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THE NEW CFIUS REGULATIONS: WHAT HAPPENS AFTER FEBRUARY 13?

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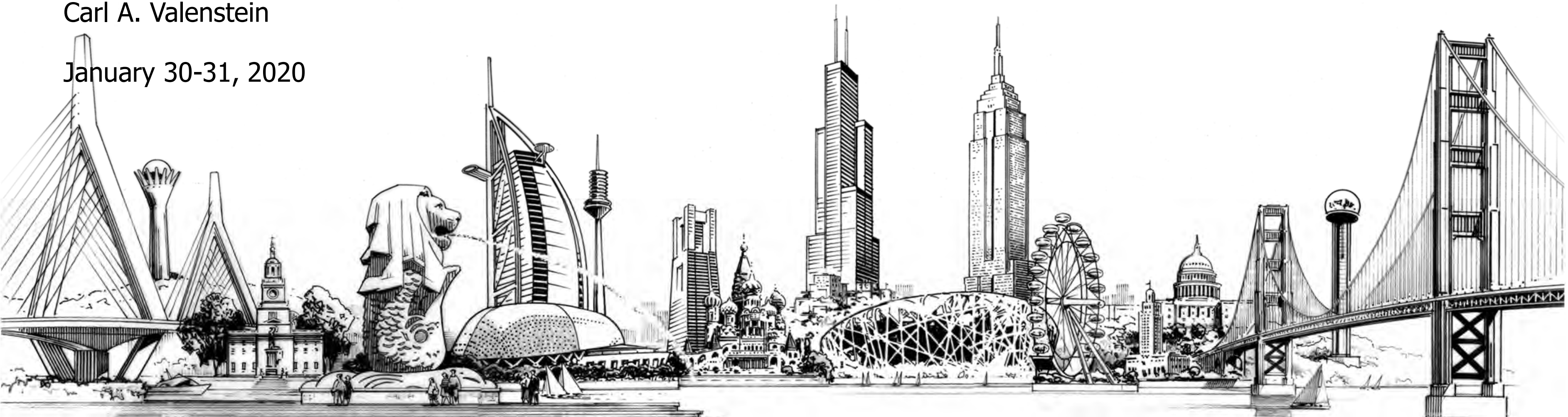

UPCOMING CFIUS SYMPOSIUM

SECOND ANNUAL CFIUS SYMPOSIUM

FIRRMA UNDER THE NEW RULES

Thursday, May 14, 2020 9:00 AM to 5:00 PM

Co-sponsored by

Morgan Lewis & Bockius, LLP CFIUS Working Group

The National Security Institute of George Mason Law School

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Location:
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Agenda

I. Foreign Investment Risk Review Modernization Act of 2018

II. Update on the January 13, 2020 Treasury Regulations

III. Summary of Key Areas Affecting Cross-border Investments Based on the January 13, 2020 Treasury Regulations

IV. Roundtable Discussion of Answers to Key Questions

Introduction

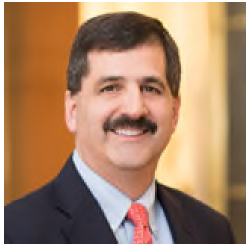
- The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), signed as part of the National Defense Authorization Act signed in August 2018, reflects the first comprehensive reform of the CFIUS process since the 2007 Foreign Investment and National Security Act of 2007 (FINSA) amendments.
- In the wake of FIRRMA, Treasury, as the chair of CFIUS, issued pilot program regulations in October of 2018 (effective November 2018) establishing the first mandatory declaration program requiring CFIUS filings for particular cross-border noncontrolling investments that involved certain NAICS codes and critical technologies.
- CFIUS received an unexpectedly low number of mandatory filings under the pilot program (approximately 100) and Treasury considered this as part of their regulatory review process.
- In September 2019, CFIUS finally proposed a full set of regulations to implement FIRRMA to cover controlling, noncontrolling, and a separate set of regulations for real estate investments.

Introduction

- Although Treasury received a number of detailed comments–reflecting concerns about the lack of clarity and certainty as well as possible overreach on the part of the Committee's jurisdiction–the rules that issued on January 13, 2020 made only modest changes to the proposed rules but included additional examples.
- The recently issued regulations retain the elements of the mandatory disclosure filings tied to certain NAICS codes and "critical technologies."
- The goal of this CFIUS update is to help you navigate the current environment in light of the recently issued regulations, which will become effective February 13, 2020.

Firm Resources – CFIUS Working Group

- This presentation provides a high-level summary of a complex statutory and regulatory regime.
- Morgan Lewis formed the CFIUS Working Group which includes partners who work regularly in this area. Each stands ready to assist in the analysis of any cross-border investments.
- The partner members of the CFIUS working group are Kenneth Nunnenkamp, Giovanna Cinelli, Stephen Paul Mahinka, Ulises Pin, and Carl Valenstein



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Reviews under the Defense Act of 1950, As Amended

- Since 1975, CFIUS has historically reviewed transactions involving the acquisition of control by a foreign person of a US business that posed threats to national security under the Defense Production Act of 1950. The Committee had the discretion to review other transactions, but the statutory and regulatory focus revolved around ownership and control.
- These reviews have historically been based on voluntary submissions–the parties to a transaction could decide whether to voluntarily file a joint notice, although CFIUS has had the right to require review of certain nonnotified transactions and for the first time ever publicly announced, intervened before closing to block an attempted Broadcom hostile takeover of Qualcomm through the use of its interim authorities.
- Before 2016, CFIUS had publicly blocked or required the divestiture in only a small number of foreign investments, principally involving Chinese State-Owned Enterprises (SOEs) generally with military connections, but proposed mitigation terms in a larger number of cases to address national security issues. The number of blocked or withdrawn transactions involving Chinese investors began a dramatic increase in the Obama Administration and has continued in the Trump Administration–centered in part on the changing geopolitical framework, publicly articulated Chinese technology development policy, and the Section 301 Investigation by the USTR.

Reviews under the Defense Act of 1950, as amended

- CFIUS examines each investment on a case-by-case basis, using a risk–based evaluation process focused on threats plus vulnerabilities equal consequences.
- Deciding whether to file a notice to the CFIUS now requires consideration of the risks associated with not filing a voluntary submission and also the impact of failing to file a mandatory declaration. There are no penalties for failing to file a voluntary notice, but parties may be fined up to the value of the transaction (as well as face forced divestiture) for a failure to file a mandatory declaration.

CFIUS Has Broad Powers under FIRRMA

- FIRRMA explicitly gives CFIUS the authority to:
  - suspend a proposed or pending transaction that poses a risk to national security while it is under review by the Committee;
  - refer transactions to the President for action at any time during the review or investigations;
  - use mitigation agreements, including, when needed, to address situations where the parties have voluntarily abandoned a transaction before CFIUS completes it review;
  - impose interim mitigation agreements;
  - require plans for monitoring compliance with mitigation agreements;
  - review older agreements and conditions to determine whether they are no longer warranted;
  - unilaterally initiate a review of a previously reviewed transaction if the parties, intentionally or unintentionally, materially breach terms and conditions of CFIUS clearance; and
  - allow for the use of independent parties to monitor agreements.

Roundtable Discussion of Answers to Key Questions

- When do the final regulations become effective with respect to pending transactions and should I reconfirm prior CFIUS advice if my deal has not yet closed?
- The effective date of the rules is February 13, 2020.
- Transactions are governed by existing rules if on February 12, 2020:
  - The transaction has closed;
  - A binding agreement setting forth the material terms of the transaction has been executed;
  - A party has made a public offer to buy the shares of a US business;
  - A shareholder has solicited proxies in connection with an election of a board of a US business; or
  - A holder of a "contingent equity interest" has requested conversion
- Pilot program transactions are subject to existing rules if the transaction is signed before February 13, 2020.

Roundtable Discussion of Answers to Key Questions

- What are some of the impactful changes to the regulations on technology, infrastructure, and data (TID) businesses?
  – Increasing focus on social media acquisitions involving sensitive personal data, including reviewing previously closed transactions not filed for review:
  – Beijing Kunlun/Grindr (sensitive personal data)
  – iCarbonX/PatientsLikeMe (personal healthcare information)
  – ByteDance/Musical.ly (TikTok) (personal information)

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

- Most telecommunications network and service providers are now considered part of critical infrastructure
  - The CFIUS process does not substitute for Team Telecom review, but a CFIUS filing (even if voluntary) may be helpful to expedite approval by Team Telecom
- The detailed list in the separate CFIUS regulations on real estate should also be consulted to determine if any of the facilities in the target US business are in geographic proximity to military installations and other US Government sites of security concern and are not covered by any available exceptions

Roundtable Discussion of Answers to Key Questions

- What are the general strategies that buyers/investors and sellers/investees should consider with respect to CFIUS?

For buyers/investors:

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

Roundtable Discussion of Answers to Key Questions

For buyers/investors:

- Consider potential mitigation strategies to address any national security concerns. These could include adopting special security agreements, proxy control or a voting trust structure, or spinning off certain assets/contracts/product lines that present national security issues.
- Consider appropriate contractual provisions to allocate risk and cost of CFIUS filings and affect on timeline. Avoid agreeing in advance to any mitigation that CFIUS might require or paying breakup fees if CFIUS rejects the transaction.
- Consider appropriate (proactive or reactive) PR/lobbying strategies to counter any opposition from interest groups or competitors. Strictly comply with FARA and LDA requirements.

Roundtable Discussion of Answers to Key Questions

For sellers/investees:

- If there are multiple interested parties, consider excluding foreign buyers/investors, reducing the percentage of foreign investment, or, assuming no mandatory CFIUS filing would be required, having the foreign buyers/investors assume the risk of not conditioning the transaction on clearance with CFIUS.
- If a foreign buyer/investor is the best candidate and CFIUS clearance is required, evaluate CFIUS completion risk of the buyer/investor given its track record or views of the US government.
- Conduct self-due diligence to identify potential national security issues (e.g., TID business, supply-chain issues, US government nexus through contracts/funding) and review any prior CFIUS clearances in relevant industry.
- Consider appropriate contractual provisions to allocate risk and cost of CFIUS filings and affect on timeline. Examples include requiring a buyer/investor to agree on certain mitigation in advance or to pay breakup fees if CFIUS clearance is not obtained.

Roundtable Discussion of Answers to Key Questions

- What happened to the pilot program that created mandatory declaration requirements?
  - The pilot program has been folded into the final CFIUS regulations and, for now, it remains tied to the 27 NAICS codes, although CFIUS has indicated that it will propose a change to tie it to export control requirements in the future.
  - It only applies to “critical technologies” and has not been extended to “critical infrastructure” or “sensitive personal data.”
  - New exceptions have been created, which are discussed below, that were not in the original pilot program regulations issued in October 2018.

Roundtable Discussion of Answers to Key Questions

- What if my transaction includes both real estate and a US business? Must I analyze the transaction under both sets of rules? Do I need to make two separate filings with CFIUS if covered by both?
  – You need to analyze your transaction under both sets of regulations, but only one filing is potentially required if you're covered under both.
  – The CFIUS real estate rules do not have a mandatory filing requirement, but it is important to determine if your real estate transaction is a covered real estate investment and, if so, assess the risks of not filing with CFIUS.

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

- How can I tell if my fund qualifies for the private equity exemption?
  - Private equity fund managers should determine if their existing funds qualify for the private equity exemption and design future funds, where possible, to qualify.
  - In order to qualify, the general partner must not be a foreign person.
  - Neither the advisory board/committee of limited partners nor any foreign person may have the ability to approve, disapprove, or otherwise control investment decisions or decisions made by the general partner related to the entities in which the fund is invested.
  - The foreign limited partners may not have control over the selection, dismissal, or compensation of the general partner.
  - No foreign limited partner may have access to material nonpublic technical information through membership on the advisory board/committee.
  - No foreign limited partner may be afforded access to any material nonpublic technical information in the possession of any TID US business in which the fund invests, or membership or observer rights on the board of any such TID US business or any involvement, other than through voting of shares, in substantive decisionmaking of the TID US business.

Roundtable Discussion of Answers to Key Questions

- The final regulations introduced the concept of a principal-place-of-business test that allow a fund to establish that its principal place of business is in the United States, even if its organized outside of the United States, if the general partner is based in the United States and directs, controls, and coordinates the fund's activities from there. Because this is a new concept, CFIUS has invited comments on this provision.
- The final regulations clarify, as noted above, that the substantial interest triggering event in the case of the fund will only be examined with respect to the general partner and not with respect to any limited partners.
- There is still a lack of clarity concerning the effect of minority foreign general partners.
- The NVCA proposed CFIUS insert with respect to limited partnership agreements will likely be reexamined to conform to the final regulations.

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

- If my transaction is not covered by the mandatory filing requirement, do I still need to consider conducting a CFIUS analysis?
  - Yes. Even when not subject to the mandatory filing requirements, it is important to determine if the transaction is a covered transaction for CFIUS purposes and then to assess the pros and cons of conditioning the transaction upon clearance with CFIUS, discussed in more detail below.

Roundtable Discussion of Answers to Key Questions

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

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

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

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

- What is the timeline for CFIUS reviews? How can it be managed to avoid delays?
  - Declarations: 30 days from "Day One" but CFIUS may require a full submission
  - Notices:
    - Prefiling of complete notice (allow about 10-15 days for comments).
    - After formal filing: 45 days from "Day One Letter" (generally 10-15 days to get to "Day One").
    - May be extended by "investigation phase" for up to 45 additional days. Theoretical extension for 15 more days in extraordinary circumstances.
  - At the end of process CFIUS would either:
    - Clear the transaction with no mitigation.
    - Condition approval on mitigation measures.
    - Refer the transaction to the President to take action under Section 721 or, in rare complicated cases, request a withdrawal and refiling to restart the clock.

  Be careful with drop-dead/long-stop dates that are too short given the unpredictability of CFIUS reviews.

Roundtable Discussion of Answers to Key Questions

- Has CFIUS introduced a filing fee? If not, when and how much will likely be imposed? Who pays the fee?
  - Under FIRRMA, CFIUS is authorized to impose filing fees of up to the lesser of 1% of the transaction value or $300,000.
  - Filing fees would apply only to joint voluntary notices, not declarations.
  - Who pays is a matter of parties' negotiation but will generally be the buyer/investor, as with antitrust HSR pre–notification fees.
  - A proposed regulation on filing fees is expected to issue very shortly by CFIUS (by March 2020).

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

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

Roundtable Discussion of Answers to Key Questions

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

Biography

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Kenneth J. Nunnenkamp represents buyers and sellers in transactions before CFIUS, and counsels parties to transactions regarding CFIUS risks, applicability and solutions. His experience includes representation of buyers and sellers in public and private transactions in all value ranges, from small transactions in the millions to large matters in the billions, public and private. Ken's experience with CFIUS includes almost every industry and transactions involving entities from more than 35 countries, including Japan, China, Germany, the United Kingdom, Canada, Switzerland, Norway, Sweden, Indonesia, Australia, South Korea, Luxembourg, France, and many more. Ken chairs the Morgan Lewis CFIUS Working Group, which brings together the Firm's attorneys who practice in the area and who are interested in its developments. Ken's expertise encompasses trade and regulatory fields dealing with or implicating national security issues, including: US economic sanctions; Trade remedies (§§ 201, 232 and 301, and related matters, including exclusion requests, hearing testimony and Congressional involvement); Export controls and compliance/investigations under the ITAR, EAR and other regulations; US Customs regulations governing imports and exports; Customs and Census issues arising under the Foreign Trade Regulations, Endangered Species Act and Lacey Act issues with imports and exports of exotic and controlled items; C-TPAT; and Trade Agreements/Buy American issues. Ken also represents clients in matters relating to classified activities and before the Justice Department's Foreign Agent Registration Act (FARA) division. He brings more than 30 years of litigation and investigation experience, including time as a JAG Officer in the US Marine Crops. As an experienced entrepreneur, Ken applies business acumen to legal solutions, while assessing risk in user-friendly terms. He serves on the Wake Forest University Business School Board of Visitors, and publishes and presents frequently on topics relating to national security law, trade and business.

Biography

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Giovanna M. Cinelli is the Firm's leader of the International Trade and National Security Practice. Throughout a career spanning more than 30 years, she has represented and counseled defense, aerospace and high technology companies on a broad range of issues affecting national security, including export investigations (civil and criminal), due diligence, post-transaction cross-border compliance, CFIUS reviews, government contracts, export policy, and licensing. She has conducted over 250 civil and criminal investigations (both unclassified and classified), addressed transactional due diligence matters in hundreds of investments, and counseled clients through the complexities of export control changes from 1992 through the present. She has negotiated complicated export enforcement settlements with the Department of State and successfully closed (without penalties) a range of directed and voluntary disclosures before the Departments of Commerce and Treasury (Office of Foreign Assets Control), as well as the Department of State.

Biography

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Stephen Paul Mahinka is a partner in the Washington, D.C. office of Morgan, Lewis & Bockius LLP, and a member of the firm's CFIUS Working Group. Mr. Mahinka is a former leader of the firm's Antitrust Practice, founder of its FDA Practice, and co-founder and former chair of its Life Sciences Industry group. He is responsible for many of the firm's filings before CFIUS, and has represented both foreign buyers/investors and domestic sellers of US businesses in reviews, obtaining clearances for over 50 transactions in recent years, and has analyzed hundreds of proposed transactions. These CFIUS clearances include transactions in the life sciences, energy (both conventional and renewable), technology, defense, and transportation industries. He has substantial experience in negotiating Foreign Ownership, Control, and Influence (FOCI) and other mitigation agreements that may be conditions for clearance of a proposed transaction.

Mr. Mahinka has published over 100 articles on CFIUS, FDA, and antitrust issues, and is a co-author of several books, including the ABA Antitrust Section's *Pharmaceutical Industry Antitrust Handbook* (2nd ed. 2018), *Food and Drug Law and Regulation* (3rd ed. 2015), and *Life Sciences Mergers and Acquisitions* (2008). He is a graduate of Johns Hopkins University, *Phi Beta Kappa,* and of the Harvard Law School, where he was Executive Editor of the *Harvard International Law Journal*.

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Ulises R. Pin represents US and foreign communications and technology companies on corporate, financial, and regulatory matters. He also advises private equity firms, venture capital funds, and financial institutions on investments in the telecommunications, media, and technology (TMT) sectors. Ulises represents clients before the Federal Communications Commission and government agencies in Mexico, Latin America, Europe, and Asia. He has substantial experience in cross-border transactions and particular experience on foreign investment and national security issues, including securing approvals by CFIUS.

Ulises frequently counsels clients on foreign investment, national security, export controls, and embargo issues before CFIUS, the Office of Foreign Assets Control (OFAC) of the Department of Treasury, and the Departments of Commerce, State, Defense, Homeland Security, and Justice. In this area, he has substantial experience negotiating complex mitigation agreements.

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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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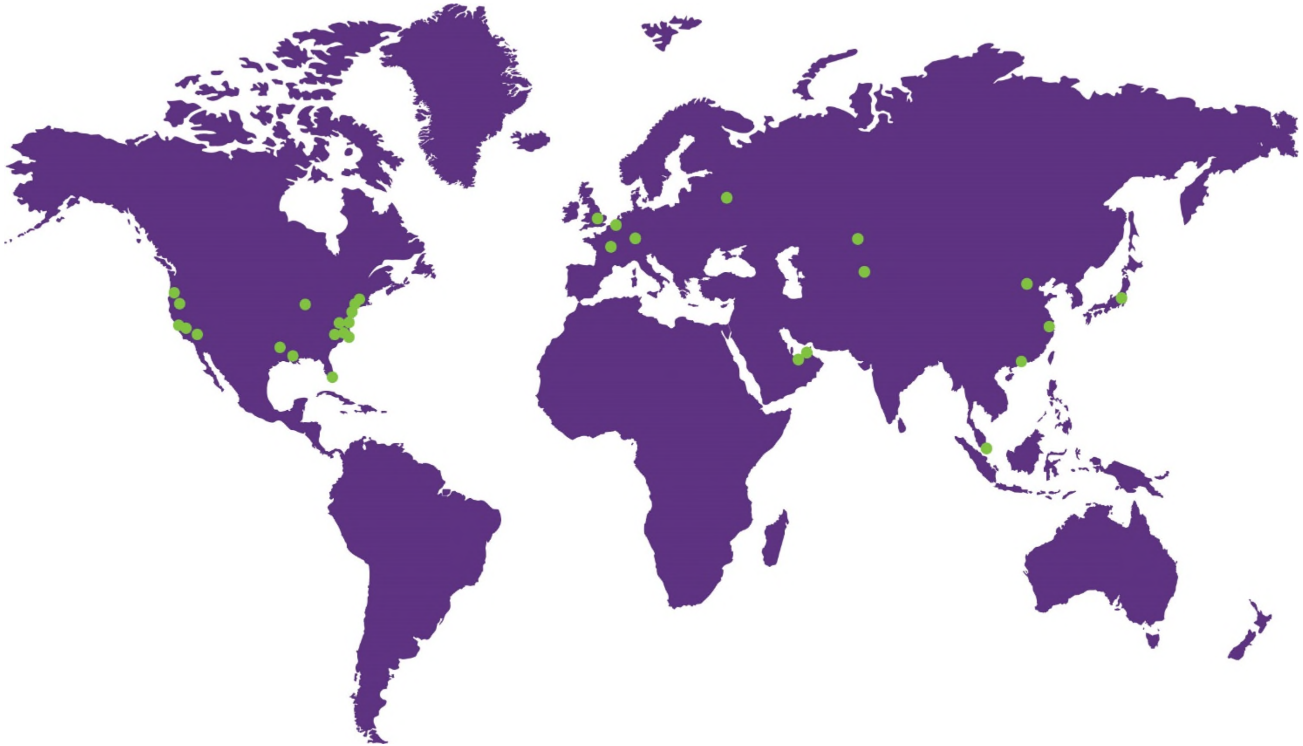

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