



Update on CFIUS and FIRRMA For USCBC

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Briefing Topics

- Recent developments
- CFIUS assessment and impact when Chinese interest involved
 - Mandatory filing requirement
 - Short form option
 - Filing fee
 - Business considerations
 - Examples
- Comparison of US / EU / China

Recent Developments

- August 2018, NDAA for Fiscal Year 2019 included companion legislation approaching national security concerns from different angles
 - Foreign Investment Risk Review Modernization Act (**FIRRMA**) – CFIUS reviews foreign investment in US
 - Export Controls Reform Act (**ECRA**) – BIS reviews exports, reexports and transfers (in country)
- Policy Objectives
 - Slowing down Chinese leadership in emerging technology
 - Maintaining integrity of US supply chains
 - Favor trusted partners aligned with US national security and foreign policy interests
- FIRRMA
 - On November 10, 2018, CFIUS Pilot Program came into effect, implementing mandatory declaration filings
 - On February 13, 2020, comprehensive new regulations came into effect implementing FIRRMA (and ending the pilot program)
 - On October 15, 2020, new mandatory filing rules came into effect changing the test for a mandatory filing based on the use of critical technology at the US business
- ECRA
 - Several rules defining control parameters for certain emerging technologies and ANPRM for foundational technology

CFIUS Assessment

- Is the transaction a covered transaction?
- If so, is filing with CFIUS mandatory or voluntary?
- Should the parties submit a short form declaration or a long form notice?
- Or, if the filing is voluntary, should parties not file at all?
- How is this assessment impacted, If the buyer or investor is from China (or controlled by a Chinese interest)?

Update on Committee on Foreign Investment in the United States (CFIUS) after FIRRMA

- What is CFIUS?
 - An inter-agency committee authorized to review transaction and investment by **foreign person** in **US business** or **US real estate interests** (i.e., a covered transaction) in order to determine the effect of such transaction or investment on the national security of the United States.
- Organization
 - Voting Members
 1. Department of the Treasury (chair)
 2. Department of Justice
 3. Department of Homeland Security
 4. Department of Commerce
 5. Department of Defense
 6. Department of State
 7. Department of Energy
 8. Office of the US Trade Representative
 9. Office of Science & Technology Policy
 - Observing Members
 1. Office of Management & Budget
 2. Council of Economic Advisors
 3. National Security Council
 4. National Economic Council
 5. Homeland Security Council
 - Non-Voting, Ex-Officio members
 1. Director of National Intelligence
 2. Secretary of Labor

CFIUS Review Authority - takeovers or investments in United States

- **Control.** Acquisition of control (or change of control) of U.S. business by foreign person (pre-existing authority)
- **Non-controlling Investment in U.S. Businesses of Specific Concern.** Equity investments in U.S. businesses that:
 - owns, operates, manufactures, supplies or services **critical infrastructure**
 - produces, designs, tests, manufactures, fabricates, or develops one or more **critical technologies** (including emerging and foundational technologies on CCL)
 - maintains or collects **sensitive personal data** of United States citizens

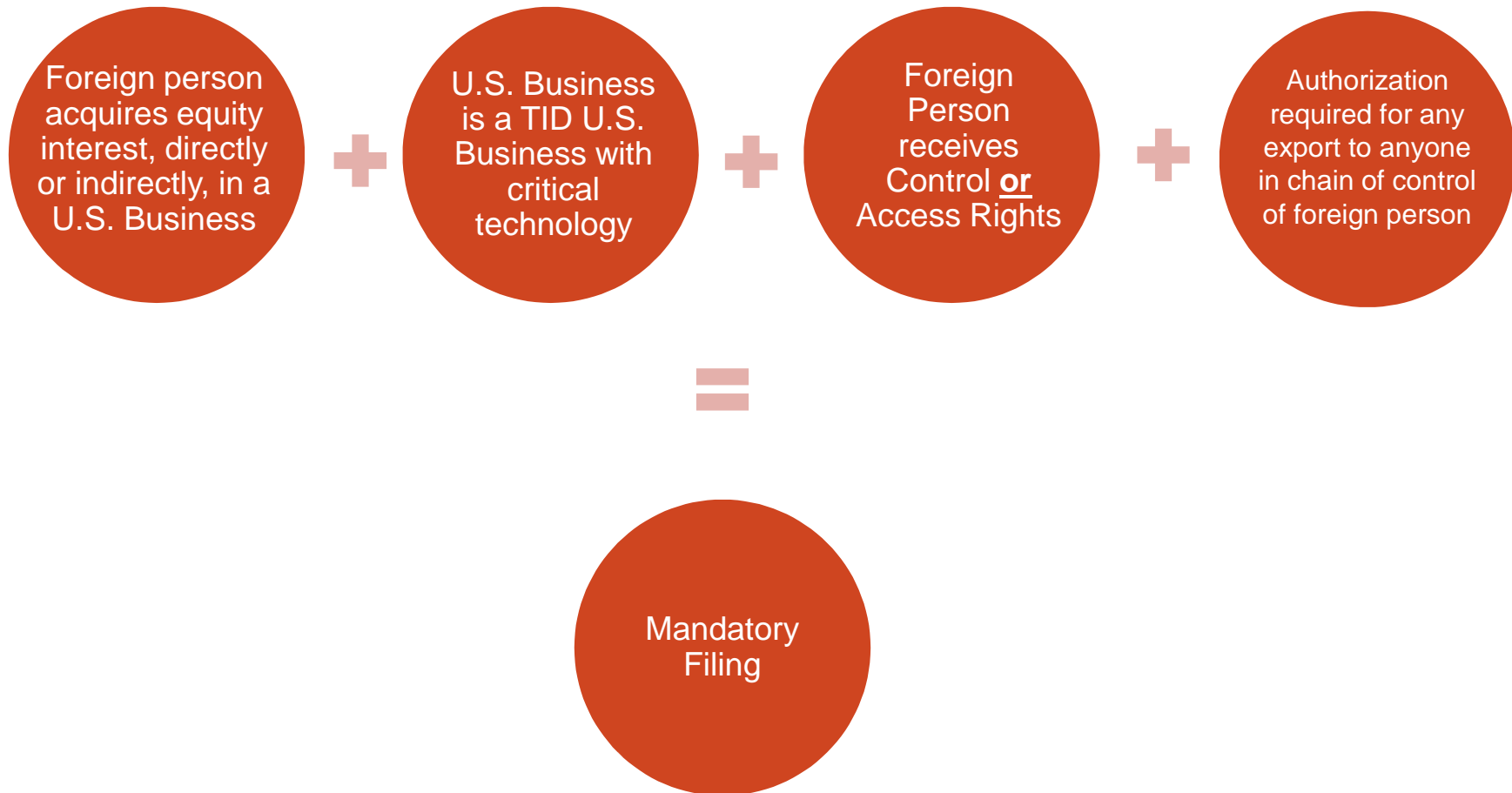
Note: Defined in the regulations as a “**TID U.S. business**” – an abbreviation for critical technology, critical infrastructure, and personal data.
- **Real Estate.** Purchase or lease of real estate interest in in proximity to a national security interest

- **Foreign Government Substantial Interest.** A covered transaction that:
 - results in the acquisition of a substantial interest ($\geq 25\%$ voting) in a TID U.S. business by a foreign person
 - in which the national or subnational governments of a single foreign state (other than an excepted foreign state) have a substantial interest ($\geq 49\%$ voting)
- **Critical Technology US Business.** A covered transaction that
 - is a covered investment (with **access rights**) in, **or** that could result in foreign control of, a U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies, and
 - U.S. government authorizations would be required to export, reexport, transfer (in-country), or retransfer the critical technology or technologies produced, designed, tested, manufactured, fabricated, or developed by the U.S. business to foreign persons in the control chain of the foreign person investor

Access Rights

- Access to any material nonpublic technical information in the possession of the TID U.S. business
- Membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or equivalent governing body of the TID U.S. business, or
- Any involvement, other than through voting of shares, in substantive decision-making of the TID U.S. business regarding
 - The use, development, acquisition, safekeeping, or release of sensitive personal data of U.S. citizens maintained or collected by the TID U.S. business;
 - The use, development, acquisition, or release of critical technologies; or
 - The management, operation, manufacture, or supply of covered investment critical infrastructure.

Elements of a Mandatory Filing for Critical Technology US Businesses



Filing Options and Business Considerations

Long form notice

■ Pros

- Safe harbor for transaction

■ Cons

■ Filing fee

Transaction Value	Fee
<\$500,000	no fee
≥\$500,000; <\$5M	\$750
≥\$5M; <\$50M	\$7,500
≥\$50M; <\$250M	\$75,000
≥\$250M; <\$750M	\$150,000
≥\$750M	\$300,000

- 45 day review plus 45 day investigation

Short form declaration

■ Pros

- 30 day review
- No filing fee
- Abbreviated data collections and form
 - No PII

■ Cons

- May not result in safe harbor
 - Clearance
 - No action
 - Require full notice

No filing (or no closing condition)

■ Pros

- No delay to closing

■ Cons

- CFIUS has authority to review transaction after closing, even years later
- Changes in business or geopolitical environment may create future risk to business

Examples

- Acquisition of controlling interest in a US business with following technology:
 - Case 1: 3A991 microprocessor technology
 - Case 2: 3A001 microprocessor technology
- Acquisition of less than 10% interest in the same business with following rights:
 - Case 1: no rights – purely an investment
 - Case 2: board seat or other access rights
- Investment in non-US business with US subsidiary
- US business with non-US ownership leases office space near its government customer in the US
- Sale of non-US business (with US sub) to new owner in the same country
- Reorganization of non-US ownership
- Forming JV company with US partner

Comparison of FDI Reviews: Key Elements

United States

- Review controlling and non-controlling investments in US
- Mandatory filing if US business has certain export controlled technology
- CFIUS can initiate its own review, even years after closing if no safe harbor
- Up to 90 day review
- Significant filing fees
- Transaction can be blocked or divested; or CFIUS can impose terms on parties as condition of clearance

EU

- No direct authority to approve or reject proposed investments -- member states retain decision-making power (15 of 27 have national security reviews)
- Coordination role -- Member States required to notify the European Commission and other Member States of ongoing FDI reviews
- Mandatory filing requirement varies by country
- Process and timeline vary by country

China

- Covers all types of investment (including greenfield) and many sectors without clear definitions
- Review controlling interest, except for defense sector
- Up to 105 working days review
- Transaction can be blocked or be imposed conditions to closing
- The rules were recently amended and expanded; Very few cases in the past

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CFIUS

Committee on Foreign Investment in the U.S.

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Upcoming/New CFIUS Filing: Affiliates of Wafra Inc. and Colony Capital, Inc.

By [Trade Practitioner](#) on July 15, 2020

Status: Upcoming/New Filing Acquirer: Affiliates of Wafra Inc. (US) Acquired: Colony Capital, Inc. (US) Value: US\$215 million Industry: Network and Data Solutions...

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Upcoming/New CFIUS Filing: Empower Retirement, Great- West Lifeco, Power Corp. of Canada and Personal Capital Corporation

By [Trade Practitioner](#) on June 29, 2020

Status: Upcoming/New Filing Acquirer: Empower Retirement, LLC (US); Great-West Lifeco Inc. (Canada); Power Corporation of Canada (Canada) Acquired: Personal Capital Corporation (US) Value: US\$825 million Industry: Financial Services Empower Retirement, LLC, a US subsidiary of Great-West Lifeco Inc., a publicly traded Canadian financial services holding company (TSX:GWO) that is majority owned by the publicly traded ...

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Talk to the Experts: Multi-country M&A Is Getting More Complex: Evolving FDI Regimes Across the UK, France, Germany, Italy and the US

By [Trade Practitioner](#) on February 25, 2021

POSTED IN EU, EVENTS, FRANCE, GERMANY, NATIONAL SECURITY - FOREIGN INVESTMENT SCREENING, UNITED KINGDOM, US

International M&A practitioners are used to dealing with CFIUS for any transaction involving assets in the US. The Europeans M&A practitioners are, however, catching up, and many multijurisdictional deals will now face clearance in a number of countries. The latest addition to the list, the UK National Security and Investment Bill, is broad in scope and potentially far-reaching in coverage. Deals now potentially face multiple levels of scrutiny, each with its own scope, trigger criteria, potential remedies, etc., and the scrutiny is likely to be more subjective and less predictable than practitioners are used to with merger clearance.

To help navigate this complex landscape, we invite you to a discussion on the different regimes in place over key jurisdictions.

When: March 18, 2021, 2 – 3 p.m. GMT



About George N. Grammas

- George Grammas is a partner in the global law practice of Squire Patton Boggs
 - Chair firm's International Trade Practice, focusing on trade compliance and national security matters across our global network in more than 20 countries and 40 plus offices.
 - Chair emeritus of the Aerospace, Defense & Government Services Industry Group
 - Served as advisor to various trade associations
 - Served as industry advisor to the U.S. Department of State, Bureau of Politico-Military Affairs
- He spends 100% of his time representing clients in
 - Committee on Foreign Investment in the United States (CFIUS) clearance,
 - Export controls, sanctions, anticorruption, and other US and global international trade regulatory, compliance and national security matters
- With over 30 years of practice,
 - He was involved in some of the earliest CFIUS clearances in the early 1990s under the Exon-Florio Amendment that established the current CFIUS process
 - He has deep national security policy and regulatory expertise to guide companies through the recent development of controls on emerging and foundational technologies, as well as to advise on the impact of the expanded CFIUS authority under the Foreign Investment Risk Review Modernization Act's (FIRRMA)
 - He is also a well-regarded as a leading expert and frequent speaker and commentator on US export control regulations (e.g., the ITAR, EAR)