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America First Investment Policy signals gradual expansion of CFIUS, Outbound Investment regulations

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The Trump administration's policy memorandum on U.S.-China investment indicates continued tightening along the lines of existing initiatives, but not a revolutionary break.

The Trump administration issued a National Security Presidential Memorandum titled the "America First Investment Policy" (the Investment Policy), which, according to the related fact sheet, is "aimed at promoting foreign investment while protecting America's national security interests, particularly from threats posed by foreign adversaries like the People's Republic of China."

The Investment Policy does not itself change existing rules but sets out policy guidance for the new administration. It underscores the Trump administration's skepticism of U.S.-China investment, but that skepticism is neither new nor limited to one party, and the Investment Policy reflects the advancement of previous proposals more than a radical break with the past. There are, however, a few novelties, including both an expansion of authorities targeting institutional investment in China and a possible curbing of intervention by the Committee on Foreign Investment in the United States (CFIUS) in transactions involving allied countries. However, in the end, the Investment Policy is a public-facing declaration of intentions, some of which would require further legislative or regulatory action and some of which would not, and the extent to which they translate into action remains to be seen over the coming months.

Below, we highlight several key proposals within the Investment Policy. Although we expect the implementation of the Investment Policy to be incremental, active monitoring and engagement with respect to pending and planned transactions will remain critical.

Investment Policy proposals

Tighter restrictions on U.S.-China investment

The Investment Policy suggests that the Trump administration will use its discretion and encourage Congress to tighten U.S. restrictions on investment to and from China, including:

Tighter CFIUS reviews of inbound investment. The Investment Policy directs CFIUS to expand its scrutiny of (and perhaps presumptively restrict) China-related investments in the United States. The Investment Policy also lists a wide range of sectors of potential concern, including critical technology and infrastructure, healthcare, agriculture, energy, and raw materials—all of which were already on the list of potential sectors of concern for experienced CFIUS counsel. One should expect China-linked investments in these industries to be subject to in-depth investigation, but it is premature to assume that commercially sensible deals that pose no real national security threat will be rejected out of hand.

The Investment Policy also suggests that the Trump administration will seek expanded authority to review "greenfield" investments. This reflects proposals dating back to the 2018 Foreign Investment Risk Review Modernization Act of 2018

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(FIRRMA) to broaden CFIUS's jurisdiction beyond acquisitions of existing United States businesses. However, in practice, CFIUS has already taken an expansive view of its jurisdiction, whether by setting a very low bar for what constitutes an existing "U.S. business," as in CFIUS's action to prevent Ralls Corporation's investment in a wind farm yet to be built, or by vigorously asserting its authority to review acquisitions of U.S. real estate, discussed in our prior client update here, and so the practical impact of any expanded authority may be limited.

In short, the Trump administration has signaled that CFIUS review of China-linked investment into the United States will be aggressive, which is not a surprise and not different from the first Trump administration. The administration has not, however, indicated that it will seek to block all investments regardless of the merits.

Expanding the scope of the Outbound Investment Program. Just before the end of the Biden administration, the Treasury Department promulgated rules restricting investment by U.S. persons in sensitive sectors in China (the Outbound Investment Program), which we described in a prior client update. The Investment Policy directs the Treasury Department to issue "new rules" to prohibit U.S. persons from investing in China's biotechnology, hypersonic, aerospace, advanced manufacturing, and directed energy sectors. These directions closely track Republican legislative proposals from the fall of 2024 and push forward an expansion of the Outbound Investment Program.

The Outbound Investment Program nominally is already in force, but the details of its restrictions and implementation remain quite unclear. The rule has far-reaching and complex implications for markets, few of which are fully anticipated in the rule, and the program has a very small staff. Furthermore, the change in administrations has severely disrupted the staff's authority and ability to provide guidance on the program as it already exists.

As discussed in our prior client update, expansion of the program (particularly to biotechnology) was previously anticipated as a possibility; the Investment Policy makes clear that future expansion is likely, regardless of teething problems with standing up the initial program. No concrete regulatory action has been taken and the implications of the existing rule are still unclear. Nevertheless, we would anticipate that the Treasury Department will be instructed to plan for expansion of the Outbound Investment Program, at the same time that the staff is working on its initial implementation. The proposals to which the Investment Policy seems to refer, though, build upon the existing outbound investment framework (which itself anticipated potential future expansion), and so the proposals appear, in principle, to build upon existing mechanisms.

New tools to disincentivize U.S. investment in China. None of these provisions are yet effective or could be effective without further action, but the Investment Policy raises a number of additional actions that could (if pursued) impair U.S.-China investment flows.

First, the Investment Policy directs the Treasury Department to review whether to suspend or terminate the 1984 United States-The People's Republic of China Income Tax Convention, which currently provides relief from double taxation on cross-border income. The President likely has the ability to terminate the treaty without congressional action, which could have a significant impact on cross-border investment.

Second, the Investment Policy questions the participation of U.S. institutional investors in the Chinese market. The references are unclear, and in some cases (e.g., the ability of U.S. institutional investors to participate as limited partners in funds investing in sectors of the Chinese economy targeted by the Outbound Investment Program) the role of U.S. institutional investors is already quite limited. The Investment Policy appears to go even further, though, suggesting that the fiduciary duty standards applicable to pension funds under ERISA may be interpreted to preclude investments in China. The Investment Policy also indicates that the Trump Administration may explore mechanisms to reduce Chinese companies' access to U.S. securities markets, such as (1) reopening the discussion on accessing audit work papers for Chinese companies under the Holding Foreign Companies Accountable Act (which we discuss in detail in our client updates here and here) and (2) possibly restricting Chinese companies (and companies from other foreign adversaries)[1] from listing variable interest entities on U.S. securities exchanges.

The Investment Policy suggests that the ability of U.S. institutional investors to deal in publicly traded securities of sensitive Chinese companies may be narrowed. It is not clear to what this discussion refers, but it could be a potential expansion of the Chinese Military-Industrial Complex sanctions (which we described in the client update here) or a narrowing of the exemption for passive investment in publicly traded securities currently found in the Outbound Investment Program regulations.

Incentives for foreign investment

The Investment Policy does not only promise restrictions on U.S. cross-border investment; it also suggests possible easing of current restrictions for investments to and from allied countries.

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Implementing an expedited "fast-track" investment process. The Investment Policy directs the Treasury Department (in consultation with the heads of other agencies, as appropriate) to create an expedited "fast-track" process, based on "objective standards" (to include the extent to which investors "avoid partnering with United States foreign adversaries") to facilitate investment from "specified allied and partner sources" into U.S. businesses involved in "advanced technology and other important areas." None of the key terms is defined, and previous promises to ease restrictions (such as the creation of a short-form declaration and the identification of "excepted foreign states" for favorable treatment) have had little practical impact, so the importance of these initiatives is an open question.

Moving away from open-ended mitigation agreements. In recent years, CFIUS has emphasized monitoring and enforcement of "mitigation agreements" imposing obligations on investors in the United States and has increasingly imposed such agreements. (See our prior discussion here and here.) The Investment Policy states that the Trump administration will move away from mitigation agreements imposing open-ended compliance obligations, focusing instead on "concrete actions that companies can complete within a specific time." Mitigation agreements have become increasingly routine and burdensome, often imposing long-term requirements on foreign investors that often pose no particularized national security threat, and it appears that the Trump administration is aware of complaints from the investing community that CFIUS is imposing itself as a de facto long-term regulator on international businesses. However, it is not yet clear whether the emphasis on structural mitigation that can be executed in the short term will in fact result in more frequent prohibition of transactions.

Expediting environmental reviews. The Investment Policy directs the Environmental Protection Agency to expedite environmental reviews for any investment over $1 billion in the United States; however, there are no additional details on the process for such reviews or associated conditions.

Conclusion

The Investment Policy is rather like a campaign platform. It announces policy direction—and to that extent is meaningful—but does not provide binding or actionable guidance. At a high level, the Investment Policy indicates that the Trump administration intends to pursue the existing direction of travel and increase friction with respect to both inbound and outbound investment between the United States and China (and other, less commercially important jurisdictions). Contrary to what a casual reading of the Investment Policy may imply, though, most of the specific proposals set out in the Investment Policy are not new, and none is self-executing. While the public message is a tough environment for U.S. -China investment, the commercial impact may be a more nuanced story to be told over time.

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[1] The Investment Policy defines "foreign adversaries" to include China (including Hong Kong and Macau); Cuba; Iran; North Korea; Russia; and the Government of Venezuela.

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