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CFIUS and Chinese Investments in the United States—A Closed Door?

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"CFIUS" is not exactly a household name. But in recent months, the acronym for the Committee on Foreign Investment in the United States has appeared with increasing frequently in the news media. A combination of increased trade tension between the United States and China, a high supply of Chinese capital together with President Xi's announced strategy of using Chinese commercial investments for military-industrial purposes, and recent high-profile decisions by the Committee itself has brought increased attention to the body charged with assessing the U.S. national-security implications of foreign acquisitions of U.S. businesses. As a result, CFIUS has become mainstream, especially in relation to Chinese investments.

A prominent theme of recent coverage suggests that CFIUS has closed the door—largely or entirely—to Chinese investments in the U.S. But is such a conclusion justified? On the one hand, considerable uncertainty will characterize the foreseeable future with respect to Chinese acquisitions in the U.S., not least of all due to potential reform of how CFIUS conducts its reviews of Chinese transactions and possible changes to the level of scrutiny it may apply going forward. Forthcoming policy change could make Chinese investments in the U.S. more difficult. On the other hand, the idea that the U.S. is firmly inhospitable to Chinese investment, or soon will be due to changes in CFIUS review, is susceptible to oversimplification, and overlooks several important facts. While the future here is undoubtedly murky, it is too early to declare that CFIUS will effectively end Chinese investments in the U.S.

Several dynamics illustrate the challenges associated with CFIUS review of Chinese acquisitions, especially recently. First, while transactions involving Chinese buyers comprise the most cases filed with CFIUS—some 50% more than the next closest countries (i.e., Canada and the U.K.)—historically *all* of the acquisitions blocked by CFIUS since the Committee's statutory establishment (and in one instance before CFIUS became a statutory body) involved Chinese would-be acquirers, including such recent cases as Aixtron, Inc. (by the Fujian Grand Chip Investment Fund) and Lattice Semiconductor Corp (by Canyon Bridge Capital Partners). What is more, CFIUS has also shown a lesser willingness to consider or allow "mitigation" to overcome U.S. national security concerns for transactions involving Chinese buyers. It is also well understood that Chinese transactions have seen significant scrutiny over the past couple of years, reflected in a number of uncompleted transactions abandoned by the parties though not formally blocked by CFIUS, including the unsuccessful acquisitions of Global Eagle (by HNA Group) and MoneyGram (by Ant Financial).

CFIUS's recent scrutiny likely owes in part to the Chinese government's express policy of using foreign commercial investment as a mechanism to advance national defense interests. That policy has unquestionably accelerated calls to increase CFIUS's scrutiny of Chinese acquisitions, especially with respect to technologies with potential defense applications. Those calls have taken the form most recently of bi-partisan legislation introduced in both houses of the U.S. Congress, known as the "Foreign Investment Risk Review Modernization Act," that would alter how CFIUS reviews transactions involving, in the words of the statute, "countries of special concern." As observed for example by one of the bill's leading sponsors, U.S. Representative Robert Pittenger (Rep. North Carolina), the primary target of this legislation is China, as responsive to China's 5-year plan to acquire leading technologies to improve its competitive posture vis-à-vis the U.S. globally. The bill's sponsors have focused also on new semiconductor and other technologies with potential "dual use" for both military and civilian purposes. Its supporters, too, have focused on certain Chinese investments or intended investments as antithetical to U.S. interests, arguing that CFIUS reform is necessary to protect U.S. interests.

On top of all of this, while the Trump Administration has expressed support for the reform legislation, the Administration is not necessarily awaiting congressional action, which may or may not happen before the expiration of the current congressional Session. First, as part of a trade war mobilization, President Trump instructed Treasury Secretary Mnuchin to consider whether and how the Administration might use certain emergency powers further to restrict Chinese trade with the U.S. Though not related to CFIUS directly, the atmosphere of trade conflict certainly could have spillover effects on the extent to which potential Chinese investors view U.S. markets to be open. Second, and more recently, the White House floated the possibility of altering CFIUS review of Chinese acquisitions by Executive Order rather than legislatively. Whether the Administration will follow through on such a dramatic step, or whether it is intended instead to lead Congress to advance pending reform legislation, remains to be seen. But such a possibility highlights the White House's critical attention on China and its apparent willingness to try to employ CFIUS further as a mechanism to manage its relationship with China.

The combination of increased CFIUS scrutiny of Chinese investments and high-profile denials of several acquisitions, possible reform legislation focused on Chinese investment, and a White House focused on curbing Chinese influence all may lead one to conclude that the U.S. is inhospitable to Chinese investments in the U.S.

Such a conclusion would be incomplete, however; there is more to the equation here. Notwithstanding the increasingly critical focus recently on U.S. investments by Chinese buyers, the available facts do not demonstrate that U.S. equity markets are closed to Chinese acquirers. For one thing, CFIUS continues to approve (technically, not to block) Chinese acquisitions, a fact often lost in media coverage of CFIUS. Within just the past two years, CFIUS has approved Chinese acquisitions of Syngenta (by ChemChina, a state-owned enterprise), the Chicago Stock Exchange (by Chongqing Casin Enterprise Group), and Fairchild Semiconductor (by ON). And within the past year, the Committee has approved a number of additional Chinese transactions, and such approvals continue up to the present. Indeed, at any given time, still, CFIUS has a number of Chinese transactions under review, and it is not at all the case that all such transactions are categorically blocked.

Even less well appreciated in much of the discourse concerning CFIUS review of Chinese transactions is the fact that even the proponents of legislative reform continue to *favor* Chinese investments in U.S. equity markets. For a notable example, Congressman Pittenger, an original sponsor of the CFIUS reform bill aimed in part at Chinese investments, recently explained to congressional colleagues that as a general proposition he is in favor of Chinese investments. In his own words: "I am from North Carolina. We have the largest hog processing plant in the world in my district, owned by the Chinese, Smithfield, [generating] 5,000 jobs. . . . So, I have a real interest in Chinese investments, foreign investments of all kinds." Similarly, Assistant Secretary of the U.S. Treasury Department for International Markets and Investment Policy, Heath Tarbert, whose responsibilities include CFIUS review at the Treasury Department recently testified at a congressional hearing on the reform legislation as follows, responding to a question about balancing U.S. business interests in supplying needs in China with national security. "[L]ast year, *even from a country like China, dozens of which . . transactions were, in fact, cleared through CFIUS*. So I think that's an important point. When we see a national security issue, in most circumstances, we can figure out a way to mitigate that and get the transaction through. So, again, we very much favor foreign investment" (emphasis added). The notion that CFIUS has blocked, and is likely to block, most Chinese transactions ignores the interest that U.S. policymakers, including reformers, continue to have in Chinese investment.

Nor, moreover, are U.S. policymakers' concerns about certain Chinese transactions new. They instead reflect a rather long-running perception that certain Chinese acquisitions may be antithetical to U.S. national security interests. For just one example, over half a decade ago, the "U.S.-China Economic and Security Review Commission" published a report in 2012 calling for greater scrutiny of Chinese investments in the U.S. motivated by national-defense rather than purely economic interests. Yet, in the years since, again CFIUS has approved dozens of Chinese acquisitions, as reflected for instance in a March 2018 Congressional Research Service Report summarizing acquisitions subject to CFIUS review by country of origin and sector.

It also warrants emphasis that some of the transactions CFIUS has not blocked in the past had generated significant controversy and political opposition on one kind or another. The Wanxiang Group's acquisition of A123 Systems, an electric car battery maker, was opposed by some members of Congress as well as by the Strategic Materials Advisory Council. The acquisition of Smithfield Foods by Shuanghui International Holdings Ltd. (the largest Chinese acquisition of a U.S. firm at the time, for $4.7 billion), was opposed by the National Farmers Union and the Center for Rural Affairs. Some even called for the Secretary of Agriculture to be added to CFIUS to review that particular transaction; others objected on the grounds that Smithfield had developed advanced genetic research that a Chinese enterprise should not have been allowed to acquire. The purchase of the Chicago Stock Exchange also was opposed by some members of Congress. In none of these cases, however, did CFIUS block the transaction.

Two points would seem to follow from the above facts. First, U.S. national security concerns are not categorically incompatible with Chinese acquisitions. CFIUS has not responded to concerns about China by blocking all Chinese transactions, or even all of them lately. Second, even influential political opposition to a given transaction is not, itself, sufficient to lead CFIUS to block it. CFIUS has approved some transactions that faced high-profile political opposition.

Taken the available evidence as a whole, CFIUS review appears to be, importantly, case by case. CFIUS is likely to view certain transactions with considerable wariness, to be sure, while others may meet fewer objections. Extrapolating from the most recent CFIUS cases and trends, the following generalizations seem apt, even as CFIUS's orientation may well be subject to change in the near future. CFIUS seems very likely examine with the most scrutiny: acquisitions new semiconductor technology or any other technologies with possible weapons applications; acquisitions that would result in Chinese purchasers possessing personally identifiable information of U.S. citizens; and acquisitions that would give a competitive edge to the next generation of telecommunications or other advanced technologies. By contrast, CFIUS might not view acquisitions involving sectors such as agriculture, health care, manufacturing, and real estate, among others, as especially problematic.

Less clear, at present, is the boundary that separates the types of transactions that CFIUS will examine with highest scrutiny. For CFIUS may focus increasingly not only on national security in the narrowest sense, but also on the U.S.'s competitive posture in emerging technologies—such as artificial intelligence and advanced communications, among others. That is to say, it is possible CFIUS will put increased emphasis on the consequences of a proposed transaction not only the U.S.'s national-defense interests narrowly conceived, but its global economic and competitive interests more broadly. Whether and exactly how CFIUS's formal mandate or informal practice changes with respect to China will be measured over the next months and years.

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