

CFIUS and Foreign Direct Investment Under President Donald Trump

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CFIUS

On January 20, 2017, presidential power will transfer from Democratic President Barack Obama to Republican President-elect Donald Trump. Presidential transitions typically increase uncertainty for parties undertaking mergers and acquisitions in the United States, particularly transactions subject to review by the Committee on Foreign Investment in the United States (CFIUS). Given the unusual campaign this year, the strong theme of “change” that appeared to capture the American electorate, the fact that investment policy was not at the forefront of the campaign, and the novelty that the President-elect has never held public office and has left no clear record of how he views foreign direct investment, the uncertainty in this particular transition is acute.

Predictions are hazardous in these circumstances. Nevertheless, there are indicators that suggest possible policy directions for the new Administration in this area. The following reflects our present assessment of the key questions and issues relating to the new Administration’s approach to foreign direct investment and CFIUS.

Will the United States Remain Open to Foreign Direct Investment?

Openness to foreign direct investment has been a pillar of U.S. trade policy for at least half a century. Every President since Carter has issued a formal statement confirming the United States’ openness to foreign direct investment.

There are reasons to believe that the incoming Administration will continue this policy. President-elect Trump has a business background and should have an innate understanding of the importance of investment to the U.S. economy. Moreover, the new Administration has described rebuilding U.S. infrastructure as an immediate priority; it is hard to conceive of how U.S. infrastructure could be refurbished without substantial investments of foreign capital.¹ The incoming Vice President, Mike Pence, is a free-trade Republican, as are the Republican leaders in Congress. Additionally, there are free-trade Republicans on Mr. Trump’s Presidential transition team.

On the other hand, Mr. Trump staked out aggressive trade positions during the campaign. He sharply criticized China in particular, vowing to bring cases in the WTO as well as in the United States, threatening to impose harsh tariffs on Chinese imports, and promising to brand China a

¹ See, e.g., U.S. Chamber of Commerce, [“From International to Interstates: Assessing the Opportunity for Chinese Investment in U.S. Infrastructure”](#) (October 2013).

currency manipulator. There are some business executives among Mr. Trump's transition team from the steel industry and other U.S. sectors that have been hit hard by offshoring and who have advocated a harder line on China in general. In addition, within Congress, there are both Republicans and Democrats who have been critical of recent Chinese acquisitions in the United States, particularly in agribusiness.

The bottom line is that we expect that the United States will remain open to foreign direct investment, while certain transactions—particularly those involving investment in industries that have been the focus of trade-related concerns with China—may receive greater political and regulatory scrutiny.

Will the Trump Administration Change the CFIUS Process?

It is too early to say whether a Trump Administration will impose any meaningful changes in the CFIUS process itself. However, we anticipate that, at the outset, the Administration will be cautious with CFIUS reviews, as it learns the process from the inside and evaluates the policy implications of the foreign direct investment landscape. The extent to which it seeks any changes may be greatly influenced by President-elect Trump's appointments to the senior executive agency positions that will be responsible for CFIUS.

The Obama White House has endeavored to avoid entanglement in CFIUS reviews and has indicated a very strong political preference to have matters resolved within the Committee in a manner that does not require overt action by the President. As a consequence, while a number of transactions encountered opposition within the Committee and ultimately were abandoned by the parties, only one formal presidential action was taken in the past eight years to block a foreign investment (with another one potentially pending at the moment).² This dynamic between the White House and the Committee has important implications for how parties manage complex or difficult CFIUS cases. Any change in the approach of the White House, including a greater willingness to wade into particular transactions or a lowered sensitivity to the political ramifications of formal presidential action, would have consequences for the management of CFIUS matters, including the calibration of whether and when to file with CFIUS, among other things.

Another important dynamic within CFIUS is the balance of power between the economic agencies and the security agencies that make up the Committee's membership. The weight collectively assigned by the agencies to countervailing economic and trade considerations, as well as to the *status quo ante*, in assessing the relative gravity of national security concerns in a particular transaction ebbs and flows over time with changes in the occupants within agencies and other inter-governmental dynamics. Over the last two decades, we have seen times of greater balance between economic and security considerations within the Committee, and other times during which the views of national security agencies largely overwhelmed those of the agencies with economic responsibilities.

² On November 18, Germany's AIXTRON SE, a leading supplier of semiconductor equipment, announced that it had been advised by CFIUS that the Committee has unresolved national security concerns with respect to the proposed acquisition of AIXTRON by Chinese-owned Grand Chip Investment GmbH. According to AIXTRON, CFIUS informed the parties that it is recommending to President Obama that the transaction be prohibited.

Accordingly, the new President's appointments to senior roles in the relevant agencies may well foreshadow the treatment of foreign direct investment for the next four years. The nominations for Secretary and Deputy Secretary of the Treasury, as Chair of CFIUS and the lead agency responsible for investment in the U.S. economy, will be most closely watched in this regard. Senior-level appointments in the other CFIUS voting member agencies—the Departments of State, Commerce, Justice, Defense, Homeland Security, and Energy, as well as the U.S. Trade Representative and the Office of Science and Technology Policy—also will be relevant. This includes not only the Cabinet and Deputy-level appointments, but also the Under Secretaries and Assistant Secretaries within the pertinent chains of authority within each agency for approval of transactions filed with CFIUS. Cabinet-level appointments almost certainly will be known before Mr. Trump is inaugurated; however, those appointees one or two tiers down from the Cabinet-level may not be known for weeks or even months after the inauguration, and ultimately may not take office until well into the second half of 2017 following the nomination and Senate confirmation process.

This delay in getting new political officials responsible for oversight of CFIUS into place, which is endemic to every new Presidential Administration, means that the CFIUS process may churn more slowly in 2017. Depending on the volume and complexity of transactions, as well as the extent to which there is any turnover at the staff level within CFIUS, there could be longer timeframes to get filings accepted, and it could be more challenging to conclude harder CFIUS cases in a single 75-day review and investigation period. These possibilities will be starker if there is a prolonged absence of experienced political leadership and attendant uncertainty for the career CFIUS staff who undertake most of the heavy lifting involved in analyzing transactions. While the Administration turnover may not impact the underlying analysis of the career officials involved in CFIUS, those officials may well encounter ambiguity or even a vacuum when they must report their conclusions and recommendations up the leadership chain within their respective agencies.

Beyond this process point, it is too early to tell whether CFIUS under a Trump Administration will reach different substantive results. The protectionist tones of aspects of the campaign would suggest more rigidity in positions and harsher outcomes. On the other hand, as noted, President Trump's entire professional life has been spent in business, focusing on transactions, which could augur a more accepting position on investment transactions in comparison to trade policy matters.

What Are the Prospects for an Amendment to the CFIUS Statute?

The CFIUS statute last was amended in 2007 in the wake of the controversy concerning the Committee's approval of the attempted 2006 Dubai Ports World transaction. During the legislative process, there were various legislative proposals to require CFIUS to consider economic factors in future CFIUS reviews, but those were successfully defeated.³ The resulting

³ To be clear, the Dubai Ports matter itself—the proposed sale of port management businesses in six major U.S. seaports by British-owned Peninsular and Oriental Steam Navigation Company to a company based in the United Arab Emirates—did not raise economic security interests; those interests arose during the subsequent legislative debate. Rather, opposition to the deal focused on the matter of foreign-government control (and control by an Arab government in particular, with the events of 9/11 still a very recent memory) of sensitive port assets. The most direct result of the Dubai Ports controversy was

modifications to the law governing CFIUS, in the form of the Foreign Investment and National Security Act of 2007 (FINSA), retained the Committee's mandate to focus strictly on national security considerations in connection with foreign acquisitions of U.S. businesses.

However, long-time observers will recall—importantly—that the movement for CFIUS reform preceded even Dubai Ports. Indeed, the first real catalysts for legislative modification of CFIUS were triggered by a 2005 Government Accountability Office (GAO) report on the adequacy of the CFIUS process and the nearly concurrent (and quickly abandoned) attempt by the China National Offshore Oil Corporation to acquire U.S. petroleum company Unocal Corporation, which already had an agreement to be purchased by Chevron Corporation.

In this regard, it is notable that the GAO, which is an independent agency that conducts audits and investigations on behalf of Congress, is currently conducting a review of the CFIUS process. GAO launched its review in October after 16 members of Congress requested that GAO review whether CFIUS's authorities should be expanded to keep pace with "the growing scope of foreign acquisitions in strategically important sectors in the U.S."

While, for nearly a decade, the 2007 amendments resulting in FINSA largely sated congressional desires to exercise tighter reins over CFIUS, the current tasking of the GAO report and its likely delivery sometime next year could increase attention in the 115th Congress to possible legislative reform of CFIUS. The following factors may also heighten the prospects of congressional action:

- **Prevalence of Chinese investment.** Since FINSA, there has been a dramatic shift in the origin of foreign direct investment in the United States from principally Western developed economies, such as the United Kingdom, to more geographically diverse and developing economies, particularly the People's Republic of China. Between 2005 and 2007, at the time of enactment of FINSA, CFIUS had reviewed a total of just four (4) transactions from China. During that same period, it reviewed 79 investments from the UK. By contrast, for the period between 2012 and 2014—the most recent years for which data is available—Chinese investors filed no fewer than 68 notices with CFIUS, easily relegating the UK's 45 notices in the same period to second place. And, while official numbers of transactions filed with CFIUS this year are not available, we expect that the Committee will review a record or near-record number of matters, with the volume of transactions from China far exceeding any other country (and possibly, in this year alone, exceeding the number of Chinese-related transactions filed with CFIUS from all of 2012-2014). In this context, it is notable that the congressional request for the GAO report specifically cited concerns over transactions from Chinese state-owned enterprises or "state champions"—including the pending acquisition of Syngenta AG by China National Chemical Corp.—and the degree to which such transactions may pose "a strategic rather than overt national security threat."

greater accountability of CFIUS to Congress in the form of reports and certifications following final CFIUS action. The close cooperation of the Gulf States in general, and the UAE in particular, in combatting the war on terror has largely overcome the geopolitical considerations that were manifest a decade ago. On the other hand, congressional and popular unease with foreign government ownership of U.S. assets from any region is a perennial issue and may well prove a heightened stumbling block for Chinese transactions under the new Administration.

- **Alignment between anti-China Republicans and anti-trade Democrats.** While there are significant policy differences between congressional Democrats and Republicans on many fronts, one potential area of convergence among left-leaning Democrats, especially those supported by the trade unions, and more hawkish Republicans, may be on trade and investment matters focusing on China. In its just-released annual report, the congressionally appointed U.S.-China Economic and Security Review Commission (which is well-known for being hawkish against China on security and trade issues) urged lawmakers to amend the CFIUS statute to bar Chinese state-owned enterprises from acquiring control of U.S. companies, asserting that the Chinese Communist Party has used state-owned enterprises to advance the PRC's security interests. The Commission's report has garnered little attention in prior years, but it is plausible that, following this year's volatile election, it may receive a greater audience than in the past.
- **Rumored sympathy for CFIUS reciprocity test within Trump transition team.** There have been some indications from within the President-elect's transition team—including from allegedly leaked policy documents and from informal comments made by senior transition leaders—that the new Administration may be prepared to support legislation that would require a reciprocity test within CFIUS for proposed foreign investments in the United States: i.e., a determination that a U.S. company would be eligible to undertake a comparable investment in the same sector in the origin country. Even if the Trump Administration is not prepared actively to support such a test, there is the prospect that the Administration may not be prepared to fight efforts to impose such a test; at the same time, given the vast number of Cabinet and sub-Cabinet level positions remaining to be filled, the reality is that there likely is not yet a clear view on this topic within the new Administration.

The upshot of these and other considerations is that, while the legislative landscape in the next Congress is still to be defined, there is a greater chance now than at any time in the last decade of potential legislation to amend CFIUS. To be sure, we are not saying that such legislation will happen—only that there is more kindling for CFIUS-related legislation than has been present in the last decade. The precise nature and timing of such proposed legislation, and whether it actually becomes law, depends on a wide range of factors, including the many other acute legislative priorities of the new Administration relating to immigration, taxes, and healthcare; the relative influence of moderate pro-trade Republicans and Democrats; and a variety of geopolitical factors, including the evolution of the U.S.-China bilateral trade relationship in 2017. Further, if such legislation does move, the extent of any amendments is difficult to predict at this stage, though we would expect debate to include issues such as: a net benefit or economic security test; a reciprocity test; greater authorities for national security agencies, such as the Department of Defense; expanded jurisdiction to include greenfield investments; limitations on foreign investment or ownership in certain sectors or industries; and/or a limitation on investments by state-owned enterprises or investments subsidized by foreign governments (including through government-owned financial institutions). Moreover, unlike past presidential Administrations, it is not certain that a Trump White House will vigorously oppose such legislation, even if it does not actively support it.

In these circumstances, at a minimum, the potential for legislative action on CFIUS is an issue that the U.S. and foreign business communities should monitor closely and be aware of when planning for transactions.

Will the Trump Administration Attempt to Reopen Prior CFIUS Reviews?

A cardinal principle of filing a voluntary notice with CFIUS is that transaction parties receive a *quid pro quo* in exchange for their willingness to undergo a review—namely, a safe harbor from any future review if CFIUS approves their transaction. The statute itself, which is set forth at Section 721 of the Defense Production Act of 1950, provides explicitly that a covered transaction that already has been reviewed by CFIUS is not subject to future review unless the parties either made false or misleading representations or omissions in the CFIUS process, or the parties have materially and intentionally breached a mitigation agreement with CFIUS. If this safe harbor were not sacrosanct, it would call into question the logic of ever filing voluntarily with CFIUS.

We expect the Trump Administration to adhere to the existing law and protect the safe harbor legal principle for transactions that have been consummated. While it is at least theoretically possible that the CFIUS statute could be amended to permit a covered transaction that previously has been reviewed or investigated—i.e., prior to any statutory amendment—to be subject to the initiation of a new review following a statutory amendment,⁴ an attempt by the Trump Administration to reopen prior CFIUS reviews almost certainly would encounter stiff opposition in the courts as transaction parties sought injunctions based on the Due Process, Takings, or Bill of Attainder provisions of the U.S. Constitution, depending upon the circumstances.

We think it is unlikely that the new Administration will want to tie up its resources on such an issue. On the other hand, it is easier to imagine the Trump Administration working with Congress to seek limits on future acquisitions of U.S. businesses by foreign entities, including in particular foreign government controlled entities. There already is precedent in certain sectors of U.S. industry—such as the aviation and broadcast industries—for limiting foreign ownership of particular U.S. enterprises. In this regard, we think prospective legislation is more likely than a retrospective effort.

How Should Transaction Parties Prepare for a CFIUS Review Under the Trump Administration?

In this time of uncertainty, there is one thing of which we feel highly confident—the Trump Administration will not take a softer position on U.S. national security or foreign direct investment than the Obama Administration. In these circumstances, we offer the following suggestions to transaction parties:

⁴ Article I, Section 10 of the U.S. Constitution, provides that “no State shall pass any ex post facto Law.” A similar provision that applies to Congress is located in Section 9 of the same Article. While these so-called *ex post facto* provisions would seem on their face to bar Congress from enacting a law after the occurrence of an event or action that retrospectively changes the legal consequences of that event or action, the U.S. Supreme Court long ago held that the prohibition of retroactive laws applies only to criminal, not civil, laws. It is not easy to enact and enforce *ex post facto* laws in the United States—they are disfavored by the courts, which attempt to construe legislation when possible as not having retroactive effect—but if appropriately crafted, a law potentially could change previously settled positions of transaction parties.

- **Do not underestimate the likelihood that a transaction will implicate U.S. national security interests.** Recent history is littered with abandoned and blocked investments in the United States in which the parties and their counsel initially concluded that it was “absurd” or “ridiculous” to imagine that their proposed transaction could possibly raise national security concerns.
- **Ensure that CFIUS considerations are at the forefront when first evaluating a potential investment target.** A few hours of focusing on potential national security considerations and getting an experienced view on such issues at the outset of a due diligence assessment can avoid weeks or even months of wasted effort evaluating a business and negotiating terms with respect to a U.S. business that ultimately will not be a realistic investment target. Thus, the time to evaluate CFIUS issues is when parties are at the outset of the transaction process, such as when producing or receiving a confidential information memorandum or management presentation, if not sooner.
- **Anticipate the potential need to address national security interests both in the transaction agreement and in the operation of the acquired business.** While the vast majority of CFIUS cases are approved without conditions, it also is not unusual for CFIUS to seek mitigation measures from parties to address the government’s national security considerations. These can range from spinning off certain assets or business operations prior to closing (or post-closing), to conditions on ownership and governance, to various security-related undertakings and monitoring requirements—or all of the above. Incorporating such considerations into the ultimate valuation of the U.S. business, as well as when negotiating the transaction agreement, can avoid disappointing commercial expectations among the parties and help maintain realistic goals for the timing of closing and integration of the U.S. business.
- **Plan for management of the public and government relations aspects of transactions.** We may be about to enter a volatile, politically charged environment for foreign investments in the United States—perhaps more so than anything we have seen since the events of 9/11. Having a sophisticated government relations (GR) and public relations (PR) team that is coordinated early with CFIUS counsel will be invaluable to transaction planning. In our experience, we see the best results when we are able to commence planning with GR and PR advisors well in advance of deal signing and announcement; this tends to permit adequate time to make sure that public messaging around the transaction hits the right notes while also anticipating and addressing potential political opposition.

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We hope that you find this analysis useful. Please do not hesitate to contact the following members of our CFIUS Practice Group if you would like to discuss any aspect of the foregoing in further detail:

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