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CFIUS 2.0:

The “new” Committee on Foreign Investment in the U.S.

Presentation to the International Network of Boutique and Independent Law Firms
Great Legal Minds series

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- “CFIUS is the No. 1 weapon in the Trump administration’s protectionist arsenal, the ultimate regulatory bazooka.”
 - Hernan Cristerna, co-head of global mergers and acquisitions at JPMorgan Chase
- August 14, 2020, President Trump issues Executive Order under the Defense Production Act of 1950, requiring ByteDance to divest “any tangible or intangible assets or property, wherever located, used to enable or support ByteDance’s operation of the TikTok application in the United States . . . and (ii) any data obtained or derived from TikTok application or Musical.ly application users in the United States.”
- March 27, 2019, Reuters reports that Grindr’s recent Chinese acquirer, Beijing Kunlun Technology Co. Ltd. (Kunlun) was divesting Grindr due to U.S. government concerns
- March 11, 2018, President Trump announces that Broadcom’s \$117 billion hostile bid for Qualcomm is blocked
- Dozens of additional blocked or abandoned transactions in the past few years, including from Obama administration



AGENDA

- CFIUS overview
- Revised authorities
- Substantive areas of focus
- Structural areas of focus
- Buyer-specific issues
- Voluntary v. mandatory filings
- Process
- Keys to successfully obtaining clearance
- Related regulatory reviews



CFIUS OVERVIEW

- Federal, interagency committee
 - Treasury (Chair)
 - Defense, Justice, Homeland Security, Energy, State, Commerce, USTR, OSTP
- Reviews foreign investments into U.S. businesses
 - “Covered control transactions”
 - “Covered investments”
- Where a transaction may threaten to impair the U.S. national security, has the authority to suspend, prohibit or place conditions on the transaction
- May review and unwind transactions post-closing; no statute of limitations
- No dollar threshold: “control” and governance/access tests only
- Statutory authority: Defense Production Act of 1950 (50 U.S.C. § 4565), as modified by Foreign Investment Risk Review Modernization Act of 2018





REVISED CFIUS AUTHORITIES

- Foreign Investment Risk Review Modernization act of 2018 (FIRRMA)
- Regulations finalized February 2020
- Main process: 31 C.F.R. Part 800
 - Broad voluntary review process
 - Narrow mandatory review process
 - Realignment/broadening of U.S. national security priorities
 - Diplomatic policy agenda – “white list” of safe investors
- Critical Technology Pilot Program: 31 C.F.R. Part 801
 - Incorporated into main process (i.e., Part 801 is no longer operative)
 - Subject to expansion in the near future
- Real Estate Provisions: 31 C.F.R. Part 802
 - Airports, seaports and proximity to military installations





CFIUS SUBSTANTIVE FOCUS

- “TID” Businesses
 - Technology
 - Infrastructure
 - Data
- Critical technologies (possible mandatory filings)
- Critical infrastructure
- Government supply chain
- Real estate
- “Emerging” and “Foundational” technologies



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CFIUS STRUCTURAL FOCUS

- Acquisitions of “controlling” stakes in U.S. businesses
 - No bright line: 10% or greater stake could trigger filing
- Other investments that provide:
 - Board or observer seat
 - Access to “material nonpublic technical information”
 - Other influence over substantive decisionmaking
- Look-through to ultimate controlling entity of acquirer
 - Domicile of acquisition vehicle is generally irrelevant
- Foreign LPs in U.S.-controlled investment funds may trigger filings
 - Significant questions re: “control” by LPs
- Joint Ventures





ACQUIRER ISSUES

- State-owned / State-controlled entities
 - Subject to mandatory filings
- Country of domicile
 - Declared intentions as an adversary of the U.S.
- History of compliance with U.S. / international law
- “Excepted Investors”
 - Minor carve-out





VOLUNTARY VS. MANDATORY PROCESS

- CFIUS has historically operated on a “voluntary” filing process
- Under new regulations, certain transactions trigger a mandatory filing
 - Investments in companies that develop “critical technology,” (i.e., technologies that require U.S. export authorizations)
 - Investments by state-owned / state-controlled investors trigger mandatory filings
- Failure to file a mandatory filing at least 45 days prior to closing can result in penalties up to the value of the transaction, among other things
- Not filing where CFIUS has jurisdiction (mandatory or voluntary filings) leaves you open to post-closing enforcement in perpetuity





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FORMAL PROCESS

- Long-form “Notice” Process
 - Parties voluntarily* submit draft joint notice to CFIUS of transaction
 - CFIUS reviews, comments on draft notice
 - Parties submit formal notice
 - CFIUS accepts notice and starts clock on review
 - 45-day review
 - 45-day investigation (approx. 50% of transactions)
 - 15-day Presidential review (very rare)
- Short-form “Declaration” Process
 - Parties voluntarily submit a declaration to CFIUS
 - Clock begins quickly on a 30-day short-form review
 - CFIUS either approves, declines to take a position, requests a notice or unilaterally initiates a long-form review





MITIGATION

- National Security Agreement or other written instrument
- Signed as a precondition to CFIUS clearing a transaction
 - Can be imposed in post-closing enforcement actions
- Certain member agency signatories (“CFIUS Monitoring Agencies”)
- Provisions can include, among others
 - Governance restrictions
 - Access restrictions
 - Controls re: distribution of IP/technology
 - Supply chain controls
 - Reporting obligations
 - Independent compliance checks (third-party security monitor, annual audit, compliance certification)





T R A N S A C T I O N C O N S I D E R A T I O N S

- Structure
- Diligence
- Deal documents
 - Reps
 - Covenant
 - Condition
 - Access/governance provisions
 - Break fee
- Outreach strategy
- Timing



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SAMPLE OF RECENTLY BLOCKED/ABANDONED DEALS

- Cree (Wolfspeed Power & RF)/Infineon Technologies AG
- Cowen/CEFC
- MoneyGram/Ant Financial (blocked)
- Xcerra/Hubei Xinyan (abandoned)
- HNA/Skybridge (abandoned)
- HNA/Glencore (U.S. portion of deal abandoned)
- Aixtron SE/Fujian Grand Chip Investment Fund LP (blocked)
- Broadcom/Qualcomm (blocked)
- Canyon Bridge/Lattice (blocked)
- Grindr/Kunlun (unwound)
- Cofense/Pamplona (unwound)
- iCarbonX/PatientsLikeMe (unwound)





KEYS TO SUCCESSFUL REVIEW

- Identify issues early
- Buyer/seller buy-in
- Anticipate potential mitigation, identify operational methods to address issues
- Proactively reach out to agencies
- Transparency throughout process



B E N E F I T S O F F I L I N G

- Manage substantive risk
- Manage timing risk
- Maintain/expand relationships with U.S. government
- Establish and maintain a relationship with CFIUS
- Public and customer relations
- Buyer and seller thoroughly review operations
- General posture of transparency





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RELATED REGULATORY REVIEWS

- Directorate of Defense Trade Controls (DDTC)
- Bureau of Industry Security (BIS)
- Defense Security Service (DSS)
- Government Contracts (various)
- Federal Communications Commission / “Team Telecom”
- Antitrust (FTC / DOJ)
- Bureau of Economic Analysis (BEA)





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Kabealo Law is an outsourced national security regulatory expert for parties to M&A transactions. The firm has been engaged by parties, M&A law firms, global consultancies, financial institutions, compliance auditors and security officials to advise and assist with regulatory compliance requirements. Its clients include everything from blue-chip investment funds, to publicly traded companies around the world and stealthmode startups.

The firm's founder, John Kabealo, has advised hundreds of companies on issues relating to the Committee on Foreign Investment in the United States (CFIUS), the Defense Counterintelligence and Security Agency (DCSA), the Directorate of Defense Trade Controls (DDTC), the Bureau of Economic Analysis (BEA) and other matters. John has successfully presided over some of the most complex and challenging cases before CFIUS and DCSA, and he has negotiated national security agreements with the U.S. government across a broad range of sectors, including the telecommunications, defense, energy, technology and financial industries.

His articles have appeared in leading industry publications such as *The M&A Lawyer*, *Transaction Advisers* and *Law360*. He is a contributing author to American Bar Association's forthcoming *Cybersecurity Handbook*, and has been quoted by *The New York Times*, *The Wall Street Journal* and *Marketplace* regarding CFIUS issues.

John is a graduate of Princeton University, where he was a defensive back for the Princeton Tigers football team. He attended the University of Virginia School of Law, where he was the Editor in Chief of the *Virginia Law Weekly*.

Contact:

Kabealo PLLC
1629 K St. NW, Suite 300
Washington, DC 20006
202-770-8495
john@kabealo.law