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# CFIUS Overview, Trends & Recent Changes


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CFIUS Overview, Trends & Recent Changes



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4 March 2019

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Road Map

- ▣ Intro to CFIUS
  - ▣ Committee on Foreign Investment in the US
  - ▣ Purpose, history, statutes, membership
- ▣ China-related controversies
- ▣ New statute, August 2018
  - ▣ FIRRMA – Foreign Investment Risk Review Modernization Act
- ▣ New regulations & new pilot program, November 2018
- ▣ Practical considerations


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## Overview

- ▣ Interagency committee chaired by Treasury Department
- ▣ Reviews inbound investment for national security concerns
- ▣ President has power to stop or unwind certain deals
- ▣ Reviews have become increasingly rigorous, especially (but not only) for investment from China
- ▣ More filings, more delays and uncertainty
- ▣ **New:** Mandatory filings for some deals

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## Basic Function

- ▣ Review and investigate possible national security concerns. Then:
  - ▣ No action
  - ▣ Mitigation agreement
  - ▣ Recommend Presidential action
  - ▣ Also, interim orders
- ▣ President may “suspend or prohibit” a “covered transaction” if “there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security”
  - ▣ May obtain court order to unwind a deal that already closed

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## Purpose: National Security

- ▣ “Narrow focus on national security alone,” focusing “solely” on “genuine national security concerns” without regard to “other national interests”
- ▣ Key debate: What is “national security”?
  - ▣ Not defined
  - ▣ Changes over time
- ▣ Economic security? Food security? Industrial capacity? Technological leadership? Critical infrastructure?

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## National Security over Time

- ▣ Cold War
- ▣ Homeland Security after 9/11
- ▣ China as a rising power
- ▣ Trump Administration
  - ▣ More assertive / Less constrained
    - ▣ Generally, and about China in particular
  - ▣ Trade cases and export control cases
  - ▣ Manufacturing base / Tech superiority
  - ▣ Threat to invoke emergency powers against Chinese investment
  - ▣ New legal authority

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## National security assessment

Buyer side	Target side
<ul style="list-style-type: none"> <li>▣ Details of ownership, control, and financing, esp. relationships with government and military</li> <li>▣ Diplomatic issues</li> <li>▣ Economic issues</li> <li>▣ Special concerns</li> </ul>	<ul style="list-style-type: none"> <li>▣ Sensitive sectors</li> <li>▣ Government contracts</li> <li>▣ Security clearances</li> <li>▣ Controlled goods &amp; tech</li> <li>▣ Sensitive data</li> <li>▣ Proximity</li> <li>▣ Critical infrastructure</li> <li>▣ Cyber security</li> </ul>

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## Deals stopped

All deals formally stopped ever are China-related

- ▣ 1990 - China National Aero-Technology Import and Export Corp. / MAMCO Mfg
- ▣ 2012 - Ralls Corp. / Four Oregon wind farms
  - ▣ Lawsuit
- ▣ 2016 - Fujian Grand Chip Investment Fund / Aixtron's U.S. subsidiaries
  - ▣ Formally limited to US subsidiaries, but really stopped the whole deal in Germany
- ▣ 2017 - Canyon Bridge Capital / Lattice Semiconductor
  - ▣ After three 75-day investigations
- ▣ 2018 - Broadcom / Qualcomm
  - ▣ Quick (42 days) and unilateral


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## The Rest of the Iceberg

- Many other companies voluntarily end their own deals
  - “Nearly half” of all investigations, 1990-2018
- 2014
    - 2 abandoned for CFIUS reasons
    - 3 abandoned for other reasons
  - 2015
    - 3 abandoned for CFIUS reasons
    - 1 abandoned for other reasons
  - 2016
    - 5 abandoned for CFIUS reasons
    - 7 “other,” maybe some refiled in 2017

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## Jurisdiction

- Traditionally limited to “covered transactions,” where a foreign person obtains control over a US business
    - Control - Direct or indirect
    - Not greenfield investment
    - Not passive investments up to 10%
    - Some JV's
    - No dollar threshold
  - New under FIRRMA
    - Some investments short of control, even <10%
    - Some real estate purchases


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## New: Mandatory Filings

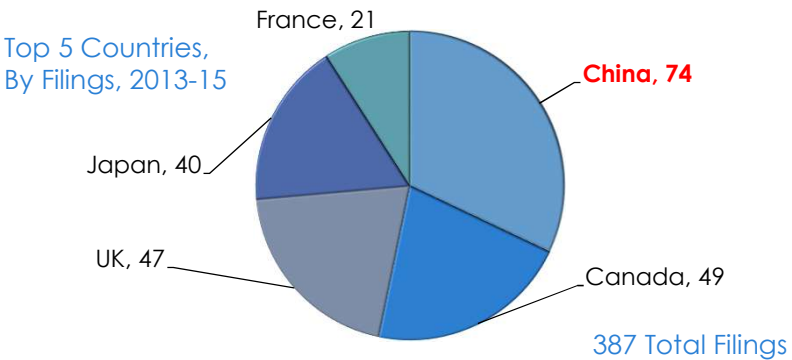
- FIRRMA requires CFIUS filings in some cases
- Pilot program started November 10
- Mandatory for initial group of 27 industries
  - May be full notice or 5 page "declaration"
  - May expand to other concerns, including infrastructure and data
- Applies to some investments sans control: "Critical tech" in specified industries **and**
  - Access to tech,
  - Board rights, **or**
  - Decisions re tech
- Exception for some deals through investment funds
- Penalties for failure to file up to value of the deal

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## Countries

Top 5 Countries, By Filings, 2013-15



Country	Number of Filings
China	74
Canada	49
UK	47
Japan	40
France	21
<b>Total</b>	<b>387</b>

387 Total Filings

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## Some recent controversies re China

- Tech: Huawei, Tsinghua/Micron, Fujian Grand Chip/  
Aixtron, GO Scale/Lumileds, Tsinghua/Western Digital,  
ChemChina/Syngenta, Naura Microelectronics/Akron,  
Marvell/Cavium, Canyon Bridge/Lattice Semiconductors
- Sensitive data: China Oceanwide/Genworth, Chongqing  
Cassin/Chicago Stock Exchange,\* Ant Financial/  
Moneygram
- Location: Ralls Corp, Anbang hotels (mixed), Cosco  
Shipping/Long Beach Terminal from OOIL
- Food: Shuanghui / Smithfield Ham

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## Case Study - HNA

- Early successes
  - Ingram Micro (\$6BB) – for sale?
  - c.25% of Hilton Hotels – later sold
  - OM Asset Management (UK)
- Recent failures
  - Global Eagle
  - Skybridge Capital (Anthony Scaramucci)
  - Building near Trump Tower – Divestment (formal order?)
  - Ness Technologies – Lawsuit
  - Jan. 2018 suspended from future consideration by CFIUS  
pending clarity about its ownership

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## Practical considerations

- ▣ Carefully evaluate possible deals in advance
  - ▣ Including willingness to share private info with USG
- ▣ Advance preparation
  - ▣ Limit deal and investor's rights?
  - ▣ Mitigate potential national security concerns, some in advance and prepare for additional steps
- ▣ Due diligence
  - ▣ May require an export license
- ▣ Risk premium
- ▣ Anticipate delays

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## Contract issues

- ▣ Condition of closing
- ▣ Reps & warranties
- ▣ Best efforts
  - ▣ Lawsuit: Ness Tech v. HNA
- ▣ Mitigation within limits
- ▣ Reverse termination fees / escrow
- ▣ Governing law / choice of court or arbitration

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## Other national security issues

- Economic sanctions
- Export controls
- Security clearances
- Terrorist financing

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Need coordinated strategies, focus on assuring compliance. Consider possible look-backs and disclosures. Restricts some investments. May require additional filings.

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## Thank you!

More detailed slides available at [https://works.bepress.com/perry\\_bechky/](https://works.bepress.com/perry_bechky/). Please do not hesitate to contact me:



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