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CFIUS Introduction


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CFIUS Introduction



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November 7, 2023

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Personal Introduction

- 30 years as international lawyer, mainly international trade and investment
- Started career at US Treasury, long experience at top global firms
- Former law professor
- Current focus mainly sanctions (OFAC) and investment reviews (CFIUS)
- Boutique firm with international focus



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Road Map

- ▣ Intro to CFIUS: purpose, history, statutes, membership
- ▣ CFIUS process
- ▣ CFIUS standards
- ▣ Rising scrutiny and its effects
- ▣ China-related controversies (select)
- ▣ Practical considerations

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Part 1 - Introduction

Purpose, history, statutes, membership

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CFIUS Overview

- ▣ Committee on Foreign Investment in the US (CFIUS)
- ▣ Reviews inbound investment for national security concerns
- ▣ President has power to stop or unwind certain deals
- ▣ Interagency committee
 - ▣ Chaired by Treasury Dept
 - ▣ Other full members include Defense, Energy, Homeland Security, Justice, State, Commerce

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CFIUS's 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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History: Deals stopped



- ▣ Formal: 5 deals + TikTok ongoing
- ▣ Many more companies voluntarily end their own deals
- ▣ Also, recently unwinding by agreement

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Recent Trends

- ▣ **MORE of everything** - More filings, more questions, more 2d stage investigations, more mitigation agreements, more time
- ▣ Filing fees → More staff, more budget, more inquiry into "non-notified transactions"
- ▣ Wider jurisdiction, including some real estate deals
- ▣ Mandatory filings for some deals
- ▣ Starting penalties
- ▣ Significant continuity in the Biden Administration so far
 - ▣ New Executive Orders


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Part 2 – CFIUS Process

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Considering whether to file

- Filing traditionally was voluntary, but...
 - Safe harbor
 - Threat of CFIUS self-initiation
- Substantive considerations
 - Within CFIUS jurisdiction?
 - Any apparent national security concerns?
- Other considerations
 - Relationship with USG
 - Cost
 - Timing
 - Commitment to necessary degree of disclosure and cooperation
 - Confidentiality

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Now, Some Filings Are Mandatory

- ▣ Required in some cases – **Penalties** for failure to file on time may go as high as the value of the deal
- ▣ Includes some investment without control: Mostly, “critical tech” **and**
 - ▣ Access to tech,
 - ▣ Board rights (incl. observers), **or**
 - ▣ Decisions re tech
- ▣ Also some deals by government-owned investors **and** “critical tech,” “critical infrastructure,” **or** “sensitive data”
- ▣ Exception for some investments from “5 Eyes” countries

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Initiation

- ▣ Normally starts with joint “notice” by the parties
 - ▣ Requires extensive details about the parties and the deal
 - ▣ Supplemental questions
 - ▣ Filing may be rejected if not sufficiently forthcoming
- ▣ **CFIUS can self-initiate**
 - ▣ Increasing attention to “non-notified transactions”
- ▣ Alternative: Short “declaration” instead of a “notice”
 - ▣ Rarely used for Chinese investors

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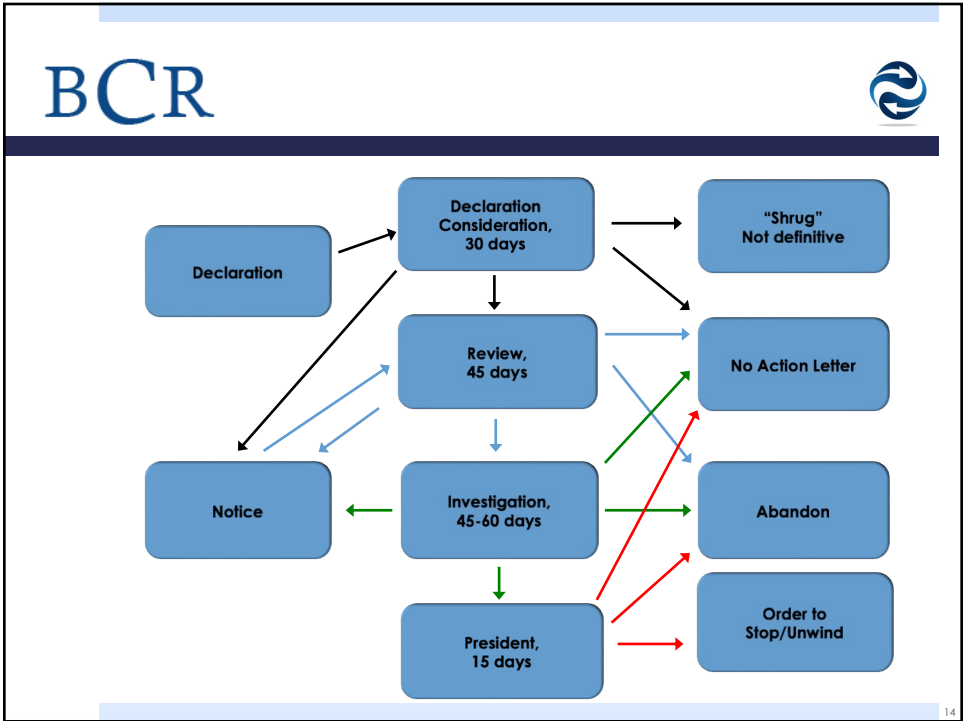
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Timeline for Notice


- ▣ Pre-notice consultation
- ▣ File notice and pay filing fee
- ▣ Up to 14 days: accept notice or comment if incomplete
- ▣ 45 days: initial review About 50% end here
- ▣ 45 days: formal investigation (60 in extraordinary cases)
- ▣ 15 days: Presidential decision
- ▣ 119 days total. **Informally, can take much longer.**

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Part 3 – CFIUS Standards

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FIRMA Themes

- ▣ Foreign Investment Risk Review Modernization Act, 2018
- ▣ Approving and encouraging CFIUS practices
 - ▣ Includes clear (albeit not express) reference to China as a “country of special concern”
- ▣ Expanding jurisdiction
- ▣ Increasing funding and staffing
- ▣ Rhetorical emphasis on critical infrastructure & tech

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Jurisdiction

- ▣ Jurisdiction had been 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
 - ▣ Applies regardless of the value of the deal
- ▣ Expanding under FIRRMA
 - ▣ Some real estate (separate regulations)
 - ▣ Some investments short of control, even <10%

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National security assessment

Buyer side

- ▣ Details of ownership, control, and financing, esp. relationships with government and military
- ▣ Diplomatic issues
- ▣ Economic issues
- ▣ Special concerns
 - ▣ Including sanctions

Target side

- ▣ Sensitive sectors
- ▣ Government contracts
- ▣ Security clearances
- ▣ **Controlled goods & tech**
- ▣ **Sensitive data**
- ▣ Critical infrastructure
- ▣ Cyber security
- ▣ Proximity to sensitive locations

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Critical Technology

- ▣ ITAR controls
- ▣ Most items under EAR controls
 - ▣ Not EAR99
- ▣ Nuclear items
- ▣ Toxins and some chemical agents
- ▣ "Emerging and foundational technology"
 - ▣ To be defined

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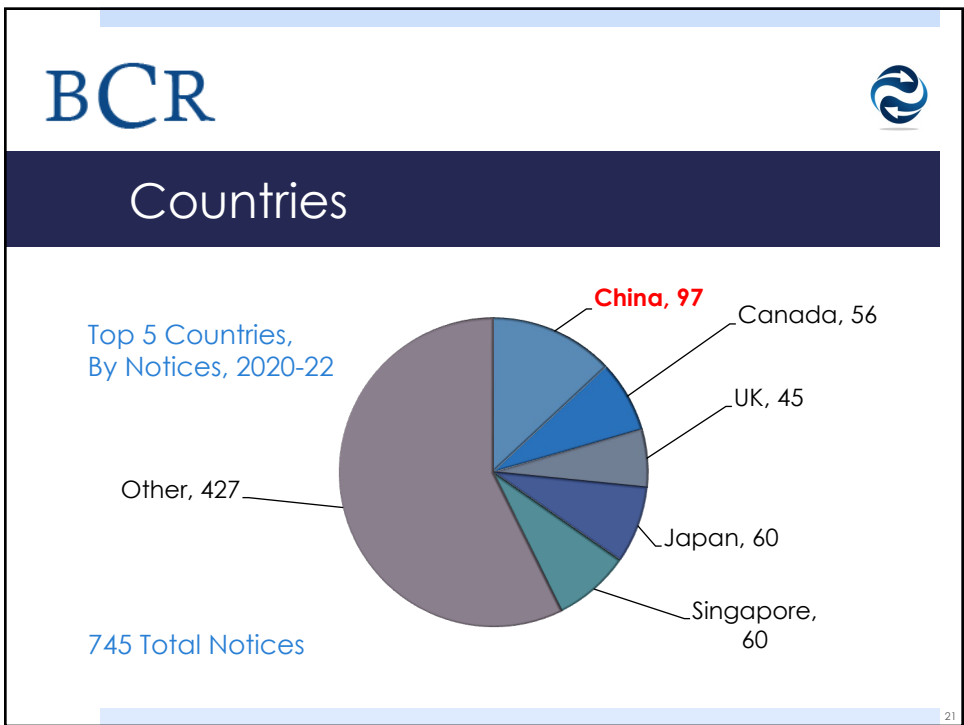
Critical Infrastructure

- ▣ "System or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset ... would have a debilitating impact on national security"
- ▣ Department of Homeland Security –

▣ Chemical	Commercial	Communications
▣ Critical Mfg	Dams	Defense Industrial Base
▣ Emergency Svcs	Energy	Financial Svcs
▣ Food & Ag	Govt Facilities	Health
▣ IT	Nuclear	Transportation
▣ Water & Wastewater		

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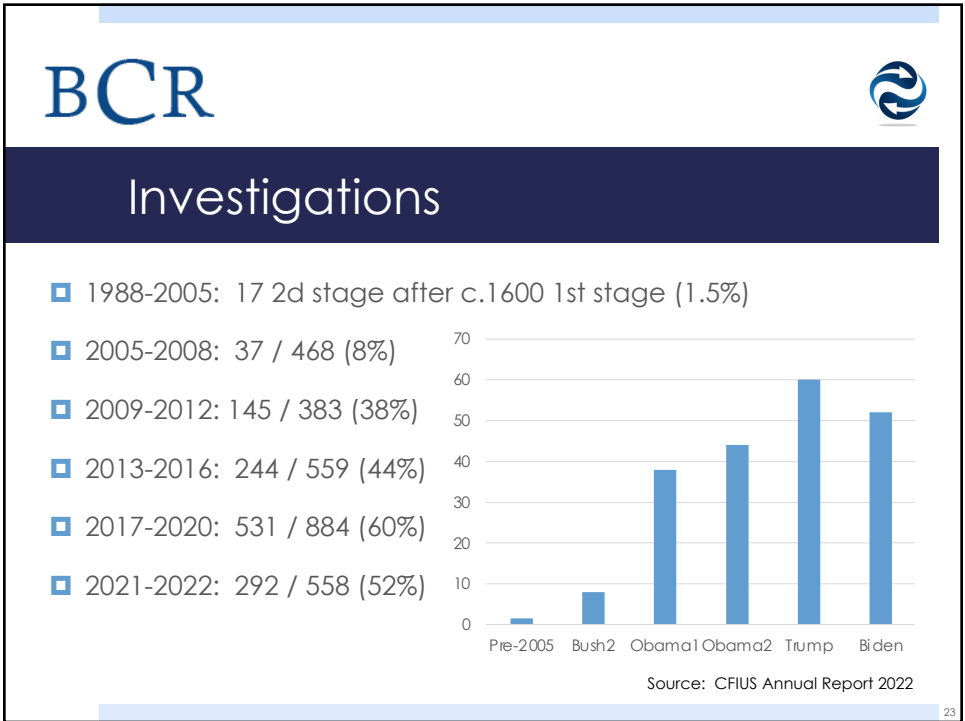
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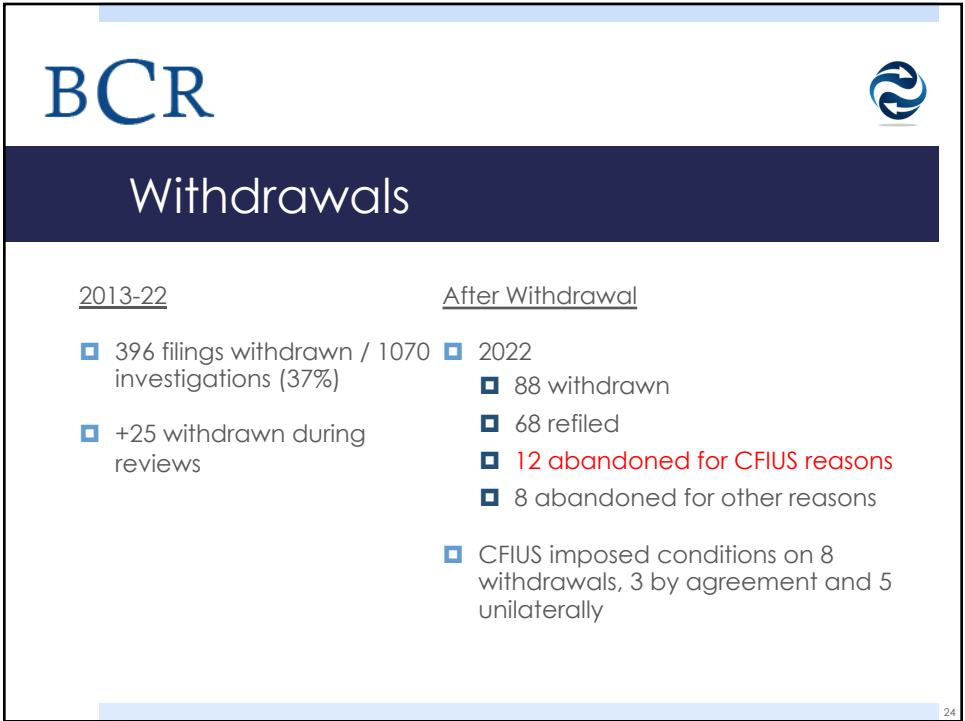
Part 4 – Rising Scrutiny

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Mitigation Agreements

- CFIUS may negotiate a “mitigation agreement” with the parties to a deal
- Goal to resolve any national security concerns
 - All recent include compliance plans
 - Can include CFIUS and 3d-party monitoring (including site visits)
- Enforceable by civil penalties up to \$250,000 per violation and breach-of-contract provisions for payment of actual or liquidated damages
 - First \$1MM civil penalty, 2019
- Some legal limits

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Mitigation Agreements

- 2022: 44 new mitigation agreements
 - 214 total being monitored
 - 16 terminated
 - 22 amended
- Examples:
 - Limiting access to tech and data
 - Rules for government contracts
 - Review by USG of certain business decisions
 - Exclusion of sensitive assets

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Part 5 – China-Related Controversies

Selected examples only

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Formally Blocked

- ▣ 1990 - China National Aero-Technology Import and Export Corp. / MAMCO Mfg
- ▣ 2012 – Ralls Corp. / Four Oregon wind farms
 - ▣ Proximity
 - ▣ 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
- ▣ 2020 – TikTok (ByteDance / Musical.ly)
 - ▣ But lawsuit led to ongoing negotiations
 - ▣ Private data

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Other China-related controversies

- ▣ Shuanghui / Smithfield Ham
- ▣ China Oceanwide / Genworth Financial
- ▣ Ant Financial (Alibaba) / Moneygram
- ▣ Chongqing Cassin / Chicago Stock Exchange
 - ▣ Approved by CFIUS under Pres. Obama
 - ▣ Rejected by SEC under Pres. Trump

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Still More

- ▣ Beijing Kunlun / Grindr
- ▣ Anbang / Waldorf Astoria hotel
- ▣ Anbang / Hotel del Coronado (San Diego)
 - ▣ Excluded from a package with 15 other hotels
- ▣ Dalian Wanda / Hollywood investments (mixed success)

... and many more!

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Part 6 – Practical Considerations

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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
- ▣ Risk premium
- ▣ Anticipate delays

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Contract issues

- ▣ Condition of closing
 - ▣ Cut off date?
- ▣ Due diligence / reps & warranties
- ▣ Best efforts
 - ▣ Lawsuit: Ness Tech v. HNA
 - ▣ Mitigation within limits
- ▣ **Reverse termination fees** / escrow
 - ▣ Market accounting for CFIUS risk

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Other national security issues

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

Need due diligence and coordinated strategies, focus on assuring compliance. Consider possible look-backs and disclosures.

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Thank you!

Please do not hesitate to contact me:



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