

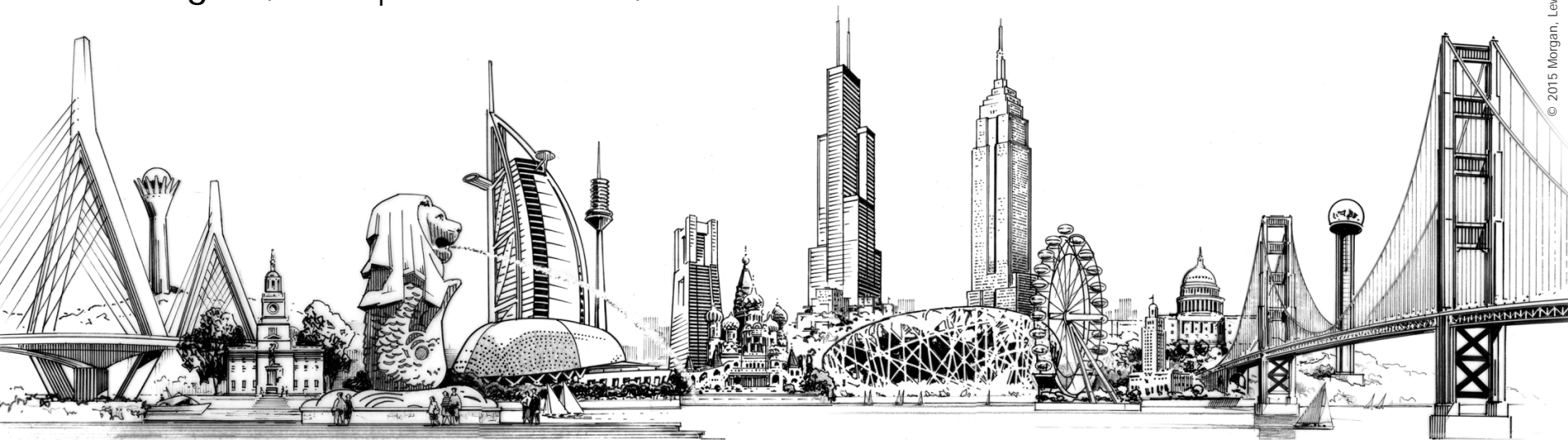
Morgan Lewis

THE CFIUS REVIEW PROCESS: CURRENT ISSUES AND ENFORCEMENT TRENDS

Stephen Paul Mahinka

All China Lawyers Association (ACLA) Meeting

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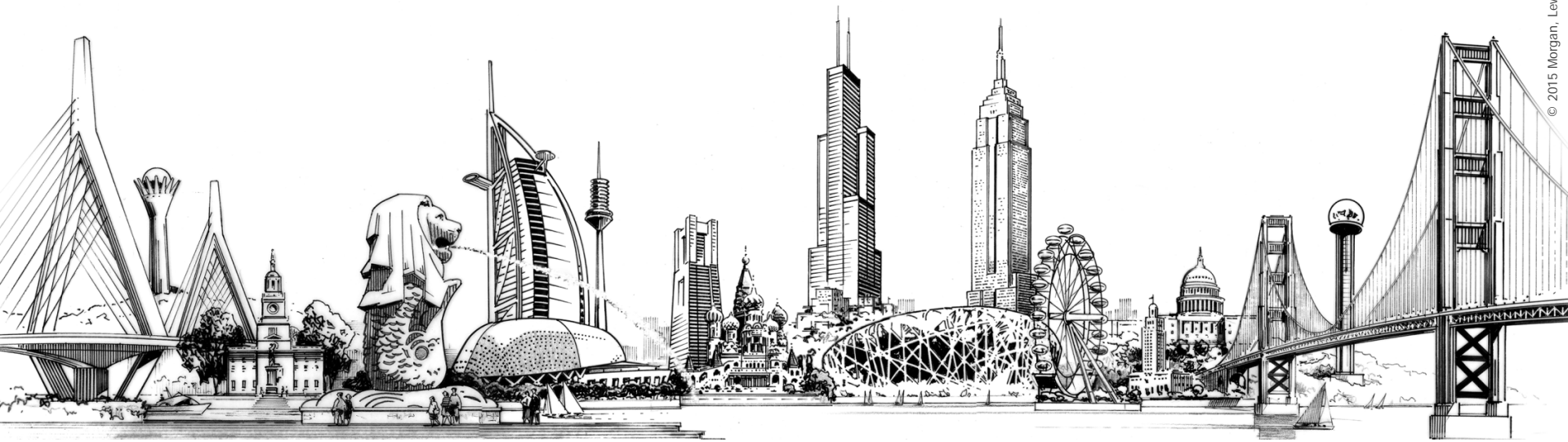


Morgan Lewis

美国外国投资委员会审查程序： 目前的问题和执法趋势

Stephen Paul Mahinka

2015



Importance of CFIUS to U.S. Investment Decisions

- Increased importance of the Committee on Foreign Investment in the United States (CFIUS) to decisions on strategy for U.S. investment and acquisitions
- Broad scope of industries ordinarily reviewed by CFIUS, from national security and defense to critical infrastructure
- Relatively little guidance from CFIUS and lack of transparency of CFIUS decisions

美国外国投资委员会 对于美国投资决策的重要性

- 美国外国投资委员会的决定对于在美投资和收购策略越来越重要
- 美国外国投资委员会通常审查的行业范围十分广泛，从国家安全防御到关键基础设施
- 美国外国投资委员会给予的指导很少，其决定也缺乏透明度

What is CFIUS?

- Section 721 of the Defense Production Act (“DPA”), as amended by the Foreign Investment and National Security Act of 2007 (“FINSA”) establishes the process for reviewing the national security impact of foreign acquisitions and certain investments and joint ventures of U.S.-located businesses by CFIUS.
 - Applies to all foreign investments in U.S. defense and critical infrastructure businesses regardless of whether they have classified contracts with the government
 - The President of the U.S. has the authority to suspend or terminate such transactions if they present “credible threats” to national security that cannot be adequately mitigated under other laws, excluding the International Economic Emergency Powers Act

美国外国投资委员会是什么？

- 由2007年《外国投资和国家安全法》(FISIA)修正的《国防生产法》第721条确立了由美国外国投资委员会 (Committee on Foreign Investment in the United States; CFIUS) 审查外国的合并收购和某些美国本土公司的合资企业对国家安全所产生的影响的程序。
 - **适用于国防和关键基础设施**相关的公司进行的所有外国投资，无论美国本土公司是否与政府有机要合同
 - **倘若某类交易对国家安全构成“可信威胁”且这种威胁无法通过其他任何法律（《国际经济非常时期权力法》除外）充分减轻**，则美国总统有权暂停或终止此类交易

What is CFIUS?

- **Permanent members of CFIUS (by statute)**
 - Treasury Department (chair)
 - State Department
 - Commerce Department
 - Department of Defense
 - Department of Justice
 - Department of Homeland Security
 - Department of Energy, and
 - Department of Labor (*ex officio*)
 - Director of National Intelligence (*ex officio*)
- **White House, by Executive Order, added:**
 - US Trade Representative and Office of Science and Technology Policy, as members; and
 - National Security Council, Council of Economic Advisors, Office of Management & Budget, and others, as non-voting participants
 - Other agencies participate as relevant to particular cases

美国外国投资委员会是什么？

- 美国外国投资委员会永久成员(依法设立)
 - 财政部（主席）
 - 国务院
 - 商业部
 - 国防部
 - 司法部
 - 国土安全部
 - 能源部，及
 - 劳工部（职权成员）
 - 国家情报总监（职权成员）
- 白宫按照行政命令增加了下列成员：
 - 美国贸易代表、科技政策办公室作为正式成员；和
 - 国家安全会议、经济顾问理事会、管理预算办公室和其他机构，作为无表决权参与者；以及
 - 与特定案例相关的其他参与机构

What Does CFIUS Review?

- CFIUS has jurisdiction to review “covered transactions” -- defined as a foreign person or entity’s acquisition of control of a U.S. business with products, services, or intellectual property that presents a national security concern.
 - U.S. Business – An existing business, not a “greenfield” investment, or acquisition of patents, or technology license
 - Control – Any arrangement that allows a foreign person to “determine, direct, or decide important matters affecting an entity.” As a practical matter, CFIUS typically considers sufficient control to be present when a minority foreign investor obtains protective supermajority rights often seen in M&A and investment transactions.
 - National Security or Critical Infrastructure – CFIUS interprets these terms very broadly and does not define them

美国外国投资委员会审查的内容是什么？

- **美国外国投资委员会**有权审查“应受审查交易”— 其定义是外国人或外国实体对引发国家安全问题的、附带产品、服务或知识产权的“**美国业务**”的控制权的收购交易。
 - **美国业务**—现存业务，并非尚未开发的“**绿地**”投资，也不是对母公司或技术许可的收购
 - **控制**—允许外国人“**确定、指导或决定影响某实体的重要事项**”的任何安排。在实践中，当外国实体通过少数投资人掌握保护性的绝对多数权时—这在收购和投资交易中是常见的，美国外国投资委员会常会认定其已获得充分的控制权
 - **国家安全或重要基础设施** – 美国外国投资委员会将这一词条解释的很广泛并且没有给出定义。

Covered Transactions

- Foreign Person - any “foreign national, foreign government, foreign entity,” or “any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity.”
 - Includes acquisitions of control in U.S. companies or entities with foreign parents or significant foreign shareholders
- Financial investments or convertible voting instruments may not constitute “control” and thus not be subject to filing depending upon their terms.

应受审查交易

- “外国人”被定义为“外国公民、外国政府或外国实体”或“由某一外国公民、外国政府或外国实体行使了或可行使控制权的任何实体”。
 - 这一广泛定义包括了有外国母公司或有重要外国股东的美国公司
- 财务投资或可转换的具有表决权的金融工具可能不会构成“控制”，故要根据其条款再决定是否需要向美国外国投资委员会申报。

Recent Review Activity: Filings

Covered Transactions, Withdrawals, and Presidential Decisions 2009 – 2013 (CFIUS Annual Report to Congress, 2013)

<u>Year</u>	<u>Number of Notices</u>	<u>Notices Withdrawn During Review</u>	<u>Number of Investigations</u>	<u>Notices Withdrawn During Investigation</u>	<u>Presidential Decisions</u>
<u>2009</u>	<u>65</u>	<u>5</u>	<u>25</u>	<u>2</u>	<u>0</u>
<u>2010</u>	<u>93</u>	<u>6</u>	<u>35</u>	<u>6</u>	<u>0</u>
<u>2011</u>	<u>111</u>	<u>1</u>	<u>40</u>	<u>5</u>	<u>0</u>
<u>2012</u>	<u>114</u>	<u>2</u>	<u>45</u>	<u>20</u>	<u>1</u>
<u>2013</u>	<u>97</u>	<u>3</u>	<u>48</u>	<u>5</u>	<u>0</u>
<u>Total</u>	<u>480</u>	<u>17</u>	<u>193</u>	<u>38</u>	<u>1</u>

近期审查一览表：申报

应受审查交易、撤回申报的交易, 和送交总统决定的交易

2009 – 2013

来源: 外国投资委员会2013年年度报告

年度	申报件数	审查期间撤回的申报件数	调查件数	调查期间撤回的申报件数	送交总统决定的申报件数
<u>2009</u>	<u>65</u>	<u>5</u>	<u>25</u>	<u>2</u>	<u>0</u>
<u>2010</u>	<u>93</u>	<u>6</u>	<u>35</u>	<u>6</u>	<u>0</u>
<u>2011</u>	<u>111</u>	<u>1</u>	<u>40</u>	<u>5</u>	<u>0</u>
<u>2012</u>	<u>114</u>	<u>2</u>	<u>45</u>	<u>20</u>	<u>1</u>
<u>2013</u>	<u>97</u>	<u>3</u>	<u>48</u>	<u>5</u>	<u>0</u>
<u>Total</u>	<u>480</u>	<u>17</u>	<u>193</u>	<u>38</u>	<u>1</u>

Recent Review Activity: Industries

Covered Transactions by Sector and Year, 2009-2013 (CFIUS Annual Report to Congress, 2013)

<u>Year</u>	<u>Manufacturing</u>	<u>Finance, Information, and Services</u>	<u>Mining, Utilities and Construction</u>	<u>Wholesale, Retail, and Transportation</u>	<u>Total</u>
<u>2009</u>	<u>21 (32%)</u>	<u>22 (34%)</u>	<u>19 (29%)</u>	<u>3 (5%)</u>	<u>65</u>
<u>2010</u>	<u>36 (39%)</u>	<u>35 (38%)</u>	<u>13 (14%)</u>	<u>9 (10%)</u>	<u>93</u>
<u>2011</u>	<u>49 (44%)</u>	<u>38 (34%)</u>	<u>16 (14%)</u>	<u>8 (7%)</u>	<u>111</u>
<u>2012</u>	<u>45 (39%)</u>	<u>38 (33%)</u>	<u>23 (20%)</u>	<u>8 (7%)</u>	<u>114</u>
<u>2013</u>	<u>35 (36%)</u>	<u>32 (33%)</u>	<u>20 (21%)</u>	<u>10 (10%)</u>	<u>97</u>
<u>Total</u>	<u>186 (39%)</u>	<u>165 (34%)</u>	<u>91 (19%)</u>	<u>38 (8%)</u>	<u>480</u>

近期审查一览表：涉及行业

按行业统计的应受审查交易 2009-2013

来源：外国投资委员会2013年年度报告

年度	制造业	信息产业	矿业、基础设施 和建筑业	批发和零售业	总计
2009	21 (32%)	22 (34%)	19 (29%)	3 (5%)	65
2010	36 (39%)	35 (38%)	13 (14%)	9 (10%)	93
2011	49 (44%)	38 (34%)	16 (14%)	8 (7%)	111
2012	45 (39%)	38 (33%)	23 (20%)	8 (7%)	114
2013	35 (36%)	32 (33%)	20 (21%)	10 (10%)	97
Total	186 (39%)	165 (34%)	91 (19%)	38 (8%)	480

Recent Review Activity: Nationality

<u>Covered Transactions by Acquirer Nation</u> <u>(CFIUS Annual Report to Congress, 2013)</u>						
<u>Country</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>Total</u>
<u>United Kingdom</u>	<u>17</u>	<u>26</u>	<u>25</u>	<u>17</u>	<u>7</u>	<u>92</u>
<u>China</u>	<u>4</u>	<u>6</u>	<u>10</u>	<u>23</u>	<u>21</u>	<u>64</u>
<u>Canada</u>	<u>9</u>	<u>9</u>	<u>9</u>	<u>13</u>	<u>12</u>	<u>52</u>
<u>Japan</u>	<u>4</u>	<u>7</u>	<u>7</u>	<u>9</u>	<u>18</u>	<u>45</u>
<u>France</u>	<u>7</u>	<u>6</u>	<u>14</u>	<u>8</u>	<u>7</u>	<u>42</u>
<u>Israel</u>	<u>5</u>	<u>7</u>	<u>6</u>	<u>4</u>	<u>1</u>	<u>23</u>
<u>Netherlands</u>	<u>5</u>	<u>2</u>	<u>7</u>	<u>6</u>	<u>1</u>	<u>21</u>
<u>Sweden</u>	<u>3</u>	<u>5</u>	<u>6</u>	<u>2</u>	<u>2</u>	<u>18</u>
<u>Germany</u>	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>4</u>	<u>14</u>
<u>Australia</u>	<u>1</u>	<u>3</u>	<u>4</u>	<u>3</u>	<u>0</u>	<u>11</u>
<u>Italy</u>	<u>2</u>	<u>3</u>	<u>2</u>	<u>1</u>	<u>0</u>	<u>8</u>
<u>Russian Federation</u>	<u>0</u>	<u>4</u>	<u>0</u>	<u>2</u>	<u>1</u>	<u>7</u>

近期审查一览表：申报交易的主要国家

应受审查交易的收购方国家

来源：外国投资委员会2013年年度报告

国家	2009	2010	2011	2012	2013	Total
英国	17	26	25	17	7	92
中国	4	6	10	23	21	64
加拿大	9	9	9	13	12	52
日本	4	7	7	9	18	45
法国	7	6	14	8	7	42
以色列	5	7	6	4	1	23
荷兰	5	2	7	6	1	21
瑞典	3	5	6	2	2	18
德国	1	2	3	4	4	14
澳大利亚	1	3	4	3	0	11
意大利	2	3	2	1	0	8
俄罗斯联邦	0	4	0	2	1	7

CFIUS: Filing Process

- The CFIUS review process typically begins with the parties filing a voluntary joint notice with the Agency.
 - It is common practice if possible to notify CFIUS of a pending transaction and provide a “pre-filing” one week prior to the final filing.
 - CFIUS may ask questions of the parties or request additional information, either as part of the pre-filing process or after accepting the joint notice.
 - A pre-filing allows the parties to gather any requested information and incorporate it into the final joint notice without being subject to any regulatory time constraints.
 - After filing a joint notice, the parties are required to respond to CFIUS’ requests for additional information within three business days.

美国外国投资委员会：申报程序

- **美国外国投资委员会的重要程序通常始于各方共同向委员会提出自愿申报：**
 - 通常的做法是告知委员会有关未定交易并在申报之日前至少一个星期提供详尽的“预申报”介绍。
 - 美国外国投资委员会可能会作为预申报程序的一部分或在接受共同申报之后，向各方提出问题或要求提供更多材料。
 - 预申报使得各方能够集中所有被要求的资料汇总，纳入共同申报内容之中，却不受任何规定的时间限制。
 - 提出共同申报之后，各方必须回应外国投资委员会提出的要求，在三个工作日内提供附加补充材料。

CFIUS: Filing Process

- CFIUS also can unilaterally initiate a review of any defense or critical infrastructure-related transaction, so parties to such transactions ordinarily file a joint notice voluntarily.
- Under the National Information Security Program Operating Manual (“NISPOM”), when a government contractor with a facilities security clearance enters into negotiations for a proposed transaction affecting control, it must notify the Defense Security Service (“DSS”) of the commencement of the negotiations.
- CFIUS filings are confidential and not subject to disclosure.

美国外国投资委员会：申报程序

- 外国投资委员会还可以对任何有关国防或关键基础设施的交易单方提出审查，因此该交易各方通常会共同自愿提出申请。
- 依据《国家信息安全计划操作手册》，当一个有进出政府机构安全证的政府承包商开始为某项拟定交易进行谈判时，其必须通知国防安全局谈判的开始。
- 外国投资委员会的所有申报均是保密的，无需披露。

CFIUS: Timing

- **30 Day Initial Review Period**

- The majority of transactions filed with CFIUS are cleared at end of this period or determined not to be “covered transactions” subject to CFIUS jurisdiction
 - State owned or controlled enterprises may be subject to a 45-day initial review period

- **45 Day Investigation Period**

- If CFIUS still has concerns about the transactions after the 30 day initial review, it may initiate a second, 45 day, investigation period
- Pursuant to FINSA, a 45 day investigation is mandatory when a transaction involves foreign government control or the acquisition of critical infrastructure. This requirement can only be waived by the deputy heads of the co-lead agencies reviewing the transaction. The co-lead agencies are CFIUS and the member agency most related to the industry involved.

- **15 Day Presidential Review Period**

- If CFIUS cannot reach a consensus to allow the transaction, or recommends a Presidential rejection, or in other special circumstances such as a refusal by the parties to comply, the transaction goes to the President for a final decision, followed by a report to the Congress

外国投资委员会：时间表

- **30天初审期**

- 在外国投资委员会申报的大部分交易会在此阶段结束时获得批准或确定不属于外国投资委员会规定范围内“所包括交易”。
- 国家拥有或控制的企业可能需要45天的初审期

- **45天调查期**

- 如果外国投资委员会在30天初审后仍有任何问题，它可以启动第二阶段45天的调查。
- 依照《外国投资和国家安全法》，如果交易涉及外国政府控制和/或对关键基础设施进行收购，则必须进入45天的第二阶段调查。这一要求只能由审查交易的联席领导机构豁免。联席领导机构包括外国投资委员会和其他与所涉及行业密切相关的成员机构。

- **15天总统审查期**

- 如果外国投资委员会不能就某项交易达成一致意见，或建议总统干预，或在其他特殊情况下，交易由总统最后决定，然后向国会汇报。

CFIUS: Practical Considerations

- What happens if the parties don't file a voluntary notice and CFIUS decides to investigate the transaction?
 - FINSA does not apply only before closing of a transaction; if security issues are raised post-closing, and CFIUS calls the parties requesting a filing, it could then review and force dissolution of the transaction.
 - If CFIUS calls the parties before closing and requests a filing, the closing of the transaction could be delayed or compromised if the purchase agreement does not contemplate such government clearance or filings and the 30-day (or 45-day) review period extends beyond the purchase agreement's closing date.
 - As a practical matter, if a voluntary filing is not made, CFIUS may learn of any security concerns from other sources (e.g. competing bidders who may complain to Congressional representatives; public notices required by U.S. securities law; CFIUS' own monitoring of acquisitions)
 - Many government-supply contracts contain provisions requiring notification to the relevant agency in the event of a transfer of control.

外国投资委员会：实际考虑

- 如果各方不主动申报，而外国投资委员会决定对交易进行调查，怎么办？
 - 外国投资国家安全法不仅适用于交易完成之前；如果在交割后提出了安全考虑，且外国投资委员会要求各方进行申报，则其可以审查交易，甚至解散交易。
 - 如果外国投资委员会在交割前要求各方进行申报，并且如果收购协议并未预期此类政府认可或申报的可能，而为期30天（或45天）的审查超过了收购的交割日期，则有可能延迟或影响交易的完成。
 - 实际上，如果未主动申报，外国投资委员会由可能经由其他管道获知安全问题（如：可能向国会代表申诉的竞争持有人，按照美国证券法要求发出的公高；外国投资委员会对收购的自行检测。）
 - 注：许多政府供应合同包含要求在控制权转移前通知相关机构的要求。

CFIUS: Practical Considerations

- How do you know whether the contemplated transaction involves “national security assets” or “critical infrastructure”?
 - The definition of national security and critical infrastructure assets is vague and imprecise.
 - In practice, it clearly covers traditional categories such as military weapons and technology, but also includes, for example:
 - Items and materials used in weapons research;
 - Certain computer software;
 - Bioterrorism agents, such as certain drugs, facilities, equipment, material and technologies;
 - Natural gas and oil transmission lines;
 - Oil reserves and refineries;
 - Telecommunications and broadcast facilities;
 - Certain computer and information technology products;
 - Bridges and ports.

外国投资委员会：实际考虑

- 如何知道预期交易是否涉及“国家安全资产”或“关键基础设施”？
 - 国家安全和关键基础设施的定义含糊不清。
 - 在实践中，它不仅明确涵盖了诸如军事武器和技术等传统类别，而且涵盖了：
 - 武器研究用品和材料；
 - 某些计算机软件；
 - 生物恐怖主义制剂，如特定药物、设施、设备、材料和技术；
 - 天然气和石油输送线；
 - 油库和炼油厂；
 - 电信设施；
 - 某些计算机和IT产品；
 - 桥梁及港口。

CFIUS: Practical Considerations

- Critical questions in determining whether CFIUS likely would want to review a transaction, and thus whether the parties should decide to voluntarily file, include:
 - Is the foreign purchaser a private or public (i.e., state-owned or government controlled) entity (if the latter, special rules of review timing apply)?;
 - What is the nationality of the purchaser (for example, China, Israel, and France can be expected to raise more interest in review than Great Britain, Italy, or Japan), including that of sovereign wealth funds?;
 - Do the facilities or personnel of the acquired entity have security clearances and, if so, at what level?;
 - Are the products or services direct or indirect components of weapons systems or critical infrastructure and, if indirect, how many steps removed they are from the final product or service and the degree of modification of the components in final assembly?;

外国投资委员会：实际考虑

- 确定美国外国投资委员会是否要审查某项交易从而使当事各方决定是否自愿申报的关键问题包括：
 - 外国购买方是私营实体还是公共实体（若是后者，由于新修正案的原因，应适用特别审查规则）；
 - 购买方的国籍（例如，法国、以色列和中国可能比英国、意大利或日本引起更大的审查兴趣），包括主权财富基金的情况；
 - 被收购实体的设施或人员是否获得了安全许可，若是，安全许可是什么级别；
 - 产品或服务是否是武器系统或关键基础设施的直接或间接组成，若是间接组成，它们距离最终产品或服务还有几个步骤，部件最终装配的改装程度如何；

CFIUS: Practical Considerations

- Whether the assets are connected to critical infrastructure, such as energy or communications grids?
- What government supply contracts exist, with what security classifications, and with what obligations of confidentiality and restrictions on the ability to transfer such contractual obligations to others without notice and/or permission?
- Whether production or research facilities to be acquired will be closed or removed from the U.S. post-acquisition?
- Has the foreign acquirer or one of its affiliates ever taken action adverse to U.S. national security policy or interests?
- Whether any ancillary agreements required to be entered into as conditions of the acquisition raise concerns?
- The proximity of the physical assets or any assets to be constructed to existing U.S. security facilities?

外国投资委员会：实际考虑

- 资产是否与关键基础设施相关，如能源或通讯网络？
- 现有哪些政府供应合同，它们是何种安全分类，在保密性方面承担哪些义务，对不经通知和/或许可的情况下将此类合同义务转移给他人的能力有哪些限制？
- 拟收购的生产或研究设施是否打算在收购之后关闭或搬离美国？
- 外国购买方或其某个关联公司是否曾经采取不利于美国国家安全政策或利益的行动？
- 作为收购条件而要求签署的任何辅助性协议是否产生了问题？
- 实物资产或任何其他资产是否在现有美国安全设施附近？

CFIUS: Practical Considerations -- Political and Public Relations Contacts

- Government contacts:
 - It is often advisable for officials of the U.S. target company and the foreign purchaser to alert government purchasing and Defense Security Services officials to the potential transaction to obtain their views as to whether a FOCI mitigation agreement appears necessary or warranted and determine if there appear to be any initial concerns regarding the potential transaction.
- Political contacts:
 - Where it is likely that a transaction will result in an investigation by CFIUS, it may also be advisable for the parties to contact appropriate Congressional representatives, of the states in which facilities are located or who are on relevant Congressional committees, and state and local government officials, to inform them of the proposed transaction and emphasize the positive aspects of the transaction (e.g., new investment, job protection, no shutdown of plants).
- Public relations contacts:
 - It also may be advisable to contact unions/employee groups, and national, local, and trade press to explain the purpose and positive effects of the transaction.
- All government and public relations contacts must be closely coordinated and must present a consistent message about the transaction.

外国投资委员会：实际考虑 – 政治与公共关系

- 政府关系

- 通常建议美国目标公司的高级职员和外国购买方提醒政府采购官员和国防安全局官员注意潜在交易，以便就是否有必要采用“外国所有权、控制和影响”缓解协议或者以此作为保证，获得他们的观点，并确定关于潜在交易是否出现了任何初步的问题。

- 政治关系

- 尽管任一项交易都有可能由外国投资委员会调查，建议当事各方与设施所在地那个州的国会代表或国会委员会成员以及州和地方的政府官员联系，告知其潜在交易的存在及其积极影响（如新投资、对工作机会的保护、未关闭任何工厂等）。

- 公共关系

- 也建议当事各方联系工会/雇员集团以及国家的、地方的和行业的媒体，解释交易的目的和积极影响。

- 所有政府和公共关系一定要密切合作，就有关交易必须传达一致的信息

CFIUS: FOCI Mitigation

- If CFIUS determines that the transaction will result in Foreign Ownership, Control, or Influence (“FOCI”) over a company that has access to classified information or that FOCI might adversely affect the performance of classified contracts, CFIUS ordinarily will require the parties to enter into a mitigation agreement prior to approving the transaction.
- From 2009 through 2013, 27 transactions filed resulted in mitigation agreements.
- There are standard types of mitigation agreements that CFIUS may require the parties to enter into depending on the level of foreign ownership, control, or influence.
 - These include: Board Resolution; Security Control Agreement; Special Security Agreement; Proxy Agreement; Voting Trust Agreement.
- Penalties for violations of mitigation agreements can range from fines, to revocation of contracts, to dissolution of the acquisition.

外国投资委员会：缓解外国所有权、控制或影响

- 如果外国投资委员会确定交易会对能够获得机密信息的某家公司产生外国所有权、控制或影响，或外国的所有权、控制或影响可能会对机要合同产生负面影响，则委员会通常会要求各方在批准交易之前达成一个缓解协议。
- 2009年至2013年，有27项申报的交易需要采用缓解协议。
- 根据外国所有权、控制或影响的程度不同，美国外国投资委员会可要求各方签署标准的缓解协议。
 - 包括：董事会决议、特别控制协议、特别安全协议、代理协议、表决权依托协议。
- 违反缓解协议将面临罚款、撤销合同和解除收购的惩罚。

Recent Challenges & Developments

- Huawei Technologies
 - In May 2010, Huawei purchased the intellectual property of a U.S. computer software company, 3Leaf, and hired many of its employees, for \$2 million. It did not file a voluntary notice with CFIUS.
 - In late 2010, CFIUS notified Huawei that it was retroactively reviewing the transaction.
 - In early 2011, CFIUS concluded that the transaction posed a threat to national security and informed Huawei that it would recommend that the President block the transaction if the assets were not divested voluntarily.
 - After initially proposing to challenge CFIUS' conclusion, Huawei decided to divest the 3Leaf assets and took the novel step of negotiating an ongoing oversight agreement in April 2011 with CFIUS to encourage open communication between Huawei and CFIUS concerning any future proposed transactions.

近期的挑战与进展

- 华为技术有限公司
 - 2010年五月，华为以200万美元收购美国计算机软件公司3Leaf的知识产权，并聘用了许多3Leaf雇员。华为没有就此向外国投资委员会主动申报。
 - 2010年底，华为被告知，外国投资委员会正在对这项交易展开回溯审查。
 - 2011年初，外国投资委员会断定这项交易对国家安全造成威胁，并通告华为如果资产没有自愿剥离，外国投资委员会将建议总统阻止这项交易。
 - 华为最初对外国投资委员会的结论提出挑战，之后决定剥离3Leaf资产，并与外国投资委员会就持续监督协议展开新的谈判，以鼓励华为和外国投资委员会之间在未来交易申报中建立开放式的沟通。

Recent Challenges & Developments

- U.S. House of Representatives Intelligence Committee Report
 - In October 2012, the Intelligence Committee of the U.S. House of Representatives issued an over 50-page report urging U.S. businesses to avoid doing business with Huawei Technologies and ZTE Corporation because of national security concerns relating to U.S. telecommunications networks.
 - The Report focused on alleged connections between the two companies and Chinese military or intelligence services.
 - In March 2013, Sprint Nextel and Softbank of Japan reportedly assured the House Committee, during CFIUS review of their proposed acquisition of a wireless communications company, Clearwire Corp., that they would phase out equipment from Huawei Technologies used in Clearwire's network.

近期的挑战和进展

- **美国众议院情报委员会的报告**
 - 2012年10月，美国众议院情报委员会发布了一份**50多**页的报告，敦促美国商家出于与**美国通信网络**有关的国家安全的考虑，避免与华为和中兴进行交易。
 - 这份报告的重点在于这两家公司与中国军方或情报部门之间所谓的联系。
 - 2013年3月，有报道称Sprint Nextel 公司和日本软银，在外国投资委员会审查他们拟收购Clearwire Corp.公司（一家无线通信公司）的交易时，向美国众议院作出保证，他们将淘汰Clearwire网络中使用的来自华为的设备。

Recent Challenges & Developments

- Hybrid Kinetic Group
 - In June 2012, Nevada Gold Holdings disclosed that CFIUS had required its parent, Hybrid Kinetic Group of Hong Kong, to divest its controlling interest.
 - CFIUS' concerns related to the proximity of Nevada Gold's primary mining operation to a U.S. Navy air training facility.

近期的挑战和进展

- 正道集团

- 2012年6月, 内华达黄金控股有限公司披露, 外国投资委员会要求其母公司, 香港正道集团, 剥离其控股权益。
- 外国投资委员会的顾虑在于内华达黄金的主要采矿作业临近美国海军航空训练设施。

Recent Challenges & Developments

- A123 Systems
 - In January 2013, CFIUS approved the acquisition of bankrupt battery manufacturer A123 Systems by Wanxiang Group.
 - The decision to permit the acquisition received political opposition from some members of the U.S. Congress. Unlike prior transactions, in which opposition to a Chinese investment was motivated by security concerns, the A123 acquisition raised issues related to its receipt of substantial funding from the Department of Energy.
 - To respond to these concerns, Wanxiang excluded government contracts from the bankruptcy acquisition, and agreed to keep the two A123 facilities to be acquired that were built with DOE funds operating in Michigan.

近期的挑战和发展

- A123 Systems
 - 2013年1月，外国投资委员会批准了万向集团收购破产的电池生产商A123 Systems。
 - 批准收购的决定遭到了一些美国国会成员出于政治目的的反对。与以往的交易不同，在那些交易中反对中国投资都出于安全的顾虑，A123收购涉及的问题是与它从美国能源部收到的大量资金有关。
 - 作为对上述担忧作出的回应，万向集团将政府合同从破产收购中排出，并同意保持拟收购的两个美国能源部资助建设的A123设施继续在密西根运营。

Recent Challenges & Developments

- CNOOC

- In February 2013, CFIUS cleared the acquisition by CNOOC, a Chinese state-owned enterprise, of Nexen, a large Canadian oil and gas company which also had assets in the U.S. Gulf Coast.
- Following at least two review cycles, with the parties having withdrawn and resubmitted their filing, CFIUS cleared the transaction.
- Reportedly, CFIUS required alteration of certain U.S. oil drilling leases as a condition of clearance, presumably affecting CNOOC's access to information and control regarding Gulf Coast operations in view of their locations near U.S. Navy facilities and subsea telecommunications facilities.

近期挑战与进展

- 中海油

- 2013年2月，CFIUS 批准了中国国有企业 – 中海油对加拿大大型油气公司 – Nexen的收购，其资产也在美国墨西哥湾沿岸。
- 该审查至少进行了两个周期，各方先后撤销和重递申报，最终CFIUS批准了他们的交易。
- 据报道，鉴于墨西哥湾沿岸作业所在地在美国海军基地和海底电信设施附近，为防止中海油获得对该处的情报信息和控制，作为批准条件，CFIUS要求修改某些美国钻井租约。

Recent Challenges and Developments

- Shuanghui International Holdings, Ltd. of China – acquisition of Smithfield Foods for \$7.1 billion cleared by CFIUS in September 2013, notwithstanding political and food safety challenges.
- Lenovo Group Ltd. of China – acquisition of IBM's low-end computer server business, for \$2.3 billion, cleared by CFIUS in August 2014.
- Anbang Insurance Group Co. of China – acquisition of Waldorf-Astoria hotel in NYC for \$1.95 billion cleared by CFIUS in February 2015, notwithstanding issues relating to use as official residence of the U.S. Ambassador to the United Nations.

Recent Challenges and Developments

- Avago Technologies Ltd. Of China – acquisition of Broadcom Corp., a U.S. semiconductor chip manufacturer, for \$37 billion, cleared by CFIUS in May 2015.
- Hua Capital Management Co. of China – acquisition of OmniVision Technologies, Inc., a manufacturer of advanced digital imaging solutions, for \$1.9 billion, received clearance from CFIUS in October 2015.
- Go Scale Capital – proposed acquisition of Philips Lumileds, an LED semiconductor chip and lighting manufacturer, for \$2.9 billion has been delayed because of “certain unforeseen concerns” raised by CFIUS in October 2015.

Recent Challenges & Developments

- Ralls Corporation (a subsidiary of Sany Group of China) – first court challenge to a CFIUS / Presidential decision
 - In September 2012, President Obama ordered Ralls Corporation, a subsidiary of Sany Group, to divest four Oregon wind farms it had previously acquired from Innovative Renewable Energy LLC, confirming CFIUS' refusal to clear the transaction.
 - Ralls had not made a filing with CFIUS prior to its acquisition of the four wind farms, which were located in and adjacent to restricted airspace near a U.S. Navy training facility. Ralls later submitted a notice to CFIUS after the U.S. Navy requested Ralls relocate one of the wind farm projects to avoid interfering with military training operations.

近期的挑战和进展

- Ralls Corporation – **第一次通过诉讼挑战外国投资委员会/总统决定**
 - 2012年9月，美国总统奥巴马下令Ralls Corporation（三一集团的子公司）剥离四家此前从Innovative Renewable Energy LLC公司收购的俄勒冈风电场，确认了外国投资委员会拒绝批准该交易的决定。
 - Ralls 在其收购四家风电场之前，没有向外国投资委员会进行申报。这四家风电场位于并且临近美国海军训练设施附近的一处受管制的空间领域。在美国海军要求Ralls搬迁其中一家风电场项目，以避免对军事训练活动造成干扰后，Ralls随即向外国投资委员会发出通知。

Recent Challenges & Developments

- Ralls Corporation (cont'd)
 - After CFIUS made its recommendation and the President ordered Ralls to divest the wind farm assets, Ralls challenged the order in federal court. In July 2014, the U.S. Court of Appeals for the District of Columbia Circuit held that the President had unconstitutionally deprived Ralls of its right to due process concerning its property interest, and that Ralls was entitled to review and a right to respond to unclassified portions of the evidence relied on by CFIUS, although the Court concluded that a Presidential determination regarding the national security risk is not judicially-reviewable. Ralls Corp. v. CFIUS (D.C. Cir., July 15, 2014).
 - Ralls Corp. announced, in October 2015, that it had reached a settlement with CFIUS to divest the disputed assets to a purchaser acceptable to CFIUS. Ralls Corp. v. CFIUS, (D.D.C., Oct. 9, 2015).

Investigation Trends and Issues

- Cybersecurity
 - CFIUS is increasingly concerned about potential cybersecurity threats to national security or critical infrastructure systems.
 - Cybersecurity issues can arise in a variety of transactions:
 - CFIUS and Congress has expressed concern that the acquisition of key hardware or software companies by foreign companies could lead to the introduction of “back doors” or other malicious code into U.S. computer systems
 - CFIUS is also concerned about the acquisition of infrastructure assets that are connected to integrated utility systems (e.g., electrical grids, natural gas transmission lines) and whether foreign companies will adequately protect those assets from cyber attacks that could affect these systems
- Geographic proximity
 - CFIUS is increasingly focused on whether any facilities of the U.S. business to be acquired are located near any U.S. national security installations or other facilities of security concern (for example, nuclear plants).

Impact of CFIUS on U.S. Investment and Acquisitions

- Important to assess at an early stage whether a filing with CFIUS is warranted in considering potential U.S. investments and acquisitions.
- Important to evaluate and include the CFIUS review process in corporate agreements and transaction timelines.
- Important to evaluate utility of advance contact with CFIUS and other appropriate government officials to reduce the potential for security objections to be raised.

美国外国投资委员会 对在美投资与收购产生的影响

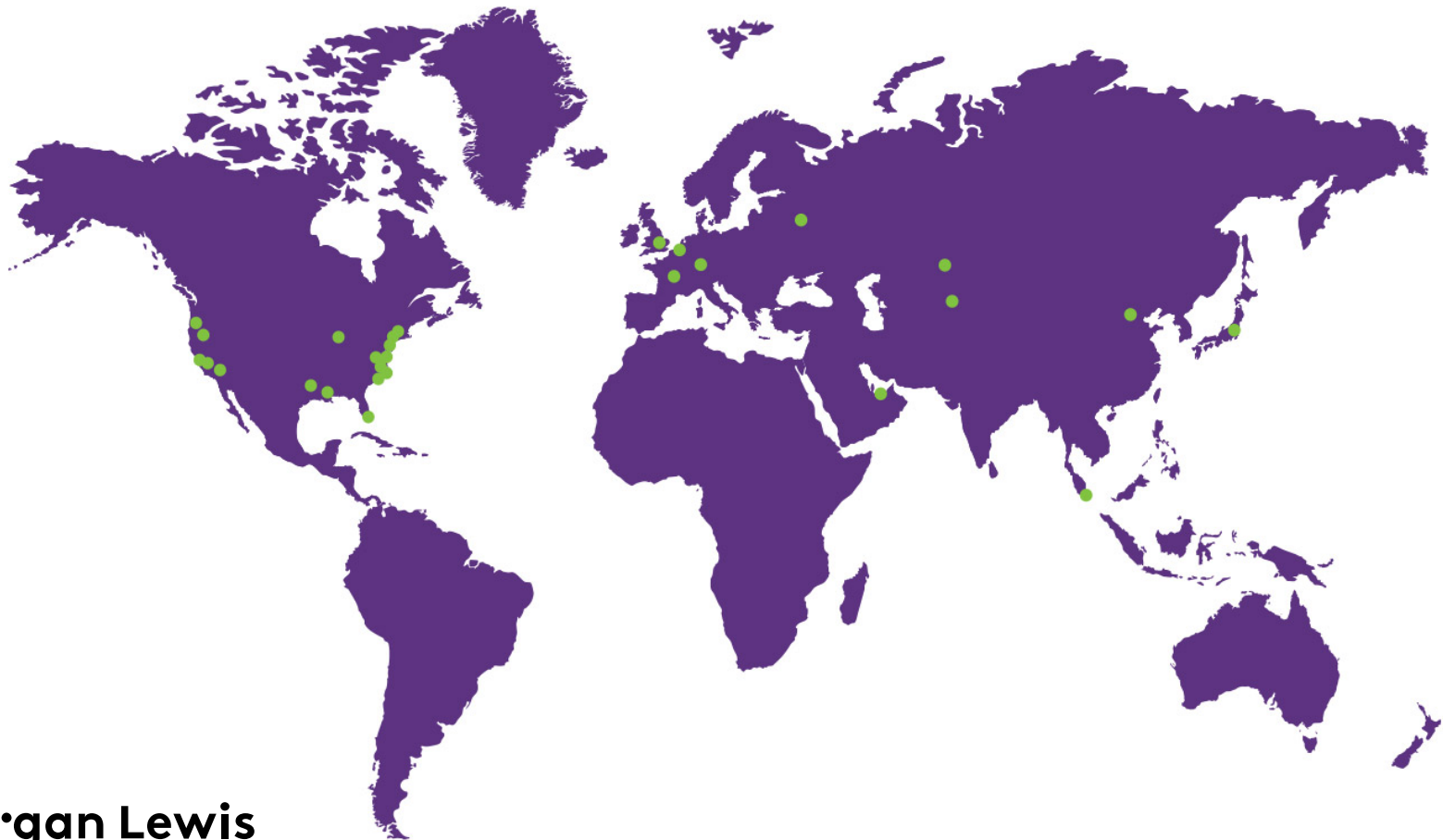
- 在考虑在美国进行投资和收购时，应尽早评估是否需要向美国外国投资委员会进行申报
- 在订立公司协议和交易进程时，应评估和囊括美国外国投资委员会审查程序所需时间
- 通过与美国外国投资委员会及其他适当政府官员作事先沟通，以减少因安全问题被否决的可能

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty
Astana
Beijing
Boston
Brussels
Chicago
Dallas
Dubai
Frankfurt
Hartford
Houston
London
Los Angeles
Miami
Moscow
New York
Orange County
Paris
Philadelphia
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