

TRUMP BLOCKS CHINESE ACQUISITION OF LATTICE SEMICONDUCTOR ON CFIUS GROUNDS

September 14, 2017

- I. Executive Summary: On September 13, 2017, President Trump blocked the acquisition by a Chinese state-backed investor of Lattice Semiconductor Corp. on CFIUS grounds, in only the fourth such refusal of a foreign investment in 27 years. The refusal of the deal, coupled with several other that have been withdrawn voluntarily in the face of CFIUS opposition, portends what the new administration promised: an increasingly hostile environment to foreign investment by countries perceived as not abiding by free trade rules and not being cooperative strategic partners, with China in particular in the cross-hairs.

- II. Background: The Exon-Florio amendment to the 1988 Omnibus Trade Bill (“Exon-Florio”), as amended by the Foreign Investment and National Security Act of 2007, is the most important law affecting foreign investment in the United States. Exon-Florio authorizes the President of the United States to review on national security grounds mergers, acquisitions, and takeovers of U.S. businesses by non-U.S. persons. The investigation is mandatory when the acquirer is “an entity controlled by or acting on behalf of a foreign government” and when the acquisition could “affect” U.S. national security. This definition can apply to many non-U.S. companies, including ones not majority state-owned, but in which the non-U.S. government retains a minority “golden share,” signifying control equivalent to majority status or veto rights. Conversely, Exon-Florio implicates even minority investments when effective control of the target is gained.

Exon-Florio review is conducted under delegated executive authority by an inter-agency panel, the Committee on Foreign Investment in the United States (“CFIUS”). CFIUS members include the Secretaries of the Treasury (who chairs the Committee), State, Defense, Homeland Security, Energy and Commerce, and the Attorney-General. Pre-closing notification to CFIUS of a potentially implicated transaction is voluntary but encouraged. CFIUS may also initiate review on its own motion of a transaction before or after closing. Upon receipt of notice of a transaction, CFIUS has 30 days to decide whether to conduct an Exon-Florio review. If CFIUS decides to review the transaction, it then has 45 days to review and render a decision. The President then has 15 days to review and approve the CFIUS decision. Information submitted during the review process is confidential. Executive authority under Exon-Florio may be exercised only if the President finds that: (i) there is credible evidence that the non-U.S. entity “might take action that threatens to impair the national security;” and (ii) other statutory authorities, including the International Emergency Economic Powers Act, do not provide adequate protection for national security.

Upon such findings, the President may prohibit or suspend a proposed transaction, or order divestiture of a completed one. No judicial review is permitted. Because transactions not reported to CFIUS may be subsequently reviewed at any time and the divestiture sanction imposed, without the possibility of judicial

review, voluntary Exon-Florio reporting in the early stages of a transaction that would grant control to a non-U.S. person and that may implicate security concerns is sound practice.

III. The Lattice Refusal: President Trump blocked the \$1.3 billion acquisition of Portland, Oregon-based Lattice Semiconductor Corp. by a private equity firm, Canyon Bridge Capital Partners LLC, that is financed by a Chinese state-owned entity. Lattice makes programmable semiconductor logic chips, which can be programmed and reprogrammed with software. The chips are therefore highly versatile, and have both civil and military applications. Over two-thirds of Lattice's sales are in Asia.

IV. Take-aways: Generally, a transaction not approved by CFIUS is voluntarily withdrawn, but on three prior times since 1990, the transaction went to the President, who blocked it. Lattice Semiconductor is the fourth, and the President's refusal only came after Lattice itself appealed to Trump after three unsuccessful reviews by CFIUS, arguing that the deal would save U.S. jobs. However, at least three other transactions this year, since President Trump took office, have been withdrawn in the face of adverse CFIUS action. President Trump's expressed hostility to Chinese trade practices and disappointment with perceived lack of Chinese support in confronting North Korea's nuclear program clearly played a role in the decision, and may be expected to influence future foreign investment decisions, especially involving China, going forward. Parties should pre-prepare their CFIUS arguments before going too far down the road.

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