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"America First Investment Policy" Signals Heightened Focus on China and Tightening of CFIUS and Outbound Investment Controls

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On February 21, 2025, President Trump signed a National Security Presidential Memorandum detailing his administration's "America First Investment Policy" (the NSPM). Reiterating the U.S.' historic commitment to an open investment climate, the NSPM directs the U.S. government (USG) to implement new measures to protect America's national security interests from threats posed by "foreign adversaries" (which the NSPM defines as the PRC, Cuba, Iran, the DPRK, Russia and Venezuela). While the NSPM does not change current law, it is an important indication of the Trump administration's foreign investment and national security policy priorities.

The NSPM draws on a variety of proposals with broad bipartisan support, including many which were put forth by current Secretary of State Marco Rubio during his Senate tenure and others that have been advanced by members of the House Select Committee on China. Although its direction to CFIUS to restrict Chinese investments in sensitive sectors largely aligns with how CFIUS currently assesses such transactions, the NSPM suggests that CFIUS may pare back its use of mitigation agreements — especially with investors from U.S. partners and allies — which had dramatically increased in recent years, in what may be an implicit recognition that CFIUS' more frequent use of these agreements in reviews of investments from partners and allies may have had a chilling effect on largely benign foreign investments.

Here's our quick take on the top five highlights of the NSPM.

- **Enhancements of CFIUS' legal authority to target Chinese investments in sensitive sectors**: The NSPM states that the USG will use all available legal tools, including CFIUS, to restrict investments by PRC-affiliated persons in identified "critical" sectors (including technology, critical infrastructure, healthcare, agriculture, energy and raw materials). Because CFIUS has already taken a skeptical view of virtually all PRC investments in these sectors for several years, the practical impacts of this declaration may prove less significant. The NSPM also suggests that (i) the administration will work with Congress to empower CFIUS to review "greenfield" investments, a proposal that's been floated at various times in Congress (despite the narrowness of CFIUS' existing "greenfield" exception in practice), and to take steps to tighten restrictions on "foreign adversary" access to U.S. know-how in key sectors, including artificial intelligence; and (ii) the universe of "emerging and foundational" technologies will expand, thus triggering more mandatory CFIUS filings.

- **"Third-country" risks remain under the microscope**: The NSPM highlights the PRC's efforts to use investments in third-country investment funds to gain indirect access to U.S. IP and technology. CFIUS' scrutiny of these "third-country risks" has been a hallmark of CFIUS reviews for years, and we expect that CFIUS will continue to scrutinize transaction parties' direct and indirect connections to foreign adversary countries. This focus may have outsized impacts on reviews involving co-investors with significant investments in mainland China as well as potential connections to Iran and other foreign adversaries.
- **Changes to CFIUS' mitigation practices**: The NSPM previews that CFIUS will decrease its use of mitigation agreements to address national security risks arising from investments from foreign adversary countries — presumably because CFIUS will simply decline to approve investments that give rise to risks in the first place. In practice, CFIUS generally hewed to this approach during the Biden administration; it's been a while since CFIUS approved a Chinese buyer deal subject to a complex national security agreement. More importantly, the NSPM suggests that CFIUS' mitigation agreements may be limited more targeted mitigation of shorter duration to address specific national security and supply chain risks rather than a more formulaic approach. Presumably, certain long-standing mitigation techniques that are more commonly used to address potential risks in non-Chinese deals (e.g., supply assurance agreements with no expiration date) would also survive under this new standard.
- **Explicit support for investments from key partner countries as well as for so-called passive investments**: The NSPM previews the creation of a new (and yet undefined) "fast track" process to facilitate increased investment from allied and partner countries in U.S. advanced technology and similar sensitive sectors, and emphasizes that the U.S. will "maintain a welcoming stance toward passive foreign investments from all persons." Explicit approval of passive foreign investments may prove helpful in moving CFIUS away from its current practice of asking detailed questions about passive LPs in fund structures, which an FAQ issued under former

Assistant Secretary Rosen had defended as necessary for CFIUS to fully assess a transaction.

- **Expansion of outbound investment restrictions, including to cover investments by U.S. pension funds and university endowments**: The administration will create or expand restrictions on U.S. outbound investments in sensitive technologies, including semiconductors, artificial intelligence and quantum (which are currently covered by the existing OISP rules that became effective on January 2, 2025) as well as biotechnology, hypersonics, aerospace, advanced manufacturing, directed energy and other areas implicated by the PRC's national Military-Civil Fusion strategy. The new sectors track what we had anticipated were likely additions to the OISP, as all have been included in some form in several congressional outbound investment proposals over the years. With respect to biotechnology, we'd expect that any new restrictions will likely draw on the categories of biotechnology that the Department of Commerce has previously identified as important for U.S. national security (i.e., nanobiology, synthetic biology, genomic and genetic engineering, and neurotech). Because President Trump had previously directed Treasury to assess whether the outbound investment security program warranted enhancements, and Treasury's evaluation is due to the president by April 1, 2025, we would not expect any changes to the existing rules before then. The administration's consideration of restrictions on U.S. pension funds and others from investing in sensitive sectors in China similarly reflects long-standing concerns from members of Congress and other stakeholders about capital from U.S. institutional investors being used, directly or indirectly, to fund companies perceived as supporting China's military-industrial complex.

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Suggested Reading

- 28 February 2025 Kirkland Alert FinCEN to Pause Corporate Transparency Act Enforcement for Further Rulemaking
- 21 February 2025 Kirkland Alert U.S. Department of the Treasury Releases Final Rule Implementing Executive Order on Outbound Foreign Investments into China
- 19 February 2025 Kirkland Alert Court Order Restores Corporate Transparency Act Reporting Obligations — Most Filings Now Due by March 21, 2025