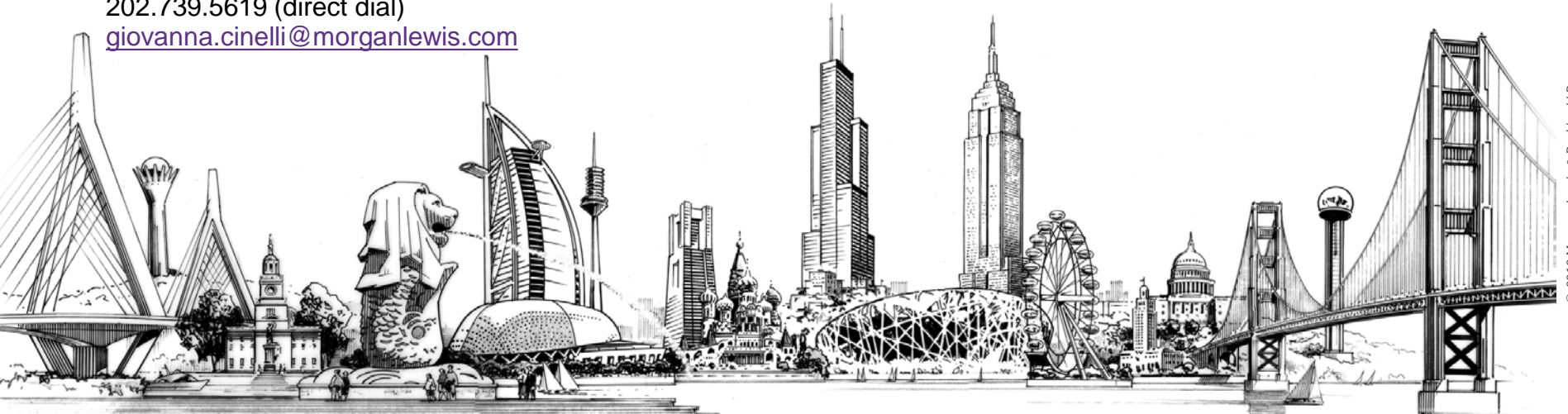


COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: CURRENT AND FUTURE EXPECTATIONS FOR THE NUCLEAR INDUSTRY

NUCLEAR FUEL SUPPLY FORUM
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Giovanna M. Cinelli
Co-Lead, International Trade, National Security & Economic Sanctions Practice
202.739.5619 (direct dial)
giovanna.cinelli@morganlewis.com



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

- History
 - 1974-75: Established by President Ford as an Executive branch review committee
 - Did not have formal regulations or chairman
 - More ad hoc
 - Did not publish results of any cross-border transaction reviews
 - 1988: Exon-Florio Amendments to the Defense Production Act (“DPA”), 50 USC App. § 2170
 - Driven, in part, by concerns over Japanese investment in US semiconductor industry
 - Chaired by the Department of Treasury
 - Constituent member agencies included: the Departments of Defense, State, Commerce, Energy, Justice, Treasury
 - Individual agencies establish policies to assess the national security implications of cross-border transactions
 - Treasury manages the process and issues regulations, 31 CFR Part 800

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

- History
 - 2006-2007: Foreign Investment and National Security Act of 2007 amends the DPA
 - Driven, in part, by concerns of the purchase by Dubai Ports of several US ports already owned by a British company
 - Establishes CFIUS as a statutory committee
 - Assigns Treasury as the staff chair
 - Updates the CFIUS regulations to extend reviews to cross-border transactions in the critical infrastructure space – e.g., telecommunications, financial institutions, energy grids, and industries that affect the health and welfare of the general population (such as certain healthcare, food, and related industries)
 - Individual agencies continue to establish policies to assess the national security (and now critical infrastructure) issues related to cross-border transactions
 - Some agencies – such as the Department of Defense – published guidelines or handbooks that provided entities insight into areas of interest or concern for the agency
 - Standing CFIUS members include Homeland Security, USTR and Office of Science and Technology Policy

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

- Current Situation
 - Beginning in 2010 and through 2017, the People’s Republic of China (“PRC”) or (“China”) published several policies, position papers and technology objectives related to the country’s transition to a more critical role in the supply chain, manufacturing realm and research and development (“R&D”) arena
 - Made in China 2025 (2015)
 - China’s 13th Five Year Plan (2016-2020)(focus on robotics, biotech, genomics, electronics, virtual reality, AI, big data)
 - China also began to invest more assertively in US businesses or foreign businesses with operations in the United States
 - While the US Government tracks foreign investment through various statutory requirements – *e.g.*, the Bureau of Economic Analysis BE forms; the Securities and Exchange Commission requirements reflected in 20F filings – the Government currently lacks a cohesive, fully coordinated process to collect, analyze and share foreign investment data across agencies with an interest in such investments

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

- Current Situation
 - The lack of a cohesive information collection and analysis process enhanced existing challenges within CFIUS regarding the implications of FDI on US Government interests – both specific and generally
 - The US maintain an “open door” policy regarding FDI and that policy is generally managed by Treasury, the US Trade Representative and Commerce
 - This “open door” policy is counterbalanced by the impact of FDI on US military and critical technology advantages, cyber capabilities, intellectual property, and supply chain integrity – equities generally managed by the Departments of Defense, Justice (to include the Federal Bureau of Investigation) and Homeland Security
 - From 2000 through 2017, national security agencies embraced commercial technologies outside of the Government R&D or procurement process as a way to cut costs and take advantage of cutting edge technologies developed by the private sector

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

- Current Situation
 - The challenges within the Committee, and to transactions in general, increased with more frequent Chinese attempts (and some successes) to purchase, for example, semiconductor or related businesses in alignment with China’s policy to match and overtake US primacy in this field
 - This resulted in changes in the way:
 - Parties structured their transactions
 - CFIUS reviewed the transactions
 - Parties were asked to pull and refile CFIUS notices; and
 - Mitigation agreements designed to limit the national security impact of a particular transaction were drafted and implemented
 - Some of these changes were shared publicly in the required Annual Report on CFIUS activity and others came to light through public statements issued by the parties to a transaction

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

- In 2016, 2017 and 2018, the President and the Executive branch took several actions related to the following transactions that further underscored the Government’s focus on the national security implications of cross-border investments:
 - 2016:
 - Philips NV’s proposed sale of Lumileds to a Chinese Consortium (including GSR Ventures and Nanchang Industrial Group) (January 2016)
 - Fairchild Semiconductor International proposed sale to China Resources Microelectronics Ltd and Hua Capital Management Co Ltd. (February 2016)
 - AIXTRON SE proposed sale to Grand Chip Investment GmbH (a Chinese company) (December 2016)
 - 2017:
 - Wolfspeed proposed sale to Infineon Technologies (February 2017)
 - Inseego Corporation proposed sale of MiFi business to TCL Industries Holdings (June 2017)
 - Global Eagle Entertainment, Inc. proposed sale to HNA Co Ltd (July 2017)
 - 2018:
 - Moneygram proposed sale to Ant Financial (January 2018)

Committee on Foreign Investment in the United States (“CFIUS”) Administrative Actions

- ❖ In addition to these actions, beginning in 2016, some parties encountered changes in the CFIUS review process
 - ❖ Parties experienced more requests for information, both prior to formal submission and during the formal filing process
 - ❖ CFIUS increased the number of days needed to complete the pre-filing review for various transactions
 - ❖ More transactions required mitigation agreements or other changes to address national security or critical infrastructure concerns
 - ❖ New or previously less focused upon issues arose – for example, access to personal information has become a key area of concern for several CFIUS members
 - ❖ CFIUS increased the number of filings that required a 75 calendar day review period (30-day review plus 45-day investigation timeline)

Committee on Foreign Investment in the United States (“CFIUS”) Proposed Legislation

- ❖ Based on this background, Congress heightened its interest in modernizing and changing the CFIUS process
 - ❖ The Senate Committee on Banking, Housing and Urban Affairs retains jurisdiction over CFIUS because Banking oversees the DPA, as well as dual-use related export laws
 - ❖ Other Congressional committees – *e.g.*, Senate Select Intelligence Committee, House Intelligence Committee, Senate and House Armed Services Committees, and the Senate Judiciary Committee – have expressed concerns with the manner in which CFIUS has addressed cross-border reviews, in particular in relation to China and within certain industries (*e.g.*, semiconductors, financial services, AI, robotics, big data, uranium, etc.)
 - ❖ Changes in areas of concern – *i.e.*, big data, personal information, access to technology, access to R&D that can be used to leapfrog existing development, cyber capabilities, software development, artificial intelligence, biotechnology, civil nuclear applications, robotics, commercial technologies with national security applications, and industrial base issues have become key factors in any CFIUS

Committee on Foreign Investment in the United States (“CFIUS”) Legislative Proposals

Draft Bill Number	Title	Sponsors	Date	Summary
S. 1722	True Reciprocity Investment Act of 2017	Sullivan	August 20, 2017	Requires a report from the US Trade Representative, in consultation with the Department of Commerce, to determine whether countries provide investment reciprocity to US investors
S. 1983	United States Foreign Investment Review Act of 2017	Brown and Grassley	October 20, 2017	Establishes a mandatory process at the Department of Commerce to review cross-border transactions in relation to reciprocal treatment by a foreign purchaser’s home country; designed to supplement, not replace, the voluntary CFIUS process
S. 2098*	Foreign Investment Risk Review Modernization Act of 2017	Cornyn, Feinstein, Burr, Peters, Rubio, Klobucher, Scott, Barrasso, Manchin, Lankford, and Collins	November 17, 2017	Enhances and expands CFIUS’ authorities to review additional transactions, joint ventures, cross-border investments related to a range of technologies; defines “countries of concern”; sets a fee for a voluntary CFIUS filing; establishes new factors to consider when assessing the national security implications of a cross-border investment; establishes a “CFIUS lite” process

Committee on Foreign Investment in the United States (“CFIUS”) Legislative Proposals

Draft Bill Number	Title	Sponsors	Date	Summary
HR 4235	To authorize a review of financial services industry requirements of the People’s Republic of China and the implications of such requirements on national security interests of the United States	Smith, Estes, Jenkins, Franks	December 3, 2017	Establishes factors to consider in financial services transactions that involve China; identifies areas of concern regarding such transactions
HR 4337	Safeguarding American PII Act	Royce and Maloney	January 7, 2018	Requires consideration of access (or potential access) to personal information as part of a CFIUS review to assess national security implications of cross-border investments
HR 4311*	Foreign Investment Risk Review Modernization Act of 2017	Pittenger, Nunes, Smith, Hartzler, Yoho, Rogers, DeLauro, Gallagher, Roby, Loesbeck, Heck, Weber, Johnson, Culberson, Duffy, King, Stefanik, Banks, DeSantis, and Graves	January 7, 2018	Companion bill Act to S. 2098

Committee on Foreign Investment in the United States (“CFIUS”) Next Steps

- ❖ Anticipated legislative changes
- ❖ Increased scrutiny of specific transactions involving:
 - ❖ Specific countries – China, Russia, or proxy countries
 - ❖ A broader range of technologies and/or services
 - ❖ Foundational or disruptive technologies – whether civil or defense related
 - ❖ Big data and data management
 - ❖ Companies or businesses that may be crucial to the supply chain for US national security or critical infrastructure interests
 - ❖ AI, robotics, autonomous vehicles (air, underwater, ground)

Committee on Foreign Investment in the United States (“CFIUS”) Next Steps

- ❖ Additional factors to consider
 - ❖ Foreign purchaser’s history of compliance with US laws and regulations
 - ❖ Protection of personal information
 - ❖ Role in the supply chain
 - ❖ Transaction financing
 - ❖ Candor and accuracy
 - ❖ Consistent representations
 - ❖ Indirect foreign government control or influence

Committee on Foreign Investment in the United States (“CFIUS”) Next Steps

- ❖ Preparing for the changes
 - ❖ Expand your due diligence – e.g., not only of the business but of the parties involved
 - ❖ Research beyond the information provided by the parties – see, e.g., *Ness Technologies SARL v. Pactera Technology International, et al.* (Supreme Court of NY, Filed December 6, 2016)
 - ❖ Plan for detailed filings – e.g., parties will likely find little success by taking the approach that “we’ll submit it to CFIUS and see what it says”
 - ❖ Carefully consider financial penalties when CFIUS is a closing condition
 - ❖ Answer CFIUS questions asked, not ones the parties would like to answer
 - ❖ Although the process remains voluntary, the Government has identified and is using resources to educate itself on transactions that have occurred or are underway, but have not been notified to the Committee

QUESTIONS?

Biography



Giovanna M. Cinelli

Washington, D.C.

T +1.202.739.5619

F +1.202.739.3001

Giovanna.cinelli@morganlewis.com

Giovanna M. Cinelli is co-lead of the International Trade, National Security and Economic Sanctions practice. As a practitioner for more than 25 years, she counsels clients in the defense and high-technology sectors on a broad range of issues affecting national security and export controls, including complex export compliance matters, audits, cross-border due diligence, and export enforcement, both classified and unclassified. She handles complex civil and criminal export-related investigations and advises on transactional due diligence for regulatory requirements involving government contracts, export policy, and compliance, as well as settlement of export enforcement actions before the US departments of State, Commerce, Treasury, and Defense, and related agencies. Giovanna has conducted dozens of export investigations and has negotiated six consent agreements before the Department of State. She advises clients on matters before the Committee of Foreign Investment in the United States (CFIUS), and addresses mitigation requirements that may apply as part of CFIUS clearances for cross-border transactions.

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Asia Pacific
Europe
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Middle East
North America

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