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ELECTION 2016

Proposals to Curb Foreign Investment in the United States May Be Gaining Steam After the U.S. Election

SELECT POST-ELECTION AND PRE-ELECTION DEVELOPMENTS

Post-Election

- **Nov. 16.** CNN reported that a Trump transition memorandum stated that the President-elect would on Day 1 of his presidency, “order CFIUS” to review “food security in trade” and “reciprocity in international corporate takeovers.”
- **Nov. 16.** The U.S.-China Security and Economic Review Commission recommended that Congress amend the CFIUS statute to “bar” Chinese state-owned enterprises “from acquiring or otherwise gaining effective control of U.S. companies.”

Pre-Election

- **2016.** The Government Accountability Office announced that it would, in response to some Congress members’ request, examine whether CFIUS has the legal power to “keep up with efforts by state-owned firms in Russia and China to buy strategic U.S. companies.”
- **2016.** During and after a September 20 Senate Judiciary Committee Hearing on consolidation in the agrochemical industry, Senators requested assurances from the CEO of Syngenta AG that the company would not assert sovereign immunity as a defense in U.S. litigation following its acquisition by state-owned ChemChina (if completed).
- **2016.** Senator Grassley (R-IA) introduced the State-Owned Entity Transparency and Accountability Reform (STAR) Act of 2016, which deprives state-owned entities of sovereign immunity as a defense in U.S. Courts.
- **2016.** Senator Grassley (R-IA) introduced the Securing American Food Equity Act of 2016 (SAFE Act of 2016) to add the Secretary of Agriculture to CFIUS and include in the scope of CFIUS reviews the national security effects of transactions involving agricultural assets.
- **2016.** A bipartisan group of Senators called for a CFIUS national security review of ChemChina’s proposed purchase of Syngenta and renewed calls for a USDA role in the CFIUS process.
- **2014.** The Foreign Investment and Economic Security Act was introduced in the House of Representatives. The Bill provides for a USDA role in CFIUS reviews of transactions that affect U.S. agriculture and/or food safety.
- **2013.** A bipartisan group of Senators called for a CFIUS national security review of the Shuanghui-Smithfield deal and USDA participation in the process. The Senate Agriculture Committee held a hearing on Smithfield and future foreign investment in U.S. agriculture.

Pre- and Post-Election Scrutiny of Foreign Investment in the United States, Particularly by Chinese and Other State-Owned Enterprises

Major acquisitions of U.S. businesses by foreign firms have in recent years garnered increasing attention and push back in the United States. Acquisitions of U.S. businesses by state-owned enterprises (SOEs), particularly Chinese-owned, and their subsequent commercial activities have generated the most attention and backlash.

In response to high value takeovers of U.S. businesses in sectors that have national security value or otherwise touch national interests—such as technology and agriculture—members of Congress, industry associations, and others have demanded, among other measures, modifications to the U.S. national security-based foreign investment review process, carried out by the Committee on Foreign Investment in the United States (CFIUS).¹

Proposals to Expand the Scope of CFIUS Reviews (and Other Proposals) Have Some Bipartisan Support and Appear to Align with the President-elect’s Trade Agenda

A recent news report suggests that some proposals to curb foreign investment in the United States would be adopted by a Trump Administration. According to a November 16 CNN report—*which should incorporate the apparently generally applicable caveat that positions may change*—a memorandum prepared by the Trump transition team stated that on “Day 1” of his presidency, the incumbent President would “order the Committee on Foreign Investment [in the United States] . . . to review food security in trade and reciprocity in international corporate takeovers (i.e. whether a US company would be able to buy a Chinese company like a Chinese company would be able to be buy a US company).”²

The President-elect’s reported planned action appears to fit generally with some of his protectionist, “America first” statements on trade during the presidential campaign. Nevertheless, his reported planned action is neither new nor unique to him or his campaign.

Calls to tighten the CFIUS review process or expand CFIUS’s scope were made well before the President-elect prevailed on November 8, and

before he declared his candidacy for president in June 2015. More generally, foreign acquisitions of U.S. businesses have in recent years been met with progressive proposals for, among other actions: (1) more frequent and stringent reviews of SOE-involved transactions; (2) measures to assess the impact of foreign investment beyond national security, including by adding in some cases the heads of the Departments of Agriculture and Health and Human Services to CFIUS to ensure that relevant sector impacts are assessed;³ (3) limitations on SOEs' sovereign immunity and separate corporate entity status in U.S. litigation;⁴ and, most recently, (4) an outright ban on acquisitions or control of U.S. businesses by Chinese SOEs.⁵ (See the box on the right of page 1 for related pre-election developments).

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- [Food Security and Agriculture Investment Require Multidimensional Approaches](#), February 2014.

A Trump Order That CFIUS Consider “Food Security” in Transaction Reviews Would Coalesce with Prior Bipartisan Proposals

If a Trump Administration were to order CFIUS to consider “food security” in its reviews of transactions, such an order—assuming it would be legally sufficient, without legislation, to mandate such an extension of CFIUS’s scope (and this seems debatable at best)—would be consistent with, for example, the Foreign Investment and Economic Security Act of 2014 (introduced in the House by Democratic Congresswoman DeLauro in 2014 and reintroduced in 2016), which seeks to institute a “net benefit” assessment of foreign investment in the United States, including whether transactions affect “food safety.”⁶

The addition of a food security/food safety component to the CFIUS review would also be consistent with, *inter alia*: (1) the Securing American Food Equity Act of 2016 (SAFE Act of 2016), introduced by Senator Chuck Grassley (a Republican) to add the Secretary of Agriculture to CFIUS and include in the scope of CFIUS reviews the national security effects of transactions involving agricultural assets⁷ and (2) prior bipartisan calls for such a consideration, made by members of Congress in response to the acquisitions by Chinese firms of Smithfield Foods in 2013 (cleared by CFIUS and completed) and Syngenta AG (cleared by CFIUS and now [pending approval by European regulators](#)).⁸ (It is worth noting that the Secretary of Agriculture [did, following calls for his participation by Congress members, participate in CFIUS’s review of the proposed ChemChina-Syngenta transaction](#)).

Key Takeaways

As demonstrated by the nature and outcome of the U.S. Election—at the presidential and Congressional levels—prognostication is a risky business. It is not clear what, if any, measures a Trump administration would, in its early days, take with respect to foreign investment in the United States. Moreover, the legal effectiveness of some actions if taken (such as a presidential executive “order”) would require assessment.

Nevertheless, it is worth noting for now that there is and has been support, within and outside of Congress, for more rigorous reviews of and limits on foreign investment in the United States, including by expanding CFIUS’s composition and the scope of its reviews of foreign takeovers of U.S. businesses. These proposals appear to be coalescing and in some cases gaining steam after the U.S. Election. More generally, the

current political environment in the United States provides more fertile ground for proposals to impose more checks on or limit foreign investment to materialize as law, policy, or consequential political positions (unless or to a lesser extent, perhaps, if the incumbent president changes course and sets a new tone, as some speculate he might do).

Acquisitions of U.S. businesses by SOEs, particularly Chinese SOEs, have been a key focus of concern about foreign investment in the United States. Chinese *and other* SOEs would be well-advised to acquaint themselves with the gathering focus in Washington on their U.S. investments, commercial activities (post-acquisition), and sovereign immunity under U.S. law and in U.S. litigation—non-Chinese SOEs should not assume that they will not be subjected to the same or similar scrutiny. At minimum, SOEs—Chinese and non-Chinese—may be well-served by understanding the origins of some Trump transition team (and later administration) proposals and/or their linkages to prior proposals.

Privately-owned foreign enterprises should also take note, as sentiments about foreign investment in the United States may also directly or indirectly affect their planned or future investments (including, perhaps, favorably, if SOEs are (to an extent) taken out of competition for U.S. assets as a result of legal, policy, or political measures adopted in the United States). ■

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¹ Such as, in agriculture, the 2013 acquisition of Smithfield Foods by China's Shuanghui International. For more information about the reactions to the Shuanghui-Smithfield and other agriculture transactions, see MassPoint's April 2016 publication, "[Foreign Investment in U.S. Agriculture Under Scrutiny: Raising National Security, Critical Infrastructure, and Key Resources Concerns](#)" (hereinafter "**MassPoint Agriculture Investment Update**").

² Tal Kopan, [Trump transition memo: Trade reform begins Day 1](#), CNN Politics, November 16, 2016.

It is not clear if "food security" connotes the commonly and internationally used meaning—primarily the availability of food at affordable prices and in sufficient quantities and varieties to meet demand. As used by the Trump transition team memo, the intended meaning may be food safety. Moreover, it is not clear if "reciprocity" would only encompass, as the quoted Trump transition memo suggests, the ability of U.S. firms to acquire or takeover Chinese firms, or if reciprocity would include more broadly that U.S. firms in China be treated as Chinese firms are treated in the United States.

³ See, e.g., Foreign Investment and Economic Security Act of 2014, H.R. 5581, 113th Cong., §§ 3, 6 (2014) ("**FIESA**"). The FIESA was introduced by a Democrat, Congresswoman Rosa DeLauro of Connecticut, in 2014 and reintroduced in the current Congress

as the Foreign Investment and Economic Security Act of 2016, H.R. 5665, 115th Cong. (2016). Read more about the FIESA in the [MassPoint Agriculture Investment Update](#).

- ⁴ On September 14, 2016, Senator Chuck Grassley of Iowa (a Republican) introduced the State-Owned Entity Transparency and Accountability Reform (STAR) Act of 2016, S. 3323, 114th Cong. (2016). The STAR Act is a bill to amend the Foreign Sovereign Immunities Act of 1976 and would deprive foreign state-owned enterprises of sovereign immunity as a defense in U.S. Courts and make “commercial activity . . . attributable to any corporate affiliate of the agency or instrumentality that . . . directly or indirectly owns a majority of shares . . . and . . . is also an agency or instrumentality of a foreign state.” *Id.* at § 3. In other words, the STAR Act, if adopted, would diminish the separate corporate entity status of affiliated SOEs, and thus is significant as a matter of corporate law (as well as sovereign immunity law). Read more about the STAR Act in MassPoint’s September 2016 Business Update, “[Senate Bill Deprives State-Owned Enterprises of Sovereign Immunity as a Litigation Tactic in U.S. Courts.](#)”
- ⁵ U.S.-China Security and Economic Review Commission, 2016 Annual Report to Congress, November 16, 2016, [Comprehensive List of Commission’s Recommendations](#) (“The Commission recommends . . . [that] Congress amend the statute authorizing the Committee on Foreign Investment in the United States to bar Chinese state-owned enterprises from acquiring or otherwise gaining effective control of U.S. companies.”). The Commission “[was created by the United States Congress](#) in October 2000 with the legislative mandate to monitor, investigate, and submit to Congress an annual report on the national security implications of the bilateral trade and economic relationship between the United States and the People’s Republic of China, and to provide recommendations, where appropriate, to Congress for legislative and administrative action.”
- ⁶ See FIESA, §3, *supra* n. 3 (providing, *inter alia*, that the heads of the Departments of Agriculture and Health and Human Services be included in CFIUS “[i]f the President determines that the covered transaction may affect the agricultural sector, including food safety . . . [and/or] the public health, including food safety . . .”). As stated in note 2 above, it is not clear that the Trump transition memo’s use of “food security” means or encompasses “food safety.” However, given pre-Election concern about food safety in the context of foreign acquisitions of U.S. agricultural assets, it seems reasonable to assume that food safety is intended or encompassed.
- ⁷ Securing American Food Equity Act of 2016 (or the SAFE Act of 2016), S. 3161, 114th Cong. (2016).
- ⁸ See, e.g., regarding Syngenta, a [March 24, 2016 letter](#) to the Secretary of the Treasury, in his capacity as the Chairman of CFIUS, requesting that CFIUS review ChemChina’s proposed acquisition of Syngenta. Notably, the letter characterized food safety and food security as national security matters, citing “a shared sentiment among lawmakers, military officials, and everyday Americans that protecting the safety and resiliency of our food system is core to American national security.” The letter was co-signed by four members of the Senate Agriculture Committee: Senators Debbie Stabenow (D-MI), Charles Grassley (R-IA), Sherrod Brown (D-OH), and Joni Ernst (R-IA). United States Senate Committee on Agriculture, Nutrition, & Forestry. For more background, see [MassPoint Agriculture Investment Update](#). A bipartisan group of senators wrote a similar letter to the Secretary of the Treasury in connection with the 2013 Smithfield transaction. They wrote that “any CFIUS review of this transaction should look beyond any direct impact on government agencies and operations to the broader issues of food security, food safety, and biosecurity.” [Bipartisan Group of Senators Urge Appropriate Oversight of Proposed Smithfield Purchase](#), June 20, 2013.