

Frequently Asked Questions (FAQ) and Answers Regarding the International Emergency Economic Powers Act (IEEPA) Trump Administration May Use IEEPA to Enact Chinese Investment Bans

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It has been publicly reported that the Trump Administration is considering invoking the International Emergency Economic Powers Act (IEEPA) to further regulate—and in certain areas potentially preclude—Chinese direct investment in the United States, beyond the authorities exercised by the Committee on Foreign Investment in the United States (CFIUS). The prospect of such additional targeted screening of Chinese investment has been the subject of intense interest for many of our clients. This report addresses what is currently known—and importantly what is still uncertain—regarding the Administration's potential unprecedented use of IEEPA to address inbound investment, including the potential scope of Chinese investment bans; the relationship of this effort to CFIUS reform legislation known as the Foreign Investment Risk Review Modernization Act (FIRRMA); and other related considerations, including potential timing and administrative issues.

1. What is IEEPA?

IEEPA stands for the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1707). It is a law, enacted in 1977, that allows the President to exercise broad authorities to regulate commerce after declaring a national emergency:

to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.

Historically, it has most often been invoked to implement sanctions on specific foreign countries and persons, but it has occasionally been used more broadly. Most notably, the Export Administration Act, which allowed the President to control export of dual-use technologies (i.e., technologies that have both military and civilian applications), lapsed most recently in 2001, but the substantive provisions of the act have been maintained through an invocation of IEEPA.

2. How is the Trump Administration contemplating using IEEPA?

In August 2017, the President directed the U.S. Trade Representative (USTR) to investigate whether China's laws, policies, practices, or actions were unreasonable or discriminatory and if they may be harming American intellectual property rights, innovation, or technology development. USTR subsequently opened an investigation under section 301 of the Trade Act

of 1974 (19 U.S.C. § 2411) and released a [report](#) with its findings on March 22, 2018. In response to that report, President Trump issued a [memo](#) noting, among other findings, that:

China directs and facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and to generate large-scale technology transfer in industries deemed important by Chinese government industrial plans.

The memo also directed the Secretary of the Treasury, in coordination with other executive branch agencies, to:

Propose executive branch action, as appropriate and consistent with law, and using any available statutory authority, to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States.

Initially, it was thought that the reference to “any available statutory authority” encompassed the ongoing legislative efforts to reform CFIUS, the primary U.S. government tool for assessing and addressing national security risks that arise from foreign direct investment into the United States. However, as subsequently confirmed by Treasury officials and as [reported](#) in the press, the Administration is also considering invoking IEEPA to enact bans of Chinese investment into the United States in certain industry sectors.

3. What is known about the potential scope of such bans under IEEPA?

It is our understanding that the scope of such bans is still being fiercely debated within the Administration, and it is not yet known what final shape they will take. The Administration is likely trying to balance policy effectiveness versus the potential impact on capital formation in industries that the Administration wants to see grow, as well as potential disruption of financial markets.

We understand that the initial focus of Administration discussions has been on the industry sectors that China had indicated are a priority for the development of indigenous Chinese manufacturing capabilities under its “[Made in China 2025](#)” (MIC 2025) initiative. The sectors include:

- Next-generation information technology (presumably including semiconductors, artificial intelligence, and next-generation communications technologies related to 5G)
- High-end numerical control machinery and robotics
- Aerospace and aviation equipment
- Maritime engineering equipment and high-tech maritime vessel manufacturing
- Advanced rail equipment
- Energy-saving and new energy vehicles
- Electrical equipment
- New materials
- Biomedicine and high performance medical devices

- Agricultural machinery and equipment

It is not yet clear whether there will be broad bans across all 10 sectors or more tailored bans involving some subset of technologies within these sectors. We understand that the Administration is also still internally debating whether to extend potential investment bans beyond these manufacturing-focused sectors to also include potentially sensitive service industries, such as cloud computing. One factor being considered in this debate is the potential administrative burden that would arise from a broader scope of the investment bans. We also understand that elements of the Administration would advocate for covering not only inward investment from China, but also certain outbound sharing of intellectual property (IP) under joint ventures between U.S. and Chinese firms.

4. Is IEEPA being considered to implement any aspect of the Foreign Investment Risk Review Modernization Act (FIRRMA)?

The Department of the Treasury, as chair of CFIUS, has reportedly [signaled](#) to Capitol Hill that it is also considering using IEEPA authority to implement some aspects of FIRRMA if the bill is not expeditiously moved through the House and Senate. We expect, however, that the Administration and Congress will each prefer to address CFIUS' authorities through legislation and distinct from any implementation of Section 301 recommendations through IEEPA. Indeed, the Administration teams working the IEEPA and FIRRMA issues are themselves distinct (though with some overlapping staff at some agencies). Nevertheless, there may be some correlation between issues addressed through CFIUS reform legislation and implementation of Section 301 under IEEPA. For example, the consideration of using IEEPA to restrict certain outbound sharing of IP parallels the similar discussion about potentially using CFIUS reform to address similar transfers. Should Congressional consideration of FIRRMA hit a major roadblock, the Administration is more likely to explore implementation of some aspects of FIRRMA via IEEPA.

5. What is the current status of the Administration plan to leverage IEEPA, including potential timing?

Secretary Mnuchin must provide the President a progress report on this effort by May 21, 2018, and we understand the Administration is attempting to put as much of the plan in place as possible by that date. As previously discussed, however, Administration officials are still debating the scope of the bans, as well as working out myriad logistical and legal issues related to implementation and enforcement. These include a wide range of substantive and technical issues, including, among others:

- How "investment" would be defined (including whether there would be any exceptions for entirely passive investments);
- How "Chinese entity" would be defined;
- Whether there would be an exception for investments in U.S. firms that already have a substantial Chinese presence;
- How compliance with such a ban would be monitored;
- Which agencies would be responsible for enforcement;
- What the penalties for non-compliance would be; and
- Whether there would be any appeal process.

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If bans in specific sectors are announced, we would normally expect those bans to be implemented swiftly, so as to not allow parties to race to complete transactions before the bans are enacted. Treasury is likely to be primarily responsible for administration and enforcement of the bans, possibly with personnel detailed from other agencies to support the process.

However, as noted above, we believe the executive branch will still have a large number of administrative issues to work out, even once it finalizes the intended scope of covered investments. We assess that the staff, processes, and procedures to administer those actions will likely not be fully in place by May 21 and, therefore, even if bans are announced around that date, they likely will not take effect until sometime later or be implemented in phases to stagger the burden to the implementing agencies. For example, it is possible that the Administration may create some additional regulatory review process to assure that a specific transaction is not subject to a ban, either because it falls outside the intended scope or is granted an exception for other reasons, but the details of what such a process would entail and who exactly would administer it are unknown, and we think it is unlikely that they would be fully settled by May 21.

We do not expect the bans to be retroactive (i.e., they would not apply to already consummated investments). It is unclear, however, how pending investments (i.e., investments that have been announced but not completed) would be handled, including how the process would address transactions under formal review by CFIUS at the time of announcement or implementation of the IEEPA-based bans.

Thus, as noted, this remains a very fluid issue and the exact contours and effect of any IEEPA-based investment restriction mechanism are still to be defined.

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We will continue to monitor and report on these developments. If you have any questions concerning the material discussed in this client alert, please contact the following members of our CFIUS and Trade Controls practices:

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