

Trump administration highlights limitations of CFIUS process

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In separate recent public statements, two Trump administration cabinet secretaries expressed concerns with the national security review process of the Committee on Foreign Investment in the United States ('CFIUS'). They also suggested that certain technologies require protection, either through the CFIUS process or through other US or foreign government authorities. The semiconductor industry may be chief among the sectors for which the cabinet secretaries envision technology protections. Separately, media reports suggest that the Department of the Treasury, which chairs CFIUS, may be working with Congress on efforts to permit greater scrutiny of transactions originating in certain countries, including China and Russia.

On 13 June 2017, secretary of defense James Mattis, during testimony before the Senate Armed Services Committee, described CFIUS as 'outdated', saying it 'needs to be updated to deal with today's situation'. When asked for suggested changes to CFIUS, secretary Mattis offered as one example 'the lack of restrictions on investment in certain types of technologies that we must have put in place'. He declined to specify in open session the technologies he would seek to protect.

One day earlier, secretary of commerce Wilbur Ross participated in a *Wall Street Journal*-hosted event in Washington, DC. Secretary Ross was generally complimentary of CFIUS, though he stated that the administration is looking at ways to strengthen the process, particularly as it relates to joint ventures and small companies – even 'two young kids in a garage somewhere' – developing emerging technologies.

Secretary Ross was more specific about technologies requiring protection, indicating that President Donald Trump's administration has significant concerns with the expansion of Chinese

capabilities in the semiconductor sector at the expense of US business. Secretary Ross said the administration's concerns relating to semiconductors arise from their importance as building blocks for important technologies now and in the future. He noted that the United States is the technological leader in semiconductors but that China is both the largest consumer and largest competitor in the semiconductor sector; it has the goal of becoming self-sufficient in semiconductor technology by 2025 by climbing the 'intellectual value added ladder'. Secretary Ross indicated his

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belief that China will seek not only to be self-sufficient but to become a net exporter of semiconductors.

The implication of these changes, according to secretary Ross, is that the United States could soon be dependent on Chinese sources for semiconductors: 'How would the world be if in five or 10 years from now, we have the same conditions in the semiconductor industry that we already have in steel and aluminum? ... [T]hose of you who are involved with semiconductors as consumers, as users, or as players in the industry – how comfortable are you going to be if they are the world leader in 2025?'

Secretary Ross's focus on the

semiconductor industry is notable in the context of Secretary Mattis's comments, but his comparison of semiconductors to the steel and aluminum industries is especially significant because the Commerce Department is currently undertaking national security investigations of steel and aluminum imports pursuant to section 232 of the Trade Expansion Act of 1962, as amended.

These investigations allow the president to 'adjust imports' of articles whose imports threaten to impair 'national security,' which is defined broadly to include a number of economic considerations. Secretary Ross suggested that additional section 232 investigations are forthcoming; while he declined to specify the industries that would be affected, his emphasis on semiconductors suggests a potential candidate.

The Commerce Department has already stated that a section 232 investigation targeting semiconductor imports may be under consideration. Secretary Ross's words suggest that action may be moving closer.

Foreign acquisitions in the semiconductor industry have already been the focus of several recent CFIUS cases, including transactions blocked following CFIUS reviews. However, secretary Ross also expressed concerns that tightening the CFIUS process would merely result in aggressive foreign acquirers pursuing technological advancement through acquisitions in other countries – a trend, he suggests, is already underway.

Given secretary Ross's comments, it is possible that the Commerce Department will not only take a more aggressive stance within the CFIUS process but will also encourage America's allies to continue developing their own more aggressive national security regulatory review processes.

CFIUS reviews have occasionally been

undertaken in parallel with national security reviews in foreign countries, with a notable example being the review by both CFIUS and the German government of the proposed 2016 acquisition of Germany's Aixtron SE by Grand Chip Investment GmbH, a company ultimately owned by investors in China. Both CFIUS and German authorities ultimately blocked the transaction. Companies should be prepared for the possibility of more aggressive European reviews of cross-border acquisitions as well as greater cooperation between the United States and European allies.

Finally, according to a 14 June 2017 Bloomberg report, citing unnamed administration officials, secretary of the Treasury, Steven Mnuchin is working with senator John Cornyn, R-Texas, and members of Congress on a preliminary proposal for CFIUS to undertake more extensive national security reviews of investments from specific countries of

concern, including China, Russia, Iran and North Korea. This proposal would be part of broader legislation to strengthen the CFIUS process.

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If accurate, this report would signal the administration's departure from CFIUS's long-stated approach in which investments originating in all countries

are treated equally. Depending on the specifics of the legislative proposal, the practical effect of designating transactions from the four specified countries for more rigorous CFIUS inquiries may be limited. Most of the transactions terminated as a result of CFIUS reviews for which public information is available have originated in China, and Russian transactions are already likely to face heavy scrutiny in light of recently publicised views of the US intelligence community. Additionally, few, if any, CFIUS-reviewed transactions originate in Iran or North Korea.

In light of the statements by both secretary Mattis and secretary Ross, companies should expect a more restrictive approach to foreign investments in emerging technologies and related early-stage ventures in a variety of sectors. Prospective legislation, if adopted, may change the CFIUS environment further. ■

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