China

November 29, 2016

Congress Urged to Block Certain Chinese Investments in the U.S.

By Thomas M. Shoesmith, Matthew R. Rabinowitz, Nancy A. Fischer and Julian Zou

This alert was also published as a bylined article on LexisNexis on December 18, 2016

On November 16, 2016, the U.S.-China Economic and Security Review Commission (USCC) issued its 2016 Annual Report to Congress, which included 20 recommendations on Congressional action to be used for assessing progress and challenges in U.S.-China relations. In its report, the USCC recommended that the Committee on Foreign Investment in the United States (CFIUS) block all Chinese state-owned enterprises (SOEs) from acquiring or gaining control over U.S. businesses. The full USCC report and its recommendations are available here.

The USCC was created by the U.S. Congress in October 2000 with the mandate to monitor, investigate and report to Congress on the national security implications of the bilateral trade and economic relationship between the U.S. and the People's Republic of China (PRC), and to provide recommendations, where appropriate, to Congress for legislative and administrative action. It is a bipartisan committee comprised of 12 members serving two-year terms, with three members elected by each of the Majority and Minority Leaders of the Senate, and the Speaker and the Minority Leader of the House. In preparing its most recent annual report, the USCC conducted six public hearings, received briefings from various U.S. agencies and the Intelligence Community, and made official delegation visits to Taiwan, China and India.

CFIUS, an inter-agency committee chaired by the U.S. Treasury Department, oversees a voluntary review process for parties to submit a notice describing transactions involving foreign acquisitions of U.S. businesses. Upon submission of the notice, CFIUS reviews the transaction for national security concerns. Based on its review, CFIUS may find the transaction presents no national security risks, or if a risk does exist, may enter into an agreement or impose conditions on the parties to address those risks.

In its report, the USCC found that Chinese investment in the U.S. is rising rapidly and that a particular increase in the acquisition of U.S. technology companies has raised political concerns. Moreover, the USCC described the "thin line" between Chinese SOEs and private companies, stating that during its June

2016 trip to Asia, it learned that the PRC can exert certain methods of ''control'' over private companies, including through direct or indirect ownership, preferential lending by a state bank, board member appointments, or forcing an agreement among shareholders. **As a result of these growing political concerns, the USCC recommends that Congress amend CFIUS' authorizing legislation to bar all Chinese SOEs from acquiring or otherwise gaining "control" of U.S. companies.**

The USCC's recommendation is purely advisory and would require further Congressional action. In the past, the USCC has made other recommendations involving CFIUS, such as expanding its scope beyond national security and requiring reports to Congress on reviewed transactions. These recommendations have been met with varying levels of success at the congressional level. While Congress has yet to adopt the USCC's recommendation to expand CFIUS reviews beyond national security concerns, 16 members of Congress called on the U.S. Government Accountability Office (GAO) to consider whether CFIUS reviews should indeed be broadened. In October, GAO announced that it would commence its review around January 2017, once certain staff members become available.

In addition, several members of Congress have called on CFIUS to block specific transactions involving Chinese companies that they believe raise national security concerns. For example, earlier this year, four U.S. Senators wrote to CFIUS requesting they review the proposed acquisition of Syngenta, a Switzerland-based crop protection and seed company with U.S. operations, by China National Chemical Corporation. This transaction ultimately cleared CFIUS review in August 2016. In November, 12 U.S. senators wrote to CFIUS regarding the planned multi-billion dollar acquisition of U.S.-based aluminum company Aleris Corp. by Liu Zhongtian's Zhongwang USA LLC.

If legislation is indeed passed requiring CFIUS to block any Chinese foreign government owned or controlled transaction, this action would have a sweeping impact on Chinese investment in the U.S. It would also require comprehensive reviews of acquisitions by private Chinese firms, where there is the potential for a Chinese SOE to exert "control" over the U.S. business being acquired.

If you have any questions about the impact of the USCC's recommendation, please contact the authors of this client alert.

Pillsbury continues to monitor developments concerning foreign direct investment in the U.S. and the firm maintains a database based on publicly available information of known transactions involved in CFIUS review.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Thomas M. Shoesmith (bio)
Silicon Valley
+1.650.233.4553
thomas.shoesmith@pillsburylaw.com

Matthew R. Rabinowitz (bio)
Washington, DC
+1.202.663.8623
matthew.rabinowitz@pillsburylaw.com

Nancy A. Fischer (bio)
Washington, DC
+1.202.663.8965
nancy.fischer@pillsburylaw.com

Julian Zou (bio)
Silicon Valley
+1.650.233.4057
julian.zou@pillsburylaw.com