

Chinese Investments and the Committee on Foreign Investment in the United States

IN SHORT

The Situation: Transactions involving Chinese investors continue to receive increased scrutiny by CFIUS.

The Result: Chinese investments in the United States can face an uphill battle at CFIUS.

Looking Ahead: CFIUS is very attuned to the particular facts of each transaction that it reviews. As such, not all Chinese deals will be blocked by CFIUS.

It is no secret that Chinese investments in the United States can face an uphill battle at the Committee on Foreign Investment in the United States ("CFIUS"). CFIUS is an interagency committee of the U.S. government that has broad jurisdiction to review transactions that could result in control of a U.S. business by a foreign person. The CFIUS process is a joint, voluntary process that parties initiate based on the perceived risk that the President of the United States might require divestment post closing if there are national security or critical infrastructure concerns associated with a particular transaction within the jurisdiction of CFIUS. A number of Chinese investments have been abandoned or are having challenges obtaining CFIUS clearance. This does not, however, mean that all Chinese deals will be blocked by CFIUS. CFIUS has not adopted a "one size fits all" approach and, in fact, is very attuned to the particular facts of each transaction that it reviews.

Using recent CFIUS precedent as a guide, CFIUS is primarily focused on:

- Investments involving Chinese state-owned or controlled investors;
- Chinese investments in industries or assets that the U.S. government believes are sensitive, such as investments that allow Chinese investors to have access to:
 - The U.S. financial system;
 - Sensitive personnel identifier information; and
 - Certain U.S. technology, including technology that could marginally advance the Chinese semiconductor industry, even if the technology would not require a license for export to China; and
- Ensuring that Chinese investments do not disrupt the U.S. government supply chain and do not result in Chinese ownership or control of assets located in close proximity to sensitive U.S. government facilities or other areas of strategic importance to the U.S. government.

On the other hand, Chinese investments in less sensitive industries or assets can and have received CFIUS clearance. For example, CFIUS has recently approved:

- The acquisition of Stillwater Mining Company by Sibanye Gold Limited, a South African company with a substantial Chinese shareholder.
- The acquisition of a controlling stake in Cinedigm Corporation, a U.S.-based entertainment company, by Bison Capital Holding Company Limited, a Chinese-backed investment fund;
- The acquisition of LEDvance, the lamps business unit of Osram Licht AG, by a consortium of buyers led by a Chinese investment firm; and
- The acquisition of a Robert Bosch business that manufactures starter motors and generators for cars by Zhengzhou Coal Mining Machinery Group Co., Ltd., a Chinese equipment manufacturing company.

Parties with assets in the United States seeking to transact with Chinese companies should carefully consider whether the U.S. business could be considered sensitive to the U.S. government. Taking the time to undertake such an evaluation at the infancy of a potential transaction is critical because it could impact:



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- The timing of the transaction;
- The risk that the transaction is not consummated; and
- Remedies that the parties negotiate in the event of a transaction being abandoned as a result of CFIUS.

In addition, the parties may wish to consider possibly carving off the sensitive portions of the U.S. business before proceeding with the transaction or even carving off the entire U.S. business so that the investment is outside the jurisdiction of CFIUS. To the extent that parties decide to submit a notice to CFIUS, they should be prepared for, among other things, longer review times and the imposition of opportunistic mitigation measures (i.e., measures that do not appear to relate to national security concerns, but nonetheless are imposed because transactions are before CFIUS).

THREE KEY TAKEAWAYS

1. When evaluating potential transactions with ties to China, the Committee on Foreign Investment in the United States ("CFIUS") is generally focused on investments involving Chinese state-owned or controlled investors, investments in sensitive industries (finance, technology, etc.), and confirming that proposed Chinese investments would not disrupt any government supply chains.
2. Parties with assets in the U.S. considering transactions with Chinese companies should consider whether the business could be considered sensitive to the U.S. government.
3. Parties submitting a notice to CFIUS should be prepared for, along with other factors, extended reviews and the imposition of opportunistic mitigation measures.

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