

Report from Washington

President Trump Directs the Treasury Secretary to Propose New Restrictions on Chinese Investments in the United States

March 28, 2018

Introduction

On March 22, 2018, President Trump issued a memorandum directing: i) the Secretary of the Treasury to propose restrictions regarding Chinese investment in “industries or technologies deemed important to the United States”; ii) the U.S. Trade Representative (or “USTR”) to propose products for inclusion in a new round of tariffs targeting China; and iii) the USTR to pursue dispute settlement in the World Trade Organization (WTO) to address China’s “discriminatory licensing practices.” The President’s directives underscore the Administration’s skepticism of Chinese foreign direct investment in the broader context of the Administration’s findings on China’s alleged unfair trade practices concerning technology and intellectual property.

President Trump’s Directives

Investment Restrictions. President Trump tasked Treasury Secretary Mnuchin to “propose executive branch action, as appropriate and consistent with law, and using any available statutory authority, to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States.”

Tariffs. President Trump also called for the U.S. Trade Representative to publish a proposed list of products and accompanying tariffs by Friday, April 6, 2018, to address “the acts, policies, and practices of China that are unreasonable or discriminatory and that burden or restrict U.S. commerce.”

WTO Dispute. In addition, President Trump directed the USTR to work with other member nations to pursue a WTO action addressing “China’s discriminatory licensing practices.”

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– USTR Report

Elaborating on the directives during the memorandum’s signing ceremony, President Trump said he anticipated the tariffs “could be about \$60 billion,” noted the WTO directive responded to “a tremendous intellectual property theft situation” amounting to “hundreds of billions of dollars” on a yearly basis, and emphasized his ultimate goal of achieving reciprocity: “The word is ‘reciprocal.’ That’s the word I want everyone to remember . . . If they charge us, we charge them the same thing. That’s the way it’s got to be.”

The Directives Dovetail with Findings from the USTR’s 301 Investigation

President Trump’s directives are based on the conclusions of an investigation that the Office of the U.S. Trade Representative opened last August, pursuant to Section 301 of the Trade Act of 1974, as amended (19 U.S.C. § 2411). At the President’s request, the USTR’s investigation evaluated whether China’s acts, policies, and practices were unreasonable, discriminatory, or harmful toward U.S. intellectual property rights, innovation, or technology development. Joining President Trump for the memorandum signing ceremony, the USTR Robert Lighthizer remarked: “[W]e concluded that, in fact, China does have a policy of forced technology transfer; of requiring licensing at less than economic value; of state capitalism, wherein they go in and buy technology in the United States in non-economic ways; and then, finally, of cyber theft.”

Along with the President’s memorandum, the USTR released a formal report setting out the findings of its investigation and identifying four primary conclusions:

1. China uses foreign ownership restrictions, including joint venture requirements, equity limitations, and other investment restrictions, to require or pressure technology transfer from U.S. companies to Chinese entities. China also uses administrative review and licensing procedures to require or pressure technology transfer, which, inter alia, undermines the value of U.S. investments and technology and weakens the global competitiveness of U.S. firms;
2. China imposes substantial restrictions on, and intervenes in, U.S. firms’ investments and activities, including through restrictions on technology licensing terms. These restrictions deprive U.S. technology owners of the ability to bargain and set market-based terms for technology transfer. As a result, U.S. companies seeking to license technologies must do so on terms that unfairly favor Chinese recipients;
3. China directs and facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and

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— Steven Mnuchin, United States Secretary of the Treasury

intellectual property and to generate large-scale technology transfer in industries deemed important by Chinese government and industrial plans; and

4. China conducts and supports unauthorized intrusions into, and theft from, the computer networks of U.S. companies. These actions provide the Chinese government with unauthorized access to intellectual property, trade secrets, or confidential business information, including technical data, negotiating positions, and sensitive and proprietary internal business communications, and they also support China’s strategic development goals, including its science and technology advancement, military modernization, and economic development.

Particularly noteworthy, the USTR’s report reveals that investigators based their conclusions on a review of “hundreds” of transactions in “technology-intensive” sectors such as aviation, integrated circuits, information technology, biotechnology, industrial machinery, renewable energy, and automotive. To support the USTR’s conclusion that China uses private mergers and acquisitions to procure IP, trade secrets, and other valuable assets from U.S. companies, the USTR’s report details numerous completed deals, some or all of which were likely reviewed and cleared by the Committee on Foreign Investment in the United States (“CFIUS”)—including, among others: Aviation Industry Corporation of China’s acquisitions of Epic Aircraft, Teledyne Technologies, and Cirrus Aircraft; Beijing E-Town’s acquisitions of Integrated Memory Logic Limited (iML) and Mattson Technology, Inc.; and Zhejiang Wanfeng’s acquisition of Paslin Co.

Secretary Mnuchin released a statement responding to President’s Trump’s call for investment restrictions noting that “China has sought to gain access to intellectual property and cutting-edge technology developed by U.S. businesses through such wrongful practices as systemic, government-driven investment in U.S. companies, unreasonable requirements and limiting restrictions intended to pressure U.S. firms, and cyber-enabled intrusions.”

Implications for Chinese Investment

It remains unclear under what statutory authority Secretary Mnuchin will propose limiting investments from China. And while Secretary Mnuchin has confirmed that “[the Treasury Department] would be the lead agency on managing any investment restrictions or licensing,” he has otherwise declined to provide any additional details.

Executive authority to suspend or prohibit foreign investments in the United States—as opposed to regulate trade, control exports, or impose economic sanctions—derives from Section 721 of the Defense Production Act of 1950, as amended (50 U.S.C. § 4565), which establishes CFIUS, the inter-agency committee charged with reviewing foreign investments

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in U.S. businesses for national security implications. As reported last November, a bipartisan effort is currently underway in both chambers of Congress to enact reform legislation to modernize CFIUS and expand the Committee’s jurisdiction, broaden its powers, and enhance its resources.¹

Although unconfirmed, one source of statutory authority that the Administration may be considering as the basis for any new investment restrictions is the International Emergency Economic Powers Act (50 U.S.C. §§ 1701 et seq.) (“IEEPA”), which provides the President with broad authority to “deal with any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States.” This authority requires the President to declare a “national emergency” and has traditionally been used as the basis for most of the economic sanctions programs implemented by the Treasury Department’s Office of Foreign Assets Control. The use of such extraordinary power to address concerns about trade and foreign direct investment involving Chinese parties could well be challenged. Unlike the Defense Production Act, the IEEPA does not exempt Presidential action from judicial review. That said, any challenger would have to shoulder a heavy burden—the Supreme Court has made clear that Presidential Action under the IEEPA “is supported by the strongest of presumptions and the widest latitude of judicial interpretation.” *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952)).

Neither President Trump’s directive nor Secretary Mnuchin’s public remarks on the subject clarify whether any investment restrictions will exist within the current CFIUS framework. To the contrary, the President’s directive for Secretary Mnuchin to “propose executive branch action [] using any available statutory authority” suggests that President and Secretary Mnuchin may be exploring whether they can open up a new front, outside of the CFIUS process, to review and prohibit Chinese investments.

Stepping back, President Trump’s direction to the Treasury Secretary could be seen as a means to accomplish by Executive Branch action some of what the bipartisan CFIUS reform bill would achieve by Congressional enactment. Although the latter has been subject to some industry pushback, Congress appears to be on track to pass the legislation by the time of the August recess.

¹ http://www.stblaw.com/docs/default-source/memos/reportfromwashington_11_13_17.pdf

To learn more about our foreign investment review practice and how to navigate key processes, including matters before CFIUS, the Treasury Department's Office of Foreign Assets Control ("OFAC"), the State Department's Directorate of Defense Trade Controls, and the Defense Department's Defense Security Service, please contact the following:

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