations for Non-Mandatory Filings

- Joint Voluntary Notice or Voluntary Declaration assessment decision:
  - Declaration much shorter / less data needed / response in 30 days.
  - One CFIUS response to Declaration, however, may be to require or request filing the more detailed JVN, thus losing time regarding closing.
  - No closing allowed during Declaration review; closing can be done before or during a JVN filing and review.
- The parties should consider and negotiate potential risk-shifting mechanisms in the purchase/investment agreement, such as CFIUS representations as to foreign-government control or technology classifications, and limits on potential mitigation demands that might be economically acceptable.

Risks of Not Filing

- What is the likelihood that CFIUS will review a non-notified covered transaction? Does the potential vary depending upon whether the non-notified covered transaction is a controlling versus a non-controlling deal?
  - CFIUS has increased its resources to monitor so-called non-notified covered transactions and since 2016 the number of reviews of non-notified covered transactions has increased, particularly involving sensitive personal data as noted above.
  - It is expected that CFIUS will further increase its review of non-notified covered transaction, but only time will tell as to the pattern and practice.
  - While CFIUS has not to date reviewed a non-controlling covered transaction, that may change in the future.
  - Just because CFIUS reviews a non-notified covered transaction does not mean that it will require mitigation of national security issues or divestiture. Those remedies will likely remain only in a small percentage of cases.

Managing CFIUS Review Process

- What is the timeline for CFIUS reviews? How can it be managed to avoid delays?
  - Declarations: 30 days from "Day One" but may CFIUS may require or request a full submission.
  - Joint Voluntary Notices:
    - Pre-filing of complete notice (regulations specify ten days for CFIUS comments).
    - After Formal Filing: 45 days from "Day One Letter" (generally 10-15 days to get to "Day One").
    - May be extended by "investigation phase" for up to 45 additional days. Theoretical extension for 15 more days in "extraordinary circumstances."
  - At the end of process CFIUS could:
    - Clear the transaction with no mitigation.
    - Condition approval on mitigation measures.
    - Refer the transaction to the President to take action under Section 721, if the parties do not abandon the deal, or, in complicated cases, request a withdrawal and refiling to restart the clock.
- Be careful with drop dead/long stop dates in a purchase/investment agreement that are too short given the unpredictability of CFIUS reviews.

New Filing Fees

- Effective May 1, 2020, CFIUS introduced a sliding scale of required filing fees, depending on the size of the transaction.
- The fees range from no fee for transactions less than U.S. $500,000 to a $300,000 fee for transactions of U.S. $750,000,000 or more.
- Filing fees would apply only to Joint Voluntary Notices, not mandatory or voluntary Declarations.
- Who pays is a matter of parties' negotiation, but generally can be expected to be the buyer/investor, as with antitrust HSR pre-notification fees.

Penalties

- What are the penalties/remedies for a failure to comply with CFIUS requirements – whether filings, mitigation agreements, or interim orders regarding signed, but not closed transactions?
  - Several civil penalties provisions are incorporated in the new rules.
  - $250,000 per violation for submitting false information in a filing to CFIUS.
  - $250,000 or the value of the transaction, whichever is greater, for failure to make a mandatory filing.
  - $250,000 or the value of the transaction, whichever is greater, for intentional or grossly negligent violation of a material provision of a mitigation agreement, per violation.
  - A mitigation agreement also may include a provision for liquidated or actual damages for breaches of the agreement.
  - In April 2019, CFIUS revealed that in 2018, it imposed a $1 million civil penalty on an unnamed entity "for repeated breaches" of a 2016 mitigation agreement.

Due Diligence-Spotting CFIUS Issues

- How can I spot a CFIUS issue? Is there a standard due diligence 'checklist' to which I can refer?
  - In any transaction involving a foreign person and a US business, particularly a TID US business, there is a potential CFIUS issue that should be analyzed early on given the complexity of the rules.
  - Due diligence checklists have been developed for determining mandatory filing requirements as well as areas of CFIUS concern based on the required contents of a Declaration or Joint Voluntary Notice, but these need to be customized for the particular transaction in question to avoid missing issues. For example, the acquisition of a TID US business including real estate would need to include due diligence items under both sets of regulations.

Contractual Documentation

- Is there standard contract or agreement language to address CFIUS issues?
  - Pre-FIRRMA, standard CFIUS language was developed in change of control transactions based on HSR pre-merger notification provisions. Variations depended upon commercial leverage and often revolved around who bore the consequences of non-clearance by CFIUS in terms of breakup fees and the level of required cooperation/mitigation by the foreign person to obtain CFIUS clearance.
  - Post-FIRRMA, representations and warranties were developed under the pilot program to address triggering events for mandatory filings.
  - The NVCA developed general partner friendly CFIUS language to insert in limited partnership agreements, which has not always been accepted by influential limited partners.
  - We expect to see this language evolve and, over time, become more standardized under the final regulations.
  - Parties will need to address the payment of filing fees and the risk of CFIUS review of non-notified covered transactions if the transaction is not conditioned upon CFIUS clearance.

Stephen Paul Mahinka

Washington, DC
T +1.202.739.5205
F +1.202.739.3001
stephen.mahinka@morganlewis.com

Stephen Paul Mahinka is a partner in the Washington, D.C. office and a member of the firm's CFIUS Working Group. He is a former leader of the Antitrust Practice, founder of the FDA Practice Group, and co-founder and former chair of its Life Sciences Practice group. He is responsible for many of the firm's filings before CFIUS, and has represented both buyers and sellers of U.S. businesses, obtaining over 50 clearances in recent years. These clearances include transactions in the life sciences, energy, technology, and transportation industries. He is experienced in negotiating of Foreign Ownership, Control, and Influence (FOCI) and other mitigation agreements.

Mr. Mahinka has published over 100 articles on CFIUS, FDA, and antitrust issues, and is a co-author of several books, including the ABA Antitrust Section's *Pharmaceutical Industry Antitrust Handbook* (2nd ed. 2018) and *Food and Drug Law and Regulation* (3rd ed. 2015). He is a graduate of Johns Hopkins University, *Phi Beta Kappa*, and of the Harvard Law School, where he was Executive Editor of the *Harvard International Law Journal.*

Carl A. Valenstein

Boston
T +1.617.341.7501
F +1.617.341.7701
carl.valenstein@morganlewis.com

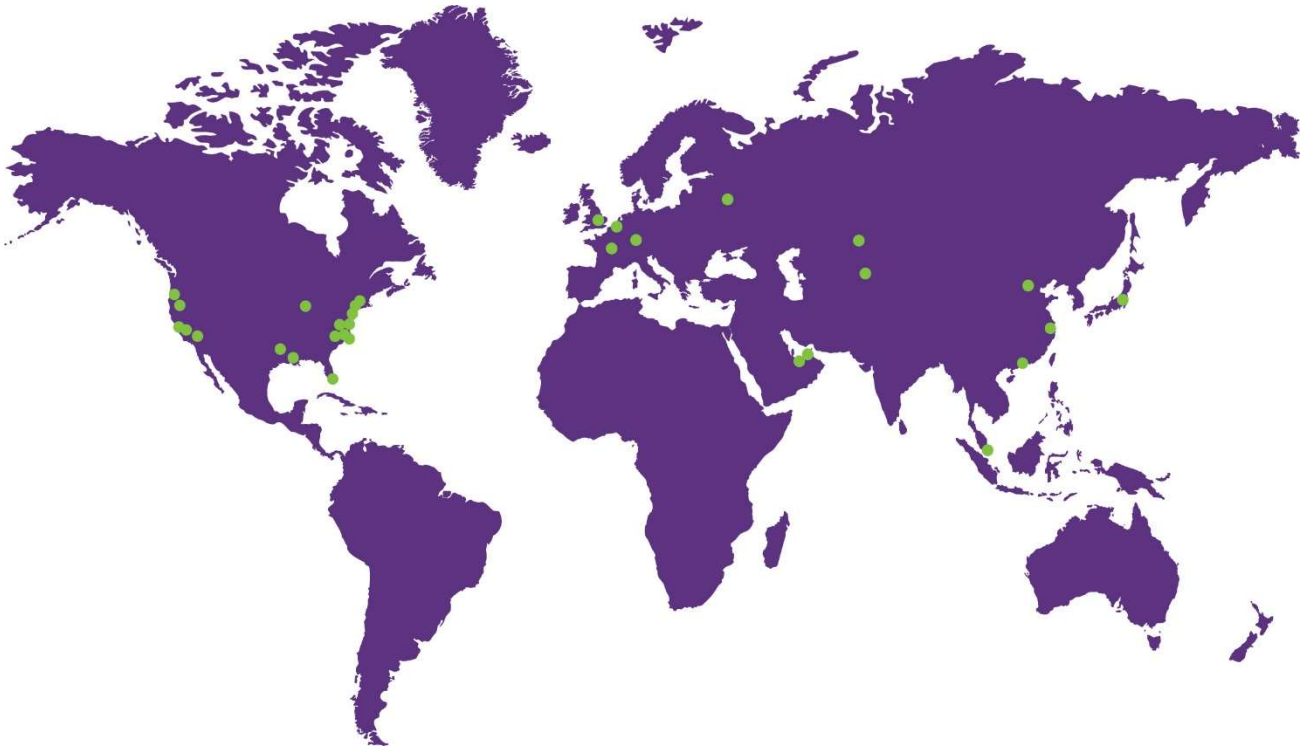
Carl Valenstein focuses his practice on domestic and international corporate and securities matters, mergers and acquisitions, project development, and transactional finance. He counsels extensively in the life science, telecom/electronics, and maritime industries, and he has worked broadly in Latin America, the Caribbean, Europe, Africa, Asia and the Middle East. He is the co-chair of the International Section of the Boston Bar Association and co-chairs the firm's Cuba Initiative. He is a frequent speaker at conferences on a variety of international compliance and transactional topics. Carl is a member of the Morgan Lewis CFIUS working group.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Beijing*
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
Moscow
New York
Nur-Sultan
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Shanghai*
Silicon Valley
Singapore*
Tokyo
Washington, DC
Wilmington



Morgan Lewis

*Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

THANK YOU