

# Navigating the Impact of CFIUS

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Presented by

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**TITLE TENETS** Webinar Series

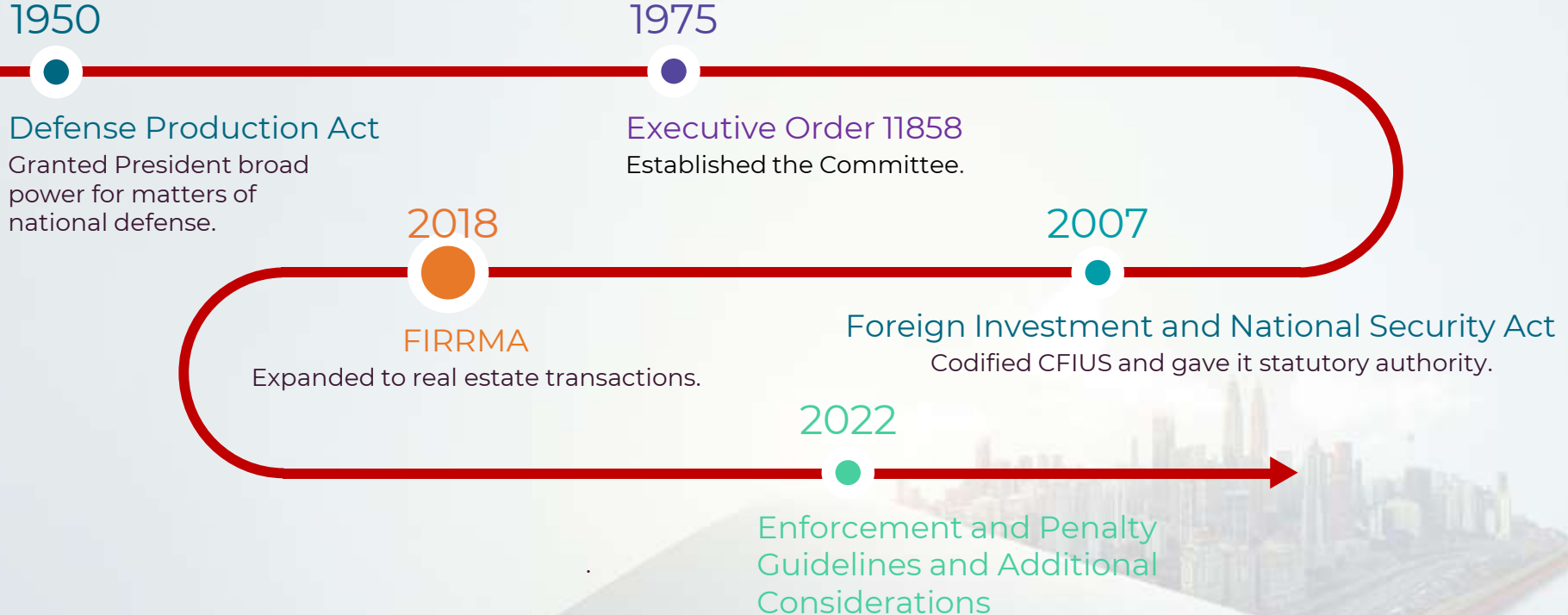
# What is CFIUS?

Committee on Foreign Investment in the United States:

- Advises the President on how foreign investment in the US could affect national security
- President can block, impose mitigation measures, or require modification of a transaction to satisfy national security concerns.



# History of CFIUS



# Who is CFIUS?

Current Members are Heads of the Following Departments:

- Treasury (Chair)
- Justice
- Homeland Security
- Commerce
- Defense
- State
- Energy

US Trade Representative and Director of the Office of Science and Technology Policy.

Director of National Intelligence and Secretary of Labor are non-voting members.



# Transactions Subject to CFIUS Review:

Transactions involving investment in an asset or entity by a foreign person that could affect national security.

“National Security” is broadly construed and can include potential

- Loss of people
- Loss of production
- Exposure of data

that could have an impact on national security.

**“Foreign Person” includes any foreign national, government, or entity, or an entity over which control is exercised or exercisable by a foreign national, government, or entity.**

# Real Estate Transactions Subject to CFIUS Review:

## Foreign Investment Risk Review Modernization Act of 2018

Expanded Reach of CFIUS to transactions involving the purchase, lease, or concession of US real property that is located within:

- or functions as a part of certain ports or airports identified by the DOT
- One mile from identified US military installations or other US government facilities



# Real Estate Transactions Subject to CFIUS Review:



- 100 miles from identified US military training centers, ranges, and testing centers
- the county or an identified geographic area near active US Air Force ballistic missile fields
- Any part of the US Navy off-shore ranges or operating areas within the limits of the US territorial sea

# Real Estate Transactions Subject to CFIUS Review:

Transaction must also give a foreign person at least 3 of the following property rights to be subject to CFIUS review:

- Physical Access
- Ability to exclude others
- Right to improve or develop the property
- Right to attach fixed or immovable structures to the property

**Review can occur at any time a foreign person acquires at least 3 of the enumerated rights.**



# Specific Transactions Excluded from CFIUS Review:

- Urban area or urban cluster
- Single family housing
- Commercial office space in a multi-unit building
- No more than 10% of total square footage of building or 10% of the tenants
- Retail space
- Air carriers
- Tribal land

# CFIUS PROCESS

## DECLARATION

- Abbreviated process
- Can limit CIFIUS from initiating its own review
- Voluntary, usually

## PRESIDENTIAL REVIEW

- CFIUS may refer transaction to President for decision
- President may block or unwind a referred transaction



## NOTICE

- Longer review period
- Mandatory
- Review may result in a CFIUS investigation

## SAFE HARBOR

- CFIUS or the President decides not to exercise authority
- Allows transaction to proceed

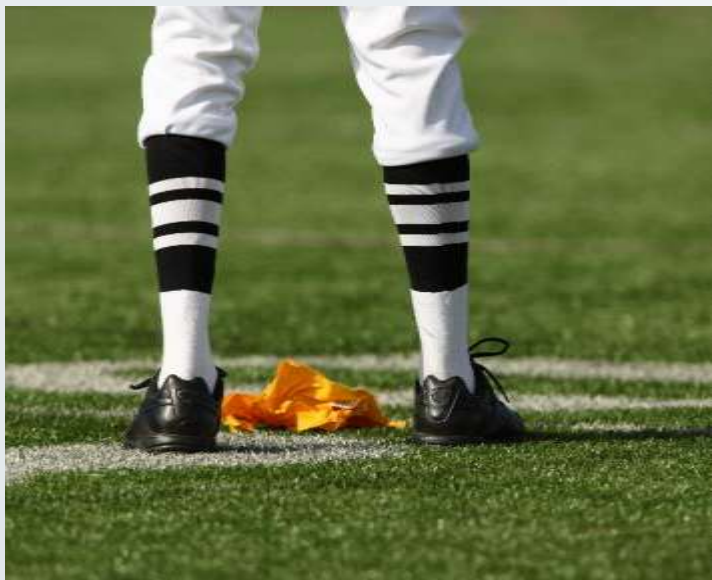
# New Additional Considerations

- Resilience of Critical Supply chains
- Leadership of US in technology in areas affecting national security
- Industry Investment Trends
- Cybersecurity Risks
- Risks to sensitive data of United States citizens
  - i.e. TikTok

# New Enforcement and Penalty Guidelines

## Types of Activity that may constitute a violation include:

- Failure to timely notify CFIUS if the transaction requires filing
- Conduct that is prohibited by mitigation requirements
- Failure to comply with mitigation requirements
- Material misstatements or omissions in filings
- False or incomplete certifications in filings



# Penalty Factors

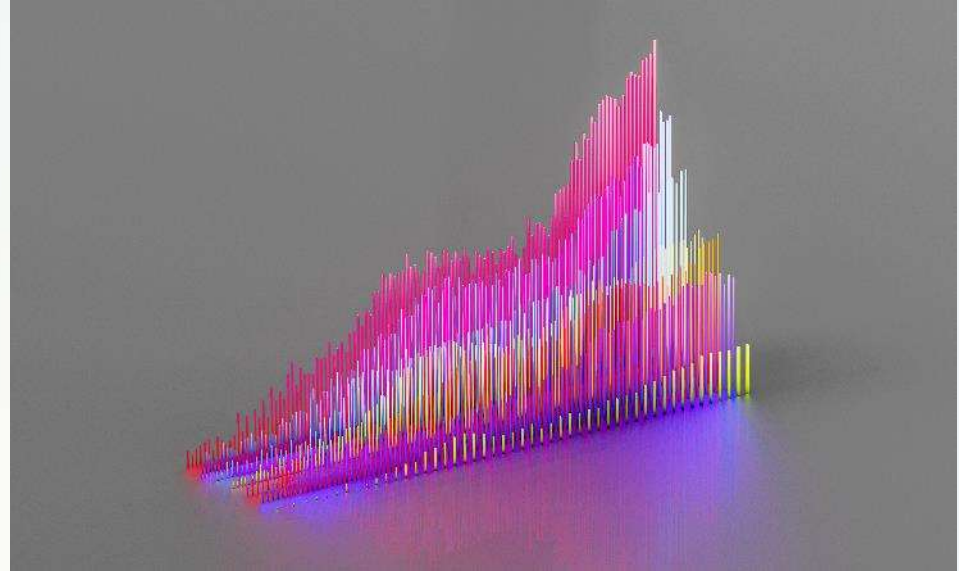
- Accountability
- Future compliance
- Extent of harm
- Negligence
- Awareness
- Intent
- Frequency and duration of conduct
- Length of time to notify CFIUS
- Response
- Remediation steps
- Sophistication of party
- History of CFIUS compliance

# Trends

In the last decade, we have seen increases in:

- Filings with CFIUS - Declarations up 30% from 2019 to 2020
- Withdrawal of transactions
- Presidential blocking or unwinding of transactions
- Scrutiny of investments in or acquisitions of companies associated with critical technology, sensitive data, and semiconductors

Trends are difficult to predict because of changes in policies with different Administrations.



# Strategies for dealing with CFIUS

## PLAN AHEAD

Review list of sensitive sites and industries to determine if your transaction falls within CFIUS scrutiny.

## KNOW THE PARTIES

Consider limiting foreign investors to those from Excepted Foreign States.

## WHEN IN DOUBT, FILE

Consider filing a voluntary Declaration or Notice for CFIUS review and determination regarding the proposed transaction.

# State Action

Several states are considering legislation to limit the acquisition of certain real property by certain foreign parties, for example:

- Texas
- Florida
- Indiana
- California





# Thank You

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