

Implications for Chinese Investment in the US After Section 301 Report

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Section 301 provides the president with broad authority to implement new policies and procedures that could impact reviews of Chinese investment in the United States. The president could rely on the International Emergency Economic Powers Act to expand or alter those reviews, and even open up foreign joint ventures to the review process.

President Trump issued his Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation (the Memorandum) on March 22. That Memorandum, which is based on the US Trade Representative's (USTR's) Investigative Report on China's technology transfer and intellectual property practices (Section 301 Report), authorizes the USTR and the secretary of the US Department of the Treasury (Secretary) to propose specific actions to address the Section 301 Report's findings.

According to the Section 301 Report, China has engaged in a series of improper acts that contribute to the trade imbalance between China and the United States, as well as systematic theft of trade secrets, cyber intrusions, and unfair barriers to entry in China. On the basis of these findings, the president ordered the USTR and the Secretary to

- identify products from China that will be subject to enhanced tariffs;
- pursue appropriate measures through the World Trade Organization; and
- “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.” (Emphasis added.)

This last mandate highlights the flexibility and powers the president has to address Section 301 findings and the very real specter that Chinese investment in the United States will face even greater scrutiny from a presidential administration that has already flexed its muscles in this area.

While commentary thus far has focused on how section 3 of the Memorandum may refer to enhancing the review process currently conducted by the Committee on Foreign Investment in the United States (CFIUS), the breadth of both Section 301 and of the Memorandum suggests that, while the White House may be considering a more rigorous CFIUS review of Chinese transactions, it also may be contemplating actions pursuant to other statutes. The Memorandum invites the Secretary to devise more open-minded uses of presidential powers to restrict, regulate, void, or prohibit Chinese investments in the United States beyond those contained in the Defense Production Act, 50 USC § 2170 (DPA) and its implementing CFIUS regulations, 31 CFR Part 800.

While nothing has yet been officially announced, the Trump administration may be exploring its options for “executive branch action” under the broad authorities of the International Emergency Economic Powers Act, 50 USC 1701-1707 (IEEPA), which could be used to support presidential action affecting Chinese investments within the United States.

How Broad Is IEEPA?

IEEPA grants the president extraordinary latitude once he has declared a “national emergency” under 50 USC § 1701. After the declaration of a “national emergency,” the president may take those steps necessary (and presumably constitutional) to address the identified emergency.

The statute authorizes the president:

[U]nder such regulations as he may prescribe, by means of instructions, licenses, or otherwise ... [to] investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, **transfer**, withdrawal, transportation, importation or **exportation** of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or **with respect to any property, subject to the jurisdiction of the United States**. 50 USC § 1702(a)(1). (Emphasis added.)

This authority permits the president (and his designee) to affect transfers of property subject to US jurisdiction, whether exports or imports, as well as acquisitions. In terms of acquisitions, using IEEPA would allow the president to prevent a broader range of activities than those that can be prevented by CFIUS. Whereas CFIUS focuses on foreign investment that threatens to “impair” US national security, IEEPA is not so narrowly drawn. Rather, under 50 USC § 1701, the president may declare an IEEPA “national emergency” “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.” Clearly, the threats identified by the Section 301 Report meet this standard, opening the door to administration action beyond the limits of CFIUS and the DPA.

To exercise his IEEPA authorities, the president would need to find that Chinese investments (or other participation) in various domestic sectors or industries create an unusual and extraordinary threat to the “national security, foreign policy, or economy” of the United States and that the Section 301 Report justifies particular “executive branch action” to deal with that threat. These findings would appear to flow naturally from the Section 301 Report. The question is whether the administration is considering the extraordinary relief IEEPA affords to further limit Chinese investment in the United States or China’s access to technology through other ventures.

Wide-Ranging Possibilities for Presidential Action Beyond CFIUS

Whereas current CFIUS regulations set forth a structured process for the review of foreign investment, IEEPA permits the president to establish a China-centric review process that could analyze transactions or investments instead of, or in addition to, CFIUS. A new, IEEPA-based process related to Chinese investment focusing on such investments' effects on the US economy would not be restricted by the CFIUS regulations and could operate quite differently, if deemed advisable. For example, the president could appoint agencies other than Treasury to spearhead these reviews and would not be constrained by either the CFIUS timelines or other CFIUS criteria. IEEPA allows for the application of such reviews by "means of instructions, licenses, or otherwise." The president could therefore devise and impose almost any regime that meets constitutional standards under the notion of "or otherwise," since IEEPA permits him to "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit" any type of Chinese investment in the US economy that presents the type of threat covered by the Section 301 Report.

The reach of IEEPA-based executive action also could extend beyond the current scope of CFIUS, which is restricted to the subject matter included in Section 721 of the DPA (i.e., there must be a "US business," "control," etc.) The president could, therefore, use an IEEPA-based process to review Chinese greenfield investments, joint ventures, or any other subject matter not currently covered. In fact, the president could determine that the Chinese joint ventures that have been excluded from current legislation should be reviewed under IEEPA authority. Subjecting these joint ventures to review would be consistent with the Section 301 Report findings that China was misusing these rules to unfairly gain access to US technology.

IEEPA authorizes the president to issue regulations prescribing definitions that may be necessary for the exercise of the powers granted by that statute, 50 USC § 1704. The president may, for example, redefine "critical technology" or "critical infrastructure" to coordinate those terms with the definitions set forth in the 2017 National Security Strategy (NSS) or the various Defense Sciences Board reports that address critical technology or critical infrastructure. Thus, the new process may subject to scrutiny transactions that threaten US competitive economic advantage, which was identified in the NSS as an important national security concern. Moreover, an IEEPA-based Chinese investment review process would not require all of the CFIUS member agencies to collaborate, and could include more departments than those currently involved in CFIUS.

Unlike CFIUS, however, IEEPA does not prohibit judicial review of actions taken by the president. Less certain, however, is whether this available judicial review under IEEPA is limited to the president's actions only, rather than those of the administrative agencies acting pursuant to the delegation of the president's authority. Even with judicial review, courts generally grant expansive deference to presidential discretionary actions based on national security, foreign policy, and diplomatic considerations—which an IEEPA-based review of Chinese investments would likely satisfy.

The possible IEEPA-based options are likely to be unveiled in approximately 60 days, when the Secretary is expected to provide the president with his recommendations for actions to respond to the Section 301 Report. Whether that recommendation will be limited itself to CFIUS is uncertain, but if it does not, the president's broad IEEPA authorities could be a game-changer.

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