

# Foreign Investment Review 2021

Contributing editor  
Oliver Borgers



**Publisher**

Tom Barnes  
tom.barnes@lbresearch.com

**Subscriptions**

Claire Bagnall  
claire.bagnall@lbresearch.com

**Senior business development manager**

Adam Sargent  
adam.sargent@gettingthedealthrough.com

**Published by**

Law Business Research Ltd  
Meridian House, 34-35 Farringdon Street  
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between November 2020 and January 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021  
No photocopying without a CLA licence.  
First published 2012  
Tenth edition  
ISBN 978-1-83862-662-4

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



---

# Foreign Investment Review 2021

**Contributing editor**

**Oliver Borgers**  
McCarthy Tétrault LLP

---

Lexology Getting The Deal Through is delighted to publish the tenth edition of *Foreign Investment Review*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the European Union, France, Italy, Pakistan, Spain, Sri Lanka and Uzbekistan.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.



London  
January 2021

---

Reproduced with permission from Law Business Research Ltd  
This article was first published in January 2021  
For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

# Contents

<b>Australia</b>	<b>5</b>	<b>Laos</b>	<b>80</b>
Deborah Johns Gilbert + Tobin		Dino Santaniello Tilleke & Gibbins	
<b>Austria</b>	<b>12</b>	<b>Myanmar</b>	<b>86</b>
Isabella Hartung and Julia Schönhuber Barnert Egermann Illigasch Rechtsanwälte		Nwe Oo and Ross Taylor Tilleke & Gibbins	
<b>Cambodia</b>	<b>17</b>	<b>New Zealand</b>	<b>89</b>
Jay Cohen and Nitikar Nith Tilleke & Gibbins		Ben Paterson and Lance Jones Russell McVeagh	
<b>Canada</b>	<b>21</b>	<b>Pakistan</b>	<b>99</b>
Oliver Borgers, Dominic Thérien, Jonathan Bitran and Erin Keogh McCarthy Tétrault LLP		Sarjeel Mowahid and Ahmed Reza Mirza ABS & Co	
<b>China</b>	<b>33</b>	<b>South Korea</b>	<b>107</b>
May Liu Global Law Office		Joo Hyoung Jang, Rieu Kim, Kyunghun Kim and Youjin Hwang Barun Law LLC	
<b>European Union</b>	<b>39</b>	<b>Spain</b>	<b>112</b>
Charles Pommiès, Dominic Long and Jonathan Benson Allen & Overy LLP		Juan Manuel de Remedios and Laura del Olmo White & Case LLP	
<b>France</b>	<b>45</b>	<b>Sri Lanka</b>	<b>117</b>
Orion Berg and Camille Grimaldi White & Case LLP		Nirosha Peiris Tiruchelvam Associates	
<b>Germany</b>	<b>51</b>	<b>Switzerland</b>	<b>123</b>
Roland M Stein and Leonard von Rummel BLOMSTEIN Partnerschaft von Rechtsanwälten mbB		Stephan Erni, Astrid Waser and Eric Olivier Meier Lenz & Staehelin	
<b>India</b>	<b>58</b>	<b>Thailand</b>	<b>131</b>
Hardeep Sachdeva and Priyamvada Shenoy AZB & Partners		Jirapong Sriwat and Apinya Sarntikasem Nishimura & Asahi	
<b>Italy</b>	<b>68</b>	<b>United Arab Emirates</b>	<b>136</b>
Francesco Salerno and Kathleen Lemmens Gianni & Origoni		Silvia Pretorius Afridi & Angell	
<b>Japan</b>	<b>74</b>	<b>United Kingdom</b>	<b>142</b>
Koki Yamada and Dai Iwasaki Tokyo International Law Office		Tim Cowen and Claire Barraclough Preiskel & Co LLP	

**United States** 148

Paul Marquardt, Chase Kaniecki, Nathanael Felix Kurcab,  
Nora McCloskey and Elise Lane  
Cleary Gottlieb Steen & Hamilton LLP

**Uzbekistan** 154

Mahdi Magdiev  
Winfields

**Vietnam** 159

Phuong Thi Minh Tran and Nam Ngoc Trinh  
Tilleke & Gibbins

# United States

Paul Marquardt, Chase Kaniecki, Nathanael Felix Kurcab, Nora McCloskey and Elise Lane

Cleary Gottlieb Steen & Hamilton LLP

## LAW AND POLICY

### Policies and practices

- 1 | 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. 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 certain sensitive businesses) over a US business 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 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).

### Main laws

- 2 | 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).

### Scope of application

- 3 | 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.

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.

### Definitions

#### 4 | 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

#### 5 | 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 covered critical infrastructure or sensitive data businesses may trigger a mandatory CFIUS filing.

### Relevant authorities

#### 6 | 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.

#### 7 | 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.

## PROCEDURE

### Jurisdictional thresholds

#### 8 | 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). 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.

### National interest clearance

#### 9 | 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 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).

**10 | 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).

**Review process**

**11 | 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 review timeline varies and depends largely on whether parties choose to make a full notification or a short-form declaration.

In the case of full notifications, CFIUS's regulations state that it will review draft filings and provide comments on or accept a notice within 10 business days where the parties stipulate CFIUS has jurisdiction to review the transaction, but that timeline is often not honoured and the formal review timeline does not start until CFIUS accepts a filing. While submission of a draft notification is nominally optional, CFIUS will review filings and potentially return comments regardless of whether a notification is labelled as a 'draft'. Once any comments are incorporated, the revised draft is reviewed, and the filing is accepted, the formal timetable commences. CFIUS then has 45 days for 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 if any CFIUS member agency 'believes that the transaction threatens to impair US national security and the threat has not been mitigated'. Transactions involving foreign-government controlled entities and transactions that would result in a foreign person controlling critical technology, critical infrastructure or sensitive personal data face a default presumption of a second stage of review. At the conclusion of the investigation, CFIUS will issue a letter clearing the transaction or refer the transaction (with or without recommendation) to the President, who then has 15 days to rule on the transaction. The President typically accepts CFIUS's recommendations. However, even the statutory review timeline is not absolute; if CFIUS has not completed its review at the end of the second stage, it has pressured parties to 'voluntarily' withdraw and resubmit their notification (restarting the deadlines) to avoid a recommendation that the transaction be prohibited.

Short-form declarations are also available for all transactions. Once CFIUS accepts a declaration as complete, it has 30 days to either clear the transaction; request a full notice; inform the parties that CFIUS cannot conclude review based on the submitted declaration; or initiate a unilateral review. If CFIUS does not conclude review (a common outcome), any mandatory filing requirement is satisfied, but CFIUS retains jurisdiction to reopen an investigation of the transaction at any time (including after closing).

It typically takes several weeks, and sometimes longer, to gather the information and documents required for a full CFIUS filing.

**12 | 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. (Although the regulations state that the requirement runs from the

date of submission, it is at the time of writing unclear whether CFIUS believes the requirement runs from the date of acceptance, which can be substantially different.) 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.

**Involvement of authorities**

**13 | 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.

**14 | 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.

**15 | 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.

**SUBSTANTIVE ASSESSMENT****Substantive test**

- 16 | 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.

- 17 | 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.

**Other relevant parties**

- 18 | 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.

**Prohibition and objections to transaction**

- 19 | 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.

- 20 | 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.

**Challenge and appeal**

- 21 | 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.

**Confidential information**

- 22 | 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.

**RECENT CASES**

**Relevant recent case law**

23 | 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.

**Qualcomm Incorporated**

On 12 March 2018, President Trump blocked the proposed US\$117 billion hostile acquisition of Qualcomm Incorporated, a US chipmaker, by Broadcom Limited, a Singapore-incorporated company headquartered in the United States. Although Broadcom is based in Singapore, it is not obviously a foreign acquirer under CFIUS’s regulations because its primary stock exchange and principal place of business are within the United States. CFIUS moved with unprecedented aggressiveness to block the deal before it was signed and before Broadcom reincorporated in the United States. President Trump issued an order blocking the deal days before Qualcomm shareholders were set to replace a majority of directors with persons nominated by Broadcom.

CFIUS’s reasoning supporting the conclusion that the acquisition would impair US technological competitiveness was also unprecedented. The parties released a letter from the Treasury Department stating that CFIUS was concerned that acquisition by Broadcom would weaken Qualcomm’s research and development given the former’s ‘private equity style approach’ and reputation for cost-cutting. CFIUS’s stated justification was that this would reduce Qualcomm’s long-term competitiveness and thus leave an opening for China to take the lead in 5G technology standards. Surprisingly, other than a passing reference to Broadcom’s relationship with unnamed foreign third parties, the Treasury Department letter did not set out any traditional national security concerns. Instead, CFIUS appears to have focused on whether or not the proposed business plan for an entity would be successful. This move and the rationale behind it marked new territory for an entity not historically concerned with industrial policy.

**Grindr**

On 27 March 2019, press reports emerged that CFIUS was forcing the Kunlun Group, a China-based technology firm, to divest its wholly owned US subsidiary, the dating app Grindr, because the group’s continued ownership constituted a national security risk. While no official statement was released, CFIUS was likely concerned with the sensitive personal data that Grindr collects about its US users, potentially including US military and intelligence personnel or other persons with access to information of interest to foreign governments and potentially vulnerable to blackmail.

Grindr operates ‘a geosocial networking and online dating application geared towards gay, bi, trans, and queer people’ with a reported 27

million users that are required to provide potentially personally identifiable information (eg, account credentials, unique device identifiers and last known device locations). Users can also voluntarily provide additional personal information such as ethnicity, age, height, weight, relationship status and health information. As a result, Grindr collects and maintains a substantial amount of sensitive personal information relating to US citizens, which is a key area of concern for CFIUS.

Notably, CFIUS’s decision came more than three years after Kunlun Group acquired 60 percent ownership and effective control of Grindr in January 2016. In January 2018, the group acquired the remaining ownership interests of Grindr and replaced the CEO and founder with the group chairman, who is a Chinese national. Neither transaction was notified to CFIUS. Kunlun Group publicly stated in May 2019 that it had reached an agreement with CFIUS prohibiting further access to information about Grindr’s users and setting a deadline for sale of the app by June 2020.

The forced divestiture of Grindr is an important reminder that CFIUS remains focused on protecting the sensitive personal data of US citizens, has the power to upend closed deals that have not been cleared by CFIUS, and is dedicating increased resources to the review of transactions not notified to CFIUS.

**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.

As with Grindr, the forced divestiture of SNT 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.

**UPDATES AND TRENDS**

**Key developments of the past year**

24 | 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?

In February 2020, the Committee on Foreign Investment in the United States (CFIUS) issued final regulations implementing the most recent CFIUS statute. These changes, among other things, added mandatory notification requirements for government-linked investments in US critical infrastructure and sensitive personal data businesses, lowered the jurisdictional threshold for investments in more sensitive US businesses, and extended CFIUS’s jurisdiction to certain acquisitions of real estate not operated as a business.

In May 2020, CFIUS began requiring tiered filing fees for all full CFIUS notices submitted to CFIUS, subject to a maximum fee of US\$300,000 for transactions valued at greater than US\$750 million.

In addition, effective 15 October 2020, CFIUS significantly changed the mandatory notification requirement applicable to foreign investments into US critical technology businesses. The changes eliminated the prior limitation to targets active in specified industries and instead focus on whether the target develops, tests or manufactures technologies that would require a licence for export – whether the technologies are in fact exported or sold to third parties at all (eg, proprietary manufacturing technologies) – to the jurisdiction of the investor or any entity in its chain of ownership. This requires parties to determine the export control status of all products, software and technology that are produced, designed, tested, manufactured, fabricated or developed by the US business, the jurisdiction of every entity in the investment chain, and the corresponding licensing requirements, potentially introducing significant delays with respect to any target business that has not previously undergone a thorough export control review.

Going forward, parties should also keep in mind that CFIUS has increased resources to identify and reach out regarding non-notified transactions. In fact, CFIUS is reaching out on non-notified transactions more than ever before.

### Coronavirus

25 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 pandemic has created market conditions ripe for increased cross-border investment, as businesses look for capital and investors target distressed assets. Similar to efforts by other countries to use existing or new foreign investment review tools to protect sensitive domestic industries and other interests, senior US officials from CFIUS member agencies publicly noted that they would look to use the CFIUS process to protect against adversarial investments during the related economic crisis. While CFIUS's mission is national security and not economic protectionism (which has remained true during the pandemic), the covid-19 crisis is likely to lead to increased scrutiny in a number of sectors, notably healthcare. From a procedural perspective, although CFIUS is operating and accepting new filings while government operations are restricted, remote work has had an unpredictable impact on the length of CFIUS reviews.

## CLEARY GOTTLIB

### Paul Marquardt

pmarquardt@cgsh.com

### Chase Kaniecki

ckaniecki@cgsh.com

### Nathanael Kurcab

nkurcab@cgsh.com

### Nora McCloskey

nmccloskey@cgsh.com

### Elise Lane

eglane@cgsh.com

2112 Pennsylvania Avenue, NW  
Washington, DC  
20037  
United States  
Tel: +1 202 974 1500  
www.clearygottlieb.com

## Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)