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CFIUS policy to be more cohesive under Biden

In his inaugural national security column, Berkeley Research Group's Harry Broadman outlines why Biden's CFIUS policy is unlikely to differ significantly from Trump's, but will be more coherent

By **Harry Broadman**

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Donald Trump's presidency coincided with the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), the most systematic and comprehensive statute undergirding both the direction and operations of the Committee on Foreign Investment in the US (CFIUS) since its inception in the 1970s. FIRRMA not only enjoyed wide bipartisan support but also garnered near unanimous votes in both houses of Congress.

One would have thought, therefore, that the Trump administration's CFIUS policy would have been coherent, widely supported and effectively administered. It was not.

This is no better epitomised than the case of the Chinese firm Byte Dance's ability to own and operate the widely popular video-sharing app TikTok in the US.

Over the course of just two weeks last summer, president Trump issued a spate of executive orders on the matter. They were awkwardly choreographed and focused on seemingly contradictory actions. The first order sought to ban Americans' use of TikTok, while the second directed the Chinese to divest the app's ownership to a US entity. Today, notwithstanding Trump's pronouncements about the immense national security risks posed to the country by TikTok, the app's availability in the US and its Chinese ownership remain unchanged.

Given the nascency of President Biden's administration, it is still too soon to predict with much precision how CFIUS policy will be conducted under his presidency, including whether he will take up the TikTok matter.

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Yet, in light of both his seasoned foreign relations and national security background and extensive experience as a senior level decision-maker as vice president and senator – not to mention the deep backbench of veteran policy-making cabinet members and White House staff with whom he has surrounded himself – one should be confident in Biden's approach towards CFIUS. The hope is that it will be free from the drama and chaos that permeated his immediate predecessor's handling of these matters, especially, of course, those that came to him for decisions.

This very last point deserves emphasis.

The lion's share of the media's attention given to CFIUS focuses only on the transactions that involve the need (or the desire) for an Oval Office decision. In fact, those cases are the exception rather than the rule. The vast majority of transactions reviewed by CFIUS are decided at the sub-cabinet level. And, most of those tend to be approved. This has been the practice for as long as CFIUS has been in existence. Having been a member of CFIUS in the early 1990s, I can testify that this was also the case then.

Thus, much of the perception held by outsiders to the CFIUS process – which, like other complex regulatory regimes is dominated by specialists, both those in the legal profession and non-lawyers – is skewed.

Still, it might be argued that CFIUS policy-making overall during the Trump administration was less coherent than it should have been.

This is because the actions of interagency staff working on CFIUS cases at the sub-cabinet level can ultimately be a reflection of the views of their agencies' senior most officials. In some administrations – and arguably more so during the Trump era than most in the recent past – decisions by those officials can be driven by what they think are the views of the president. It is hardly a secret that Trump is widely known to have mercurial decision-making tendencies.

To be fair, it may also be the case that with a new law in place, which required a sizeable number of implementing regulations to be promulgated, the workings of CFIUS over the course of the Trump administration were subjected to teething pains. However, even if that were true, there is only a remote chance those effects would have reverberated to a level where important decisions were significantly affected.

In addition, if anything, one of the major benefits engendered by FIRRMA and its implementing regulations which were finalised in 2020 is they serve to make CFIUS's decision-making calculus *more* regularised and transparent. This is especially true where the regulations delineate the types of transactions where notification to CFIUS is mandatory and which specific subsectors will be subject to review, such as critical technologies, infrastructure services, and data and personal information. To be frank, that is a huge change relative to the time of my tenure on the Committee. And it is all for the good.

Metamorphosis

Of course, FIRRMA and the implementing regulations do not obviate the fact that in the final analysis an administration will always put its imprimatur on the decisions it takes.

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Putting aside for a moment differences in policy stances, operational styles and demeanors of the two presidents, this maturation of the CFIUS process augurs well for Biden's team to adopt a more coherent approach than did Trump's. In fact, given the way in which Biden has been known to work in coming to policy decisions – devoting significant effort to reaching out to stakeholders who will be directly affected – he will likely vigorously capitalise on CFIUS's metamorphosis.

Those who might interpret this as implying Biden's approach to CFIUS will be more lenient than Trump's likely will be disappointed. Recall that one of his very first economic decisions after taking office was to make more stringent permitted exemptions under the Buy American Act.

At the same time, he has also moved to devote more resources and staff working on CFIUS issues in business segments that heretofore have not been a focus of the Committee – for example, the venture capital industry.

Frankly, the increased attention being paid to the potential national security impacts of venture capital funding of US investments, whether originating in China or in other foreign nations, should not be a surprise to foreign investors or to US recipients of such investment. It is yet another reflection of the maturation of the CFIUS process; indeed of the increasing dexterity of the Committee.

After all, the need for CFIUS to continue to "raise its game" reflects its response to safeguard US national security as foreign parties closely scrutinized by Washington and their potential domestic recipients test out new channels to try to consummate deals in an environment where regulatory constraints have been tightening. In a very real sense this is part and parcel of the natural process of investment optimisation in a global economy where there is competition for investment capital that is increasingly highly mobile.

See also: TikTok's time is nearly up

Indeed, just as CFIUS has become more dexterous, foreign parties with robust interests to invest in the US but seen by Washington as evincing significant national security risks – China being the obvious example – are rapidly climbing the CFIUS "learning curve." Their self-selection of deals being attempted in the US is readily apparent. While Chinese-related transactions accounted for the largest share of all notices filed with CFIUS in 2017 and 2018 (25% and 24%, respectively), in 2019, China's share fell to 11%. That is a 50% decrease. Indeed, for 2019, deals related to Japanese entities accounted for the absolute largest number of filed CFIUS Notices, equal to 20% of the total.

A systemic approach

Biden's approach to CFIUS will be far more systematic than his predecessor and the rationale for decisions made will be more clearly articulated. For example, Biden appears to be interested in coordinating US national security regulation of inbound foreign investment and US controls on exports with analogous regimes – either already in place or in the process of development, sometimes with an eye toward mirroring CFIUS – of our economic allies, especially those seemingly focused on countering China.

His recent executive order initiating a comprehensive assessment of US global supply chains would appear to be cut from the same cloth. He could even move these efforts to enhance US national security and international competitiveness further upstream by strengthening our R&D collaboration with other members of the G7 countries.

It is also likely that Congressional oversight of CFIUS's actions during the Biden administration will increase. While not always a certainty, this dynamic could well engender consensus-building between the legislative and executive branches on the US stance in this area, thus fostering greater policy coherence and stability.

This should not be a surprise, both because of the intense involvement by the Congress in the writing of FIRRMA and the teething phase of devising the statute's implementing regulations has now ended. And, do not forget that Biden is a creature of the Congress, with a penchant for a "whole of government" approach where it is both desirable and feasible.

See also: China responds to aggressive moves in US capital markets

To be sure, executive branch officials sometimes (maybe even often) bemoan oversight by Congress. The upside in the case of CFIUS policy is that the process will likely only strengthen the global credibility of the stance taken by the US on economic decisions seen abroad as controversial and sensitive.

Along with the greater policy coherence and stability that oversight can bring, if it also enhances US credibility on CFIUS matters, that is surely a welcome outcome, especially in light of the uneven record of the previous administration on this score. After all, an important engine of US economic growth over the past century has been its ability to produce an investment-friendly policy environment that can attract overseas investment.

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