Revamping Foreign Investment in the United States from a National Security Perspective

September 22, 2020
7:30 p.m. – 8:30 p.m.

CT Bar Association
Webinar

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LAWYERS’ PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client’s transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party’s opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;
- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

**Competency:**

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client’s interests is critical to the lawyer’s function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

**Responsibility:**

I recognize that my client’s interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client’s decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.
Mentoring:
I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:
I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer’s conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.
Revamping Foreign Investment in the United States from a National Security Perspective (SIS200922)

Speaker
Paul B. Edelberg, Fox Rothschild LLP, New York, NY

Agenda
1. FIRMA (50 minutes)
2. Q&A (10 min)
For over four decades, Paul’s practice has focused on corporate and commercial law for privately owned businesses, with an emphasis on general business counseling, commercial finance, mergers and acquisitions, private equity and venture capital and international trade and cross-border transactions. His multifaceted practice enables him to serve the domestic and international needs of a wide range of clients, particularly those with interests in China.

Paul has counseled clients on business structuring and outsourcing transactions in China, international trade and finance matters, acquisitions by and of Chinese companies and Committee on Foreign Investment in the United States (CFIUS) compliance.

Paul also counsels both U.S. companies doing business overseas and foreign companies — particularly Chinese companies — doing business in the United States, in matters involving:

- International private equity and venture capital transactions
- Cross-border structuring
- International debt and equity financing transactions
- Trade and trade finance
- Sales distribution agreements
- Joint ventures
- CFIUS compliance
- Foreign Corrupt Practice Act (FCPA) compliance
- EB-5 Regional Centers

Most recently, Paul was part of a Fox Rothschild team that represented Chinese company Humanwell Pharmaceutical in its $650 million acquisition of U.S.-based Epic Pharmaceutical.

In his banking practice, Paul regularly represents lenders in commercial loan transactions and workouts, and has extensive experience representing banks on various types of regulatory matters, including compliance and consumer lending issues. He has represented a number of banks in responding to supervisory orders issued by the federal and state bank regulatory agencies, including the OCC and the FDIC, and has represented bank directors in civil money penalty proceedings. Paul also handles de novo bank formations, bank acquisitions and change of control transactions.
As a trusted advisor to corporations, businesses and banks, Paul handles complex mergers and acquisitions and financing transactions for privately held companies and community banks, including venture capital and private equity transactions, private placements, commercial and corporate finance transactions and other debt and equity financings. Paul's extensive knowledge of angel financings, venture capital, private equity, strategic investments and private placements has made him a key player in the Stamford business community.

Paul is active in the American Bar Association's International Law Section, in which he currently serves as the Asia Pacific Division Chair, a Deputy to the President of the Section, and a member of its governing District Council. He is the immediate past Co-Chair of the Section's Central/East Asia & China Committee. Paul is also Immediate Past President of the Connecticut China Council. He is actively involved in China civic activities in New York and Connecticut and has lectured and written on various China legal topics.

Before Fox Rothschild

Prior to joining the firm, Paul was counsel to a New-England based regional firm, where he headed its China practice, and was a member of its Privately Owned Business, Private Equity, Community Banking and International Practice Groups.

During law school, Paul was an editor of the Connecticut Law Review.

Beyond Fox Rothschild

Paul is recognized within the State of Connecticut and the City of Stamford for both his professional and community activities, and has taken a leadership role in China and international activities on a local and statewide basis. He serves as Division Chair and as a District Council Member to the American Bar Association’s Section of International Law, and has written and lectured extensively in the U.S., China and other countries on China and international legal and business topics.

In addition, Paul spearheaded the establishment of the UConn Center for Globalization and Commerce and the Stamford Chamber International Trade Resource Program (SITREP). He has also guest lectured at the Western Connecticut State University, at the University of Connecticut and at the University of New Haven on China. Finally, he gave an educational presentation to the Shandong (China) Bar Association on representing clients on international mergers and acquisitions.

Honors & Awards

- Recipient of the Chairman's Award from the Stamford Chamber of Commerce (2007)
- Recipient of the President's Award from the Stamford Chamber of Commerce (2005)

Practice Areas

- Corporate
• Financial Services Industry
• International
• International Trade
• Mergers & Acquisitions
• Public Companies
• Emerging Companies & Venture Capital
• EB-5 Immigrant Investor Services
• China

Bar Admissions

• Connecticut
• New York

Education

• University of Connecticut School of Law (J.D., with honors, 1976)
• Wesleyan University (B.A., 1972)

Memberships

• American Bar Association, International Law Section (Asia Pacific Division Chair, Deputy to the President and District Council Member)
• American Bar Association, Business Law Section
• Connecticut Bar Association (Former Chair, Financial Institutions Section)
• Connecticut Bar Association (Business Law Section)
• Connecticut District Export Council (Appointed by U.S. Commerce Secretary Gary Locke)
• Connecticut China Council
• Fairfield County Bar Association
• Stamford Chamber of Commerce (Founder and Former Chairman, International Trade Council)
• U.S.-China Center Advisory Board of the Connecticut Board of Regents

Board of Directors

• Connecticut China Council (Immediate Past President)
• Stamford Chamber of Commerce (Former Chairman)
International Law Section of the Connecticut Bar Association

Revamping Foreign Investment in the U.S. from a National Security Perspective: The FIRRMA Amendments to CFIUS

Paul B. Edelberg, Esq.
Partner, Fox Rothschild LLP
September 22, 2020
CFIUS

- The Committee on Foreign Investment in the United States (the “Committee”)
- Provides a process for filing a notice of a direct or indirect foreign controlling acquisition of and (post-FIRRMA) minority investments in a U.S. business to determine if the transaction threatens the national security of the United States
  - Numerous factors, but primarily national security effects on critical infrastructure and critical technologies
- Voluntary filing, but the Committee is authorized to impose fines and unwind a transaction if it later determines that a non-filed transaction threatened national security.
- If the Committee determines it threatens national security, it will recommend that the President block the transaction or enter into mitigation agreements.
- Otherwise, the Committee will officially decline to take action.
- Committee is composed of the heads (or deputy heads) of nine government agencies, plus two *ex-officio* non-voting members
Dollar Volume of FDI Transactions in the U.S.

Source: Bureau of Economic Analysis, U.S. Department of Commerce
Number of CFIUS Transactions by Year

Source: US Department of Treasury
Recent Filing Trends (2019 Annual Report to Congress)

• Number of 2019 Filings
  – 231, which represents a continuing increase over the last 3 years (over 200).
    • 113 resulted in investigations – significant drop in percentage from two prior years (approx. 70%)
  – Sectors – 44% in manufacturing, and 39% in finance, information and services.
    • China – 10.8% in 2019, compared to 24% in 2018 and 25.3% in 2017.
    • Japan – 19.9% in 2019, compared to 13.5% in 2018 and 8.4% in 2017.
    • Canada – 9.9% in 2019, compared to 12.6% in 2018 and 9.2% in 2017.
    • China led in recent years (despite 2017 drop-off) until 2018, when Japan took over the lead.
Recent Filing Trends (2019 Annual Report to Congress)

• Withdrawals
  – None during review phase in 2019, compared to 2 in 2018 and 4 in 2017.
  – 30 during investigation phase in 2019, compared to 64 in 2018 and 70 in 2017.
  – Reasons for reduced number of withdrawals:
    • FIRRMA provided more clarity
    • Declaration process and extended review phase
    • Chinese investment has declined
Recent Filing Trends (2019 Annual Report to Congress)

• 2019 Mitigation Measures:
  – prohibiting or limiting the transfer or sharing of certain intellectual property;
  – establishing guidelines and terms for handling existing or future USG contracts, USG customer information, and other sensitive information;
  – limiting access to certain technology or customer information;
  – establishing a Corporate Security Committee and other mechanisms to ensure compliance
  – notifying customers regarding the change of ownership;
  – controls over certain business decisions;
  – exclusion of certain sensitive assets from the transaction;
  – ensuring that only authorized vendors supply certain products or services;
  – prior notification to and approval by relevant USG parties in connection with any increase in ownership or rights; and
  – divestiture of all or part of the U.S. business.
FIRRMA

- Foreign Investment Risk Review Modernization Act
  - Signed by President Trump on 8/13/18
- Expands coverage to a new group of transactions
- Establishes process for identifying and controlling export of “emerging and foundational technologies”
- Makes significant procedural and filing modifications
- Strengthens the Committee’s authority in other important aspects.
FIRRMA Regulations

- Initial set of CFIUS regulations in October of 2018 – mostly procedural
- Critical technology pilot program regulations – November of 2018
- Final regulations – issued January 13, 2020, effective February 13, 2020
- FIRRMA became effective in full on February 13, 2020.
- Proposed Rule published May 21, 2020
- Department of Commerce regulations on “emerging and foundational technologies” – not yet issued, with one exception.
Scope of Post-FIRRMA CFIUS

• Applies to:
  – Control acquisitions ("covered control transactions")
    • Includes contractual arrangements that effect control.
  – Minority non-passive investments ("covered investments")
  – Ownership, leases and "concessions" of certain real estate
  – Changes in a foreign investor’s rights in a “United States Business”
  – Mergers and acquisitions carried out through joint ventures
  – Schemes to evade CFIUS

• The above, other than real estate transactions” is termed “covered transactions”
Covered Transactions and Covered Investments

• “Covered Control Transaction”
  – Could result in foreign control of any U.S. business, including through a joint venture.
  – Exception for 10% passive foreign investment in acquirer

• “Covered Investment”
  – Any direct or indirect investment in an unaffiliated “TID U.S. business”
    • Excludes covered control transactions
    • Is a “non-passive investment”
  – TID U.S. Business – Any U.S. business that:
    • Produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies;
    • Performs the functions as set forth in Column 2 of appendix A to part 800 with respect to covered investment critical infrastructure; or
    • Maintains or collects, directly or indirectly, sensitive personal data of U.S. citizens.
Non-Passive Investment

• Affords the foreign person either:
  – Access to “material nonpublic technical information” of the TID U.S. Business, or
  – Board or equivalent membership or observer rights of the TID U.S. Business or the right to nominate such a person; or
    • Narrow carve-out for fund investments
  – Any involvement, other than through voting of shares, in substantial decision-making of the TID U.S. business regarding critical technologies, critical infrastructure or sensitive personal data of U.S. citizens maintained by the U.S. business.
Investment Fund Carve-Out

• Narrow carve-out for board/observer participation for investment funds under Non-Passivity Test:
  – Must meet following criteria:
    • Fund is managed by a U.S. general partner
    • If foreign person is on advisory board or committee of the fund, board/committee does not have the ability to control investment decisions
    • Foreign person does not otherwise have the power to control the fund, and
    • Foreign person does not have access to material nonpublic technical information as a result of its participation (if any) on the advisory board or committee of the fund
  – Seat on the advisory board or committee of the U.S. business does not qualify for this exemption
National Security Test

• National Security Test:
  – “critical infrastructure”;
  – “critical technology”; or
  – “sensitive personal data”
    • Added by FIRRMA
Critical Infrastructure

• Covered control transactions:
  – “Systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.” 31 C.F.R. §800.214.
  • For TID U.S. businesses, limited to infrastructure that performs the functions set forth in Appendix A to 31 C.F.R. Part 800.
Sensitive Personal Data

– Sensitive personal data – *identifiable* data that is certain genetic information or is maintained by a U.S. business that:

  • Targets or tailors products or services to certain U.S. government departments and agencies or the U.S. military,
  
  • Has maintained data on greater than 1,000,000 individuals during the last 12 months, or
  
  • Aims to maintain data on greater than 1,000,000 individuals as an integral part of its primary products or services.

– Must be data that is used re an individual’s financial distress, a consumer report, health or other personal insurance, physical, mental or psychological health, a provider of third-party electronic communications (e.g., email), geolocational data, biometric enrollment data, processed for generating government ID cards or government personnel security clearance or position of public trust.
Critical Technologies

• Prior to FIRRMA:
  – Defense articles and services – United States Munitions List under ITAR
  – Commerce Control List items in the EAR
  – Nuclear facilities, equipment, parts, components, materials, software and technology
  – Select statutorily defined agents and toxins

• Added by FIRRMA:
  – “Emerging and foundational technologies”
Emerging and Foundational Technologies

• Waiting on U.S. Department of Commerce regulations for definition.
  – US DOC authorized under the Export Control Reform Act (ECRA), a companion Act to FIRRMA
  – Only licensing requirement to date - software specially designed to automate the analysis of geospatial imagery
  – Critical technology pilot program

• ECRA
  – Export licensing requirements
  – Restricts greenfield investments, US-based joint ventures, collaborations
U.S. Real Estate Ownership, Leases and “Concessions”

• Meets any of the following criteria (“covered real estate”):
  – Is located within or will function as part of maritime ports or airports or
  – Is either:
    • In “close proximity” to sensitive government military or other facilities,
    • Reasonably allows eavesdropping or the collection of intelligence from such facility, or
    • Could expose national security activities at such facility, and

• Concession – U.S. public entity grants a right to use real estate for the purpose of developing or operating infrastructure for a covered port.
Maritime Ports and Airports

• Covered port:
  – “large hub” per Federal Aviation Administration (FAA)
  – Airport with annual aggregate all-cargo landed weight greater than 1.24B pounds per FAA
  – “joint use airport” per FAA
  – Commercial strategic seaport within the National Port Readiness Network per DOT’s Maritime Administration
  – Any top 25 tonnage, container, or dry bulk port per DOT’s Bureau of Transportation Statistics

• Connecticut – Bradley Airport exceeded 1.24B pounds landed weight in 2019.
Military and Government Facilities

• “Close proximity” to a military installation - one mile from the boundary line, which for certain listed military installations is extended to 100 miles from the boundary line.

• “Military Installation” includes certain of the following sites identified in Appendix A to 31 C.F.R. Part 802:
  – Air Force bases, radar sites, missile sites and training sites,
  – Army bases, ammunition plants and training centers
  – Defense Dept. offices
  – Radar sites in certain states
  – Range and test facilities
  – Marine Corps bases and air stations
  – Military ranges, bases and air stations owned by the Navy or Air Force in certain states
  – Naval surface, air, and undersea warfare centers and research labs; and
  – Navy off-shore range complexes and operating areas

• None in Connecticut.
Covered Real Estate Property Rights

• Must have at least 3 of the following property rights to trigger a covered real estate transaction:
  – Right or ability to physically access the real property
  – Right or ability to exclude others from physical access
  – Right or ability to improve or develop the real estate
  – Right or ability to attach fixed or immovable structures
Excepted Real Estate Transactions

– Excepted Investor
– Within an urbanized area or urban cluster, as defined
– Single housing unit
– Foreign air carrier within a covered port with which a security program has been accepted by the Dept. of Homeland Security
– Lease or concession within a covered port for the retail sale of consumer goods or services to the public
– Leases in commercial spaces within covered real estate that do not exceed 10% of total square footage and do not represent more than 10% of total tenants in the commercial space
– Real estate owned or held by certain native Alaskan and native American Indians
Excepted Foreign Investors

• Excepted Investor - a foreign person who is:
  – A foreign national of an excepted foreign state;
  – A foreign government of an excepted foreign state; or
  – A foreign entity that is organized and has its principal place of business in an excepted foreign state or the U.S., and is mostly owned by excepted investors or U.S. nationals.

• Excepted foreign state – a foreign state for which the Committee has made a determination of excepted foreign state status.
  – Currently only Canada, Australia, United Kingdom and Northern Ireland.

• If excepted investor, do not have to file for a covered investment or for a covered real estate transaction. Not exempt from filing for covered control transactions; i.e., CFIUS maintains jurisdiction.
Standards for Review

• Risk-based analysis of the effects on national security
  – Threat - a function of the intent and capability of a foreign person to take action to impair the national security of the United States
  – Vulnerabilities - the extent to which the nature of the U.S. business presents susceptibility to impairment of national security
  – Consequences to national security - the potential effects on national security that could reasonably result from the exploitation of the vulnerabilities by the threat actor
Types of Filings

• Notice Filing
  – Filing fee

• Declaration (added by FIRMA) – a short form declaration filing with abbreviated information for expedited determination
  – No filing fee unless converted to a notice filing.

• Voluntary process (with exceptions) – weigh benefits of safe harbor vs. cost and delay

• Applicant may file voluntarily.
  – Declaration vs. notice filing

• The Committee can require a filing.
Mandatory Declarations

• Mandatory declaration filings required if:
  – “Substantial interest” transactions
  – Certain critical technology transactions

• Proposed Rule published May 21, 2020 proposes revisions to the mandatory declaration rules.
Mandatory Declarations - Substantial Interest Transactions

• Direct or indirect acquisition of a substantial interest in an “unaffiliated” United States business by a foreign person in which a foreign government has a direct or indirect substantial interest
  – A prerequisite is that the business is a TID U.S. business

• “Substantial interest”:  
  – 25% direct or indirect voting interest by a foreign person in a U.S. Business, and  
  – 49% direct or indirect voting interest by a foreign government in a foreign person
Mandatory Declarations - Certain Critical Technology Transactions

• Prior to effectiveness of Proposed Rule, required for a covered transaction involving a TID US Business that produces, designs, tests, manufactures, fabricates or develops a critical technology in a prescribed technology.
  – Prescribed technology - based on specified NAICS Codes

• Proposed Rule – replaces NAICS Codes with Dept. of Commerce licensing requirements, effective once rule becomes final.
  – “U.S. Regulatory Authorization”:
    • Dept of State under ITAR licenses and approvals
    • Dept. of Commerce license under the EAR
    • Dept. of Energy specific or general authorizations for assistance to foreign atomic energy activities
    • Nuclear Regulatory Commission specific licenses for export or import of nuclear equipment and material
Mandatory Declarations - Exceptions

• Exceptions:
  – Investment Fund Carve-Out for qualifying funds controlled by a U.S. GP in which the foreign person has a purely passive role;
  – A covered control transaction by an excepted investor
  – A covered transaction subject to a security control agreement, special security agreement or the like pursuant to the National Industrial Security Program;
  – A covered control transaction involving an air carrier; and
  – After the Proposed Rule takes effect, a covered transaction that requires a U.S. regulatory authorization and satisfies certain limited license exceptions.
Timing for Reviews and Investigations

• Reviews:
  – Declarations -30 days
  – Notices - 45 days after completed notice or initiation of unilateral review by the Committee.

• Investigations:
  – 45 days after investigation commences
  – Committee has authority to extend for one 15-day period under “extraordinary circumstances”
    • Due to a force majeure event or for national security protection

• In practice, process can take 90-120 days.
• If contingency in Acquisition Agreement, must allow for these extended time periods.
  – Avoidance of paying reverse break-up fee.
Recent Adverse CFIUS Actions

• Canyon Bridge Capital proposed acquisition of Lattice (2017)
  – $1.3B transaction
  – Semiconductor chipmaker
  – Lack of transparency re ownership
  – Blocked

• Ant Financial Group proposed acquisition of MoneyGram (2018)
  – Ant Financial – Alibaba affiliate
  – Money forwarding business
  – $1.2B transaction
  – Sensitive personal data
  – Notice withdrawn
Recent Adverse CFIUS Actions (cont.)

• HNA Group proposed acquisition of SkyBridge Capital (2018)
  – Anthony Scaramucci’s financial services firm
  – Withdrawn

• Broadcom Limited proposed $121B acquisition of Qualcomm Incorporated (2018)
  – Singapore-based company with Chinese investment
  – Telecommunications industry (5G technology)
  – Blocked
Recent Adverse CFIUS Actions (cont.)

• Ekso Bionics Holdings JV with Zhejiang Youchuang Venture Capital Investment Co. (2020)
  – Ekso Bionics is a U.S. company in the business of developing exoskeleton technology
  – JV based in China to develop the technology
  – Chinese partner made $5M stock purchase in Ekso Bionics
  – Ekso Bionics had US government contract
  – Termination of Ekso Bionics’ role with the JV ordered.
  – Basis of CFIUS’ action and jurisdiction unclear.
Recent Adverse CFIUS Actions (cont.)

- Beijing Kunlun Tech Co. Ltd. add-on acquisition of Grindr LLC (2019)
  - Grindr originally acquired in 2016
  - Add-on transaction closed in Jan. 2018
  - Dating app company
  - Sensitive personal data
  - Divestiture ordered

- iCarbonX acquisition of PatientsLikeMe (2019)
  - Transaction closed in 2017
  - Online health app company
  - Sensitive personal data
  - Divestiture of majority stake ordered.
Recent Adverse CFIUS Actions (cont.)

• Increased resources going towards identifying non-filed transactions.
• Committee more willing to order full divestiture.
• Chinese-related transactions are subject to greater scrutiny and are more difficult to clear.
• Sensitive personal data is being used expansively as a critical technology tool.
• The *Ekso Bionics* order appears to demonstrate a more expansive use of CFIUS.
This presentation is for informational and educational purposes only and should not be construed as legal advice.