

# Alerts & Publications

## Key Contacts

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## US Still Open for Business — But Planning Required

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### *Key Takeaways from CFIUS Rejection of the Lattice Semiconductor Acquisition*

On September 13, 2017, US President Donald Trump signed an order prohibiting a consortium of investment funds led by Canyon Bridge Capital Partners from acquiring Lattice Semiconductor Corporation. Lattice is a US-based Nasdaq-listed manufacturer of high-performance programmable logic. Canyon Bridge is also US-based, but its funding is China-based. On the basis of national security concerns, President Trump acted on the recommendation of the Committee on Foreign Investment in the United States (CFIUS), which cited “the importance of semiconductor supply chain integrity to the US government and the use of Lattice products by the US government.”

### Background

President Trump’s action was not unexpected in the United States. During the Obama administration, CFIUS scrutiny of M&A activity involving semiconductor and other advanced technology companies noticeably increased, particularly following a spike in the number of proposed transactions by Chinese buyers and the adoption of China’s Made in China 2025 policy, with the stated goal of indigenizing key sectors of China’s economy to become “the world’s major science and technology power.” Many observers attribute increased tech industry activity by Chinese buyers to this policy and the accompanying Chinese government financial backing for these investments. At the same time, complaints intensified about unfair limitations and requirements on access to China’s



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tech markets by non-Chinese companies, including forced technology transfers as a cost of entering the market, widespread and unfair subsidies to domestic Chinese companies, and discriminatory anti-monopoly enforcement. President Trump recently requested a trade investigation of such actions, with a goal of protecting US intellectual property and technology.

The US Congress and other stakeholders have identified industries where the US should maintain enhanced CFIUS scrutiny, including robotics, artificial intelligence, automation, and semiconductors—particularly where semiconductors are used in sensitive sectors such as the military, aviation, and critical infrastructure.

### Key Takeaways

The outcome of the Lattice case does not mark a decisive change in US investment policy or CFIUS practice and successful acquisitions are still possible. The Lattice action is consistent with CFIUS investigative and analytical trends that have evolved over the past two years in response to new market considerations and deepening US concerns about the implications for US national security of a perceived loss of critical industry-wide technological leadership and productive capacity. Accordingly, non-US investments in any segment of the semiconductor industry (or in any advanced technology company) merits caution and planning. Lattice demonstrates once again that foreign investors must assess the CFIUS environment as carefully as they evaluate the business merits of a potential deal. Key considerations include:

#### ■ ***Sensitive Technologies***

News reports and President Trump's decision indicate that Lattice's products and technologies had been and were being used in specific military applications. This is a traditional factor in CFIUS assessments of national security threats. The company disputed the potential "dual-use" capabilities of its products, and there may well have been deeper issues beyond past products sales.

CFIUS is increasingly concerned about foreign acquisition of "fundamental" technologies that are critical building blocks for future innovations having important economic and military applications. There is no definitive list of such sensitive technologies, and sensitivity may not be evident at first glance: A company may be at a very early stage of development, its technology may not be controlled for export, and the US government may not have shown interest in supporting development of the technology. Or, a technology may be relatively old and widely available, suggesting little reason for concern.

Going forward, however, investors and targets both must examine a target's technology especially carefully through a new "whole ecosystem" lens that accounts for the potential role of the technology to US competitiveness, not just to discrete defense applications. Such

foundational technologies certainly include advanced semiconductor process technologies and tools, robotics, artificial intelligence, autonomous vehicles, augmented/virtual reality, and blockchain.

#### ■ ***Enhanced Scrutiny of Ownership and Funding Sources***

As evidenced by Lattice and other recent high-profile transactions, CFIUS is digging deeply into questions of ultimate ownership and control of foreign investors, and how a transaction is being funded. Potential acquirers must be prepared to disclose comprehensive details about their ultimate owners, limited partners in investment vehicles, and funding sources. In the Lattice case, CFIUS evidently was not persuaded that the presence of a US-domiciled private equity fund managed by US nationals was sufficient to shield the fund's portfolio companies from the control and influence of the fund's primary (or sole) investor, Hong Kong-incorporated Yitai Capital Limited. Yitai's parent company is China Venture Capital Fund Corporation Limited, a Chinese corporation owned by Chinese state-owned entities.

#### ■ ***Sensitive Information***

Lattice apparently did not acquire and maintain databases of individual personal identifier information, but potential acquisition of such databases is another emerging area of particular CFIUS scrutiny. Such database concerns may arise in transactions involving any company that interfaces with consumers, health care companies, insurers and others where acquisition of advanced technologies is not an issue. The recent Equifax security breach will only heighten CFIUS sensitivity to this issue.

#### ■ ***Prolonged Process***

In addition to the heightened CFIUS concerns with advanced technology and other sensitive transactions, the CFIUS caseload reportedly has increased about 50% from the same stage a year ago. At the same time, the new Trump Administration has taken office but many senior positions in the CFIUS agencies remain unfilled. One clear result of these developments is that CFIUS is taking much longer to initiate and to complete its work. The Lattice case is but one example of a transaction that has cycled through two or three consecutive investigation periods before concluding. Chinese investors should assume that the CFIUS process could take six months or more to complete from the date a deal is signed.

Despite the tough new environment and the rejection of the Lattice transaction, importantly, Trump Administration officials and key members of Congress have reaffirmed the long-standing US policy of welcoming foreign investment, and so far have rejected calls that CFIUS examine non-national security factors in its investigations, such as reciprocal treatment in the investor's home country and the balance of public benefits from the investment. CFIUS will continue to review proposed transactions on a case-by-case basis, although that evaluation will increasingly take into account how the target fits within a broader ecosystem of related businesses. Chinese and other foreign investments in non-sensitive industries should

proceed in the normal course.

A key to successful acquisition proposals will be the presentation of persuasive mitigation plans where CFIUS identifies national security concerns. Just as CFIUS investigations are becoming more complex, parties need to consider new, creative measures to address the issues that emerge.

The US M&A market thus remains “open for business,” and investors should not be deterred by the Lattice case from pursuing carefully planned acquisitions.

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