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Foreign Investment Under Trump Administration

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Most likely affected: Biotech sector, Food and beverage industry, energy sector, mergers and acquisitions by Chinese buyers

CFIUS has the power to unwind your M&A deal. That power will likely expand. That is the headline.

The Committee on Foreign Investment in the United States (CFIUS) reviews acquisitions by foreign parties of “critical industries” and “critical infrastructure” in the United States. The inter-agency committee’s actions warrant plenty of explanation, and you can find much of it here.

However, the critical note for the purposes of this article is that CFIUS has the power to review certain purchases of U.S. assets by foreign companies. CFIUS has some discretion in the transactions it chooses to review. Although the Committee chooses a variety of deals to examine, it takes a particular interest in purchases by companies owned or controlled by China or Chinese persons.

China was a favorite target of tough talk from the Trump campaign. However, the risk of starting a trade war with the United States’ largest goods trading partner ($598 billion in 2015) may require the Trump administration to find means of exerting economic pressure on China without coming to economic blows.

Why CFIUS

Because CFIUS already scrutinizes numerous transactions out of China, it could serve as an ideal vessel for restricting Chinese entry into the U.S. economy and underlining the Trump Administration’s tough stance against China. The Administration could achieve two stated goals by broadening CFIUS’s scope of review or heightening its scrutiny of foreign investments:

1) The Administration could put a subtle squeeze on Chinese investors, creating a bargaining chip to negotiate better behavior from China on trade issues; and

2) The Administration could tout the changes as an act in furtherance of its protectionist agenda.

Recent comments from Peter Navarro, the head of the Administration’s National Trade Counsel are consistent with the possible use of CFIUS to push back against foreign investment. Mr. Navarro stated:

> *Suppose instead that it is not a benign ally buying up our companies, our technologies, our farmland and our food supply chain, and ultimately controlling much of our industrial base. Rather it is a rapidly militarizing strategic rival intent on hegemony in Asia and perhaps world hegemony."*

Mr. Navarro added,

> "*We have already begun to lose control of our food supply chain.*"

That last line may or may not be consistent with actual economic conditions. However, it appears to clearly signal the Administration's position that more than just the defense and infrastructure sectors of the U.S. economy require protection from foreign investment. We believe the most likely shield the Administration could use is the powers of CFIUS.

Possible Expansion of CFIUS

What if all Chinese investment in the U.S. had to be reviewed by CFIUS? President Trump could expand CFIUS's reach or direct its scrutiny through an executive order. Because there have been calls from both sides of the aisle to expand CFIUS's mandate, such an order would likely face less resistance than other points of the Trump Administration's agenda. Additionally, because CFIUS's decisions are not reviewable by a court, the Committee's actions pursuant to a presidential order would also be difficult to challenge.

Will An Expansion of CFIUS Affect Your Company?

Generally, CFIUS has decided to review foreign investment in security, infrastructure, and critical energy projects. However, a congressional commission charged with an economic security review of U.S.-China relations reported that outsourcing to China poses substantive threats to U.S. security with respect to the following:

- food safety;
- biotechnology;
- pharmaceutical products:
- critical technology; and even
- labor and employment conditions.

The Commission recommended restrictions on Chinese acquisitions of U.S. companies as well as a blanket CFIUS investigation requirement for any acquisition by a state-owned enterprise. The Commission cited Chinese restrictions on U.S. investments in China as grounds for implementing the expansion of CFIUS's mandate.

Forward planning companies should understand how that will affect the U.S. economy overall and their own businesses in particular. Then they should have a plan in place for that exact eventuality.

The Takeaway: What Your Business Can Do To Prepare for Changes

If your business is in an industry that could be considered critical – and recall the expanding definition of critical discussed above – you may need to plan for more time and resources to bring in investment from outside the United States. If your business is investment or private equity, you may need to plan for the increasing difficulty of partnering with foreign, particularly Chinese, buyers to acquire critical assets in the United States or, conversely, plan for an advantage for U.S. investors in domestic industry. Companies that keep an eye on trends in CFIUS's statements and actions will be able to navigate changes by moving ahead of them, rather than being caught unprepared and reacting to changes when it is more difficult, expensive, or even too late.

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