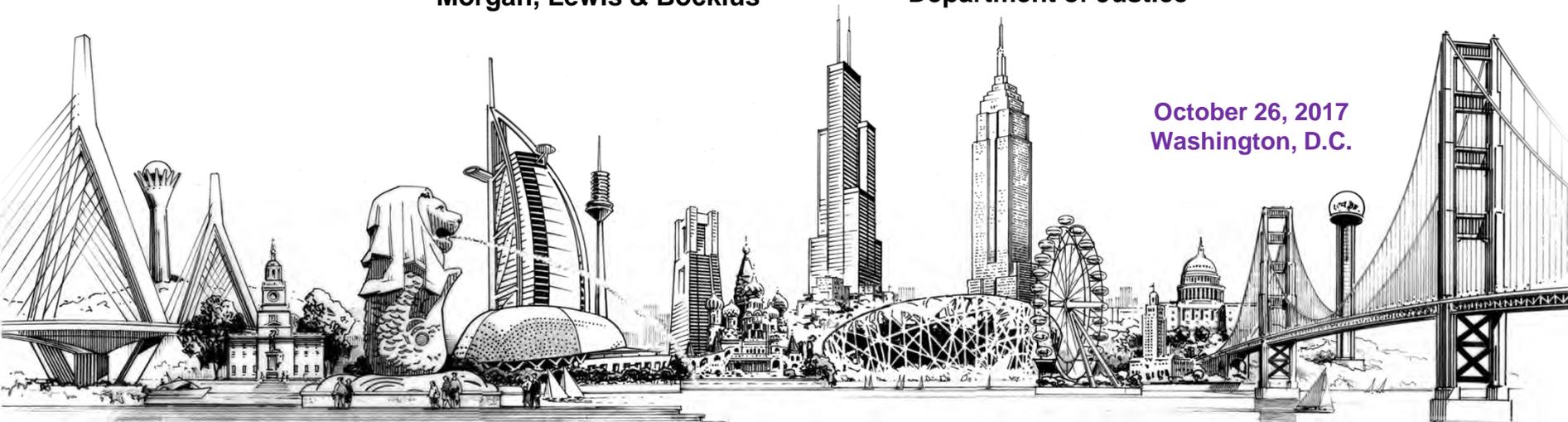


# THE UPSIDE TO CFIUS REVIEW: HOW TO WEIGH THE COSTS AND BENEFITS OF ENGAGING THE COMMITTEE

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# CFIUS FILING CONSIDERATIONS

- Is it a “covered transaction” = any transaction by or with any *foreign person*, which could result in *control* of a *US business* by a *foreign person*
- Important elements of the covered transaction definition
  - ❖ transaction
  - ❖ control
  - ❖ US business
  - ❖ foreign person

# IMPORTANT DEFINITIONS FOR DETERMINING A COVERED TRANSACTION

- Transaction = a proposed or completed merger, acquisition, or takeover (31 CFR § 800.224)
  - ❖ The acquisition of an ownership interest in an entity
  - ❖ The acquisition or conversion of convertible voting instruments of an entity
  - ❖ The acquisition of proxies from holders of a voting interest in an entity”

# IMPORTANT DEFINITIONS FOR DETERMINING A COVERED TRANSACTION

- Transaction = a proposed or completed merger, acquisition, or takeover (31 CFR § 800.224)
  - ❖ A merger or consolidation
  - ❖ The formation of a joint venture
  - ❖ A long-term lease under which a lessee makes substantially all business decisions concerning the operation of a leased entity, as if it were the owner

# IMPORTANT DEFINITIONS FOR DETERMINING A COVERED TRANSACTION

- Control = the power, direct or indirect, whether or not exercised, to determine, direct, or decide important matters affecting an entity (31 CFR § 800.204)
  - ❖ Ownership of a majority or a dominant minority of the total outstanding voting interest in an entity
  - ❖ Board representation
  - ❖ Proxy voting
  - ❖ Special share
  - ❖ Contractual arrangements, formal or informal arrangements to act in concert

# IMPORTANT DEFINITIONS FOR DETERMINING A COVERED TRANSACTION

- The power to determine, direct, take, reach, or cause decisions regarding a delineated list of matters, “or any other similarly important matters affecting an entity”
  - ❖ Example list of ten (10) matters provided:
    - ◆ Sale, lease, mortgage, pledge, or other transfer of any of the tangible or intangible principal assets of the entity, whether or not in the ordinary course of business
    - ◆ Reorganization, merger, or dissolution of the entity;
    - ◆ Closing, relocation, or substantial alteration of the production, operational, or research and development facilities of the entity;

# IMPORTANT DEFINITIONS FOR DETERMINING A COVERED TRANSACTION

- ❖ Example list of ten (10) matters provided:
  - ◆ Major expenditures or investments, issuances of equity or debt, or dividend payments by the entity, or approval of the operating budget of the entity;
  - ◆ Selection of new business lines or ventures that the entity will pursue;
  - ◆ Entry into, termination, or non-fulfillment by the entity of significant contracts;
  - ◆ Policies or procedures of the entity governing the treatment of nonpublic technical, financial, or other proprietary information of the entity;

# IMPORTANT DEFINITIONS FOR DETERMINING A COVERED TRANSACTION

- ❖ Example list of ten (10) matters provided:
  - ◆ Appointment or dismissal of officers or senior managers;
  - ◆ Appointment or dismissal of employees with access to sensitive technology or classified US Government information; and
  - ◆ Amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of the entity with respect to the matters described in 1 through 9

# IMPORTANT DEFINITIONS FOR DETERMINING A COVERED TRANSACTION

- *US business:*
  - ❖ Any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce (31 CFR § 800.226)
  
- *Foreign person:*
  - ❖ Any *foreign national, foreign government, or foreign entity* (each is separately defined)
  - ❖ Any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity (31 CFR § 800.216)

# IMPORTANT DEFINITIONS FOR DETERMINING A COVERED TRANSACTION

## ➤ *Foreign entity:*

- ❖ Any branch partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization organized under the laws of a foreign state if either its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges (31 CFR § 800.212)
- ❖ But not if a majority of the equity interest in the entity is ultimately owned by US nationals (citizens or persons who owe “permanent allegiance” to the US)

# THE ROLE OF NON-NOTIFIED TRANSACTIONS IN THE COST-BENEFIT ANALYSIS

- What is a CFIUS Non-Notified Case
- Statutory Basis for CFIUS to review Non-Notified Cases
- Historical Trends
- Consequences of not filing transactions with CFIUS
- National Security, Non-Notified Transactions, and your company
- Rolling the Dice – Will CFIUS detect your transaction?
- Way Ahead for CFIUS Non-Notifies

# WHAT IS A CFIUS NON-NOTIFIED CASE?

- Transactions that are subject to CFIUS jurisdiction yet are not filed with voluntarily CFIUS by the parties can include, for example:
  - ❖ US subsidiary in the US is purchased by a foreign entity
  - ❖ Certain foreign joint ventures
  - ❖ Situations where there exist “indirect control”

# STATUTORY BASIS FOR CFIUS TO REVIEW NON-NOTIFIED CASES

- The Foreign Investment National Security Act (“FINSA”), 50 USC 4565
- Treasury CFIUS Regulations (31 CFR 800)
  - ❖ CFIUS, under the above authority, is authorized to review pending or completed transactions even absent company-initiated Joint Voluntary Notice (“JVN”). These transactions are commonly referred to as “non-notified cases.” See 50 USC 4565 (b)(1) (D) and 31 CFR 800.401(b)

# HISTORICAL TRENDS

- Number of non-notified transactions considered by CFIUS is increasing



# NATIONAL SECURITY, NON-NOTIFIED TRANSACTIONS, AND YOUR COMPANY

- National Security is not Defined in FINSA
- National Security Threats Evolve
  - ❖ Investment country strategic objectives
  - ❖ New Technologies (leading edge innovations especially in digital field and in sensitive fields yet not licensed for export)
- What was not a threat a few years ago, is one now – each is analyzed case by case
  - ❖ Big Data
  - ❖ Internet of Everything

# NATIONAL SECURITY, NON-NOTIFIED TRANSACTIONS, AND YOUR COMPANY

- PII and other information may be valuable to our potential adversaries (PII has “dual use” characteristics)
- Only mitigation that is effective, and can be monitored and enforced is used to resolve risk arising out of a transaction

# BENEFITS OF FILING TRANSACTIONS WITH CFIUS

- Provides Safe Harbor from POTUS prohibition/divestment
- Protects security clearances and licenses
- Efficient use of resources, using information in more than one (1) regulatory environment (other federal or state regulators)

# CONSEQUENCES OF NOT FILING TRANSACTIONS WITH CFIUS

- Costs of Unwinding / Divestment

*“Obama Blocks Chinese Firm From Wind-Farm Projects”*

- Wall Street Journal, September 28, 2012

- Unanticipated cost of CFIUS mitigation

- Shareholder Lawsuits

- Decreased stock prices

- Good Will and Reputational Damage

# ADDITIONAL REASONS TO NOTIFY

- Rolling the Dice – Will CFIUS detect your transaction?
  - ❖ Don't take a chance
  - ❖ CFIUS is getting increasingly better at detecting non-notified transactions
  - ❖ Not a good thing to receive a phone call from CFIUS requesting a filing
- Way Ahead for CFIUS Non-Notifies
  - ❖ It is a growing part of the CFIUS caseload
  - ❖ Don't assume that DSS oversight or export control licenses will exempt you from the need to file with CFIUS

# CFIUS CONSIDERATIONS

- Does the transaction raise national security concerns?
  - ❖ FINSA authorizes the President to suspend or prohibit any covered transaction when both of the following are found to exist
    - ◆ There is credible evidence to believe that the foreign person exercising control over a US business might take action that threatens to impair the national security
    - ◆ Provisions of law other than FINSA and the International Emergency Economic Powers Act (50 USC 1701– 1706) do not provide adequate and appropriate authority for the President to protect the national security in the matter

# CFIUS COST-BENEFIT ANALYSIS

- Your transaction is covered
- National security (and/or critical infrastructure) issues or questions *may* exist
  - ❖ Defense contracts
  - ❖ Supply chain
  - ❖ Access to sensitive data
  - ❖ Access to personal data/big data
  - ❖ Co-location issues
  - ❖ Critical infrastructure ownership or access

# CFIUS COST-BENEFIT ANALYSIS

- Weighing deal delay and legal fees versus certainty
- Is the purchase premium worth the CFIUS risk?
- Risky behavior
  - ❖ Deciding yourself that no national security issues are raised or exist
  - ❖ Ignoring objective indicators
    - ◆ Defense contracts (including DPAS contracts)
    - ◆ Critical infrastructure (power plants, smart grid, national airspace, transportation facilities and control, *etc.*)

# CFIUS COST-BENEFIT ANALYSIS

- ❖ Ignoring objective indicators
  - ◆ Defense contracts (including DPAS contracts)
  - ◆ Critical infrastructure (power plants, smart grid, national airspace, transportation facilities and control, *etc.*)
  - ◆ Important technology/supply chain
  - ◆ Food supply
  - ◆ Buyer is from a country subject to close scrutiny
- ❖ Assuming/Hoping the government does not notice
  - ◆ Other regulatory reports will inform CFIUS (SEC, BIS, DDTC, FERC, DOT)
  - ◆ Non-notified processes within the government

# CFIUS COST-BENEFIT ANALYSIS

- Certainties
  - ❖ Not limited to later action by CFIUS
  - ❖ Later divestiture value could be impacted
  - ❖ Changed circumstances
  - ❖ Purchase price adjustments
  - ❖ Enhanced due diligence
- Competing concerns – buyer versus seller

## Our Global Reach

Africa  
Asia Pacific  
Europe  
Latin America  
Middle East  
North America

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