CFIUS, FIRRMRA and ECRA?
Making sense of alphabet soup on foreign investment screening and emerging technology controls
Speakers

Dave Hanke
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U.S. blocks Alibaba affiliate Ant Financial's $1.2B bid for Moneygram

Reuters

Obama blocks Chinese wind farms in Oregon over security

The Wall Street Journal

U.S. Officials Pressure Russia-Linked Buyout Firm to Sell Stake in Cybersecurity Company

The New York Times

Washington — The Trump administration is expanding its efforts to block Chinese acquisitions in the United States, moving to force a Chinese firm that owns Grindr, the gay dating app, to relinquish control over concerns that Beijing could use personal information to with the situation.

The action, which is being driven by the Committee on Foreign Investment in the United States, is unusual given that the panel typically investigates mergers that could result in control of an existing American company.

The Chinese Acquisition

The Trump administration is also considering whether to block the acquisition of the U.S. chip company United Silicon by a Chinese company.

The administration is looking at the deal because of concerns about the sale of the Chinese company's technology to a second hand dealer in the United States.

The deal involves the sale of the United Silicon to a Chinese company called United Silicon China, which has a majority stake in the U.S. chip company.

The Trump administration is considering whether to block the deal because of concerns that the Chinese company could use the technology to build a competing chip company in the United States.

The Chinese company is majority-owned by a Chinese government-owned company called China National Technology Investment.

The administration is also looking at whether to block the Chinese company's acquisition of the United Silicon chip company because of concerns that the Chinese company could use the technology to build a competing chip company in the United States.

The Chinese company's technology is used by major corporations, according to people familiar with the matter.

United Silicon is a major player in the chip industry and produces chips for major technology companies, including Apple and Google.

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Smart In Your World
CFIUS Basics

CFIUS = The Committee on Foreign Investment in the United States

Mission: Screen foreign investments in the US for national security risks

Interagency review: Full committee reviews each case, but Treasury co-leads each one with another CFIUS member agency
CFIUS Core Characteristics

Exclusive focus on national security

Rigorous case-by-case analysis

Confidentiality
## CFIUS Jurisdiction (Pre- and Post-FIRRMA)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Legacy CFIUS</th>
<th>Added under CFIUS 2.0</th>
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<tbody>
<tr>
<td>Merger, acquisition, or takeover that could result in foreign control of a</td>
<td>1. Non-controlling, non-passive investments in three types of “US business” (critical tech, critical infrastructure, sensitive personal data)</td>
<td>2. Lease/purchase of certain real estate&lt;br&gt;3. Transactions designed to evade CFIUS</td>
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<tr>
<td>“U.S. business”</td>
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<tr>
<td>Typical types of transactions</td>
<td>M&amp;A</td>
<td>Minority-position investments (VC, PE, etc.)</td>
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Possible CFIUS Outcomes

- CFIUS “clears” the transaction
- CFIUS clears the transaction, contingent on a risk mitigation agreement
- POTUS blocks the transaction
- POTUS unwinds the transaction (after the fact)
CFIUS Faced Big Challenges

Spike in CFIUS Case Volume
- Chinese transactions as key driver

More Complex Cases
- Complicated transaction structures
- Globalized supply chains

Legacy Authorities Outdated and Inadequate
- Foreign governments use investment to meet strategic objectives (CFIUS evasion)
- Legacy export controls also had inherent limitations
Sen. John Cornyn (lead author of FIRRMA)

- “The context for this legislation is important and relatively straightforward, and it’s China. . .[T]he not-always-peaceful rise of China has significantly altered the threat landscape in recent years.”
  Testimony before the Senate Banking Committee, January 18, 2018

- “If we want our country to retain its technological advantage and remain the top military superpower in the world, enacting this bill is an essential piece of that.”
  Senate floor speech, April 19, 2018

- “The message is, we simply can't let China erode our national security advantage by circumventing our laws and exploiting investment opportunities for nefarious purposes. The backdoor transfer of technology, know-how, and industrial capabilities has gone unchecked for too long. That is why I am glad that once our bill becomes law, a newer, stronger CFIUS process will better protect us from evolving, investment-driven threats to our national security.”
  Senate floor speech, July 24, 2018
President Trump on Enactment of FIRMA

"So this was a very big deal. This was a very important deal."

Remarks by President Trump at a Roundtable on FIRMA, August 23, 2018
Legislative Intent Behind *FIRRMA*

**Plug Gaps in CFIUS jurisdiction:**
- Certain minority-position investments
- Certain overseas joint ventures (technology)
- Real estate (that is not part of a US business)
Timetable for FIRRMA Implementation

- 18 months to fully implement changes
- Some provisions effective immediately
  - But most substantive changes take effect only with full regulations
- CFIUS retains authority to implement pilot programs anytime
New Timelines for CFIUS Process

**Overall process slightly extended**

- Still three phases, but initial CFIUS review period extended by 15 days
- Treasury Secretary may extend investigation in “extraordinary circumstances”
- Government shutdowns?

45-day review  45-day investigation  15-day window for POTUS to act
New Types of “Covered” Transactions Under FIRMA

Non-controlling, non-passive investments in three types of US businesses:

- Critical technologies
- Critical infrastructure
- Sensitive personal data
New Types of “Covered” Transactions Under FIRRMRA

Transactions designed to evade/circumvent CFIUS

Purchase/lease of real estate inside the US that:

• Is part of an airport or seaport; or
• Meets specific criteria in relation to a US military installation or other sensitive USG national security facility.
Declarations

- Short-form CFIUS filings
- Permissive declarations
- Mandatory declarations

LEXOLOGY® Webinars

Smart In Your World
“Critical Technologies” Defined

- Commerce Control List (key portions)
- US Munitions List
- “Emerging and foundational technologies” that are essential for US national security
ECRA §1758: Emerging and Foundational Tech

Relationship to CFIUS

- Another layer of critical technologies

Export Control Reform Act of 2018

- §1758 mandates Commerce-led interagency process for identifying and unilaterally controlling

Status

- No emerging or foundational technologies have been listed yet – ANPRM for emerging technologies

“We must build a bridge between the CFIUS world and the export control world in a way that allows each to focus on what it does best, while working together to address novel and complex national security risks.”

Jonathan S. Kallmer, SVP Global Policy, Information Technology Industry Council Committee on House Financial Services, Subcommittee on Monetary Policy and Trade, April 12, 2018
Emerging vs Foundational Technologies

**Emerging technologies**
- Cutting-edge developmental technologies

**Foundational technologies**
- Mature, well-understood technologies
The development of emerging and foundational technologies in foreign countries

The effect export controls may have on the development of such technologies in the US

The effectiveness of export controls on limiting the proliferation of emerging and foundational technologies in foreign countries

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(1) Define and identify emerging technologies
(2) Criteria to determine whether specific technologies are important to US national security
(3) Sources to identify technologies
(4) Other general technology categories that warrant review
(5) Status of development of these technologies in the US and other countries
(6) Impact specific emerging technology controls would have on US technological leadership
(7) Other approaches to the issue of identifying emerging technologies
Emerging Technologies – What Are These?

- Biotechnology
- Artificial Intelligence (AI)
- Position Navigation & Timing
- Microprocessor Technology
- Advanced Computing

- Data Analytics
- Quantum Information & Sensing Technology
- Logistics Technology
- Additive Manufacturing (3D)

- Robotics (micro drones/swarming)
- Brain computer interfaces
- Hypersonics
- Advanced Materials
- Advanced Surveillance
It is essential that the United States starts thinking of technology as a National Strategy in and of itself, as opposed to a capability to be protected.

-In-Q-Tel, ANPRM comments

ECRA §1752(2)
The national security of the United States requires that the United States maintain its leadership in the science, technology, engineering, and manufacturing sectors. Such leadership requires that United States persons are competitive in global markets. The impact of the implementation of this title on such leadership and competitiveness must be evaluated on an ongoing basis and applied in imposing controls under [ECRA] to avoid negatively affecting such leadership.

Industry Concerns

- "Essential"
- Chilling effect
- Economic competitiveness
- International availability
Industry Recommendations

- Defining emerging technologies
- Focus on end uses/users
- ETTAC
- License exceptions
CFIUS Pilot Program on Critical Technology

Nov. 10: Two-part CFIUS pilot program took effect

- Non-controlling, non-passive foreign investments in US businesses involved in critical technologies related to 27 industries
- Where target company produces, designs, tests, manufactures, fabricates, or develops a critical technology

Mandatory declarations
Pilot Program Industries

**Manufacturing**
- Examples:
  - Aircraft, Engines, Parts
  - Computers, Storage Devices
  - Semiconductors
  - Guided Missiles, Space Vehicles
  - Propulsion
  - Military Armored Vehicles, Tanks
  - Batteries
  - Turbines

**Research & Development**
- Nanotechnology
- Biotechnology

**Other**
- Alumina Refining and Primary Aluminum Production
- Nuclear Electric Power Generation
- Secondary Smelting and Alloying of Aluminum

Examples:
- Aircraft, Engines, Parts
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CFIUS 2.0 – Other Changes of Interest

“Country specification”
authority

Information Sharing
Companies Under the CFIUS Microscope

<table>
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<th>critical technology</th>
<th>sensitive personal data</th>
<th>critical infrastructure</th>
<th>real estate (national security-sensitive)</th>
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Smart In Your World
Hypo

Corporation A (US) and Corporation B (India) each hold 50% ownership in the JV (India) and both have control over the JV.

- Cash
- US IP
- Managerial and technical personnel
- Tooling for manufacturing
- Management software
- Customer lists

Both have "control" over the JV.
CFIUS....Coming Soon

FIRRMA modernizes CFIUS and provides new tools to protect national security...

*but much work remains*

**CFIUS 2.0 regulations**
Drafting is underway
Scoping and key definitions
Coming in late summer 2019?

**Education**
Providing information to industry about CFIUS’s mission and operations

**Enforcement**
Developing and scoping enforcement functions, including analysis of non-notified transactions

**Staffing**
Treasury and other CFIUS agencies are expanding CFIUS team/organization