

U.S. PRESIDENT TRUMP USES CFIUS TO BAR CHINESE-BACKED FIRM FROM ACQUIRING U.S. MICROCHIP MAKER

On September 13, 2017, President Trump issued an Order barring Chinese-backed private equity firm Canyon Bridge from purchasing U.S.-based Lattice Semiconductor Corp., a microchip maker. In blocking the transaction, the Order stated that the purchase potentially could "impair the national security of the United States." This Order effectively upheld a decision of the Committee on Foreign Investment in the United States ("CFIUS"), the U.S. government Committee which examines and evaluates transactions for potential national security threats. The underlying CFIUS decision as well as the President's Order again signaled to China as well as the business community that the Trump Administration will continue to closely scrutinize takeover deals – especially those involving China -- that involve technologies with perceived national security implications and military applications. This action serves as a reminder that transactional parties, early on in the process, should identify, assess and devise a practical strategy for managing the risks of a CFIUS review.

CFIUS AND THE NEW ADMINISTRATION

Chaired by the U.S. Treasury Secretary, CFIUS is the U.S. inter-agency committee (that includes representatives from the U.S. Departments of Commerce, Homeland Security, Justice, Energy and State). The Committee is tasked with reviewing transactions in which a foreign entity (or person) could take control over a U.S. business and which could threaten U.S. national security. If the Committee identifies national security risks during its review, the parties to the transaction can seek to impose mitigation terms to limit such risks. Here, Canyon Bridge and Lattice engaged in an 8-month campaign to close the deal. Lattice set forth a series of mitigation proposals intended to satisfy any national security concerns, but ultimately were unsuccessful in persuading either the Committee or ultimately the President. Immediately following the President's Order, Lattice and the Canyon Bridge terminated the proposed deal.

The Lattice case is not an outlier. Since the new Administration took office, there has been an increase in CFIUS' workload. To date, there have been nearly 100 announced acquisitions of U.S. companies by Chinese firms so far in 2017. CFIUS is on pace to review well over 200 transactions, which would be an all-time record. And, many of the deals CFIUS has blocked or about which the Committee has raised concerns have not been announced publicly; rather, the applications were withdrawn and the applications cancelled.

LEGISLATIVE EFFORTS AND WHAT THAT SIGNALS

In addition, members of the U.S. Senate have announced their intentions to take additional steps to reform the laws governing CFIUS in order to further other countries from gaining access to potential military technology. The last significant legislative changes to CFIUS occurred over a decade ago, when the Foreign Investment and National Security Act of 2007 ("FINSA") revised the governing regulations. In June of this past year, U.S. Senator John Cornyn announced his plan to introduce legislation ("the Cornyn Bill") aimed at revising and reforming CFIUS. In announcing his intentions to revamp CFIUS, Senator Cornyn specifically expressed his concerns that China was affirmatively using investment strategy to gain control over critical technologies with potential military applications. Pointing to artificial intelligence, semiconductors, robotics and other cutting-edge technology, Senator Cornyn indicated his intent to shore up "gaps" in CFIUS to prevent exploitation of U.S. technologies. While specific language has not been proposed, some of the changes he identified as potential fixes include tightening loopholes that allow for technology transfers (such as the licensing of intellectual property) in the absence of an acquisition of a controlling interest; enhancing review of real estate acquisitions beyond the existing scrutiny; and increased evaluation of overseas joint ventures.

KEY TAKEAWAYS

The Lattice deal, the escalating spike in CFIUS reviews and the potential Cornyn legislation are strong reminders that the Trump Administration continues to closely scrutinize any and all transactions that could pose a perceived risk to U.S. national security interests. For entities – either as acquirers or sellers – seeking to close such a transaction, it is vital that they identify any national security risks early on in the process, err on the side of conducting due diligence on any such risks, and devise early on a mitigation strategy to manage the risks posed by CFIUS review. Certain industries will garner even closer scrutiny by the Committee, including defense, aerospace, telecommunications and energy. Entities also should adopt a sophisticated approach in submitting notice to the Committee, examining political and economic risks, and navigating the CFIUS process. Identifying and establishing effective mitigation elements will be essential to any successful deal.

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