

# CFIUS and Foreign Investment Reviews in 2017 and Beyond

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President Donald Trump has made foreign trade and foreign competition main areas of focus early in his presidency. The new administration's appointments reinforce expectations of a multipronged approach to foreign investment and specifically to reviews by the Committee on Foreign Investment in the United States (CFIUS). While most foreign acquisitions and investors will continue to be welcomed, those presenting potential national security issues — which the Trump administration may come to view as including risks to American jobs and pre-eminence in certain industrial sectors — can expect more searching CFIUS reviews.

**Trump Administration.** Additional subcabinet appointments to executive positions within key agencies will further clarify the new administration's approach. Early indications suggest it will be open to investments from friendly nations but more skeptical of those from nations it deems to be economic or strategic adversaries or engaging in trade-distorting practices. Notably, the long-standing split within CFIUS between economic and national security agencies may become more stark in the Trump administration. Appointments to the Trump Cabinet in key economic positions, including Treasury, State, Commerce and the National Economic Council, indicate an administration preference for practical dealmaking, given top-level appointees' experiences in the private sector. At the same time, some key economic appointees have indicated that the CFIUS process may not be adequately addressing trade issues, such as reciprocal market access. For example, during confirmation hearings, Commerce secretary nominee Wilbur Ross Jr. was asked about CFIUS reviews of Chinese acquisitions in the entertainment industry. Ross indicated that he was "struck to learn" that the industry is "not very reciprocal [in] that [Chinese investors] want to control entertainment and other media here, and yet are denying our companies anything getting remotely close to that." Moreover, the administration also has signaled through its appointments at Defense and Justice that it may be highly skeptical of investments from geopolitical rivals and can be expected to encourage a more rigorous and thorough review of investments from those nations.

**Job Retention.** Foreign investors can expect all of these agency priorities to yield at times to the unifying principle of President Trump's foreign investment platform: maintaining domestic employment. Treasury secretary nominee Steven Mnuchin nodded to this possibility when referring during his confirmation hearing to a potential committee role in "protecting American workers." In addition, during the transition, the incoming president broadcast his meetings with CEOs and foreign investors, such as Masayoshi Son of Japan, who have committed to expanding employment and keeping facilities and technology in the United States. As shown in those transition discussions and in the recent Carrier and Ford onshoring decisions, investors who commit to maintaining jobs in the United States can expect more favorable treatment in the Trump administration.

**Reciprocal Market Access.** The president's continuing emphasis on reciprocal market access, as shown in senior White House appointments, also demonstrates that countries with strong bilateral trade relationships with the United States should continue to enjoy a more favorable position in transactions before CFIUS. Still, while individual cabinet members have significant control over the strategies of their cabinet departments, senior and mid-level political appointees — who may not be named for several months — will ultimately be responsible for overseeing the day-to-day activities of government officials and making the majority of CFIUS decisions. Close attention should be paid to the backgrounds and views of these appointees, given their prominent roles in managing the CFIUS process.

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**Coordination With NATO Allies.** As it develops its internal approach to CFIUS reviews, the Trump administration may also be the first to need to develop an internationally coordinated approach to national security reviews, as traditional U.S. allies have begun to institute new, more rigorous oversight regimes. In recent years, CFIUS reviews have increasingly involved international cooperation or parallel national security review involving the United States and its NATO allies. Examples include:

- the recent proposed acquisition of Germany's Aixtron SE by Grand Chip Investment GmbH, ultimately owned by investors in the People's Republic of China, which was blocked by both U.S. and German authorities;
- the recent successful acquisition of Alcatel-Lucent by Nokia Corp., which was cleared by the U.S. and French governments; and
- the acquisition of Alcatel-Lucent Enterprise by China Huaxin Post and Telecommunication Economy Development Centre, which was cleared by the U.S. and French governments, as well as by the Chinese government in a simultaneous national security review.

If these multilateral national security reviews become more common, the Trump administration can be expected to face more requests for intelligence sharing and collaboration, and may elect to use those tools to strengthen alliances with close U.S. partners.

**Revising CFIUS Authorities.** The new Congress also may exercise its authority to refocus the U.S. approach to foreign investment. Members of Congress on both sides of the aisle have shown

a renewed interest in reviewing or reforming CFIUS staffing, funding and/or authorities. Topics have included expanding the committee's jurisdiction to review the economic impacts of foreign investment and requiring the committee to take into account the openness of investors' home countries to U.S. investment when reviewing specific transactions. At the request of several members of Congress, mostly Republicans, the Government Accountability Office recently announced that it will review CFIUS statutory and administrative authorities. Moreover, to the extent that reciprocal market access is revisited by either the Trump administration or Congress, they may take heed of the recent trend in European national security reviews to take market access and other economic issues into consideration.

The laws governing CFIUS last underwent a significant overhaul in 2007, and subsequent legislative attempts to expand the mission of CFIUS have been unsuccessful. However, the heightened focus on foreign trade and investment by Congress and the new administration may create a more fertile environment for change.

Parties pursuing cross-border investments will need to engage in careful advance planning, including the assessment of relevant national security risks and the potential need to craft a pre-emptive risk mitigation package. Parties should consider a proactive approach to CFIUS in advance of the formal process.