



Morgan Lewis

# **M&A ACADEMY**

## **CFIUS: THE INCREASING IMPORTANCE OF NATIONAL SECURITY REVIEWS IN M&A TRANSACTIONS**

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# Agenda

1. History and Authority: Exon-Florio Amendment & CFIUS
2. The Meaning of “Covered Transaction”
3. What Is NOT a Covered Transaction?
4. National Security Issues
5. Clearance Trends
6. The CFIUS Clearance Process
7. Mitigation
8. Contractual Language
9. Considerations When Representing Sellers
10. Considerations When Representing Buyers
11. Additional Practical Considerations
12. Potential Future Changes in CFIUS Scope of Review

Appendix: Recent Challenges and Developments

**SECTION 01**

# **HISTORY AND AUTHORITY**

# History and Authority

- Committee on Foreign Investment in the United States (CFIUS) was formally created by the Exon-Florio Amendment of 1988 to Section 721 of the Defense Production Act of 1950 and significantly strengthened by the Foreign Investment and National Security Act of 2007 (FINSA)
- The amendments authorize the president to review mergers, acquisitions, and takeovers by or with any foreign person that could result in foreign control of any person engaged in interstate commerce in the United States, to determine the effects of such transactions on the national security of the United States
- Final Rule and related guidance issued November 2008 by the Treasury Department (31 C.F.R. Pt. 800)

# Who is CFIUS?

- **Permanent members of CFIUS (by statute)**

- Treasury Department (chair)
- State Department
- Commerce Department
- Department of Defense (DOD)
- Department of Justice (DOJ)
- Department of Homeland Security (DHS)
- Department of Energy, (DOE)
- Department of Labor (ex officio) (DOL)
- 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 nonvoting participants
- Other agencies (e.g., Department of Agriculture) participate as relevant to particular cases

# United States Open Investment Policy

- The United States has maintained an open investment policy, and over the years, most foreign investments have been cleared by CFIUS.
- With the new U.S. Administration, potential for more restrictive approach to CFIUS reviews.

# The CFIUS Clearance Process Is “Voluntary”

- Unlike Hart-Scott-Rodino filings, the CFIUS process is voluntary. Essentially a risk determination by the buyer.
- CFIUS also can self-initiate reviews, if no voluntary notice is made, of any mergers, acquisitions, and takeovers by or with any foreign person that could result in foreign control of any person engaged in interstate commerce in the United States.

# Impact of CFIUS on US Investment and Acquisitions Decision Process

- Important to assess at an early stage whether a filing with CFIUS is warranted in considering potential US investments and acquisitions.
- Important to evaluate and include the CFIUS review process in corporate agreements and transaction timelines.
- Important to assess cybersecurity protections/policies and geographic proximity to US security installations.
- Important to evaluate utility of advance contact with CFIUS and other appropriate government officials to reduce the potential for security objections to be raised.
- Important to consider buyer-seller protections (e.g., reverse break-up fees; CFIUS clearance as condition precedent or as only a condition).



**SECTION 02**

# **THE MEANING OF “COVERED TRANSACTION”**

# What Does CFIUS Review?

- CFIUS has jurisdiction to review “covered transactions” — defined as a foreign person or entity’s acquisition of control of a US business with products or services that present a national security concern.
  - 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 US companies or entities with foreign parents or significant foreign shareholders
- US Business – An existing business, not a “greenfield” investment, or acquisition of patents or technology licenses
  - Low threshold

# The CFIUS Definition of “Control”

- 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.
  - Different from more typical transactional definitions of “control”
  - Not linked to 50%-plus shareholding or board majority
  - Functional Test:
    - “Control” is defined as the “power, direct or indirect, whether or not exercised ... to determine, direct, or decide important matters affecting an entity.”
    - CFIUS focuses on a foreign person’s powers, not transaction form
    - Considers relationships or arrangements to act in concert between persons

**SECTION 03**

**WHAT IS NOT A  
COVERED  
TRANSACTION?**

# What Is NOT a Covered Transaction?

- Acquisition of 10% or less of the voting interest in the entity only IF that interest is held “solely for the purpose of passive investment”
- A stock split or pro rata stock dividend that does not involve a change in control
- Start-up or “greenfield” investment
- License agreement
- Loan agreement (that does not include equity-like covenants)
- An acquisition of any part of an entity or of assets, if such part of an entity or assets does not “constitute a US business.”

# Asset Purchases

- Example: Corporation X, a US business, produces armored personnel carriers in the United States. Corporation A, a foreign person, seeks to acquire the annual production of those carriers from Corporation X under a long-term contract. Assuming no other relevant facts, this transaction is not a covered transaction, because no “US business” is acquired.

## **BUT**

- If Corporation A instead enters into a contractual arrangement to acquire the entire armored personnel carrier business operations of Corporation X, including production facilities, customer lists, technology, and staff, this transaction is a covered transaction.

**SECTION 04**

# **NATIONAL SECURITY ISSUES**

# National Security Issues

- National Security or Critical Infrastructure – CFIUS interprets these terms very broadly and does not define them.
- In some transactions, it is difficult to determine if CFIUS will decide that there is a national security risk.
- CFIUS looks at all facts and circumstances:
  - Nature of the US business
  - Identity of the foreign investor
  - Foreign government control
  - Country of foreign investor
  - Any other factors that the President or CFIUS may determine to be appropriate generally or in connection with a specific review or investigation



# National Security Issues (Cont'd)

- Nature of the US Business:
  - provides products/services to US Government entities with national security functions
  - provides products/services that could expose national security vulnerabilities
  - critical infrastructure
  - access to classified information
  - defense, security, national-security law enforcement sector
  - weapons, aerospace, radar sector
  - advanced technology related to items such as semiconductors, network and data security
  - located close to secure locations, such as military installations
  - R&D, production, or sale of technology, goods, or software subject to US export controls
  - Recent focus on real estate transactions
    - See Gov't Accountability Office Report "GSA Should Inform Tenant Agencies When Leasing High-Security Space from Foreign Owners" (January 2017)

# National Security Issues: Cybersecurity

- Focus on Cybersecurity Risks
  - 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 is 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
    - CFIUS and Congress have 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 US computer systems

**SECTION 05**

# **CLEARANCE TRENDS**

# Clearance Record & Trends

- More filings entering the 45-day investigation period
- 8% (29 cases) of CFIUS clearances from 2012 to 2014 imposed mitigation measures (11% in 2013)
- Acquisitions by investors from China accounted for the largest share of the notices filed for the three-year period with 19 percent (68 notices), up from 17 percent of all notices for the 2011 to 2013 period.
- Chinese investors also accounted for the most notices filed each year from 2012 to 2014 (23, 21, and 24 notices, respectively).

# Recent Review Activity: Filings

Covered Transactions, Withdrawals, and Presidential Decisions  
2009 – 2014 (CFIUS Annual Report to Congress, CY 2014)

Year	Number of Notices	Notices Withdrawn During Review	Number of Investigations	Notices Withdrawn During Investigation	Presidential Decisions
2009	65	5	25	2	0
2010	93	6	35	6	0
2011	111	1	40	5	0
2012	114	2	45	20	1
2013	97	3	48	5	0
2014	147	3	51	9	0
<b>Total</b>	<b>627</b>	<b>20</b>	<b>244</b>	<b>47</b>	<b>1</b>

# Recent Review Activity: Industries

Covered Transactions by Sector and Year, 2009—2014  
(CFIUS Annual Report to Congress, CY 2014)

Year	Manufacturing	Finance, Information, and Services	Mining, Utilities, and Construction	Wholesale, Retail, and Transportation	Total
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
2014	69 (47%)	38 (26%)	25 (17%)	15 (10%)	147
<b>Total</b>	<b>257 (41%)</b>	<b>201 (32%)</b>	<b>116 (19%)</b>	<b>53 (8%)</b>	<b>627</b>

# Recent Review Activity: Nationality

Covered Transactions by Acquirer Nation  
(CFIUS Annual Report to Congress, CY 2014)

Country	2009	2010	2011	2012	2013	2014	Total
United Kingdom	17	26	25	17	7	21	113
China	4	6	10	23	21	24	88
Canada	9	9	9	13	12	15	67
Japan	4	7	7	9	18	10	55
France	7	6	14	8	7	6	48
Israel	5	7	6	4	1	5	28
Netherlands	5	2	7	6	1	8	29
Sweden	3	5	6	2	2	2	20
Germany	1	2	3	4	4	9	25
Australia	1	3	4	3	0	4	15
Italy	2	3	2	1	0	0	8
Russian Federation	0	4	0	2	1	1	8

**SECTION 06**

# **THE CFIUS CLEARANCE PROCESS**



# The Review Process

**30 days – Initial Review (or, 45 days for certain transactions)**

**45 days – Investigation Period (second stage)**

**15 days – Presidential Review/Decision**

- Joint or separate filings/cooperative or uncooperative
- Starting/pausing the review clock/refiling
- Terms of the deal need to be materially complete
- Personal and corporate identifier information (highly intrusive)
- May extend beyond other government filing timelines
- Not one-stop shopping for government approvals (e.g., HSR and approval of novation of government contracts, security clearances, FCC/Team Telecom, DOD)
- Supplementary CFIUS questions (e.g., activities in countries subject to US sanctions, e.g., OFAC investigations)

# CFIUS: Filing Process

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

# CFIUS: Filing Process (Cont'd)

- CFIUS also can unilaterally initiate a review of any defense or critical infrastructure-related transaction, even if a joint notice is not filed 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 at any time, and not subject ever to FOIA.

**SECTION 07**

# **CFIUS: MITIGATION FOR FOCI ISSUES**

# CFIUS: Mitigation for FOCI Issues

- 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.
- 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, and Voting Trust Agreement.
- The techniques used for FOCI mitigation (to address NISPOM issues) can also be used to mitigate other national security concerns.

# CFIUS: General Mitigation

- From 2012 through 2014, 29 transactions (8% of all those filed with CFIUS in that time frame) resulted in mitigation agreements.
- In 2014, member agencies of CFIUS negotiated mitigation measures for 9 transactions, involving acquisitions of US companies, in the telecommunications, software, service, and technology industries.
- Penalties for violations of mitigation agreements can range from fines to revocation of contracts to dissolution of the acquisition.

# CFIUS: Types of Mitigation Imposed Recently

- In recent years, CFIUS required one or more of the following types of specific mitigation as conditions for clearance of particular transactions:
  - Ensuring that only authorized persons have access to certain technology and information.
  - Establishing a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a USG-approved security officer or member of the board of directors and requirements for security policies, annual reports, and independent audits.
  - Establishing guidelines and terms for handling existing or future USG contracts, USG customer information, and other sensitive information.
  - Ensuring that only US citizens handle certain products and services, and ensuring that certain activities and products are located only in the United States.
  - Notifying security officers or relevant USG parties in advance of foreign national visits to the US business for approval.
  - Notifying relevant USG parties of any awareness of any vulnerability or security incidents.
  - Providing the USG with the right to review certain business decisions and object if they raise national security concerns.
  - Letter of Assurance requiring disclosure on the U.S. business' websites of new foreign ownership.

**SECTION 08**

**CONTRACTUAL  
LANGUAGE:  
COVENANT**



# Contractual Language: Covenant

Following the execution of this Agreement, the Investor and the Company shall promptly submit the joint voluntary notice (the CFIUS Filing) of the acquisition of the Shares to the Chairman of the Committee on Foreign Investment in the United States (CFIUS) provided for in 31 C.F.R. Part 800 and Section 721 of Title VII of the Defense Production Act of 1950, as amended (50 App. U.S.C.A. § 2170) (the Exon -Florio Amendment), and each of the parties hereto shall make such additional filings and submissions as may be reasonably advisable under the Exon-Florio Amendment in respect of the acquisition of the Shares.

Each party shall promptly notify the other party of any material communication it receives from any governmental authority relating to any filings, or submissions under the Exon-Florio Amendment or other applicable foreign, federal, or state laws, including, for the avoidance of doubt, the CFIUS Filing.

## Seller Version:

The Investor agrees not to withhold unreasonably any consent to any mitigation or other requirements imposed by CFIUS in connection with the CFIUS Filing.

## Buyer's Version:

Notwithstanding the foregoing, the Buyer shall not be required to agree to any mitigation or other requirements as a condition of approval.

# Contractual Language: Conditions Precedent to Closing

CFIUS shall have notified the Investor and the Company in writing that:

- (i) it will not undertake an investigation in connection with the acquisition of the Shares, this Agreement, or the transactions contemplated hereby, or
- (ii) in the event that CFIUS has undertaken an investigation, it has terminated such investigation, or the President of the United States has elected to take no action to suspend or prohibit the acquisition of the Shares.

**SECTION 09**

# **CONSIDERATIONS WHEN REPRESENTING SELLERS**

# Considerations When Representing Sellers

- Whether to permit the deal to be conditioned on CFIUS clearance
- If best purchaser-candidates are foreign and may be concerned about CFIUS clearance, refusing to condition on clearance may not be acceptable to them
- Timing (may extend closing deadline if 45-day investigation)/cost (no filing fee, but filing is burdensome)
- If you decide to condition the transaction on CFIUS clearance, consider adding language requiring the purchaser to take any and all (commercially reasonable) actions to obtain approval, including agreeing to mitigation agreements or other conditions
- Whether to attempt to negotiate a break-up fee

**SECTION 10**

**CONSIDERATIONS  
WHEN REPRESENTING  
FOREIGN BUYERS**

# Considerations When Representing Foreign Buyers

- If the sale is subject to competitive bidding, requiring the transaction to be conditioned on CFIUS clearance may make your bid less competitive.
- In competitive bidding situations, it is possible that competitors (especially those from the United States or other more “attractive” jurisdictions or bidders) might either petition CFIUS or politicize the national security implications of the transaction through Congress or the media.
- Need coordinated legislative/PR strategy in high-profile deals.
- Assess the risk of CFIUS postclosing review and possible nonclearance/adverse publicity.
- Sovereign wealth funds and other government-owned or -controlled investors are subject to greater scrutiny/publicity.
- Need to consider seller’s views on whether it will accept clearance condition.
- Analyze national security aspects of target from due diligence stage in order to judge the risk of CFIUS nonclearance or imposition of mitigation agreements or other conditions.

**SECTION 11**

# **CFIUS: PRACTICAL CONSIDERATIONS**

# 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 are they from the final product or service and the degree of modification of the components in final assembly?



# CFIUS: Practical Considerations (Cont'd)

- Are the assets connected to critical infrastructure, such as energy transmission 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?
- Will production or research facilities to be acquired be closed or removed from the United States postacquisition?
- Has the foreign acquirer or one of its affiliates ever taken action adverse to US national security policy or interests?
- Do any ancillary agreements required to be entered into as conditions of the acquisition raise concerns?
- Are the physical assets or any assets to be constructed close to existing US security facilities?
- If the US business is telecommunications-related, should Team Telecom be notified?

# CFIUS: Practical Considerations (Cont'd)

- What happens if the parties don't file a voluntary notice and CFIUS decides to investigate the transaction?
  - FINSA applies even after a transaction is closed; 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., regulatory agencies, competing bidders who may complain to congressional representatives, public notices required by US securities law, CFIUS's own monitoring of acquisitions)
  - Many government-supply contracts contain provisions requiring notification to the relevant agency in the event of a transfer of control.

# CFIUS: Practical Considerations – Political and Public Relations Contacts

- Government contacts:
  - It is often advisable for officials of the US target company and the foreign purchaser to alert government purchasing and possibly Defense Security Services officials to the potential transaction to obtain their views as to whether a FOCI mitigation agreement appears necessary or warranted and to 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). Depending on the facts, it may be prudent to contact other departments as well (e.g., Energy, State, Defense).
- 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.

**SECTION 12**

**POTENTIAL FUTURE  
CHANGES IN CFIUS  
SCOPE OF REVIEW**

# Potential Future Changes

- Potential for significant changes in CFIUS policy and approach under the Trump Administration
  - See S.P. Mahinka, C. Valenstein and H. Dorsey, “Potential Increased CFIUS Scrutiny Under Trump,” Law360 (Nov 30, 2016)
- Possible changes in:
  - Composition of CFIUS
  - Industries considered critical infrastructure
  - Broadening of effects to be considered by CFIUS from proposed transactions

# Potential Future Changes (Cont'd)

- Potential changes in CFIUS composition
  - Addition of Department of Agriculture as a member agency
    - Continuing concerns by some in U.S. Congress regarding food and agriculture acquisitions
  - Addition of Director of new National Trade Council (Peter Navarro), overseeing U.S. trade and industrial policy

# Potential Future Changes (Cont'd)

- Potential broadening of industries included in critical infrastructure
  - Food / agriculture
    - e.g., recent opposition by some in U.S. Congress to ChemChina acquisition of Syngenta
  - Media / entertainment
    - e.g., recent concern regarding movie/TV production asset acquisitions
  - Financial/money transfer entities
    - e.g., recent opposition by some in U.S. Congress to acquisition of Chicago Stock Exchange by a Chinese entity, cleared by CFIUS in Dec. 2016

# Potential Future Changes (Cont'd)

- Potential broadening of effects to be considered by CFIUS
  - Effects on economic competitiveness and “strategically-important” industries
    - e.g., acquisitions in semiconductor industry
    - See President’s Council of Advisors on Science and Technology, “Report to the President: Ensuring Long-Term U.S. Leadership in Semiconductors” (January 2017)
- Effects on labor and employment
  - See, e.g., opposition by United Steel Workers Union to acquisition of Aleris Corp., an aluminum manufacturer, by Zhongwang International Group (USW letter to Treasury Secretary Jacob Lew, Sept. 15, 2016).



# Potential Future Changes (Cont'd)

- Inclusion of reciprocity as an element of review
  - Blocking foreign entity acquisition in an area where a U.S. buyer would be blocked from a similar investment in the foreign buyer's home nation
  - Members of U.S. Congress have requested the Government Accountability Office (GAO) to review and report on investment reciprocity; GAO has accepted this request to review.
- Restrictions on acquisitions by state-owned enterprises (SOEs)

# Potential Future Changes (Cont'd)

- Mechanisms for accomplishing potential future changes:
  - Statutory amendments to CFIUS' authority
    - e.g., recently introduced "Food Security is National Security Act of 2017" requiring consideration of effects on availability of and access to food and food safety and quality
  - Presidential Executive Orders
    - The President could issue an Order for the review by CFIUS of new areas as critical infrastructure, such as food/agriculture, media/entertainment, and financial industries.
  - The White House could request the Treasury Department to look more closely at certain areas or take certain issues into account in CFIUS reviews.

# Potential Future Changes (Cont'd)

- While it is highly unlikely that the Administration would attempt to reopen previously-cleared transactions, there are potential mechanisms to do so:
  - A declaration by the president under the International Emergency Economic Powers Act (IEEPA) that a cleared transaction should be reopened as a matter of national security.
  - Assertion of a material misstatement or omission in the parties' joint notice to CFIUS
- Such Presidential actions unlikely to be subject to reversal in the event of requests for judicial review.

**APPENDIX**

# **RECENT CHALLENGES & DEVELOPMENTS**

# Recent Challenges & Developments

- Huawei Technologies [retroactive review of 3Leaf Transaction]
  - In May 2010, Huawei purchased the intellectual property of a US computer software company, 3Leaf, for \$2 million, and hired many of its employees. It did not file a voluntary notice with CFIUS.
  - “Covered Transaction”– Huawei took the position that its acquisition of the 3Leaf assets did not constitute a “covered transaction,” and declined to seek CFIUS review. CFIUS disagreed with that analysis, because employees were hired as well as the acquisition of hard assets.
  - 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 order the company to unwind the transaction if the assets were not divested voluntarily.
  - After initially proposing to challenge CFIUS’s conclusion, Huawei decided to divest the 3Leaf assets and took the novel step of negotiating an ongoing oversight agreement with CFIUS to encourage open communication between Huawei and CFIUS concerning any future proposed transactions.

# Recent Challenges & Developments (Cont'd)

- Huawei Technologies [retroactive review of 3Leaf Transaction] (cont'd)
  - Postclosing Scrutiny– CFIUS asked Huawei Technologies to unwind its 2010 acquisition of technology and employees from 3Leaf.
  - Congressional Concerns – Former Senators Jim Webb and Jon Kyl expressed their concern that “Huawei’s acquisition of only certain parts of 3Leaf was specifically designed to ensure the transaction avoided CFIUS review.” They further asserted that Huawei has “well-established ties with the People’s Liberation Army” and “has supplied equipment to Saddam Hussein and the Taliban.” In addition, they claimed that Huawei was “working extensively in Iran’s telecom sector, of which the Iranian Revolutionary Guard Corps owns a significant stake.”

# Recent Challenges & Developments (Cont'd)

- U.S. House of Representatives Intelligence Committee Report on Huawei and ZTE
- In October 2012, the Intelligence Committee of the US House of Representatives issued an in-depth report urging US businesses to avoid doing business with Huawei Technologies and ZTE Corporation because of national security concerns relating to US telecommunications networks.
- The report focused on alleged connections between the two companies and Chinese military or intelligence services.

# Recent Challenges & Developments: Mitigation Involving Huawei

- 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 agree to phase out equipment from Huawei Technologies used in Clearwire's network if requested to do so.
- The parties entered into a National Security Agreement (with the DOD, DOJ, and DHS):
  - appointing an independent Security Director to Sprint's board,
  - allowing the US Government:
    - a one-time right to remove and decommission equipment by December 31, 2016 used in Clearwire, and
    - to review and approve network equipment vendors and service providers of Sprint and Clearwire.



# Recent Challenges & Developments: Proximity to Military Bases

- At least Three Chinese entities have been required by CFIUS to unwind transactions where they acquired properties near Fallon Naval Air Station (NAS) in Nevada.
- In June 2013, Procon Mining and Tunneling Ltd, and its affiliate, the China National Machinery Industry Corporation (a state-owned entity of the PRC), were required to divest a controlling interest in Lincoln Mining Corporation, which owned mining operations near Fallon NAS and the Marine Corps Air Station Yuma. (Parties made a post closing filing.)
- In June 2012, nearly two years post-closing, Nevada Gold Holdings, a company with property near Fallon NAS, disclosed that CFIUS had required its parent, Hybrid Kinetic Group of Hong Kong, to divest its controlling interest to a party who could meet US Government requirements. (CFIUS self-initiated the review of this transaction.)
- In December 2009, CFIUS informed China-based Northwest Non-Ferrous International Investment Company Ltd (a state-owned entity of the PRC) that it would recommend that the President suspend and reject its bid to acquire 51% of Firstgold Corporation, which owned four mining properties near Fallon NAS.

# 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 US 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 DOE.
  - 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.

# Recent Challenges & Developments (Cont'd)

- CNOOC
  - In 2013, CFIUS cleared the acquisition by CNOOC, a Chinese state-owned enterprise, of Nexen, a large Canadian oil and gas company that also had assets in the US 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 US 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.

# Recent Challenges & Developments (Cont'd)

- 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 US Ambassador to the United Nations.

# Recent Challenges & Developments (Cont'd)

- Ralls Corporation – 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 US Navy training facility. Ralls later submitted a notice to CFIUS after the US Navy requested that Ralls relocate one of the wind farm projects to avoid interfering with military training operations.

# Recent Challenges & Developments (Cont'd)

- 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 US 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 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).

# Recent Challenges & Developments (Cont'd)

- Avago Technologies Ltd.– acquisition of Broadcom Corp., a US 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.
- In December 2015, GlobalWafers Co. Ltd. was cleared by CFIUS for the acquisition of SunEdison Semiconductor Limited (SEMI).
- Go Scale Capital of China – proposed acquisition of Philips Lumileds, an LED semiconductor chip and lighting manufacturer, for \$2.9 billion was abandoned in January 2016 because of unspecified “unforeseen concerns” raised by CFIUS.
  - Subsequently in 2016, Lumileds sold to Apollo for \$1.5 billion.

# Recent Challenges & Developments (Cont'd)

- In August 2016, ChemChina received CFIUS clearance for its \$43 billion purchase of American agrochemical firm Syngenta. This was the largest outbound acquisition by a Chinese company on record. In March 2016, the U.S. Senate Agriculture Committee had urged CFIUS to take a close look at the deal.
- In October 2016, Blackstone ended its plan to sell the Hotel del Coronado in California to China's Anbang Insurance Group Co. after concerns were raised by CFIUS about the hotel's proximity to a major naval base.
- In November 2016, the acquisition of Ingram Micro Inc. – a California technology solutions, mobility, cloud, and supply chain solutions business – by the Chinese Tianjin Tianhai Investment Co. was cleared by CFIUS.



# Recent Challenges & Developments (Cont'd)

- CFIUS rejection of proposed acquisition of semiconductor manufacturer Business Aixtron SE by Fujian Grand Chip Investment GMBH (China)
  - Executive Order by President Obama (Dec. 2, 2016) confirming CFIUS decision
- In January 2017, CFIUS clearance of acquisition by China Oceanwide Holdings Group of International Data Corp., a technology publishing and research firm.
- In February 2017, CFIUS rejected the proposed acquisition by Infineon Technologies of Germany of Wolfspeed, a U.S. manufacturer of high-performance semiconductors.
- In February 2017, CFIUS cleared proposed acquisition of Osram Licht AG's LED lighting business, LEDvance GmbH by a consortium of Chinese buyers, including Chinese LED manufacturer MLS Co., Ltd. and Chinese investor Yiwu State-Owned Assets Operation Center.

**QUESTIONS?**

# Biography



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Margaret Gatti represents US and non-US companies, universities, and financial institutions in matters involving economic sanctions, export controls under the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR), customs and import regulations, free trade agreements, antiboycott regulations (EAR and IRS), anticorruption laws (FCPA and UKBA), anti-money laundering legislation, international commercial sales terms (INCOTERMS), international e-commerce, and Bureau of Economic Analysis (BEA) reporting, as well as national security issues.

As part of her export control and national security practices, Ms. Gatti also is involved in filings before the Committee on Foreign Investment in the United States (CFIUS), and has represented both foreign buyers and investors in and domestic sellers of U.S. businesses in reviews by that Agency. She has substantial experience in negotiating and mitigating Foreign Ownership, Control, and Influence (FOCI) issues that may be presented as conditions to clearance of a proposed transaction.

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Stephen Paul Mahinka is a former head of the firm's Antitrust practice, founder of its FDA practice, and co-founder and former chair of the firm's Life Sciences industry practice. As part of his antitrust practice, Mr. Mahinka is also responsible for many of the firm's filings before the Committee on Foreign Investment in the United States (CFIUS), and has represented both foreign buyers and investors in and domestic sellers of U.S. businesses in reviews by that Agency, obtaining clearances for approximately 50 transactions in recent years. These clearances include transactions in the energy industry, life sciences, technology, defense, and transportation. He has substantial experience in negotiating and mitigating Foreign Ownership, Control, and Influence (FOCI) issues that may be presented as conditions to clearance of a proposed transaction.

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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.

Carl advises clients on international risk management, including compliance with the foreign investment review process (Exon-Florio/CFIUS), export control and sanctions, anti-money laundering, anti-boycott, and anticorruption (FCPA) laws and regulations. He also advises on internal investigations, enforcement cases, and dispute resolution proceedings relating to his transactional and regulatory practice.

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