

WEBINAR

CFIUS Regulation Changes and Trends

JULY 14, 2020

Speakers: Jason Chipman, Benjamin Powell



	NOTE SELL	TTSELL
USD	0.7368	0.7376
GBP	0.5118	0.5124
EUR	0.6495	0.6495
NZD	1.0621	1.0666
JPY	80.0530	81.3370
HKD	5.8350	5.8955
SGD	0.9903	0.9929
THB	25.6920	25.7200
INR	N/A	49.4220
IDR	9217.90	N/A
MYR	2.8305	N/A
PHP	32.4760	N/A
FJD	1.4961	34.12



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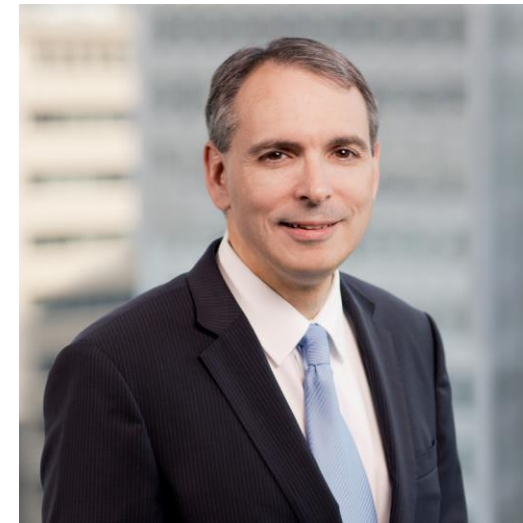
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WEBINAR

Speakers



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

CFIUS is an Executive Branch interagency group chaired by the Treasury Department that is charged with assessing the impact of foreign investment on U.S. national security

CFIUS Agencies:

- Department of Treasury (Chair)
- Department of Defense
- Department of Homeland Security
- Department of Justice
- U.S. Trade Representative
- Department of State
- Department of Commerce
- Department of Energy
- Director of National Intelligence (ex officio)
- Department of Labor (ex officio)
- Participants with observing role (e.g., NSC, NEC)

Other Departments may be invited to participate for specific transactions, such as the Department of Health and Human Services



Reach of CFIUS has been growing since 9/11

- **CFIUS used to be the concern of businesses associated with defense and telecom:**
 - Government contractors
 - Phone carriers
 - Weapons and munitions manufacturing
 - Aerospace
 - Defense technologies
- **But CFIUS increasingly impacts deals touching a wide swath of the economy:**
 - Advanced technologies
 - Large data sets / US person information
 - Strategic resources
 - Biotech advancements
- **Today, the scope of anxiety around foreign investment into U.S. advanced tech companies is hard to exaggerate**

“China is investing in the critical future technologies that will be foundational for future innovations both for commercial and military applications: artificial intelligence, robotics, autonomous vehicles, augmented and virtual reality, financial technology and gene editing. The line demarcating products designed for commercial vs. military purposes is blurring with these new technologies.”

Defense Innovation Unit Experimental (DIU-X), *China’s Technology Transfer Strategy* (2018)



Generational Changes to CFIUS in 2018

- August 2018 - Foreign Investment Risk Review Modernization Act (FIRRMA)
- Key CFIUS reforms through FIRRMA:
 - CFIUS jurisdiction expanded to capture any non-passive investment in a U.S. critical technology company, critical infrastructure company, or company with large U.S. person data sets
 - CFIUS jurisdiction expanded to review certain foreign acquisitions of real estate in proximity to sensitive facilities
 - Changed timeframe for review (45-days for review and 45-days for investigation)
 - Mandatory filings may be required for transactions involving critical infrastructure companies, critical technology companies, and companies with large amount of PII
- FIRRMA did not include a proposal for jurisdiction to review U.S. participation in joint ventures abroad
 - Export Control Reform Act instead expands authorities to curtail transfer of sensitive technology to foreign persons



**Today, CFIUS has the power to review three types of transactions:
(1) voluntary notifications, (2) mandatory notifications, and (3) real estate notifications**



CFIUS Voluntary Regime

- **Control Transaction:** CFIUS can review all transactions involving a “foreign person” obtaining “control” of a “U.S. business”
- **Covered Investment - Technology, Infrastructure, or Data (TID) U.S. Business:**
 - CFIUS can review any direct or indirect investment by a foreign person that does not result in control of the U.S. business but affords the foreign person with:
 - i. access to material nonpublic technical information, personal data, or critical infrastructure information,
 - ii. membership or observer rights on the board of the U.S. business, or
 - iii. any other involvement in the operation of the U.S. business (other than voting shares)
 - A TID U.S. Business is any U.S. business that satisfies one of three criteria:
 - Produces, designs, tests, manufactures, fabricates or develops **critical technologies**;
 - Performs particular types of work for **covered critical infrastructure**; or
 - Maintains or collects large amounts of **sensitive personal data** of US citizens (or sensitive personal data associated with military personnel)
- **Exceptions:**
 - A passive investment below 10% is generally not enough for “control”
 - Investments from certain excepted investors based in UK, Canada, and Australia not subject to “covered investment” jurisdiction



CFIUS Mandatory Regime - TODAY

- **Critical Technology Investments:** parties must notify CFIUS before closing any deal that is a control transaction or covered investment into U.S. businesses that produce, design, test, manufacture, fabricate or develop critical technology in any of 27 specially identified industries:

Critical Technology Covered Industries	
Aircraft Manufacturing	Powder Metallurgy Part Manufacturing
Aircraft Engine and Engine Parts Manufacturing	Power, Distribution, and Specialty Transformer Manufacturing
Alumina Refining and Primary Aluminum Production	Primary Battery Manufacturing
Ball and Roller Bearing Manufacturing	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing
Computer Storage Device Manufacturing	Research and Development in Nanotechnology
Electronic Computer Manufacturing	Research and Development in Biotechnology (except Nanobiotechnology)
Guided Missile and Space Vehicle Manufacturing	Secondary Smelting and Alloying of Aluminum
Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing	Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing
Military Armored Vehicle, Tank, and Tank Component Manufacturing	Semiconductor and Related Device Manufacturing
Nuclear Electric Power Generation	Semiconductor Machinery Manufacturing
Optical Instrument and Lens Manufacturing	Storage Battery Manufacturing
Other Basic Inorganic Chemical Manufacturing	Telephone Apparatus Manufacturing
Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing	Turbine and Turbine Generator Set Units Manufacturing
Petrochemical Manufacturing	

- **Foreign Government Controlled Transactions:** parties must notify CFIUS of any covered investment or covered control transaction that results in a foreign government having a “substantial interest” in a Technology, Infrastructure, or Data (TID) U.S. Business.



CFIUS Mandatory Regime – COMING SOON

- **CFIUS proposed revisions to mandatory filing requirement on May 21, 2020**
- **New rule would remove the NAICS Code prong of the mandatory filing test and replace it with a test focused on export control considerations**
- **Mandatory filings required under this rule if:**
 - The US business produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies, and
 - The technology would require an export license to transfer to any foreign party related to the transaction, and
 - The foreign person at issue (i) could directly control the target U.S. business; (ii) is directly making a covered investment; (iii) has a direct investment in the U.S. business and the changes of rights through the investment is a covered transaction, or (iv) individually holds, or is part of a group of foreign persons that in the aggregate holds, an applicable "voting interest," which is defined as "a voting interest, direct or indirect, of 25 percent or more."



What counts as a “critical technology”

CRITICAL TECHNOLOGIES:

- International Traffic in Arms Regulations
- Commerce Control List / Export Administration Regulations
- Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology
- Nuclear facilities, equipment, and material
- Select agents and toxins
- Emerging and foundational technologies



NEW CONTROLS ARE COMING:

- November 2018 advanced notice caused consternation with mention of “biotechnology, such as nanobiology, synthetic biology, genomic and genetic engineering; or neurotech” as possible emerging technology for export restrictions
- New AI controls recently announced that impose export restrictions on companies that develop “Geospatial imagery ‘software’ ‘specifically designed’ for training a Deep Convolutional Neural Network to automate the analysis of geospatial imagery and point clouds”



CFIUS Real Estate Regime

- **Foreign Real Estate Investments:** CFIUS has the power to review certain purchases, leases, or concessions of U.S. real estate by foreign persons that is within:
 - An airport or maritime port;
 - Close proximity (within 1 mile) of specially identified military installations;
 - Extended range (1-100 miles) of especially sensitive military installations; or
 - 12 nautical miles of certain coastal military installations.
- **Exceptions:** Does not apply to individual unit transactions, transactions in certain dense urban environments, or excepted investors from excepted foreign states



Investment Fund Considerations

- Funds controlled by U.S. general partner with principal place of business in the U.S. are generally treated as U.S. investors even if foreign limited partners are part of the fund structure (must be true limited partners)
- Foreign limited partner participation on a fund advisory board or committee will not by itself trigger CFIUS jurisdiction so long as the following criteria are satisfied:
 - the fund is managed exclusively by a general partner, a managing member or an equivalent;
 - the foreign person is not the general partner, managing member or equivalent;
 - the advisory board or committee does not have the ability to approve, disapprove or otherwise control the fund's investment decisions;
 - the foreign investor does not otherwise have the ability to control the investment fund; and
 - the foreign investor does not have access to material nonpublic technical information, sensitive personal data, or critical infrastructure information associated with a TID U.S. Business due to its participation on the advisory board or committee



CFIUS Filing Fees

<u>Transaction Value</u>	<u>Fee</u>
Under \$500,000	\$0
\$500,000 to \$5 million	\$750
\$5 million to \$50 million	\$7,500
\$50 million to \$250 million	\$75,000
\$250 million to \$750 million	\$150,000
\$750 million and up	\$300,000



FDI Legislation in the EU and its Member States

- **EU FDI Screening Regulation ([Regulation 2019/452](#)):**
 - Establishes new EU framework for screening **foreign direct investments** into the European Union on grounds of security or public order and coordinating national screening by EU Member States
 - Will enter into force on **October 11, 2020**
 - Includes power to conduct an **ex post review of transactions** that may have occurred before then but were not screened at the time (15-month 'look-back' that could extend back to mid-2019)
 - **Several cooperation and review mechanisms** according to whether an EU Member State already conducts FDI screening and/or whether EU critical infrastructure, projects, technology or funding are involved
- **Recently, many EU Member States have developed their foreign investment screening mechanisms**
 - Several countries (e.g., Germany, France, Poland) adopted rules extending the scope of what is considered a sensitive sector
 - Previously, targets were mainly defense, telecoms, energy; now also includes critical healthcare and biotechnology
 - EU Member States with no FDI screening have been strongly encouraged to enact legislation



M&A and Investment Considerations

- **Complexity of CFIUS and EU FDI Screening Environment is Growing**
 - More resources being devoted to the review of foreign transactions
 - U.S. authorities have shown a willingness to look back many years at older deals where a threat is perceived
- **All U.S. Foreign Investment Activity Merits a CFIUS Analysis**
 - Is there a mandatory filing requirement?
 - Is the deal likely to generate CFIUS interest?
- **Critical CFIUS Diligence and Risk Mitigation**
 - Export control assessment
 - Government contracts
 - Significance of technology (in the U.S. and abroad)
 - Closing conditions



Questions

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