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CFIUS Extends Its Reach to Order the Termination of Ekso Bionics' Role in Joint Venture in China

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On May 20, 2020, Ekso Bionics Holdings, Inc. ("Ekso Bionics"), a U.S. manufacturer of robotic mechanical suits ("exoskeletons"), announced that it had received an ultimatum from the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") to terminate its role in a 2019 joint venture with Chinese partners. CFIUS's action is remarkable in a number of respects. First, it once again underscores CFIUS's recent focus on transactions not reported to the Committee prior to closing (so-called "non-notified transactions"). Second, it illustrates the Committee's willingness to order the unwinding of arrangements that could result in the transfer of critical technology or infrastructure to China. Third, the action arises in the context of the formation of a *non-U.S. joint venture*, suggesting that CFIUS is willing to apply its jurisdiction well beyond the circumstances of foreign investment in the U.S. economy.

According to Ekso Bionics' public filings, CFIUS's order to unwind the joint venture comes at the end of a process in which multiple U.S. agencies raised concerns about the transaction:

January 2019 Ekso Bionics formed a joint venture with two Chinese companies—Zhejiang Youchuang Venture Capital (浙江优创)¹ and Shaoxing City Keqiao District Paradise Silicon Intelligent Robot Industrial Investment Partnership (硅谷天堂资产管理集团). The purpose of the joint venture was to develop and serve the exoskeleton market in China and other Asian markets.² Ekso Bionics, under the terms of the joint venture, would license its manufacturing technology in exchange for a 20% ownership position, with the other partners committing over \$90 million in cash.³



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According to Ekso Bionics' filings with the U.S. Securities and Exchange Commission, the U.S. Department of Defense ("DOD") inquired about certain aspects of the joint venture, including the company's "products' classification under U.S. export control regimes and whether the China JV parties intended to notify [CFIUS] of the China JV."⁴ On March 12, 2019, the company advised DOD that the activities contemplated under the JV agreement were "not covered by CFIUS's regulations, including those establishing the newly-implemented CFIUS 'Pilot Program.'"⁵ The company's filings further note that in July 2019, the Treasury Department made inquiries about the joint venture.

December 2019

Presumably in response to a request from the Committee, the joint venture partners formally submitted a joint voluntary notice to CFIUS in December 2019 regarding the transaction.⁶

February 2020

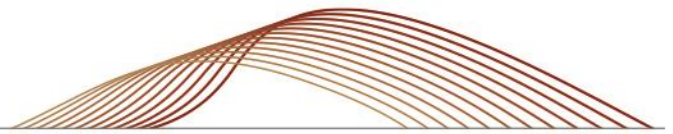
CFIUS imposed interim measures to mitigate concerns it identified pending completion of its investigation.⁷ These measures included a requirement that Ekso Bionics temporarily suspend its contributions to the joint venture and halt other integration activities of the joint venture.⁸

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Ekso Bionics announced that CFIUS notified the parties that its national security concerns regarding the JV could not be mitigated and presented Ekso Bionics and its Chinese partners with a National Security Agreement ("NSA"), which would require the termination of Ekso Bionics' role with the joint venture.⁹

CFIUS's strong response in this case was undoubtedly the result of a number of factors that may have application to future transactions:

1. ***Nexus to U.S. Defense and Military:*** Ekso Bionics has a history of working with the U.S. military on projects that involve exoskeletons. Even though Ekso Bionics has shifted its product focus to the medical field, it was previously involved in several projects to build exoskeletons for combat use. Protecting U.S. technology with military applications from transfer to nations with strategic interests in competition with those of the United States has historically been a core focus for CFIUS—a focus that remains central even as the Committee expands its reach over less traditional threats such as collection of sensitive personal information.
2. ***Sensitive Technology:*** Exoskeletons have multiple applications—they can be used in the medical industry to help people with injuries achieve mobility, which is the stated objective of the joint venture. But exoskeletons can also enhance combat capabilities of soldiers by allowing them to move faster and carry heavier weapons. U.S. companies that develop export-controlled technology remain of particular interest to CFIUS and its constituent agencies, as suggested by the fact that DOD contacted the company after the joint venture



was announced to inquire into the export control classifications applicable to Ekso Bionics' technologies.

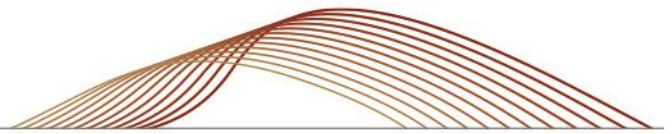
3. **U.S.-China Relations:** In addition to trade tensions, there have been recent actions against Chinese government agencies and Chinese companies that range from lawsuits filed by state attorneys general against various Chinese government agencies for COVID-19, to legislation moving through the U.S. Congress that would require the delisting of Chinese companies on U.S. stock exchanges that do not adhere to certain audit oversight standards and the U.S. Commerce Department's recent addition of 33 Chinese governmental and commercial organizations to the Entity List. Although CFIUS is charged with the discrete task of reviewing the national security implications of foreign investment in the U.S., the bilateral relationship between the U.S. and China provides a potent background against which this review authority is exercised.

It bears noting that lawyers steeped in CFIUS law could well have concluded—as Ekso Bionics indicated in its March 2019 response to DOD—that the formation of this Chinese joint venture fell outside the scope of CFIUS's jurisdiction to review transactions in which a foreign person invests in a U.S. business. Based on the parties' public releases, Ekso Bionics' contribution to the foreign joint venture consisted of know-how and a non-exclusive license to manufacture its technology in Asia, but the company did not give up any rights, much less control, of its business operations in the United States. But these factors did not, at the end of the day, dissuade CFIUS from reviewing the transaction, and they certainly did not prevent the Committee from ordering its dissolution.

Given the current geo-political climate between the United States and China, and the heightened focus being placed by the U.S. Government on transfer of sensitive technologies to China, a comprehensive and in-depth CFIUS analysis of any proposed transaction involving parties from the United States and China is paramount *before* the execution of any definitive agreement to minimize the risk of CFIUS action to unwind the deal. Such analysis is particularly important when technology and U.S. regulatory licenses are involved in the proposed transaction. In fact, the U.S. Department of the Treasury recently issued proposed rules that will revise the criteria under which parties to a foreign investment in any U.S. business that produces "critical technologies" are required to provide notice to CFIUS. Our advice regarding such development can be found at the following link: [More Clarity, More Complexity: New CFIUS Rules Put Spotlight on Mandatory Filings.](#)

Paul Hastings is at the very top of the market in terms of navigating CFIUS issues present in complex transactions, including those requiring mitigation agreements with the U.S. government. The firm most recently represented One Aviation in the clearance of its acquisition by China's Citiking, and CDH and China Grand Pharmaceutical in obtaining clearance from CFIUS for the acquisition of Sirtex Medical, a medical device company specializing in treatments for liver cancer. Paul Hastings also represented COSCO SHIPPING Holdings, which completed a \$6.3 billion acquisition of Orient Overseas Limited, including a landmark national security agreement with CFIUS. The firm has also secured several other CFIUS approvals for complex transactions, including Samsung's \$8 billion acquisition of Harman International Industries, Inc.; a clearance CJ Logistics' acquisition of warehousing, transportation and logistics assets in the United States; and the acquisition of Smithfield Foods by Shuanghui International Holdings (now WH Group).

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- ¹ Press Release, Ekso Bionics Announces \$100 Million Joint Venture to Develop the Exoskeleton Market in Asia (Jan. 30, 2019), <https://ir.eksobionics.com/press-releases/detail/654/ekso-bionics-announces-100-million-joint-venture-to-equity-joint-venture-contract-dated-january-30-2019>, https://www.sec.gov/Archives/edgar/data/1549084/000110465919056842/tm1921293d1_8k.htm.
 - ² Press Release, Ekso Bionics Announces CFIUS Determination Regarding China Joint Venture (May 20, 2020), <https://www.globenewswire.com/news-release/2020/05/20/2036681/0/en/Ekso-Bionics-Announces-CFIUS-Determination-Regarding-China-Joint-Venture.html>.
 - ³ Press Release, Ekso Bionics Announces \$100 Million Joint Venture to Develop the Exoskeleton Market in Asia (Jan. 30, 2019), <https://ir.eksobionics.com/press-releases/detail/654/ekso-bionics-announces-100-million-joint-venture-to>.
 - ⁴ EKSO BIONICS HOLDINGS INC. 10-Q (Q3 2019), Oct. 30, 2019, <https://ir.eksobionics.com/all-sec-filings/content/0001549084-19-000007/0001549084-19-000007.pdf>.
 - ⁵ *Id.*
 - ⁶ *Id.*
 - ⁷ *Id.*
 - ⁸ *Id.*
 - ⁹ Press Release, Ekso Bionics Announces CFIUS Determination Regarding China Joint Venture (May 20, 2020), <https://www.globenewswire.com/news-release/2020/05/20/2036681/0/en/Ekso-Bionics-Announces-CFIUS-Determination-Regarding-China-Joint-Venture.html>.

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