

## Potential Increased CFIUS Scrutiny Under Trump

By **Stephen Paul Mahinka, Carl Valenstein and Heather Dorsey, Morgan Lewis & Bockius LLP**

*Law360, New York (November 30, 2016, 4:09 PM EST)* -- Since the end of World War II, U.S. national economic policy has favored openness to foreign direct investment. The enactment of the Exon-Florio amendment in 1988,[1] creating the Committee on Foreign Investment in the United States, added potential scrutiny of foreign investments and acquisitions from the perspective of national security implications. The broadening of CFIUS' jurisdiction by the Foreign Investment and National Security Act of 2007[2] greatly increased the scope of the transactions for which CFIUS review is likely warranted by expressly adding review of critical infrastructure investments. However, FINSIA did not alter the agency's historic approach of maintaining an open foreign direct investment policy.[3]

In view of the apparently more protectionist approach to trade and investment of the Trump administration, however, there may be significant changes to CFIUS reviews. Questions are presented regarding whether and in what manner CFIUS, under potential new leadership and possibly with specific directions from the new administration, may change its approach to reviews of foreign investments, as well as expand its interest in reviewing investments that are not filed for prior review by the agency. In addition, the clear potential arises that CFIUS will expand its reviews to areas of possible impact of foreign investments other than those more narrowly limited to national security, such as impacts on food safety and labor and employment. Finally, questions may arise as to whether prior CFIUS clearance decisions regarding transactions that have been reviewed and cleared might be able to be reopened.

While we do not believe that it is likely that any cleared transactions would be revisited, we believe there is a significant likelihood of more stringent scrutiny of transactions, particularly in certain industries and from certain nations, under the new administration. Consequently, the decision as to whether to file regarding a proposed foreign acquisition or investment will need to be made for more transactions than previously, at the outset of negotiations, with assessment of the need to include in transaction agreements mechanisms to address potential mitigation demands by CFIUS.



Stephen Paul Mahinka



Carl A. Valenstein



Heather A. Dorsey

## How CFIUS' Review Scope and Approach Could Be Changed

It is certainly impossible to predict with any specificity the approach toward CFIUS of the new administration. Based on the campaign's focus on protectionism, however, it is certainly possible that CFIUS' historic approach to review could be altered to include certain industries or effects heretofore generally ignored or to provide more scrutiny to acquisitions or investments from certain nations, particularly China, even where the U.S. business does not present an obvious security concern.

Should the new administration decide to alter the scope or degree of scrutiny that CFIUS should apply, it could do so in several ways. The administration could seek to broaden FINSAs to include, for example, food safety and agriculture as an industry to be reviewed as critical infrastructure, or include labor and employment effects as part of the assessment of national security impacts, both of which may attract bipartisan congressional support. More immediately, the new administration could issue an executive order making such changes in the scope and issues to be reviewed by CFIUS, as with President George W. Bush's executive order 13456, issued on Jan. 23, 2008,[4] which elaborated on FINSAs. Such instructions, which conceivably could include directions to the member agencies and staff that they should take a more restrictive or skeptical view of acquisitions or investments from certain countries, would presumably be very unlikely to be challenged in court, because executive orders only rarely have been deemed to be challengeable,[5] and because CFIUS decisions are not judicially reviewable.[6]

There have been a number of efforts in recent years by members of Congress, unions and special-interest groups to broaden the scope of CFIUS reviews or enhance scrutiny of acquisitions or investments from certain nations. These groups have proposed inclusion of a variety of factors, such as food safety, biotechnology-derived drugs, biologics, and agriculture products and technology, labor and employment effects, environmental effects, and the lack of reciprocity in allowing U.S. investment by certain nations. China's own national security review process for foreign investments is quite broad, including agriculture, transportation and assembly manufacturing.[7]

Recently, for example, Republican members of Congress called for reforms in CFIUS review, and requested that the Government Accountability Office determine whether CFIUS' statutory and administrative authorities "have kept pace with the growing scope of foreign acquisitions in strategically important sectors in the U.S." [8] Their request letter specifically mentioned Chinese and Russian state-owned enterprise investments as causes of concern, urged that CFIUS review should include a "net economic benefit" test, and discussed food safety as a security issue. The letter also referenced potential food safety and security concerns regarding ChemChina's \$43 billion acquisition of Syngenta, an agricultural seed and chemical provider, which was recently cleared by CFIUS. The "net economic benefit" test presumably could be used to examine potential adverse effects on labor and employment. The GAO accepted the request to review CFIUS, and expects to begin its review in 2017.[9]

The recent 2016 annual report to Congress from the U.S.-China Economic Security Review Commission raised similar concerns, urging the GAO to prepare a report examining the extent to which "large-scale out-sourcing of manufacturing activities to China is leading to the hollowing out of the U.S. defense industrial base." [10] The report also urged Congress to amend the FINSAs to authorize CFIUS to bar Chinese state-owned enterprises from acquiring U.S. companies. While this commission's reports have not so far influenced the foreign investment review process, as even Chinese commentators have noted [11] these and other efforts may provide a foundation for enabling additional factors and effects to be considered in CFIUS' reviews of proposed transactions.

## How CFIUS' Prior Clearance Decisions Might Be Revisited

We are unaware of any prior instance in which a transaction cleared by CFIUS was reopened for further review after closing of the transaction. We doubt whether it would be considered prudent by the new administration to attempt such reopenings of prior CFIUS clearances in view of the very substantial disincentive to foreign direct investment in the U.S. by reason of the resulting uncertainty as to the finality of any transaction.

Nonetheless, we note there are several potential mechanisms that would provide a basis for such reopenings. These include: (1) reopening a case under existing FINSA authority due to a material misstatement or omission in the original submission by the parties,[12] (2) issuing an executive order asserting authority under FINSA to require CFIUS to reopen and review a cleared transaction on the basis of national security concerns, and (3) a declaration by the president under the International Emergency Economic Powers Act that a cleared transaction should be reopened as a matter of national security.

The Exon-Florio provision regarding presidential review of CFIUS clearances is statutory.[13] Once the 30-day statutory review period[14] has expired, under its current authority and presidential direction, CFIUS clearance cannot be reopened absent a material misstatement or omission in the original submission. Uncovering a misstatement or omission by parties in their original submissions is, as a practical matter, very difficult and highly unlikely. Joint voluntary notices made to CFIUS are nonpublic and exempt from the Freedom of Information Act.[15] Third parties thus would be highly unlikely to be able to provide CFIUS with evidence of false or misleading statements. While it is possible that later-derived evidence of misleading or false statements might be discovered by the federal agencies that regulate or purchase from the cleared entity, or by whistleblowers within the parties, we are unaware of this ever occurring.

As noted above, the president might consider issuance of a more limited and specific executive order than executive order 11858[16] and executive order 13456,[17] which provided general directions regarding the agency's operations under the statute, that would direct CFIUS to reopen a previously cleared transaction. While serious questions can be raised as to whether the president would properly have such authority, given the statutory presidential review period that implies finality, the great scope given to such executive orders by the courts, and the limits on judicial reviewability of CFIUS actions, nonetheless may allow use of this mechanism as an avenue for reopenings.

The president may consider use of his authority under the International Emergency Economic Powers Act[18] to reopen a transaction cleared by CFIUS. While the president would have to declare a national emergency to invoke this power, the IEEPA has been used in several instances of asserted economic harm to block foreigners' access to or use of their funds in the United States. For example, President Barack Obama used the IEEPA in 2014 to block access to assets for certain individuals contributing to Russia's seizure of Crimea from Ukraine,[19] and to extend the Export Administration Regulations pending congressional reauthorization, which was reviewed in *Micei International v. Department of Commerce*, involving certain exports from Macedonia.[20] As with executive orders, such use of the IEEPA to provide a mechanism to reopen a specific CFIUS clearance may not be subject to judicial review if invoked and CFIUS reverses a prior clearance.

There are thus several mechanisms available to the new Trump administration to alter the scope and approach of reviews by CFIUS, or even to reopen previously cleared transactions. We expect that the new administration may take actions to broaden CFIUS reviews to consider effects of transaction on

food safety and labor and employment, and to have proposed investments from certain nations reviewed more closely even when potential national security concerns relating to a proposed transaction are not obviously present.

---

*Stephen Paul Mahinka, based in Washington, D.C., and Carl A. Valenstein, based in Boston, are partners at Morgan Lewis & Bockius LLP and regularly advise on CFIUS matters. Heather A. Dorsey is an associate in the firm's Washington office and assists on CFIUS matters.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] 50 U.S.C. App. 2170.

[2] 50 U.S.C. App. § 2170.

[3] Remarks by Aimen Mir, deputy assistant secretary of the Treasury for investment security, at the Council on Foreign Relations, Washington, D.C. (April 1, 2016) <https://www.treasury.gov/press-center/press-releases/Pages/j1041.appx>

[4] Executive Order 13456, 73 Fed. Reg. 4677 (Jan. 25, 2008).

[5] See K. Andrias, The President's Enforcement Power, 88 N.Y.U.L.Rev. 1031 (2013).

[6] See Ralls Corp. v. Committee on Foreign Investment in the United States, 758 F.3d 296 (D.C. Cir. 2014).

[7] See S. Mahinka, China's New National Security Review Process for Foreign Investments: U.S. CFIUS Review Moves East, ML&B Lawflash (March 3, 2011).

[8] See Letter from Robert Pittenger et al., member of Congress, to Gene L. Dodaro, comptroller general, U.S. Gov't Accountability Office (Sept. 15, 2016) <https://pittenger.house.gov/sites/pittenger.house.gov/files/Letter%20to%20GAO%20re%20CFIUS%20Report%209.15.16.pdf>;

[9] GAO Accepts Congressman Pittenger's Request To Review Committee On Foreign Investment, Press Release, Pittinger.House.gov (Oct. 4, 2016) <https://pittenger.house.gov/media-center/press-releases/gao-accepts-pittengers-bipartisan-request>.

[10] U.S.-China Economic and Security Review Commission, 2016 Report to Congress, 29 (Nov. 2016) [http://origin.www.uscc.gov/sites/default/files/annual\\_reports/2016%20Annual%20Report%20to%20Congress.pdf](http://origin.www.uscc.gov/sites/default/files/annual_reports/2016%20Annual%20Report%20to%20Congress.pdf).

[11] See Z. Shengyong, The Perception of the U.S.-China Economic and Security Review Commission toward China and its Influence on Sino-U.S. Relations, 19 Intercultural Comm. Studies 155 (2010).

[12] See 50 U.S.C. App. § 2170(b)(1)(D).

[13] See 50 U.S.C. App. § 2170(b)(1)(D).

[14] 50 U.S.C. App. § 2170(b)(1)(E).

[15] See 50 U.S.C. App. § 2170(c).

[16] Executive Order 11858 — Foreign investment in the United States, 40 Fed. Reg. 20263 (May 7, 1975).

[17] Executive Order 13456 — Further Amendment of Executive Order 11858 Concerning Foreign Investment in the United States, 73 Fed. Reg. 4677 (Jan. 25, 2008).

[18] 50 U.S.C. §§ 1701-1707.

[19] See Executive Order — Blocking Property of Certain Persons Contributing to the Situation in Ukraine, 79 Fed. Reg. 13493 (March 10, 2014).

[20] *Micei Int'l v Dep't. of Commerce*, 613 F.3d 1147 (D.C. Cir. 2010); *In the Matter of: Micei International, Respondent*; Final Decision and Order, 74 Fed. Reg. 24788 (May 26, 2009).