



CFIUS Reform Set to Disrupt Business as Usual for MNCs in China

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The United States appears to be getting serious about responding to China's long-standing asymmetries on trade, investment and market access conditions – the “un-level playing field” per se. The US government's orientation toward China has palpably changed, and 2018 is shaping up to be a pivotal year where rhetoric turns into action. Much attention has been paid to the Trump administration's upcoming decisions on new tariff regimes and other trade restrictions and related trade war hyperbole, but a different and subtler change may have more impact on MNCs operating on the ground in China: the reform and empowerment of the Committee on Foreign Investment in the United States (CFIUS).

Please [click through to read our full analysis](#) on how US national security concerns over Chinese IP acquisitions are likely to have excessive repercussions beyond US borders. For your convenience, the key takeaways are as follows:

- A revolutionary new mandate in the leading CFIUS reform proposal currently before Congress effectively extends the Committee's reach to cover the global operations of US firms. This has the potential to dramatically disrupt many traditional partnership approaches MNCs have been using in China for many years – including co-investment arrangements that have become popular recently.
- The Foreign Investment Risk Review Modernization Act (FIRRMA) includes clauses that would extend CFIUS' reach into the domestic Chinese operating environment, and technology licensing agreements, IP sharing arrangements, open-source collaboration, JVs, and technology transfers in use by US firms in China, may now fall under the definition of an unacceptable national security risk for the US government, and hence will become subject to review.
- It is not implausible to believe that nearly every new partnering initiative in China

involving sensitive IP, and nearly every formal business collaboration by a leading US company involving technological exchange, could now entail reporting to CFIUS in advance. Even if CFIUS ultimately permits many deals to proceed, the reporting and review requirements alone will be hugely burdensome for US firms, if not constraining to their competitiveness in the Chinese marketplace.

- Many Chinese partners will be uncomfortable letting US federal authorities review the details of new JVs that are only active on Chinese soil. Certainly, for this reason, some deals will collapse before they can even begin. Beijing may even step in to prevent CFIUS-mandated transparency and access for the US government.
- Optimistically, a dramatically enhanced CFIUS might curtail China's practice of demanding IP transfer arrangements in exchange for market access; Beijing might decide that this long-running game is up, and that it's time to normalize investment and access conditions. But it is more likely that Beijing will retaliate by making life even more difficult for foreign participants in China's high-tech sphere, possibly extending to all things digital. A step-up in China's own CFIUS-like restrictions against foreign M&A and investment by US firms and those from "allied" countries can be expected. Very conceivably, these firms would be curtailed and other more cooperative firms from other countries be ushered forward. The divide and conquer game is unarguably well mastered by Chinese regulators.
- Assuming it passes, MNCs of all varieties should monitor how the US chooses to implement FIRREA ("the Cornyn Bill"), because an equal and opposite reaction from China is highly likely.

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