

## CFIUS: President Blocks Lattice Semiconductor Corporation Acquisition; Senate Holds Hearing on Possible CFIUS Reforms

September 19, 2017

Last week saw two significant developments for the Committee on Foreign Investment in the United States (“**CFIUS**”). First, on Wednesday, September 13, acting on the recommendation of CFIUS, President Trump prohibited the acquisition of Lattice Semiconductor Corporation (“**Lattice**”) by Canyon Bridge Capital Partners under Section 721 of the Defense Production Act, as amended by the Foreign Investment and National Security Act of 2007. This order marks only the fourth instance of a formal presidential prohibition in CFIUS’s history, although it is the second such action in the last twelve months. Second, on Thursday, September 14, the Senate Committee on Banking, Housing, and Urban Affairs held an open hearing entitled “Examining the Committee on Foreign Investment in the United States,” focusing on flaws in, and potential reform of, CFIUS and its underlying legal authority.

### Lattice Transaction

President Trump’s order prohibited the acquisition of Lattice by Canyon Bridge Capital Partners, a private equity firm backed by Chinese state-owned investors. The President acted on the recommendation of CFIUS, which, after an extensive review, had concluded that the acquisition posed a risk to the national security of the United States that could not be resolved through mitigation. According to a statement from the Department of the Treasury, the national security risk posed by the transaction concerned, among other things, “the potential transfer of intellectual property to the foreign acquirer, the Chinese government’s role in supporting this transaction, the importance of semiconductor supply chain integrity to the U.S. government, and the use of Lattice products by the U.S. government.”

Lattice Chief Executive Officer Darin Billerbeck reportedly stated that the parties to the transaction had offered to “give the U.S. government control over Lattice’s intellectual property and technology” in order to get the deal approved. He further contended that prohibiting the transaction would actually “heighten national-security risks,” as the U.S. government would lose its ability to control the technology and Lattice “could pursue joint-venture and licensing deals abroad that are outside” of CFIUS’s jurisdiction.<sup>1</sup>

The failed transaction is one of several recent proposed acquisitions by Chinese investors that has collapsed at least in part because of pressure from CFIUS. Since 2015, at least three other attempted Chinese investments into semiconductor producers with a U.S. presence have failed for CFIUS-related reasons, including Tsinghua Unisplendour’s proposed minority investment in Western Digital, Sanan Optoelectronics’s attempt to acquire GCS, and Fujian Grand Chip’s proposed acquisition of the Germany-based Aixtron. Two other deals just this year involving Chinese acquirers—HNA’s investment in Global Eagle Entertainment and T.C.L. Industries’ proposed acquisition of Novatel Wireless—have also fallen apart after CFIUS expressed its opposition.<sup>2</sup> Both Western Digital and GCS formed joint ventures with the Chinese firms as an alternative, as CFIUS currently has no authority to review such transactions so long

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<sup>1</sup> Kate O’Keeffe, *Trump Blocks China-Backed Fund from Buying Lattice Semiconductor*, WALL ST. J., Sept. 14, 2017.

<sup>2</sup> It is overwhelmingly likely that other, less public, transactions have also been abandoned or fundamentally changed in the face of CFIUS opposition.

as they do not result in control by a foreign person over an existing U.S. business. As noted below, however, joint ventures involving non-U.S. parties are among the topics of concern to those in Congress seeking to amend CFIUS's statutory authority and the scope of its reviews.

### **Senate Committee on Banking, Housing, and Urban Affairs Hearing on CFIUS**

Last week's Senate hearing featured testimony of three private sector representatives with experience on foreign policy, international commerce, and national security matters: Clay Lowery, Managing Director of Rock Creek Global Advisors, and former Assistant Secretary for International Affairs at the U.S. Department of the Treasury; Kevin J. Wolf, Partner at Akin Gump and former Assistant Secretary for Export Administration at the U.S. Department of Commerce; and James Lewis, Senior Vice President at the Center for Strategic and International Studies.

Legislative reform of CFIUS has received increasing attention recently. In particular, Senator John Cornyn (R-TX), the Senate Majority Whip, stated in June that he intends to introduce legislation aimed at, among other things, expanding the Committee's jurisdiction to cover transactions that transfer controlled technology to foreign persons, including joint ventures and licensing arrangements, even if the transaction does not result in non-U.S. control of a U.S. business. Other legislators have already introduced bills proposing more or less sweeping changes in the CFIUS process or the Committee's jurisdiction.<sup>3</sup> Accordingly, the scope of CFIUS's authority was a central focus of the testimony last week, although no specific bill was on the agenda.

All three witnesses stressed in written statements that Congress should carefully consider ways to control access to sensitive technology other than by expanding CFIUS's authority, particularly through export controls that provide a more flexible and targeted means of preventing such technology transfers. The witnesses recognized the commercial consequences of a more expansive CFIUS review regime, with Mr. Wolf noting in particular that "even a small expansion in the scope of CFIUS's review authority" could have a chilling effect on foreign investment. Similarly, the witnesses counseled against using CFIUS to implement certain economic or political objectives by, for example, imposing "net benefit" or "reciprocity" tests on foreign investment.<sup>4</sup>

As noted above, members of Congress have indicated that they regard overseas joint ventures with access to U.S. technology as potentially threatening national security. Lewis's testimony suggested that technology transfers could better be addressed through export controls, but he also opined that "greenfield" investments, which are currently beyond CFIUS's jurisdiction because they do not represent the acquisition of an existing U.S. business, pose a more difficult balance between security and innovation.

All three witnesses supported some changes to the CFIUS regime, noting, among other issues, the importance of ensuring that CFIUS has adequate resources to implement its mandate. CFIUS is facing an increasing burden (both in number and substantive complexity of cases) even under its existing jurisdiction, causing unprecedented delays in resolving even fairly routine cases unrelated to China. Although CFIUS has not published any official statistics since its annual report covering calendar 2014, generally reliable, if informal, sources suggest that, as of September 1, CFIUS was about to open its

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<sup>3</sup> See, e.g., Foreign Investment and Economic Security Act of 2017, H.R. 2932, 115th Cong. (2017); Food Security is National Security Act of 2017, S. 616, 115th Cong. (2017).

<sup>4</sup> *Examining the Committee on Foreign Investment in the United States: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 115th Cong. (2017) (statement of James A. Lewis, Senior Vice President, Center for Strategic and International Studies) ([link](#)); (statement of Clay Lowery, Managing Director of Rock Creek Global Advisors) ([link](#)); (statement of Kevin J. Wolf, Partner at Akin Gump Strauss Hauer & Feld LLP) ([link](#)).

175th case for calendar 2017, which matches the total number of cases filed in 2016 (also based on informal sources), itself a record. CFIUS appears to be on pace to exceed 245 filings in 2017. As noted, many of the recent cases have been more complex than in the past, adding to the burdens on the Committee staff. Expanding CFIUS's mandate without a commensurate increase in its resources, particularly personnel, seems overwhelmingly likely to impose additional delays, including on cases not posing any significant threat to U.S. national security.

With increased congressional concern over Chinese government-funded investments to acquire and control critical technologies and know-how, and concomitant concern over investors' ability intentionally to evade CFIUS's reach through selected investment structures, it seems reasonably likely that some CFIUS reform legislation could be enacted by this Congress, although probably not before the end of calendar 2017. As debate proceeds, one can hope that any legislation continues to recognize that welcoming direct foreign investment and closely reviewing selected instances of such investment both contribute to U.S. national security.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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