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M&A INSIGHT SERIES

NAVIGATING COMPLEXITY FOR
TECH GENERAL COUNSELS

UNDERSTANDING CFIUS AND RECENT
REGULATIONS

AGENDA

1. CFIUS Introduction
2. Key Definitions
3. Mandatory and Voluntary Filings
4. Timeline for Reviews
5. Recent Developments
6. CFIUS M&A
7. Key Tech Issue Areas



01

CFIUS INTRODUCTION

CFIUS - INTRODUCTION

- CFIUS is an interagency committee chaired by the Secretary of the Treasury that is authorized to review certain transactions involving foreign investment in the United States to determine the effect of such transactions on the national security of the United States.
- CFIUS can recommend that the President block or unwind a transaction for national security concerns.
- CFIUS can also impose requirements on a transaction to mitigate any national security risks (e.g., a US-citizen board, a CFIUS-approved US-citizen security officer, or the sale of sensitive assets).
- CFIUS is a confidential process on the part of the government, though annual reports with aggregate data are released.

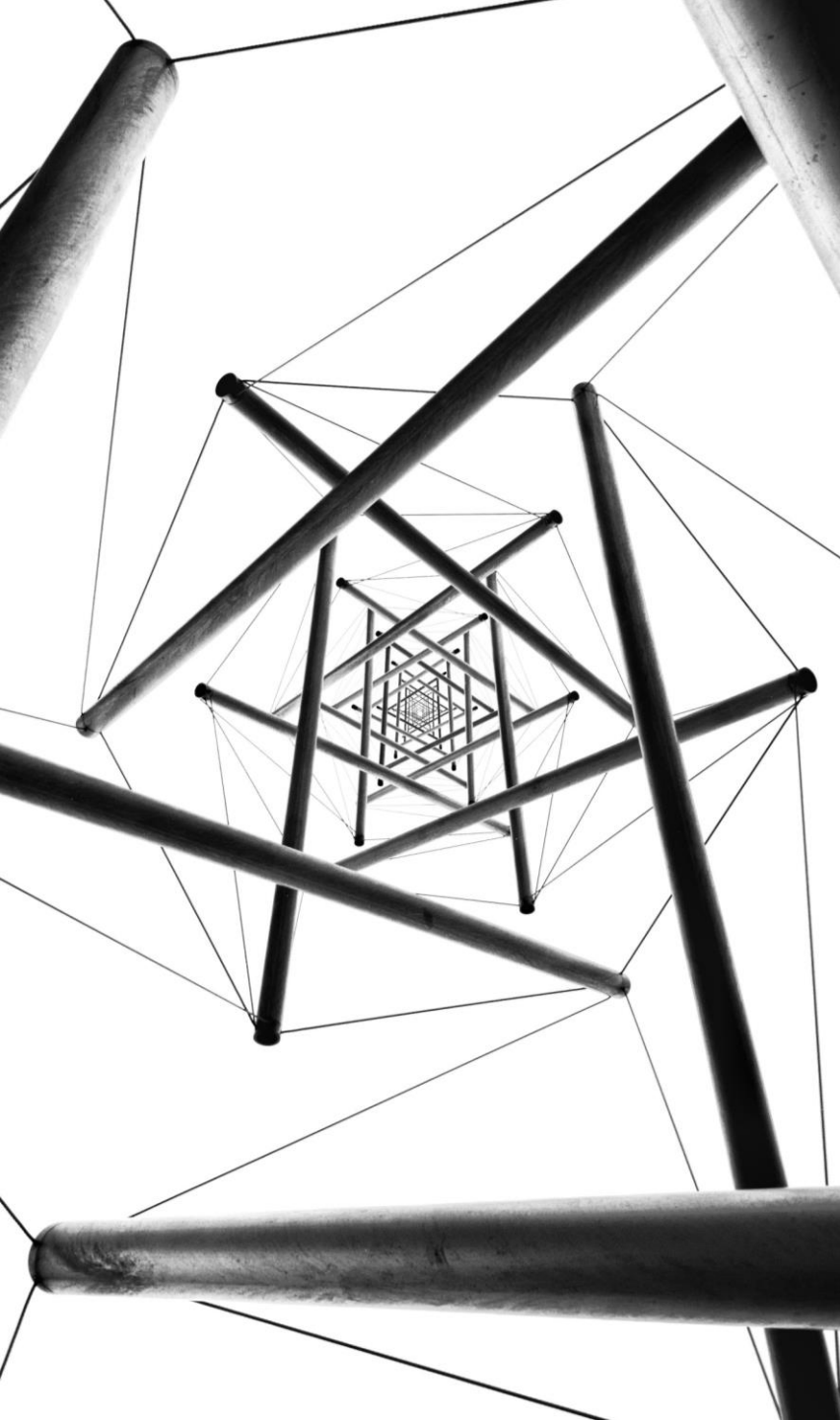
CFIUS - INTRODUCTION

- CFIUS has jurisdiction over three types of investments:
 - “Covered control transactions,” - transactions “by or with any foreign person which could result in foreign control of any U.S. business” (i.e., the traditional scope of CFIUS jurisdiction);
 - “Covered investments,” - small, non-controlling investments by foreign persons:
 - in sensitive “TID U.S. businesses,” (which deal in Critical **T**echnology, Covered Investment Critical **I**nfrastucture or Sensitive Personal **D**ata), and
 - in which a foreign person gains a board or observer seat, access to material nonpublic technical information (non-financial), or involvement in substantive decision-making other than voting its shares with respect to the U.S. business at issue; and
 - “Covered real estate transactions” - in which the real estate at issue is located in proximity to specified ports and specified sensitive government and military installations.



02

KEY DEFINITIONS



CFIUS – KEY DEFINITIONS

- “Control” is broadly defined to include:
 - the power to determine, direct, or decide important matters affecting an entity through any means, including:
 - ownership of a majority of the total outstanding voting interests, proxy voting, contractual arrangements, or arrangements to act in concert; and
 - minority interests that confer a significant ability to affect important matters related to the U.S. business (could be as low as 15% by voting share plus a board seat).
- “Critical Technologies” include:
 - Items controlled for export under the Export Administration Regulations (EAR) for reasons of National Security, Chemical/Biological Weapons Proliferation, Regional Stability, Surreptitious Listening, as well as other reasons.
 - Items controlled for export under International Traffic in Arms Regulations (ITAR).
 - Nuclear-related items.
 - “Emerging and foundational technologies.”



CFIUS – KEY DEFINITIONS

- “Sensitive Personal Data” includes identifiable data in the following categories:
 - Financial data that could be used to analyze or determine an individual’s financial distress or hardship;
 - The set of data in a consumer report;
 - The set of data in an application for health insurance, long-term care insurance, professional liability insurance, mortgage insurance, or life insurance;
 - Data relating to the physical, mental, or psychological health condition of an individual;
 - Non-public electronic communications, including email, messaging, or chat communications, between or among users of a U.S. business’s products or services if a primary purpose of such product or service is to facilitate third-party user communications;
 - Geolocation data collected using positioning systems, cell phone towers, or WiFi access points such as via a mobile application, vehicle GPS, other onboard mapping tool, or wearable electronic device;
 - Biometric enrollment data including facial, voice, retina/iris, and palm/fingerprint templates;
 - Data stored and processed for generating a state or federal government identification card;
 - Data concerning U.S. Government personnel security clearance status;
 - The set of data in an application for a U.S. Government personnel security clearance or an application for employment in a position of public trust; or
 - The results of an individual’s genetic tests.
- Threshold: maintain or collect such data on one million or more individuals, or have a designated business objective to do so (except for genetic information).

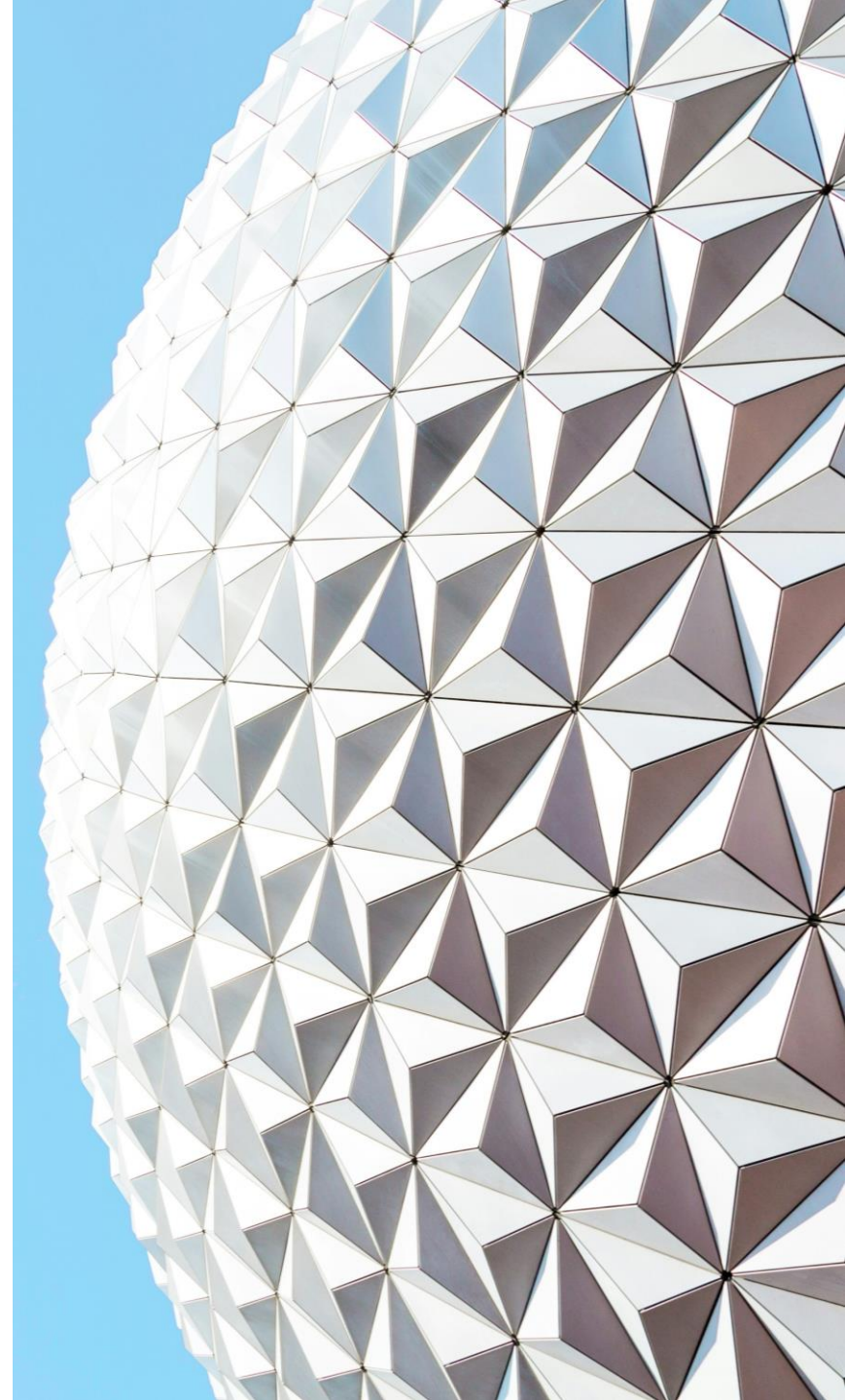


03

MANDATORY AND VOLUNTARY FILINGS

CFIUS – MANDATORY FILINGS

- Filings are mandatory in two circumstances:
 - The acquisition of a “substantial interest” (a voting interest, direct or indirect, of 25 percent) in a TID U.S. business by a foreign person in which a foreign government has a “substantial interest” (a voting interest, direct or indirect of 49 percent); for determining indirect interests, parents (50% or more) are deemed to have 100%.
 - Covered Investments and Covered Control Transactions involving TID U.S. businesses that:
 - (1) produce, design, test, manufacture, fabricate, or develop “critical technologies”, and
 - (2) a “U.S. regulatory authorization” would be required to export, re-export, transfer (in-country) or retransfer the technologies to certain foreign persons involved in the transaction.



CFIUS – VOLUNTARY FILINGS

- Otherwise, CFIUS is a voluntary process - either or both parties to a prospective transaction may notify CFIUS and initiate a review.
- However, the only way to receive a legal guarantee that CFIUS will not force a divestment or mitigation terms on a transaction is to file.
- Parties receive two types of a legal “safe harbor:”
 - If CFIUS clears the transaction and effectively approves it (which could include the negotiation of a mitigation agreement); or
 - If CFIUS determines that the transaction is not subject to its jurisdiction.
- For all transactions, either a short-form “Declaration” or a long-form “Notice” may be used.
 - When reviewing both Declarations and Notices, CFIUS may ask questions of the parties – which must respond quickly (2 business days for Declarations, 3 for Notices).





04

TIMELINE FOR REVIEWS



CFIUS – TIMELINE FOR REVIEWS

- Declarations: Once accepted by CFIUS, CFIUS must respond within 30 days. Possible responses:
 - Request a Notice from the parties (the acceptance of which would begin a 45-day review process) or unilaterally take action to review the transaction;
 - Conclude action with respect to the transaction by indicating to the parties that there are no unresolved national security concerns; or
 - Take no action with respect to the transaction, meaning that CFIUS is not able to complete action on the basis of the Declaration and that the parties may file a Notice if they wish to receive affirmative approval from CFIUS.
 - Note: this does not provide a legal safe harbor but indicates as a practical matter that CFIUS does not have concerns.
- Notice: Once accepted by CFIUS, 45-day review process begins.
 - At end of review period, CFIUS may approve the transaction or begin an investigation period.
 - Investigation: if CFIUS determines a more thorough examination is warranted, or needs more time, it will undertake an additional 45-day investigation period.

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05

RECENT DEVELOPMENTS

RECENT DEVELOPMENTS:

- Executive Order 14083: Codifies recent expansions of CFIUS focus, including critical supply chains, AI, biotech, aggregate investment trends, cybersecurity risks, and sensitive personal data
- Federal and State Proposals to Scrutinize Real Estate Acquisitions:
 - Addition of 8 additional US military facilities; follows scuttled property acquisition near Grand Forks Air Force Base.
- Enforcement/Penalty Guidelines
- Penalty enhancements
- Mitigation negotiation response times

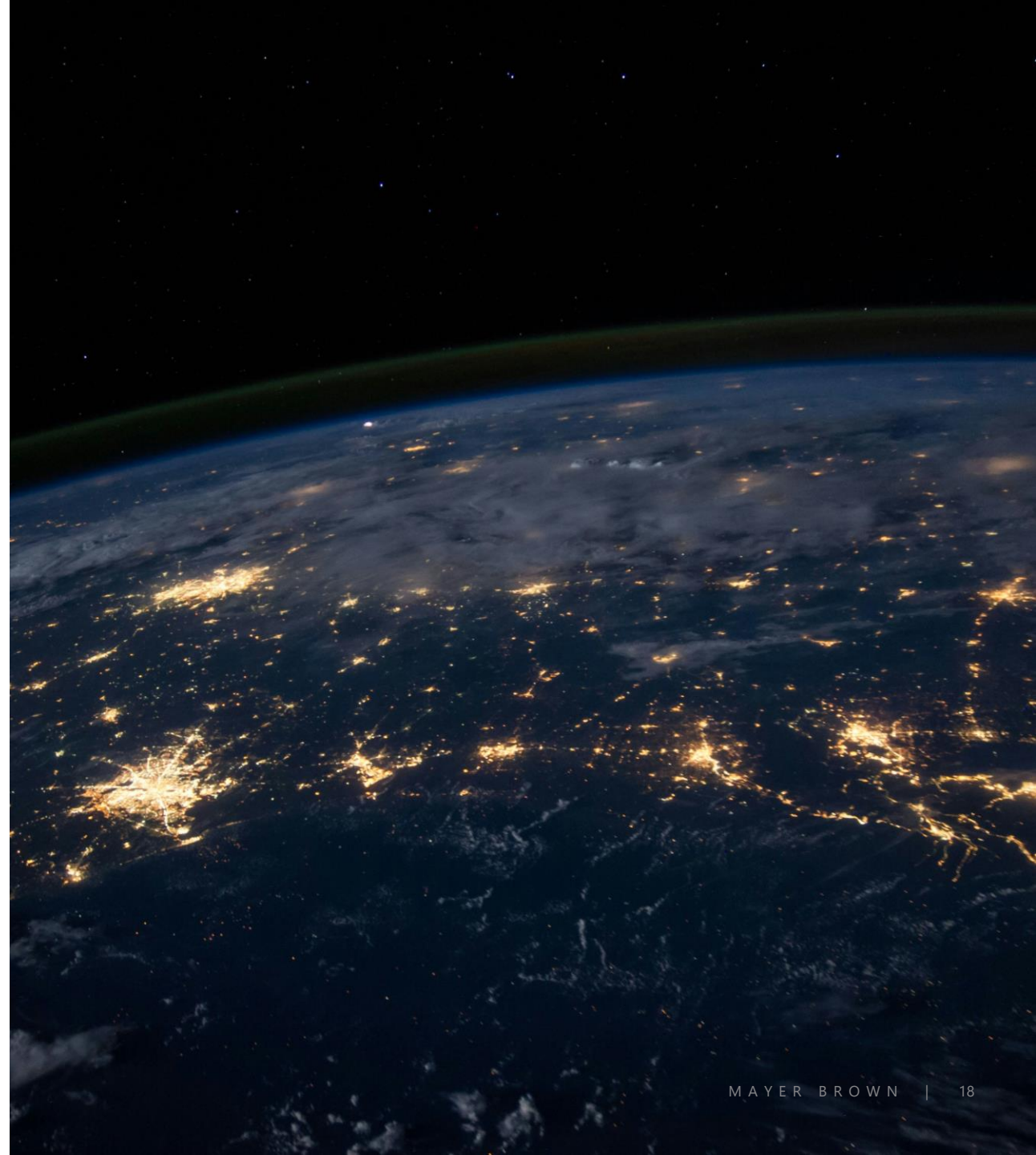


06

CFIUS M&A

CFIUS M&A

- Covenants
 - Required Efforts / Mitigation
 - Notice vs. Declaration
 - What to do if “yellow light”
- Closing Condition
- Termination Fee
- JVs





07

KEY TECH ISSUE AREAS



KEY TECH ISSUE AREAS

- Software and SaaS:
 - Certain encryption capabilities may be critical technologies, meaning a mandatory filing may be required.
 - Even the target is not a TID U.S. business, CFIUS is keenly focused on software threat vectors to critical infrastructures such as energy generation facilities.
 - Use of CFIUS as a tool to address perceived vulnerabilities can result in mitigation, especially involving:
 - Controlled access to software, systems, and code.
 - Pre-approval of code developers.
 - Restricted locations for code development.



KEY TECH ISSUE AREAS

- Personal Data:
 - Area of intense focus for CFIUS.
 - Concerns about any access to underlying personal data, even if not the primary focus of the U.S. business.
 - Potential mitigation to address:
 - Access to data.
 - Where data is stored.
 - Pre-approval of cybersecurity and other policies to secure such data.



KEY TECH ISSUE AREAS

- AI and Other Emerging Technologies:
 - AI, machine learning, and similar technologies are of intense focus for CFIUS, even if a filing for a transaction involving such technologies is not mandatory.
 - CFIUS has a team of investigators to examine non-notified transactions and this team focuses in particular on emerging technologies.
 - Potential mitigation to address:
 - Restrictions on access to information about the technology and its operation.
 - Where technology is held/stored.
 - Auditing/monitoring to address concerns of technology transfer.

QUESTIONS?



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Nina Flax represents some of the largest companies in the US and the world in their high-stakes, strategic technology M&A transactions – mergers, equity and asset acquisitions, Section 363 transactions, and domestic and international joint ventures and consortiums. Nina also counsels clients regarding transformational commercial transactions in the technology industry, including intellectual property licenses, co-development agreements, application integration agreements and alliance agreements.

"Nina is an exceptional attorney who provides sound legal counsel through complex and dynamic negotiations. She is creative, detail-oriented and has a gift for quickly synthesizing multiple business concepts into legal guidance."

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Tim Keeler joined Mayer Brown after a varied career in the US Government, serving at the Office of the US Trade Representative (USTR), the US Treasury Department (which chairs CFIUS), and the US Senate Finance Committee. He advises clients on all aspects of CFIUS work, including: assessing whether prospective transactions raise national security issues; advising whether a transaction is subject to mandatory filing pursuant to CFIUS regulations; and advising on how to structure transactions to mitigate national security concerns while achieving business objectives.

"As a former Chief of Staff to the US Trade Representative . . . Tim Keeler has a deep understanding of how the Administration and Capitol Hill work together to advance and develop US trade policy."

"He understands the law and has really good instincts with how things will be handled by CFIUS."

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Mickey has significant experience before the Committee on Foreign Investment in the United States (CFIUS) and has advised on hundreds of transactions involving companies ranging from multinational Fortune 500 corporations to small startups. He counsels clients on all aspects of the CFIUS process—from analyzing transactions to determine if a CFIUS filing is required or recommended, to drafting CFIUS filings, responding to questions from CFIUS, and negotiating and implementing mitigation agreements.

Mickey also advises a variety of clients in the private, nonprofit, and government sectors on a number of political law, campaign finance, and lobbying compliance issues, especially with respect to the Lobbying Disclosure Act, the Foreign Agents Registration Act, and political action committees.

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