

# FOREIGN INVESTMENT REVIEW

## USA



# Foreign Investment Review

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into law, policy and relevant authorities; procedure, including thresholds and timelines; substantive assessment, including interagency and international consultation, remedies and rights of challenge and appeal; relevant recent case law; and other recent trends.

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## LAW AND POLICY

### Policies and practices

What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The US government balances an open policy toward foreign investment with protecting US national security. The statutory authority to review foreign investment rests with the Committee on Foreign Investment in the United States (CFIUS), an inter-agency committee of the US government led by the US Department of the Treasury. CFIUS has authority to review transactions that could result in a foreign person obtaining control (broadly construed to include most governance rights, and even more broadly construed in the case of sensitive businesses) over a US business or certain non-controlling rights over certain types of more sensitive US businesses to evaluate the impact that these transactions could have on US national security. CFIUS also has jurisdiction to review transactions involving real estate that does not constitute a US business (eg, purchasing raw land or leasing facilities) near certain military installations and other sensitive infrastructure.

As 'national security' is not defined in the relevant laws, CFIUS has broad discretion to determine whether a transaction threatens US national security, and threats to national security are not confined to particular categories (nor must they remain static over time). When evaluating the extent to which a transaction could impair US national security, CFIUS, working in conjunction with US intelligence officials, conducts transaction-specific analyses along two independent axes: vulnerability (how a hypothetical hostile actor's control of an asset might negatively affect national security) and threat (whether the particular investor may be able and willing to exploit that vulnerability). With respect to vulnerability, CFIUS will consider factors such as whether a potentially hostile actor could augment its own capabilities, degrade functions that are important to US national security (including the functioning of the US economy), or conduct political or commercial espionage that undermines US national security. With respect to threat, CFIUS will consider whether the actor is likely to take action not in the interest of the United States, in combination with the particular vulnerability. Either significant vulnerabilities or significant threats can result in thorough CFIUS review (ie, even investors from close US allies, such as the UK and Canada, are routinely scrutinised).

*Law stated - 13 January 2022*

### Main laws

What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

The statutes pursuant to which CFIUS derives its authority and operates are section 721 of the Defense Production Act of 1950, as amended by (among others) the Foreign Investment and National Security Act of 2007 and the Foreign Investment Risk Review Modernization Act of 2018 . Regulations implementing these statutes are located in Chapter VIII of Part 31 of the Code of Federal Regulations (including 31 CFR Part 800 and 31 CFR Part 802 ).

*Law stated - 13 January 2022*

### Scope of application

Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

CFIUS can review any investment or acquisition that could result in a foreign person acquiring 'control' (ie, the affirmative or negative power to determine important decisions) over any person or entity operating a business in the United States from any other person (including from a foreign person). Joint ventures involving contributions of an existing business and certain investments involving real estate are also covered, but other 'green field' investments and purchases of assets that do not result in control of a US business are currently not. 'Control' is used in a broad sense; in practice, CFIUS views any acquisition of significant governance rights as potentially reviewable. CFIUS may deem a transaction an acquisition of control based on factors such as the voting nature of the interest, arrangements to cooperate with other investors and the ability of the investor to influence key corporate decisions (eg, sale of assets, reorganisation, closing or moving facilities, major expenditures and entering into significant contracts), including veto rights or the ability to block supermajority votes. However, certain limited minority shareholder rights are not considered independently sufficient to provide control (eg, the power to prevent the sale of all or substantially all assets and the power to prevent voluntary filing for bankruptcy or liquidation). The regulations provide a safe harbour for 'passive' investments of less than 10 per cent of the voting interests in a US business where the investor 'does not intend to exercise control, does not possess or develop any purpose other than passive investment, and does not take any action inconsistent with passive investment.' As a practical matter, CFIUS tends to view any transaction outside the safe harbour (which itself is not absolute) as potentially reviewable.

CFIUS also has jurisdiction over investments that result in a foreign person acquiring the following non-controlling rights over certain types of more sensitive US businesses (ie, US businesses that have involvement with critical technology or critical infrastructure or that maintain or collect sensitive personal data): (1) access to material non-public technical information in the possession or control of the US business; (2) membership or observer rights on the board of directors or equivalent authority of the US business; and (3) involvement, other than through voting of shares, in substantive decision-making regarding specific activities relating to critical technology, critical infrastructure or sensitive personal data.

For certain transactions involving 'critical technologies' (defined as certain export-controlled technologies, depending on the nationality of the acquirer and its parent entities) and transactions involving the acquisition of a 'substantial interest' in businesses dealing in covered critical infrastructure and sensitive personal data by a foreign government-linked entity (defined as any situation where a foreign government directly or indirectly holds at least 49 per cent of the voting equity of an acquirer purchasing a 25 per cent or greater voting stake in the relevant US business), filing at least 30 days prior to closing of the transaction is mandatory unless the investor is from a white-listed country (currently Canada, the UK or Australia) and meets stringent conditions. Where the mandatory filing rules do not apply, CFIUS has even broader jurisdiction over transactions involving critical technology, covered critical infrastructure or sensitive personal data, including transactions in which the investor does not acquire clear governance rights but has access to material non-public technical information, board observer rights, or formal or de facto consultation rights over sensitive aspects of the business. CFIUS also has jurisdiction over acquisitions of certain real estate near sensitive sites that is not operated as a business (eg, raw land or leasing empty facilities), and it has discretion to review acquisitions of contingent interests in securities but typically will do so only at the time of conversion.

*Law stated - 13 January 2022*

### Definitions

#### How is a foreign investor or foreign investment defined in the applicable law?

Under the CFIUS regulations, a 'foreign person' is any foreign national, foreign government or foreign entity, or any entity directly or indirectly controlled by a foreign person or entity. A foreign entity includes any entity organised under the laws of a foreign state if either its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges, unless the entity can demonstrate US nationals own a majority of its equity.

**Special rules for SOEs and SWFs**

Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Under the CFIUS regulations, a foreign government includes both national and subnational governments and their respective departments, agencies and instrumentalities. Both SOEs and SWFs fall within these definitions. Acquisitions by foreign government-controlled entities are presumptively subject to an in-depth investigation unless senior officials determine that there is no national security concern. In addition, investments by state-linked businesses in critical technology, covered critical infrastructure or sensitive personal data businesses may trigger a mandatory CFIUS filing.

*Law stated - 13 January 2022*

**Relevant authorities**

Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The President of the United States has delegated investment reviews in the United States to CFIUS, which is chaired by the US Department of the Treasury. The Treasury Department maintains a permanent CFIUS staff in its Office of Investment Security and works with the other members of CFIUS, including the Departments of Justice, Homeland Security, Commerce, Defense, State and Energy; the Office of the US Trade Representative; and the Office of Science and Technology Policy. The following executive branch offices also observe and, as appropriate, participate in activities undertaken by CFIUS: the Office of Management and Budget, Council of Economic Affairs, National Security Council, National Economic Council and Homeland Security Council. Further, the Director of National Intelligence and the Secretary of Labor are non-voting members of CFIUS. The President of the United States has the authority to issue orders blocking transactions that raise national security concerns or requiring that foreign investors divest themselves of investments not notified to CFIUS that raise national security concerns.

*Law stated - 13 January 2022*

Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The US government has broad discretion to determine if a transaction threatens national security and may block a transaction upon a finding that there is credible evidence to believe that the foreign investor 'might' take action that 'threatens to impair the national security'. The President's determination of whether a threat to national security exists and the remedy to be imposed is not reviewable by any court.

*Law stated - 13 January 2022*

**PROCEDURE****Jurisdictional thresholds**

What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

The Committee on Foreign Investment in the United States (CFIUS) has jurisdiction over any acquisition of

'control' (which is interpreted broadly and is more akin to substantial influence) over an operating business in the United States (including assets operated as a business) and certain non-controlling investments in certain types of more sensitive US businesses. There are no size of transaction or sectoral limitations. Notification of transactions within CFIUS's jurisdiction is usually voluntary, but CFIUS may initiate a review in the absence of a voluntary filing, either before or after closing. Because of the risk of post-closing review resulting in mandatory remedies or divestiture, it is prudent for parties to seek CFIUS clearance for any transaction that meets the jurisdictional requirements and is likely to raise national security concerns.

Two categories of transaction trigger a mandatory notification. First, any foreign investment in a US business that is involved with 'critical technology' that would require a licence or other authorisation under any of the four main US export control regimes for export, re-export or transfer to the foreign investor, and any foreign person directly or indirectly holding 25 per cent or more of the foreign investor must be notified to CFIUS. Whether a technology is 'critical technology' is a fact-specific determination requiring expertise in applying US export controls as well as the CFIUS regulations. Second, any acquisition of 25 per cent or more of the direct or indirect voting interest in US businesses involved in critical technology, covered critical infrastructure or sensitive personal data by a foreign person in which a single foreign government holds 49 per cent or more of the direct or indirect voting interest must be notified to CFIUS. There is a limited exception for investors from white-listed countries (currently Canada, the UK or Australia) that meet stringent conditions. Failure to comply with the mandatory notification requirement can result in penalties on both parties of up to the value of the transaction.

*Law stated - 13 January 2022*

## National interest clearance

What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

Typically, parties file a joint notification to CFIUS detailing the material terms of the transaction. US businesses must also submit information about their business (including, in particular, any government contracts and the export control classifications of their products). Foreign investors must provide information about their parents and their parents' directors, officers and significant shareholders. Throughout the review process, CFIUS may require the disclosure of additional information from the parties, even on issues that are not covered in the regulations. CFIUS's rules also provide for short-form declarations (which satisfy mandatory filing rules but may not result in definitive clearance of a transaction) and unilateral notifications in the case of hostile transactions (although CFIUS may not begin its review before receiving information from the target). Filing is mandatory in certain circumstances involving critical technology, critical infrastructure and sensitive data US businesses.

In the case of an involuntary review, typically CFIUS requests a filing from the parties and the parties comply. If the parties were to refuse, CFIUS has subpoena authority to compel the production of information.

Filing fees for full notifications (which took effect in 2020) range from US\$0 (for transactions valued at under US \$500,000) to US\$300,000 (for transactions valued at US\$750 million or more).

*Law stated - 13 January 2022*

Which party is responsible for securing approval?

Mandatory filing obligations fall on both parties, and each party to a notification is responsible for certifying the accuracy of information it provides (whether a filing is voluntary or mandatory).

*Law stated - 13 January 2022*



## Review process

How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

The CFIUS process and review timeline vary depending primarily on whether the parties file: (1) a declaration (which is a short-form notice with basic information regarding the transaction); or (2) a full notice (which requires substantially more information regarding the transaction and the parties to the transaction). Provided below is a description of the key differences between the two processes.

### Declaration review process

The declaration review process is designed to expedite review and approval of foreign investments that present little to no risk to US national security interests. The process requires substantially less information than a full CFIUS notice and does not require any filing fees. Parties have the option to submit a short-form declaration instead of a full notice to CFIUS. Once CFIUS accepts a declaration (which can take a few days to a week), it has 30 days to review and either (1) clear the transaction; (2) request a full notice (in response to which, parties typically prepare and submit a full notice); (3) inform the parties that CFIUS cannot conclude the review based on the submitted declaration (this outcome leaves parties with the option of going through the full CFIUS process to receive clearance); or (4) initiate a unilateral review. If CFIUS does not clear the transaction at the conclusion of the declaration review process and the parties do not submit a full CFIUS notice, any mandatory filing requirement is satisfied, but CFIUS retains jurisdiction to reopen an investigation of the transaction at any time (including after closing). During the declaration review process, the question and answer (Q&A) rounds between CFIUS and the parties to the transaction are fast-paced, and responses must be submitted to CFIUS within two business days.

While there is currently an estimated 60 to 70 per cent approval rate for declarations, there is, of course, no guarantee that CFIUS will clear a transaction at the conclusion of the declaration review period, and CFIUS could ultimately request that the parties go through the full CFIUS process.

### Notice review process

The full CFIUS process begins with preparing a draft CFIUS notice and submitting the draft to CFIUS for review and comment outside of the official review timeline. Once the parties address comments from CFIUS, CFIUS reviews the revised draft (there may be some additional back-and-forth), and the filing is accepted. Once the filing is accepted, the formal review timetable commences. CFIUS then has 45 days to complete its first-stage review. At the end of this period, CFIUS will either determine that it does not have jurisdiction, clear the transaction or initiate a second-stage investigation lasting an additional 45 days (with one 15-day extension possible in extraordinary circumstances).

At the conclusion of the investigation, CFIUS will issue a letter clearing the transaction or refer the transaction to the President of the United States, who then has 15 days to make a decision with respect to the transaction. If CFIUS has not completed its review at the end of the second stage, it can request that the parties withdraw and refile the notice, which typically restarts the 90-day review process. As previously stated, there are filing fees associated with filing a full notice (maximum of \$300,000). It typically takes several weeks, and sometimes longer, to gather the information and documents required for a full CFIUS filing, and a full CFIUS filing requires very detailed information, including personal identifiable information for senior personnel (such information is not required for a declaration). The Q&A rounds between CFIUS and the parties to the transaction also are fast-paced, and responses must be submitted to CFIUS within three business days.

*Law stated - 13 January 2022*

**Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?**

For transactions subject to a mandatory CFIUS filing requirement, parties must wait 30 days after making a filing with CFIUS to close. CFIUS can impose penalties of up to the value of the transaction on parties that fail to comply with this requirement.

Setting aside the waiting period triggered by a mandatory filing requirement, absent an interim order prohibiting the parties from doing so (which is rare), parties are not required to wait until they receive CFIUS clearance before closing a transaction, including in cases of a mandatory filing requirement. However, parties that notify CFIUS of a transaction more often than not wait until the review process is complete before closing to avoid uncertainty. Incentives may differ for the seller (who is not at risk under CFIUS's regulations post-closing) and the buyer.

*Law stated - 13 January 2022*

### **Involvement of authorities**

**Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?**

In some cases, it is possible to engage with the agencies most likely to be concerned with a transaction in advance of the formal CFIUS process. However, in general, meaningful pre-filing feedback is difficult to obtain. Filing a draft notification is customary, and CFIUS may return comments on a filing before acceptance even if it is not designated as a draft, but any comments will be requests for clarification or further information rather than substantive guidance.

*Law stated - 13 January 2022*

**When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?**

Typically, the clearance process is handled by specialist legal advisers of the parties. Other advisers may assist depending on the nature of the businesses involved (such as industry analysts for transactions involving sensitive technology). Parties should also consider contacting any US government customers of the target US business that may have concerns to address them before making a formal filing.

Public affairs specialists and lobbyists may, in some cases, be involved in a CFIUS clearance effort where an investment or acquisition may be controversial or has attracted political or press attention. In difficult cases, parties may want to contact members of Congress who are likely to be concerned. However, these public efforts have no direct role in the process. They are intended to dampen potential indirect political pressure on the CFIUS member agencies.

*Law stated - 13 January 2022*

## What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

CFIUS can review any transaction that was not notified to it, even after the closing. CFIUS has dedicated increased resources to reviewing non-notified transactions and, as a result, is looking into more non-notified transactions than ever before. Typically, CFIUS makes an informal inquiry, which may be followed by a request for a notification if the transaction is of interest. It also retains authority to rescind an earlier approval and reopen a review where any transaction party is found to have made a material misstatement during the review process or fails to conform to a material term of a mitigation agreement or condition and CFIUS finds that no other enforcement mechanisms exist.

*Law stated - 13 January 2022*

## SUBSTANTIVE ASSESSMENT

### Substantive test

## What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

To block or unwind a transaction, the President must determine that there is 'credible evidence' that a 'foreign interest exercising control over a US business might take action that threatens to impair the national security' of the United States, and provisions of other laws 'do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security.'

The President's determination with respect to national security issues is not reviewable by courts, but there is no formal legal burden on the parties to a transaction to demonstrate the absence of a national security threat. Because the Committee on Foreign Investment in the United States (CFIUS) also has broad discretion in making a recommendation to the President (which is typically followed), the parties effectively must persuade CFIUS that the transaction does not pose a national security threat. In light of the practical (though not formal) burden, parties should present available evidence in their filing that the transaction is commercially motivated and will not threaten US national security.

*Law stated - 13 January 2022*

## To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

CFIUS is permitted to share information with foreign government entities (subject to confidentiality and classification requirements), though information in CFIUS filings may not be made public. We are aware of prior consultations between the US and allied governments and note that CFIUS intends to increasingly consult with international partners on perceived threats.

*Law stated - 13 January 2022*

### Other relevant parties

## What other parties may become involved in the review process? What rights and standing do complainants have?

Government agencies that are not members of CFIUS have no formal right to participate in the process. However, in the past, CFIUS has consulted, for example, local homeland security and law enforcement agencies in evaluating transactions.

Competitors, customers and Congress do not have a role in pending reviews, and CFIUS is forbidden from disclosing information in a filing or even publicly acknowledging that a filing has been made (unless the parties disclose the information first). Nevertheless, CFIUS is aware of political and media pressure and, though this pressure is unlikely to determine the outcome of the national security review, it may make CFIUS aware of potential issues and lead CFIUS to be more cautious in anticipation of later oversight.

*Law stated - 13 January 2022*

## **Prohibition and objections to transaction**

### **What powers do the authorities have to prohibit or otherwise interfere with a transaction?**

The President has discretionary authority to suspend or prohibit a transaction that, in his or her view, threatens national security, and there is no judicial review of the substantive determination. CFIUS has authority to suspend transactions and to negotiate or impose conditions on transactions at committee level, though technically it does not have authority to block or unwind transactions without presidential action. However, the President typically follows CFIUS's recommendation.

*Law stated - 13 January 2022*

### **Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?**

CFIUS may condition clearance on parties' entering into an agreement with the US government to address or mitigate national security concerns raised by the transaction (and may impose mitigation conditions while a review is ongoing or after a transaction has been abandoned without clearance). The parameters of these agreements depend on transaction-specific concerns. Mitigation provisions vary widely but, as examples, might include: the requirement that a US citizen be appointed as a security officer for the US business; an agreement that only US persons will sit on certain committees, such as security committees; periodic government reviews of export control and security policies and procedures in place at the US business; the isolation or ring-fencing of certain businesses or assets so that foreign persons do not have access to them, including, in some cases, the formation of a US subsidiary managed by independent directors with limited parent involvement; requirements that the government receive notice of or approve changes in business processes, procedures or the locations of activities; an agreement prohibiting foreign parties from accessing certain technologies; or an agreement to institute a cybersecurity plan. A mitigation agreement will also typically contain monitoring and enforcement provisions, and designate one or more member agencies to oversee the agreement.

CFIUS is most likely to impose these requirements in transactions involving classified information or sensitive technology, presence in the supply chain of the US government, or especially sensitive infrastructure or data. A CFIUS decision to pursue a mitigation agreement is based on an internal risk-based analysis of the proposed transaction's threat to national security, and CFIUS must believe that the measures imposed are reasonably necessary to address that risk and are effective, enforceable and monitorable. Where parties materially breach a mitigation agreement, CFIUS may reopen the investigation or apply penalties of up to US\$250,000 per violation or the value of the transaction. A mitigation agreement may also provide for liquidated damages if the transaction parties violate the agreement.

*Law stated - 13 January 2022*

## Challenge and appeal

### Can a negative decision be challenged or appealed?

By statute, neither the President's finding of a national security threat nor the selection of remedies is subject to judicial review. Parties facing a potential negative recommendation from CFIUS will often abandon the transaction and request to withdraw their CFIUS notice. CFIUS typically grants these requests.

In *Ralls Corp v CFIUS*, 758 F.3d 296 (D.C. Cir. 2014), a federal appeals court ruled that parties to a CFIUS review have certain due process rights during the process leading up to a presidential decision. These rights include access to the unclassified information upon which CFIUS relies in making its recommendation. Implicitly, other matters outside of those explicitly immunised from judicial review, such as whether a transaction is within CFIUS's jurisdiction, might also be open to challenge.

*Law stated - 13 January 2022*

## Confidential information

### What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Information submitted to CFIUS during the filing and review process is deemed confidential information that may not be released to the public, including under a Freedom of Information Act request. The CFIUS statute specifically forbids the release of information obtained in a filing without the consent of the parties, subject to certain narrow exceptions related to national security and intergovernmental cooperation with adequate safeguards for confidentiality; this protection extends to information provided in relation to withdrawn notices and pre-notice consultations. Wrongful disclosure is a criminal violation and punishable by fines or imprisonment.

CFIUS makes a classified report of the results of its reviews to Congress.

*Law stated - 13 January 2022*

## RECENT CASES

### Relevant recent case law

Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

The Committee on Foreign Investment in the United States (CFIUS) reviews are confidential and neither the outcome nor the reasoning is released to the public, except in cases involving presidential orders, so all discussion of recent cases is limited to information that has been publicly discussed by parties or media accounts.

## StayNTouch

On 6 March 2020, President Trump issued an Executive Order requiring Chinese public company Beijing Shiji Information Technology Co and its wholly owned subsidiary Shiji (Hong Kong) Ltd, a Hong Kong limited company (together, the Shiji Group), to divest itself of StayNTouch Inc (SNT), a US cloud-based property management system software provider to hotels acquired in 2018. SNT's software reportedly uses facial recognition and ID scanning technologies to authenticate guest identities.

President Trump's Executive Order followed a seven-month review initiated by CFIUS and came more than a year after the acquisition. Although the Order did not offer much detail, it stated that there was 'credible evidence' that the Shiji Group could act to impair US national security and immediately prohibited the Shiji Group from accessing hotel guest data through SNT.

The forced divestiture of SNT (along with other cases, such as the review of the Grindr transaction in 2020) re-emphasises CFIUS's focus on protecting the sensitive personal data of US citizens, its power to upend closed deals that were not previously cleared by CFIUS, and the resources it has dedicated to identifying, reviewing and pursuing non-notified transactions.

## **Ekso Bionics**

In 2019, Ekso Bionics, Inc, a US company manufacturing robotic exoskeletons for medical and industrial use, entered into a joint venture with two Chinese partners, Zhejiang Youchuang Venture Capital Investment Co Ltd (ZYVC) and Shaoxing City Keqiao District Paradise Silicon Intelligent Robot Industrial Investment Partnership, to develop and service the exoskeleton market in China and certain other Asian markets and to create a global exoskeleton manufacturing joint venture. Under the publicly disclosed terms of the joint venture, the joint venture partners contributed cash and Ekso licensed certain patented technologies and non-patented manufacturing technologies to the joint venture. The plan was for the joint venture to build a manufacturing facility in China and manufacture products incorporating Ekso's technology for the Chinese and other Asian markets. No assets in the United States were transferred and Ekso's operations in the United States were unaffected. The project also involved a small, non-controlling equity investment in Ekso by entities affiliated with ZYVC.

In February 2019, the US Department of Defense requested information regarding the export classification of Ekso's products and whether Ekso intended to notify CFIUS of the joint venture. Ekso publicly disclosed this inquiry and its conclusion that the China joint venture was outside of CFIUS's jurisdiction. Nevertheless, Ekso and the joint venture partners subsequently notified the transaction to CFIUS in December 2019, possibly as a result of a request from CFIUS or its member agencies to do so. Following its review, CFIUS concluded that its national security concerns regarding the joint venture could not be mitigated and required that Ekso terminate its role with the joint venture.

Although pure technology transfer issues typically are left to the US export control laws, following CFIUS's treatment of this example, US companies engaged in manufacturing and research and development joint ventures outside the United States should be aware that any equity investment in the US partner may trigger CFIUS jurisdiction if export-controlled 'critical technologies' are licensed to the joint venture, even if the joint venture only has operations outside the United States and not a single tangible asset within the United States is transferred.

## **Magnachip**

In March 2021, the Chinese private equity firm Wise Road Capital agreed to indirectly acquire Magnachip Semiconductor Corporation, a South Korea-based semiconductor company, for \$1.4 billion. Magnachip designs and manufactures analogue and mixed signal semiconductors, an industry that CFIUS has well-established interest in. Nonetheless, Wise Road Capital and Magnachip did not notify CFIUS of the transaction, presumably as a result of thinking that CFIUS lacked jurisdiction because of Magnachip's limited connections to the United States (although Magnachip is incorporated in Delaware, is listed on the New York Stock Exchange and has a Delaware subsidiary, all of the company's significant business activities appear to take place outside the United States).

In June 2021, CFIUS requested that the parties submit a CFIUS filing and issued an interim order preventing the parties from closing the transaction until it finished its review. Magnachip later disclosed, in a public filing, that it had received a letter from CFIUS informing Magnachip that the proposed transaction posed national security risks that could not be mitigated and, absent new information, that CFIUS would refer the matter to the President.

In December 2021, Magnachip publicly announced that the parties withdrew the CFIUS filing and are terminating the proposed transaction.

CFIUS's review of the Magnachip transaction demonstrates CFIUS's willingness to interpret the term 'U.S. business' broadly to include businesses with limited US activities and actively identify and 'call in' transactions that it believes could raise national security concerns.

*Law stated - 13 January 2022*

## UPDATE AND TRENDS

### Key developments of the past year

Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

The Treasury Department, as Chair of the Committee on Foreign Investment in the United States (CFIUS), recently determined that Australia and Canada have established and are effectively utilising robust processes to analyse foreign investments for national security risks and facilitate coordination with the United States on matters relating to investment security. As a result, Australia and Canada are and will remain 'excepted foreign states' for CFIUS purposes unless and until the US government deems otherwise. The United Kingdom and New Zealand, both of which are also currently treated as excepted foreign states, have until February 2023 to fulfil the criteria necessary to remain excepted foreign states. As excepted foreign states, investments by qualified investors from Australia, Canada, New Zealand and the United Kingdom are exempted from recently expanded CFIUS jurisdiction over certain non-controlling covered investments and real estate transactions, as well as from mandatory CFIUS filings. It is possible that additional countries may be designated, as the global foreign direct investment trend, particularly in US-ally countries, continues.

Also, the US Department of Commerce continues to work on a multilateral basis to identify so-called emerging and foundational technologies pursuant to the Export Control Reform Act of 2018. Such technologies not only become subject to stringent US export controls, but US businesses that engage in activities involving such technologies are considered critical technology businesses for CFIUS purposes. We expect that the imposition of new controls on emerging and foundational technologies will remain incremental in nature for the indefinite future, both because identifying technologies currently not subject to multilateral controls but that nonetheless are essential to US national security will take time and resources and because technologies and their importance will continue to evolve.

In addition, for the first time, the 2020 CFIUS annual report (which was published in July 2021) provided information regarding non-notified transactions. These are transactions that previously closed without being notified to CFIUS. According to the report, during 2020 CFIUS identified 117 non-notified transactions. Of these, CFIUS requested a filing in connection with 17 transactions. We expect the CFIUS office dedicated to identifying non-notified transactions will continue to remain active.

Further, there are a number of proposals and legislative developments that potentially could significantly expand CFIUS' jurisdiction and authority. For example, one proposal would require mandatory CFIUS notifications for foreign investments involving US businesses that collect or maintain sensitive personal data (currently, only certain transactions involving foreign government-owned investors and sensitive personal data businesses trigger a mandatory filing). Other proposals are focused on securing US food and agricultural systems, including any effects on the availability of, access to and safety and quality of food, and providing CFIUS with the authority to review foreign funding of US higher education institutions. Whether such proposals will be adopted remains uncertain. That being said, such proposals signal the importance of and focus on CFIUS in the coming years.




*Law stated - 13 January 2022*



## Jurisdictions

	<b>Australia</b>	Gilbert + Tobin
	<b>Austria</b>	Barnert Egermann Illigasch Rechtsanwälte
	<b>Cambodia</b>	Tilleke & Gibbins
	<b>Canada</b>	McCarthy Tétrault LLP
	<b>China</b>	Global Law Office
	<b>Denmark</b>	Bech-Bruun
	<b>European Union</b>	Allen & Overy LLP
	<b>France</b>	White & Case LLP
	<b>Germany</b>	Blomstein
	<b>India</b>	AZB & Partners
	<b>Indonesia</b>	Nagashima Ohno & Tsunematsu
	<b>Italy</b>	Gianni & Origoni
	<b>Japan</b>	Tokyo International Law Office
	<b>Laos</b>	Tilleke & Gibbins
	<b>Malaysia</b>	Nagashima Ohno & Tsunematsu
	<b>Mexico</b>	White & Case LLP
	<b>Myanmar</b>	Tilleke & Gibbins
	<b>New Zealand</b>	Russell McVeagh
	<b>Norway</b>	CMS Kluge
	<b>Spain</b>	White & Case LLP
	<b>Sri Lanka</b>	Tiruchelvam Associates
	<b>Sweden</b>	Bokwall Rislund Advokatbyrå
	<b>Switzerland</b>	Lenz & Staehelin
	<b>Thailand</b>	Nishimura & Asahi
	<b>United Arab Emirates</b>	Afridi & Angell



 <b>USA</b>	Cleary Gottlieb Steen & Hamilton LLP
 <b>Uzbekistan</b>	Winfields
 <b>Vietnam</b>	Tilleke & Gibbins