

Morgan Lewis

CFIUS DEVELOPMENTS AND KEY TAKEAWAYS

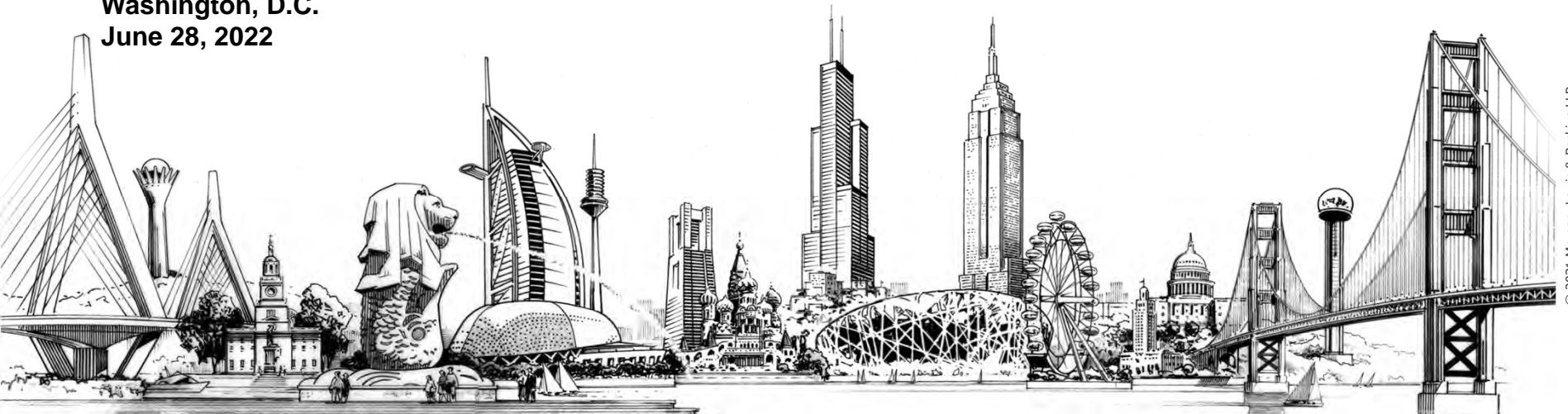
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**Washington, D.C.
June 28, 2022**



THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS)

- ❖ CFIUS hosted an open conference in June 2022 to “provide insights on CFIUS authorities, processes, and practice primarily for the business community.”
- ❖ Presenters included US government personnel from CFIUS member agencies
- ❖ CFIUS has often been viewed and referred to as a “black box”
- ❖ This represented a rare opportunity to meet and hear from some of the CFIUS member agency participants
- ❖ Biden Admin. has nominated an Assistant Secretary for Investment Security
- ❖ CFIUS Annual Report expected soon

KEY TAKEAWAYS FROM RECENT CFIUS DISCUSSIONS

- ❖ National Security Risks
- ❖ Risk landscape recognized to be evolving, expanding
- ❖ Includes supply chain, personal and health data, technology
- ❖ Not all threats are equal
- ❖ New concepts in national security; stretching into economic security
- ❖ Pandemic highlighted additional risks, including renewed emphasis on biotech

KEY TAKEAWAYS FROM RECENT CFIUS DISCUSSIONS

- ❖ Renewed openness to amending the regulations
- ❖ Awareness of Congressional interest in statutory changes and oversight
- ❖ CFIUS remains the place of last resort—per FIRRMA (and before), only if no other US government means to mitigate the potential threat
- ❖ National security remains the focus

SENSITIVE PERSONAL DATA AND THE IMPORTANCE TO CFIUS

- ❖ What is it?
- ❖ Who does it implicate?
- ❖ Why does it matter?
- ❖ Why does CFIUS care?

SENSITIVE PERSONAL DATA AND ITS INVOLVEMENT IN THE CFIUS PROCESS

- ❖ Transactions involving a U.S. business that collects or maintains sensitive personal data are generally reviewed by CFIUS on a voluntary rather than mandatory basis
- ❖ However, because of CFIUS's increasing interest in sensitive personal data, businesses should maintain the ability to (1) scope the data it collects/maintains (or can collect/maintain), (2) calculate the population on which such data is collected, and (3) define the population(s) on which it collects/maintains data
- ❖ Each of these must be done in a verifiable, justifiable manner (*i.e.*, guesses and rough sampling methodologies will not be accepted by CFIUS)

CFIUS UPDATES AND REMINDERS

- ❖ Ignorance is no excuse - CFIUS expects startups and other early-stage companies to consider these regulations at all lifecycle stages
- ❖ Lack of imagination does not mean lack of threat – CFIUS will independently evaluate a data set's potential to harm national security
- ❖ Anonymization and aggregation are inadequate – traditional safeguards that have been promulgated in the marketplace are insufficient
- ❖ Trust but verify – Increasing use of mitigation agreements to safeguard sensitive personal data
- ❖ Regulators mount up - Focus by Justice, DoD, and DHS on cases involving sensitive personal data

TAKEAWAYS FOR COMPANIES (AND COUNSEL) THAT OPERATE IN THIS SPACE

- ❖ Anonymization and aggregation are not enough – deanonymization and de-aggregation techniques have become too advanced for traditional techniques to safeguard vulnerabilities
- ❖ Companies that collect or maintain sensitive personal data are increasingly common targets for:
 - Nefarious actors (inside and outside of company)
 - CFIUS reviews
 - Non-notified inquiries from CFIUS

TAKEAWAYS FOR COMPANIES (AND COUNSEL) THAT OPERATE IN THIS SPACE

- ❖ Do not let perfect be the enemy of progress
- ❖ Importance of:
 - Formal, written processes
 - Involving counsel at the beginning of an engagement
 - Proactive engagement with the Committee in either the review or non-notified processes

COMPLIANCE

- ❖ Policies and Procedures
- ❖ In-house Security Personnel
- ❖ Corporate Security Committee
- ❖ Tracking Systems
- ❖ External Compliance Oversight
- ❖ Monitoring Agencies
- ❖ Mandatory Reports and Notifications

ENFORCEMENT

- ❖ New E-mail Tip Line and Enforcement Website
- ❖ Mitigation
- ❖ Non-Notified & Non-Declared Transactions
- ❖ Forced Divestitures
- ❖ Increased DOJ Involvement

BACKGROUND – EXCEPTED FOREIGN STATES

**Australia, Canada, New Zealand, United Kingdom
and Northern Ireland**

Exempt from:

- ❖ CFIUS jurisdiction over non-controlling investments
- ❖ CFIUS jurisdiction over certain real estate transactions;
- ❖ Mandatory filing requirements

BACKGROUND – EXCEPTED FOREIGN STATES

How does one become an excepted investor state?

- ❖ Until February 13, 2023: A foreign state identified by the committee as an eligible foreign state
- ❖ After February 13, 2023: A foreign state for which the committee has made a determination under 800.1001(a): “the foreign state has established and is effectively utilizing a robust process to analyze foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security.”
- ❖ CFIUS has provided the public with a list of factors it uses to make that determination.

U.S. GOVERNMENT OUTREACH

- ❖ The determination proscribed in the regulations is not mute.
 - ❖ High-level CFIUS officials and other stakeholders travel to, and work with, allied nations
 - ❖ Provide access to policy experts and assist with drafting regulations and implementing screening programs
- ❖ Informal global system of FDI review regimes between allied nations narrow the number of cases that cannot be reviewed (or addressed) on jurisdictional basis.
- ❖ FDI review regimes communicate with one another.

TIGHTENING THE SCREWS

- ❖ **Belgium:** Government reached a cooperation agreement on a screening regime to go into effect January 1, 2023
- ❖ **United Kingdom:** National Security and Investment Act – January 4, 2022
 - Mandatory filing obligations and pre-clearance requirements for “core sectors”
 - UK government recently hinting that it may use its national security laws to force the IPO of Arm, the British semiconductor company, to occur in London rather than the U.S.
- ❖ **Germany:**
 - Strengthened its screening mechanism Summer of 2021 by requiring mandatory filings for more industries and sectors
 - April 2022: German government blocked Beijing-based Aeonmed Group from purchasing Heyer Medical AG, a medical device manufacturer

TIGHTENING THE SCREWS

- ❖ **Italy:**
 - March 21, 2022, the Government made permanent some of the national security reviews that were implemented during the peak of the COVID-19 pandemic. Acquisitions of controlling stakes by EEA investors and minority investments in “strategic” sector
 - Italy’s Prime Minister blocked 3 Chinese takeovers between February and November of 2021
- ❖ Ultimately, national security reviews are becoming a broader regulatory concern in both large and small transactions.

CFIUS – “BEST PRACTICES”

- ❖ Declarations increasing, but hoping for more use
 - More than 70% of declarations resulted in final action
 - Little guidance regarding when the declaration should/should not be used
- ❖ Committee may engage more
- ❖ In a major change, CFIUS will consider deals earlier in their life cycle—even with bare bones term sheets
 - Risk remains on the parties, however

CFIUS – “BEST PRACTICES”

- ❖ Less is not more
 - Clearance/resolution requires providing CFIUS what it needs to do its analysis
 - Withholding key information remains an ongoing problem
 - ◆ One of the reasons for increased enforcement emphasis
 - Cooperative approach works best; not adversarial
- ❖ Don't tell CFIUS how to analyze national security
- ❖ Respond to questions timely and completely
- ❖ Think strategically about mitigation

Biography



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Ken Nunnenkamp represents clients in international trade and national security matters before United States federal courts and government agencies, including the US departments of State, Commerce, Homeland Security, Defense, and Treasury. His practice involves internal investigations and disclosures, including voluntary disclosures and responding to government demands, as well as federal court defense against government actions. He also advises on compliance counseling and training, transactional due diligence—including both domestic and cross-border transactions—and statutory submissions to US government agencies.

Biography



Heather C. Sears

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Heather C. Sears is a veteran trade compliance counsel who represents global businesses on compliance with and extraterritorial application of US laws and regulations relating to international trade. She also is a member of the US State Department's Defense Trade Advisory Group and serves as the vice chair on the board of the National Council for International Trade Development.

Heather has advised clients on a wide variety of international issues, including compliance with the International Traffic in Arms Regulations (ITAR), the Export Administration Regulations (EAR), sanctions regulations administered by the Office of Foreign Assets Control (OFAC), US Customs and Border Protection (CBP) regulations, and the Foreign Corrupt Practices Act (FCPA).

Biography



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Christian J. Kozlowski represents clients on national security matters, including on issues concerning compliance with, and investigations relating to export controls, import controls, sanctions, anti-boycott, and anti-bribery/anti-corruption. Christian also assists both US and foreign entities with questions and appearances before the Committee on Foreign Investment in the United States (CFIUS), including counseling on the CFIUS process, appearances before CFIUS, considerations of when a transaction must be notified to CFIUS, and a voluntary notification may strategically benefit the transaction parties.

Biography



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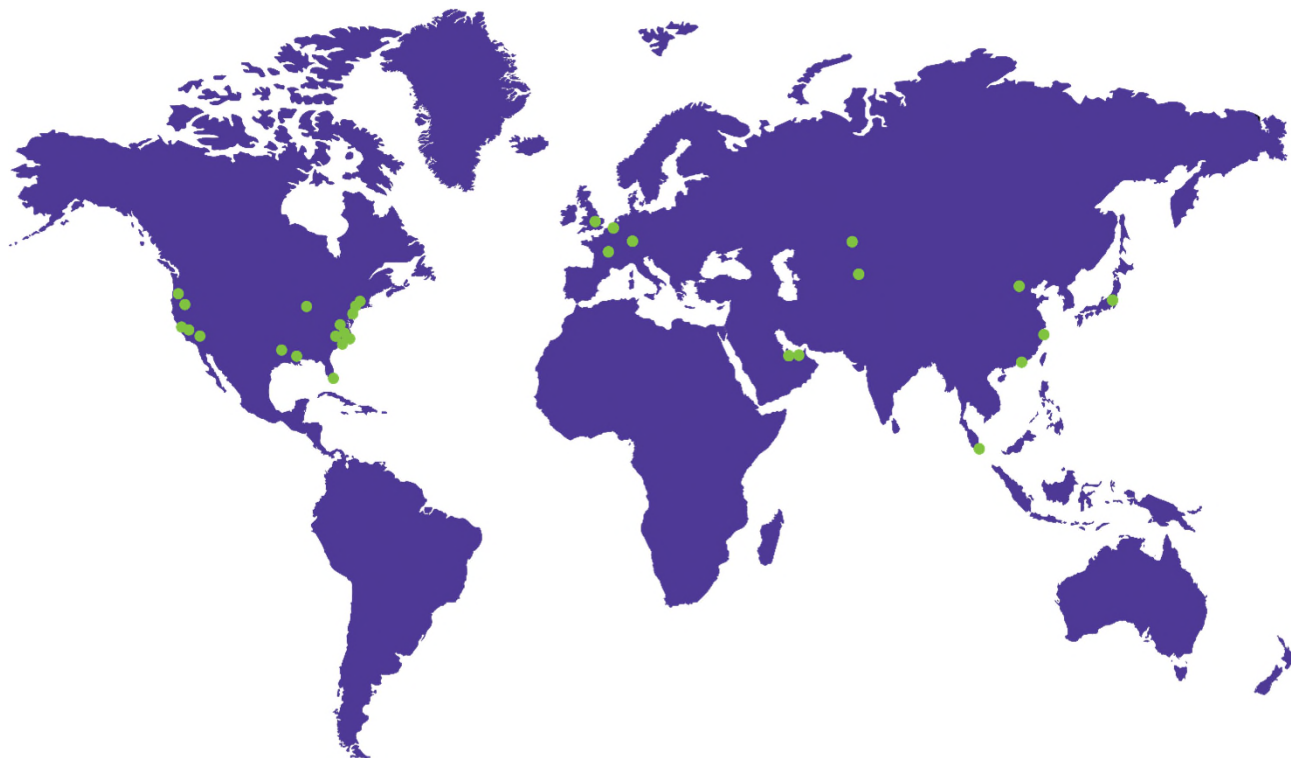
Eli Rymland-Kelly maintains an international trade practice focused on US national security laws including export controls, sanctions, anti-bribery/anti-corruption, and anti-boycott. He provides counsel to US and non-US companies on compliance with sanctions and export regulations promulgated by the Office of Foreign Assets Control, the Bureau of Industry and Security and the Directorate of Defense Trade Controls. Eli also advises clients on foreign investment matters before the Committee on Foreign Investment in the United States. Eli is admitted in California only; his practice is supervised by DC Bar members.

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Middle East
North America

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