

THE NOT-SO-SILK ROAD: THE PROLIFERATING REGULATORY OBSTACLES TO CHINESE INVESTMENT IN THE U.S.



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All companies engaged in M&A activity in the United States must plan for enhanced scrutiny from an increasingly aggressive DOJ and FTC, but non-U.S. companies, particularly Chinese companies, must also reckon with another U.S. regulatory regime with the power to scuttle their deals: the Committee on Foreign Investment in the United States, or CFIUS. CFIUS is a U.S. interagency body that assesses the risk to national security of transactions involving non-U.S. acquirers. Coincident with the trade war between the U.S. and China begun during the Trump Administration, CFIUS gained a host of new powers that enable it to investigate more transactions, and, if it deems necessary, impose national security-related conditions to closing or block transactions altogether. And interest remains high in the U.S. Congress and Executive Branch to create additional vector to scrutinize Chinese investment even beyond CFIUS. As such, this paper seeks to demystify CFIUS and offer practical guidance for attorneys and their non-U.S. clients on how to think about parallel DOJ/FTC and CFIUS review of a transaction.

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I. INTRODUCTION

Competition Policy International's audience is no doubt very familiar with the arduous path to closing long faced by deals that attract significant antitrust scrutiny. And competition authorities have gotten more aggressive of late, including in the United States, where both the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) have over the last several years employed a variety of tools that have the cumulative effect of making the U.S. merger review process even more onerous. The FTC has made a number of procedural changes, including suspending the granting of early termination of the Hart Scott Rodino (“HSR”) waiting period for unproblematic deals, issuing “close at your own peril” letters to merging parties even after the expiration of the waiting period, and reviving a policy of including a provision in its settlements with merging parties that requires the parties to obtain prior FTC approval of future deals in the affected market for a ten-year period. The DOJ has enunciated a policy of deep skepticism of merger remedies, with Assistant Attorney General Jonathan Kanter expressing the view “that merger remedies short of blocking a transaction too often miss the mark.”² And further changes are on the way, with the DOJ and FTC having jointly withdrawn the horizontal and vertical merger guidelines.

These changes at the DOJ and FTC have created additional speed bumps for all merging parties without regard to their national origin. But foreign acquirers, particularly Chinese acquirers, face yet another major, regulatory obstacle to getting deals done in the United States: the Committee on Foreign Investment in the United States, or CFIUS.

CFIUS is a U.S. interagency body that assesses the risk to national security of transactions involving non-U.S. acquirers. In so doing, CFIUS evaluates the ability and intention of the acquirer to harm national security (the threat), the degree to which the target U.S. business is susceptible to exploitation by the acquirer (the vulnerability), and the reasonably foreseeable impact on U.S. national security (the consequence).³ If CFIUS finds that a given transaction poses a risk to national security, it can work with the parties to mitigate that risk or recommend to the President of the United States that the transaction be blocked. CFIUS has recently been granted an even more muscular set of powers and a broader jurisdiction that is bound to sweep in more transactions. And while CFIUS applies to all non-U.S. acquirers, acquirers with Chinese ties have drawn disproportionate interest, particularly as the United States and China have been fighting a slow burn trade war over the last several years.

This article first provides some basic background on CFIUS and takes a look at its recent enhancements. It then reviews past CFIUS actions that have affected companies with ties to China and details recent and potential future legislation and executive action that may further affect Chinese M&A activity in the United States (and vice versa). Finally, we offer some guidance for navigating the combined competition and national security merger review gauntlet.

II. A BRIEF HISTORY OF CFIUS

Though the United States generally has an “open door” policy toward foreign investment, CFIUS has seen its jurisdiction and powers to block foreign investment expand over time. In general, this has been in response to public concern about a particular country or countries obtaining influence over United States policy through ownership of U.S. assets.⁴ CFIUS is chaired by the Secretary of the Treasury and was established by President Gerald Ford via executive order in 1975⁵ in response to concerns about increased investment in the United States from OPEC nations.⁶

² Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york>. The DOJ has not entered into any settlements to resolve concerns about a merger since this speech. See *DAMITT 2022 Annual Report: Timing and Remedy Risks Grow for Transactions Hit with Significant Investigations*, Dechert (Jan. 23, 2023), <https://www.dechert.com/knowledge/publication/2023/1/damitt-2022-annual-report-timing-and-remedy-risks-grow-for-tran.html>.

³ 31 C.F.R. § 800.102.

⁴ See generally Cathleen D. Cimino-Isaacs, *The Committee on Foreign Investment in the United States (CFIUS)*, Congressional Research Service (Updated Feb. 14, 2020), <https://crsreports.congress.gov/product/pdf/RL/RL33388>.

⁵ Exec. Order No. 11858, 3 C.F.R. § 990, (1971-1975).

⁶ Testimony of C. Fred Bergsten, Assistant Secretary for International Affairs, U.S. Department of the Treasury, 96th Cong., Hearings: *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States* (July 30, 1979).

Initially, CFIUS did not have any authority to stop or alter an individual transaction. In fact, it faced accusations of not doing much of anything in its first several years of existence.⁷ This changed in 1988. A trade dispute with Japan prompted Congressional concern about the acquisition of U.S. technology companies by Japanese companies.⁸ Worried that such acquisitions could harm national security, Congress passed the “Exon-Florio” amendment to Section 721 of the Defense Production Act (“DPA”). This new law granted the President authority to “suspend or prohibit any acquisition, merger, or takeover,” by a “foreign person” that the President determined was likely to “threaten to impair the national security.”⁹ It prescribed a timeline for the President’s review — 30 days to assess whether an investigation is warranted, 45 days to complete that investigation, and 15 days for the President to review and announce a decision, for a maximum total of 90 days.¹⁰ President Ronald Reagan delegated this new authority to CFIUS.¹¹

The next major revision of CFIUS’ authority came after it reviewed but decided not to block a high-profile transaction. In 2006, Dubai Ports World, a state-owned company based in the United Arab Emirates, proposed to acquire contracts to manage a number of major U.S. ports. Lingering post-9/11 anxiety about the security of U.S. ports sparked public and congressional outcry. The deal was not ultimately consummated, and Congress passed the Foreign Investment and National Security Act of 2007 (“FINSAs”).¹² FINSAs made a number of changes that together served to elevate the attention paid to CFIUS both within the executive branch and from Congress. FINSAs for the first time enshrined CFIUS in statute,¹³ added additional Cabinet-level members,¹⁴ required the designation of a lead agency for every transaction,¹⁵ and mandated enhanced reporting to Congress.¹⁶ In addition, FINSAs added factors for the President to consider in evaluating transactions and standards to guide CFIUS when entering into agreements with parties to mitigate national security threats.¹⁷

During the 2016 U.S. Presidential campaign, Donald Trump made clear that he would take an aggressive stance against China.¹⁸ After taking office, President Trump initiated a trade war with China in 2018. His administration undertook a number of actions, including imposing a litany of tariffs and pursuing dispute settlement in the World Trade Organization concerning China’s “discriminatory licensing practices.” President Trump also directed the Treasury Department to propose executive action to “address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States.”¹⁹ Congress had been working in parallel to update CFIUS’ powers since late 2017. In August 2018, Congress passed the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”).²⁰ FIRRMA, among other things, (i) expanded the jurisdiction of CFIUS to cover additional transaction types, (ii) introduced mandatory filing requirements, (iii) added a short-form expedited filing option, and (iv) substantially increased CFIUS’ resources to enable enhanced monitoring.

7 See Testimony of William S. Barnes, PhD, Fletcher School of Law and Diplomacy, Tufts University, 96th Cong., Hearings The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States (July 30, 1979).

8 David Sanger, *Japanese Purchase of Chip Maker Canceled After Objections in U.S.*, N.Y. Times (Mar. 17, 1987), <https://www.nytimes.com/1987/03/17/business/japanese-purchase-of-chip-maker-canceled-after-objections-in-us.html>.

9 Pub. L. 100-418, Title V, Section 5021, August 23, 1988, available at <https://www.congress.gov/100/statute/STATUTE-102/STATUTE-102-Pg1107.pdf>.

10 *Id.*

11 Exec Order 12661, s. 3-201, amending Exec. Order 11858, <https://www.archives.gov/federal-register/codification/executive-order/12661.html>.

12 Foreign Investment and National Security Act of 2007, 121 Stat. 246.

13 FINSAs § 3.

14 *Id.*

15 *Id.*

16 *Id.* at § 7.

17 *Id.* at § 5.

18 See e.g. Nick Corasantini, *Donald Trump Vows to Rip Up Trade Deals and Confront China*, N.Y. Times (June 28, 2016), <https://www.nytimes.com/2016/06/29/us/politics/donald-trump-trade-speech.html>.

19 Memorandum on Actions by the United States Related to the Section 301 Investigation of China’s Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation (March 22, 2018), available at <https://www.govinfo.gov/content/pkg/DCPD-201800180/pdf/DCPD-201800180.pdf>. See also Chad P. Bown and Melina Kolb, *Trump’s Trade War Timeline: An Up-to-Date Guide*, The Peterson Institute (Nov. 17, 2022), <https://www.piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf>.

20 H.R. Con. Res. 5515-538.

III. HOW CFIUS REVIEW WORKS UNDER FIRRMA

A. Covered Transactions

FIRRMA and its implementing regulations grant CFIUS jurisdiction to review “any covered transaction,”²¹ which includes a:

- “covered control transaction,” which is a transaction that could result in foreign control of a U.S. business.²²
- “covered investment,” a non-controlling investment in certain U.S. businesses of special concern known as “TID” businesses.²³ TID refers to businesses that involve specified “critical Technologies” or “critical Infrastructure,” or that collect or maintain “sensitive personal Data” of U.S. citizens.²⁴
- any changes in rights that could result in a covered control transaction or a covered investment or any transactions designed to avoid CFIUS jurisdiction.²⁵

CFIUS also has jurisdiction over “covered real estate transactions,” which involve the acquisition of certain rights in property in close proximity to ports and military installations.²⁶

In its latest Annual Report to Congress, CFIUS indicated that in 2021, it determined that 272 notices filed involved “covered transactions.”²⁷ This is more than double the number from ten years ago and the highest number in the ten-year period examined in the report.²⁸ Of those, CFIUS investigated 130, or around 48 percent.²⁹

B. Timing

The statutory timeline for CFIUS review was adjusted slightly by FIRRMA: the 30-day initial review period was extended to 45 days, but the time for an investigation (45 days) and for the President to decide whether to block a transaction (15 days) remain the same. There are a number of ways that CFIUS review can take longer than that basic 105-day timeline:

- Parties can choose to engage informally with CFIUS prior to filing, such as through presentations or submissions of draft versions of filings;
- CFIUS can reject the parties’ filing for a variety of reasons, meaning that the initial review period does not commence until the parties cure whatever shortcoming led to the rejection;
- The parties may withdraw their filing and re-file at a later date, which re-starts the initial review period clock; or
- CFIUS can seek a one-time 15-day extension of the 45-day investigation period due to “extraordinary circumstances” such as a force majeure-level event;³⁰

Parties have the option to file a short-form declaration that carries with it a 30-day review period instead of the 45-day review period for a formal notice.³¹ In the case of a transaction that CFIUS is not likely to perceive as a national security threat, a declaration can be a quick route to obtaining certainty that CFIUS review will not hold up the closing. But CFIUS can also request that a party who filed a declaration file a subsequent

21 31 C.F.R. § 800.101.

22 *Id.* at § 800.210.

23 31 C.F.R. § 800.211.

24 *Id.* at § 800.248.

25 *Id.* at § 800.213.

26 *Id.* at § 802.101; 802.211; and 802.212.

27 CY 2021 CFIUS Annual Report. to Congress (Aug. 2022) at 15 (“2021 CFIUS Annual Report”), <https://home.treasury.gov/system/files/206/CFIUS-Public-AnnualReportto-CongressCY2021.pdf>.

28 *Id.*

29 *Id.*

30 31 C.F.R. § 800.508(e)-(f).

31 31 C.F.R. § 800.405.

notice, in which case the declaration serves only to prolong the review period. In 2021, this happened about 18 percent of the time.³² As such, parties who believe a notice is likely to be required may prefer to go straight to the formal notice rather than filing a declaration.

C. Mandatory Filings and CFIUS' Call-in Powers

Most CFIUS filings are voluntary, but a filing is mandatory if a transaction would result in either: (i) a foreign government actor having a substantial interest in any type of TID business or (ii) foreign control of or a covered investment in a TID business that involves critical technologies subject to export control laws.³³ Of the 164 declarations filed in 2021, CFIUS concluded that 47 were mandatory filings.³⁴

CFIUS also has the power to “call in” transactions for which parties did not submit a voluntary notice to CFIUS.³⁵ This power is not new, but FIRRMA gave CFIUS substantial additional resources to enable it to exercise this power with more frequency.³⁶ In 2021, CFIUS called in 135 transactions identified through this process and requested a filing from eight of them.³⁷

D. National Security Concerns, Mitigation, and Penalties

Section 721(f) of the DPA articulates ten factors for CFIUS to consider and gives the President the authority to articulate others.³⁸ In September 2022, President Biden issued an executive order on CFIUS.³⁹ The executive order elaborated on two statutory factors: supply chain resilience 721(f)(3)) and U.S. “international technological leadership” (721(f)(5)).⁴⁰ It also added three additional factors: “aggregate industry investment trends,” cybersecurity risks, and sensitive data.⁴¹ These five factors to some extent formalize CFIUS’ existing practices, but their enumeration in an executive order is a strong signal that they will remain a focus of CFIUS going forward.

Where a transaction poses national security risk, Section 721(l) of the DPA grants CFIUS the authority to (i) temporarily prohibit the transaction from closing during the pendency of its review; (ii) make a recommendation to the President to permanently block the transaction; or (iii) negotiate mitigations that will resolve its national security concern.⁴² CFIUS has broad discretion to determine what mitigations will sufficiently address the national security risk created by a transaction. Typical mitigations include limitations on access to systems or facilities to U.S. personnel; establishment of security protocols; special handling of contracts with the U.S. government, or carve-out of sensitive U.S. assets.⁴³

Finally, CFIUS can impose penalties on parties in three circumstances: (i) failure to file a mandatory declaration or notice; (ii) failure to comply with mitigation agreements, conditions, or orders; and (iii) a material misstatement, omission, or false certification in materials filed with CFIUS.⁴⁴ Penalties for a material misstatement can be up to \$250,000; penalties for a failure to file or a failure to comply can be up to \$250,000 or the value of a transaction, *whichever is greater*.⁴⁵ In October 2022, the Treasury Department released guidelines that identified aggravating and mitigating factors CFIUS considers in deciding whether to impose a penalty.⁴⁶

32 2021 CFIUS Annual Report, at 4.

33 31 C.F.R. § 800.401(b) and (c).

34 2021 CFIUS Annual Report, at 4.

35 31 C.F.R. § 800.501(b).

36 50 U.S.C § 4565(p), added by FIRRMA, established a \$20 M annual fund, and authorized the collection of filing fees.

37 2021 CFIUS Annual Report, at 45.

38 50 U.S.C § 4565(f).

39 Exec. Order No. 14083, 87 Fed. Reg. 57369 (Sep. 15, 2022).

40 *Id.*

41 *Id.*

42 50 U.S.C § 4565(l).

43 2021 CFIUS Annual Report, 38-9.

44 U.S. Dept. of Treasury, CFIUS Enforcement and Penalty Guidelines, available at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-enforcement-and-penalty-guidelines>.

45 See 31 C.F.R. §§ 800.901, 802.901.

46 See CFIUS Enforcement Penalty Enforcement Guidelines.

IV. HOW CHINESE BUYERS HAVE FARED IN CFIUS REVIEW

According to the express language of section 721 of the Defense Production Act and CFIUS regulations, China is of no greater focus for CFIUS than any other country. By the numbers reported by CFIUS, Chinese investors represent a meaningful percentage of covered notices reviewed by CFIUS, but hardly a majority. In 2021, Chinese acquirers had the highest number of filed notices (44), accounting for 16.5 percent of all written notices filed that year.⁴⁷ But the two next highest were investors from staunch U.S. allies Canada (28 notices or 10.3 percent) and Japan (26 notices or 9.6 percent).⁴⁸ Over the three-year period from 2019 through 2019, Japanese investors filed more covered notices than did Chinese investors, 91 to 86.⁴⁹ And in terms of transactions concerning U.S. critical technology companies, Chinese acquirers were involved in only 10 of 184 in 2021, fewer than Germany, South Korea, and Japan, among others.⁵⁰

But these numbers do not tell the whole story. Since the passage of FIRRMA, Chinese investment in U.S. companies has plummeted, from a peak of \$45B in 2016 to an average of \$7B from 2018 through 2020.⁵¹ By contrast, in 2020, Japanese investment in the United States was \$651 B,⁵² and Canadian investment in the United States was \$495 B.⁵³ In other words, while the raw number of Japanese and Canadian transactions reviewed by CFIUS is comparable to that of Chinese transactions, the proportion of all Chinese transactions that get reviewed by CFIUS appears to be much higher than for Japanese or Canadian transactions.

Moreover, while it is exceedingly rare for a U.S. President to block a transaction at the recommendation of CFIUS, most that have been blocked involve an acquirer with ties to China. By way of example, President Obama blocked only two deals in total in his eight years in office. Both involved Chinese acquirers.⁵⁴

Withdrawn Transactions

The number of transactions blocked does not fully convey the heightened CFIUS scrutiny on transactions involving a Chinese acquirer. Some transactions are withdrawn and abandoned once CFIUS makes clear to the parties that no mitigation could sufficiently resolve its national security concerns and threatens to recommend a Presidential block. Parties may prefer to abandon their transaction rather than suffer the reputational harm associated with a public pronouncement by the President that their transaction presents unacceptable risk to U.S. national security.

In 2021, notices for 74 transactions were withdrawn and, of those, nine were abandoned because “either CFIUS informed them that it was unable to identify mitigation measures that would resolve the national security risk posed by the transaction, or the Committee proposed mitigation measures that the parties chose not to accept.”⁵⁵ CFIUS does not publicize the number of withdrawn transactions broken down by nationality of the acquirer. But we know at least one of the abandoned transactions in 2021 involved a Chinese company. In March 2021, Wise Road Capital entered into an agreement to purchase Magnachip Semiconductor Corporation, a South Korea-based company, for \$1.4 billion.⁵⁶

47 2021 CFIUS Annual Report, at 32.

48 *Id.*

49 *Id.*

50 2021 CFIUS Annual Report, at 49.

51 Thilo Hanemann, et al., *Two-Way Street: 2021 Update US-China Investment Trends*, US-China Investment Project at 19 (May 2021), https://rhg.com/wp-content/uploads/2021/05/RHG_TWS-2021_Full-Report_Final.pdf.

52 Foreign Direct Investment (FDI) from Japan in the U.S. 2000 to 2001, available at <https://www.statista.com/statistics/188907/foreign-direct-investment-from-japan-in-the-united-states-since-1990/>.

53 Foreign Direct Investment (FDI) from Canada in the U.S. 2000 to 2001, available at <https://www.statista.com/statistics/188881/foreign-direct-investment-from-canada-in-the-united-states-since-1990/>.

54 Presidential Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, DCPD-201200764 (Sep. 28, 2012), available at <https://obamawhitehouse.archives.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c>; Presidential Order Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GMBH (Dec. 2, 2016), available at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/02/presidential-order-regarding-proposed-acquisition-controlling-interest>.

55 2021 CFIUS Annual Report, at 37.

56 Joyce Lee, *U.S. Treasury says China private equity's Magnachip purchase poses security risks*, Reuters (Aug. 30, 2021), <https://www.reuters.com/business/us-treasury-says-china-private-equitys-magnachip-purchase-poses-security-risks-2021-08-31/>.

The parties did not initially file a notice with CFIUS. CFIUS called in the transaction, and the parties filed a notice in June 2021.⁵⁷ After review, CFIUS conveyed to the parties that no mitigation could resolve its national security concerns and that it expected to recommend that President Biden block the transaction.⁵⁸ The parties abandoned their transaction in December 2021.⁵⁹ Other recent examples of transactions abandoned by Chinese acquirers include the 2018 Ant Financial/MoneyGram⁶⁰ and 2022 Asymchem/Snapdragon deals.⁶¹

Called-in Transactions

Some Chinese companies acquiring a U.S. business have chosen not to file a voluntary notice and closed their transaction, only to be ordered by CFIUS to unwind the deal, sometimes years later. Such was the case with Beijing Kunlun Technology Company's acquisition of California-based dating app, Grindr LLC. Kunlun first acquired a majority stake in Grindr in 2016, then acquired the remainder in 2018, choosing not to notify CFIUS either time.⁶² CFIUS investigated the transaction in 2019 and expressed concerns to the parties over the access and potential use of personal data of U.S. citizens.⁶³ Kunlun entered into a national security agreement with CFIUS that required it to sell Grindr, which it ultimately did in 2020.⁶⁴

Borqs Technologies acquisition of Holu Hou Energy ("HHE") met a similar fate very recently. In October 2021, Borqs, a Chinese company that specializes in software and products related to the Internet of Things ("IoT"), acquired a 51 percent stake in HHE, a Hawaii-based solar energy storage supplier. Borqs announced in December 2022 that CFIUS had sent a letter indicating that Borqs was "required to negotiate with CFIUS to fully divest its ownership interests and rights" in HHE.⁶⁵ According to Borqs, CFIUS was concerned that Borqs' IoT software development and sourcing in China would enable the Chinese government to exert influence over HHE's operations and gain access to its technology.⁶⁶ Borqs has not announced the consummation of the divestiture as of this writing.

There are exceptions, however. In 2021, CFIUS cleared at least two deals involving Chinese acquirers: Tencent's acquisition of Sumo Group, a UK-based gaming company with some U.S. operations,⁶⁷ and Genimous Technology's acquisition of Spigot, a U.S.-based digital marketing company.⁶⁸

Both clearances were reportedly subject to mitigation.⁶⁹ Genimous acknowledged its mitigations related to the handling of sensitive personal data of U.S. citizens;⁷⁰ Tencent's may have as well, given the personal data typically collected by games. These transactions could signal

57 This transaction is also notable for the ostensibly limited connection of the target to the United States. According to Magnachip, while it is a U.S. holding company listed on the New York Stock Exchange, its entire business is located outside of the United States. Magnachip Semiconductor Corporation, Form 8-K (May 26, 2021), <https://www.sec.gov/ix?doc=/Archives/edgar/data/1325702/000119312521177243/d185128d8k.htm>. That CFIUS called in this transaction should serve as a warning that even a narrow U.S. nexus can bring a transaction within CFIUS' reach.

58 Magnachip Semiconductor Corporation, Form 8-K (Aug. 27, 2021), <https://investors.magnachip.com/node/12536/html>.

59 Magnachip Semiconductor Corporation, Form 8-K (Dec. 31, 2021), <https://www.sec.gov/Archives/edgar/data/1325702/000119312521355865/d152828d8k.htm>.

60 Greg Roumeliotis, *U.S. blocks MoneyGram sale to China's Ant Financial on national security concerns*, Reuters (Jan. 2, 2018), <https://www.reuters.com/article/us-moneygram-intl-m-a-ant-financial/u-s-blocks-moneygram-sale-to-chinas-ant-financial-on-national-security-concerns-idUSKBN1ER1R7>.

61 Rick Mullin, *US Treasury Department derails Asymchem's acquisition of Snapdragon*, Chemical & Engineering News (September 12, 2022), <https://cen.acs.org/business/investment/US-Treasury-Department-derails-Asymchem-acquisition-of-Snapdragon/100/web/2022/09>.

62 Carl O'Donnell, Liana B. Baker & Echo Wang, *Exclusive: Told U.S. security at risk, Chinese firm seeks to sell Grindr dating app*, Reuters (Mar. 27, 2019), <https://www.reuters.com/article/us-grindr-m-a-exclusive/exclusive-told-u-s-security-at-risk-chinese-firm-seeks-to-sell-grindr-dating-app-idUSKCN1R809L>.

63 See Tim Fitzsimons, *Inside Grindr, fears that China wanted to access user data via HIV research*, NBC News (Apr. 2, 2019), <https://www.nbcnews.com/feature/nbc-out/inside-grindr-fears-china-wanted-access-user-data-hiv-research-n989996>.

64 Yuan Yang & James Fontanella-Khan, *Grindr sold by Chinese owner after US national security concerns*, Financial Times (Mar. 7, 2020), <https://www.ft.com/content/a32a740a-5fb3-11ea-8033-fa40>.

65 Stephen Nakrosis, *Borqs to Divest Holu Hou Energy on CFIUS National Security Concerns*, Market Watch (Dec. 19, 2022), <https://www.marketwatch.com/story/borqs-to-divest-holu-hou-energy-on-cfius-national-security-concerns-271671490198>.

66 *Id.*

67 James Batchelor, *Tencent's Sumo acquisition continues following US national security investigation*, Games Industry.biz (December 14, 2021), <https://www.gamesindustry.biz/tencents-sumo-acquisition-continues-following-us-national-security-investigation>.

68 Tang Shihua, *China's Genimous Gains After US Govt Allows It to Keep Stake in US Data Services Firm Spigot*, Yicai Global (Oct. 8, 2021), <https://www.yicaiglobal.com/news/china-genimous-gains-as-us-government-allows-it-to-keep-stake-in-us-data-service-firm-spigot>.

69 Batchelor, *supra* and Shihua, *id.*

70 Shihua, *supra*.

that CFIUS may view acquisitions involving U.S. businesses with access to sensitive personal information as more susceptible to mitigation than the other two types of TID businesses.

V. BEYOND CFIUS

The tensions between the United States and China that led to FIRRMA have not gone away since 2018. Indeed, several additional measures that seek to regulate M&A activity implicating the U.S.-China relationship were either very recently signed into law or are under active consideration.

The Merger Filing Fee Modernization Act (“MFFMA”) of 2022 requires parties to a transaction subject to HSR pre-merger notification obligations to include in their filing information concerning any subsidies received “from countries or entities that are strategic or economic threats to the United States.”⁷¹ The MFFMA’s findings expressly cite concerns about China’s “Made in China 2025 plan” through which the Chinese Communist Party seeks to “support enterprises to carry out mergers and acquisitions, equity investment and venture capital overseas.”⁷² The MFFMA’s findings go on to warn that “[f]ailure to appreciate the gravity of this challenge and defend U.S. competitiveness would be dire . . . [and] risks setting back U.S. economic and technological progress for decades.”⁷³ The MFFMA requires the FTC, with the concurrence of the DOJ, and in consultation with CFIUS, to engage in a rulemaking to update the HSR form to account for this new requirement.⁷⁴ This law does not become effective until the HSR form is updated;⁷⁵ a timeline for the rulemaking has not been announced as of this writing.

Both Congress and the Biden Administration have expressed interest in creating a mechanism through which some U.S. investments in foreign countries can be reviewed — colloquially termed “reverse” or “outbound” CFIUS. In May 2021, a bipartisan group of Senators proposed the National Critical Capabilities Defense Act (“NCCDA”), which would “establish a whole-of-government process to screen outbound investments and the offshoring of critical capacities and supply chains to foreign adversaries, like China and Russia, to ensure the resiliency of critical supply chains.”⁷⁶ The NCCDA would create a CFIUS-like twelve-member interagency committee charged with monitoring outbound investments in identified countries of concern, including China.⁷⁷ A scaled-down version of this proposal that only impacts transactions involving semiconductor manufacturers was included in the CHIPS and Science Act passed in August 2022.⁷⁸ Approximately a month after the CHIPS and Science Act passed, the sponsors of the NCCDA sent a letter to President Biden, urging him to take executive action to establish the full version of the committee as envisioned in their proposed legislation.⁷⁹ On October 12, 2022, the Biden Administration released its National Security Strategy, which referenced the possibility of taking executive action to address the screening of outbound investment “to prevent strategic competitors from exploiting investments and expertise in ways that threaten national security.”⁸⁰ At the time of this writing, despite expectations of its imminent release, President Biden has not issued an executive order concerning outbound CFIUS.

Yet another legislative proposal sought to establish an interagency task force regarding China, this one charged with investigating “allegations of systemic market manipulation and other potential violations of antitrust laws” in the United States committed by companies in China.⁸¹ The task force would focus on three critical industries: (1) the pharmaceutical and medical devices industry; (2) the renewable energy industry; and (3) the steel and aluminum industries.⁸² This provision was included in the United States Innovation and Competition Act of 2021,

71 Merger Filing Fee Modernization Act, Title 2 § 201(b).

72 *Id.* at § 201(a)(3).

73 *Id.* at § 201(a)(4).

74 *Id.* at § 202(c).

75 *Id.* at § 202(d).

76 Press Release, Bob Casey & John Cornyn, U.S. Senators, Casey and Cornyn Release a Joint Statement on National Critical Capabilities Defense Act (May 24, 2021), <https://www.casey.senate.gov/news/releases/casey-and-cornyn-release-a-joint-statement-on-national-critical-capabilities-defense-act>.

77 Proposed Amendment 1853 to S. 1260, available at https://www.casey.senate.gov/imo/media/doc/casey-cornyn_nccda_amendment.pdf.

78 CHIPS Act of 2022 § 103.

79 Letter from Sen. R. Casey, et al., to President J. Biden (September 27, 2022), available at <https://www.casey.senate.gov/news/releases/supporters-of-outbound-investment-legislation-urge-administration-to-take-executive-action-to-safeguard-national-security-protect-supply-chains>.

80 National Security Strategy (Oct. 2022) at 33, available at <https://www.whitehouse.gov/wp-content/uploads/2022/11/8-November-Combined-PDF-for-Upload.pdf>.

81 United States Innovation and Competition Act of 2021, S.1260, 117th Cong. § 5102(a) (2021).

82 *Id.* at § 5102(a)-(b).

which passed the Senate in June of 2021. The Innovation and Competition Act was ultimately folded into the CHIPS Act, but this Chinese market manipulation task force provision was not included.

And while beyond the scope of this article, it is worth noting that a major cross-border transaction by a Chinese acquirer could also be subject to foreign direct investment (“FDI”) regimes besides CFIUS. As of September 2022, there are more than 50 FDI regimes around the world; many—such as Belgium, the European Union, Estonia, Ireland, the Netherlands, and the United Kingdom—have been established in the last several years, in many cases with CFIUS experts providing technical assistance. And, like CFIUS, existing regimes, such as those in Australia, China, Germany, and Japan, have seen their powers increase. This proliferation of FDI regimes has especially affected buyers with ties to China. In 2022, FDI regimes blocked 20 transactions around the world, 16 of which featured buyers that were either based in China or Hong Kong or that were European-based subsidiaries of Chinese companies.⁸³

VI. PRACTICAL CONSIDERATIONS

In light of the above, CFIUS risk for a Chinese acquirer should always be considered higher than a similarly situated transaction involving a buyer from virtually any other country. As such, Chinese acquirers should be assessing CFIUS risk early in the deal process, as is typically done to assess competition risk. And just as failing to account for significant competition risk can jeopardize a transaction, so too can failing to account for CFIUS risk.

Unlike the relatively simple calculation to determine whether a transaction will trip the HSR filing thresholds, determining whether to notify CFIUS of a transaction is a much more complex and holistic endeavor. There are several key questions to evaluate:

- **Is the target a TID U.S. business?** Diligence should start with determining whether the U.S. target is a TID U.S. business. The presence of a TID business is a precondition to fulfilling either prong of the mandatory filing test, and failing to file a mandatory declaration will expose the parties to substantial penalties. As a starting point, counsel should look to whether the target has any U.S. export control licenses to determine if it is involved with any “critical technologies” that would trigger a mandatory declaration. A target that is a TID U.S. business by virtue of its involvement in critical infrastructure or with sensitive data does not trigger a mandatory filing (unless the transaction would grant a foreign government a substantial interest in them - see next question), but is nonetheless likely to be of interest to CFIUS if acquired by a Chinese company.
- **Will the Chinese government obtain any interest in the target through the transaction?** Chinese acquirers should ensure they have a clear understanding of any ownership interest in their groups held by the Chinese government, or any organ thereof. CFIUS will likely be interested in any transaction regardless of the affected industry if the Chinese government will obtain a controlling interest post-transaction. And a substantial interest short of a controlling interest will trigger a mandatory filing if the target is a TID U.S. business.
- **Does the target implicate any of the areas highlighted by the Biden Administration CFIUS executive order?**
 - Is the target involved in microelectronics, artificial intelligence, biotech and biomanufacturing, quantum computing, advanced clean energy, climate adaptation technologies, or any other technology identified on the U.S. Critical and Emerging Technologies list?⁸⁴ A transaction that could affect U.S. leadership in any of these spaces is apt to get attention from CFIUS.
 - Does the target play a key role in the supply chain for any of the above technologies or that of the defense, public health, information technology, energy, transportation, or agricultural sectors? This is an incredibly broad list that has the potential to swallow up the other factors. Two aspects to pay particular attention to is whether the target directly supplies the U.S. government and the degree to which buyers have viable alternative suppliers that could replace the target.
 - Has any sector in which the target participates already seen significant investment from Chinese companies? Counsel should conduct diligence on the ownership of competitors of the target to try to detect any concentration of Chinese investment.
 - Does the target provide cybersecurity products or services? CFIUS will look at whether foreign control of the target could provide a pathway to cyber incursions into U.S. elections or critical infrastructure.

With CFIUS’ resources for identifying and calling in transactions greatly expanded post-FIRRMA, a transaction that features some or all of these factors is not likely to fly under the radar.

⁸³ Luuk Klein, *FDI screening killed at least 20 mergers globally totaling over USD 6bn in 2022*, Ion Analytics (Jan. 20, 2023), <https://community.ionanalytics.com/fdi-screening-killed-at-least-20-mergers-globally-totaling-over-usd-6bn-in-2022>.

⁸⁴ Exec. Office of the President, *Critical and Emerging Technologies List Update*, Rep. of the Nat’l Sci. & Tech. Council (Feb. 2022), available at <https://www.whitehouse.gov/wp-content/uploads/2022/02/02-2022-Critical-and-Emerging-Technologies-List-Update.pdf>.

In addition, just as parties facing an HSR review consider what remedies the DOJ or FTC might seek in order to clear a transaction, parties facing a CFIUS review should think early on about what mitigations CFIUS may require — and whether a transaction subject to those mitigations would remain worthwhile. Parties facing both types of scrutiny might consider whether there are acceptable remedies that address both sets of concerns (e.g. a divestiture of the U.S. portion of a target’s business that would satisfy CFIUS could also eliminate a product overlap of concern to the FTC or DOJ).

With this knowledge up front, an acquirer can better account for CFIUS risk in a merger agreement through similar tools to those used in managing antitrust risk:

- In the case in which the acquirer believes a mandatory filing is required, it may want to write expressly into the agreement that the parties agree that a filing is required and commit to such a filing within X days of signing. To further incent a reluctant seller, the buyer could commit to paying the buyer’s filing expenses.
- If the acquirer has concluded that there are several mitigation measures it is willing to take and others that would cause it to want to walk away from the deal, it has several options. It could include a regulatory efforts clause that commits it to agree to mitigations in order to close the transaction, but only with regard to the specific mitigations it is willing to accept. This approach signals the acquirer’s commitment to the deal without requiring it to accept every mitigation CFIUS seeks. If the acquirer is concerned that identifying specific mitigations in a regulatory efforts clause could lead CFIUS to view those as a starting point for negotiations, it might instead opt for a commitment to agree to mitigations up to a certain dollar or materiality threshold.
- The termination date, the date by which the parties can terminate if the transaction has not closed, is often driven by the expected delay caused by HSR review. A second request could delay closing by 9-12 months (sometimes more if remedies need to be negotiated across jurisdictions and especially if litigation ensues). This will typically be longer than needed to resolve a CFIUS review. But a CFIUS case involving a Chinese acquirer could involve pulling and refiling and lengthy mitigation negotiations that stretch the review out for a year or more. Thus, even if a transaction is expected to sail through an antitrust merger review or does not even meet HSR thresholds, a Chinese acquirer may want to set a termination date far enough in the future to account for a protracted CFIUS review.

Chinese acquirers considering large, cross-border transactions should also keep in mind another distinction between antitrust and CFIUS review: CFIUS and the many other FDI regimes around the world are not likely to coordinate with one another in the way that parties have grown accustomed to the DOJ and FTC coordinating with ex-U.S. competition authorities on cross-border merger review. FDI review implicates a country’s sensitive national security information, which countries are very hesitant to share with other countries — sometimes even with allies — for fear of exposing weak points or compromising sources and methods. FDI and competition authorities are typically separate bodies or separate parts of a single body that are formally or informally walled off from one another. As such, there may not be significant coordination even between the FDI and competition authorities within a jurisdiction. Notably, the U.S. may soon represent an exception to this, as the new rule requiring disclosure of non-U.S. sources of investment on the HSR form seems likely to foster increased contact between CFIUS and the FTC and DOJ. Regardless, parties should understand that coordinating the timelines for FDI review in multiple jurisdictions with one another and with parallel competition merger reviews is quite difficult and can be a source of significant pain.

All told, Chinese acquirers today face increased obstacles to investing in a U.S. business, but with sufficient planning and forethought, it remains possible to navigate this challenging path and reach a positive resolution.



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