

Entertainment Alert

September 29, 2016

Is Chinese Investment in the U.S. Film and Entertainment Industry the Next Area of CFIUS Scrutiny?

U.S. lawmakers recently submitted a letter to the Government Accountability Office (GAO) raising concerns about increased Chinese investments in the U.S. film and entertainment industry and questioning whether the Committee on Foreign Investment in the United States (CFIUS or “the Committee”) is applying, and has authority to apply, sufficient scrutiny to these and other inbound investments. This development could be an indication that CFIUS will increase its examination of such investments, which would be consistent with the Committee’s application of evolving criteria for assessing national security concerns to deals that may not present obvious CFIUS issues. Consequently, non-U.S. investors would be prudent to consider CFIUS risks in making investments in the U.S. film and entertainment industry, as would U.S. companies seeking to divest such assets.

As background, CFIUS is an interagency committee with the authority to review certain investments in the United States for national security considerations. The Committee has authority to review “covered transactions” that could result in a foreign person having the ability to control a U.S. business. If it identifies national security concerns related to a covered transaction, CFIUS can require mitigation measures for the transaction to be cleared or can recommend that the President block an ongoing transaction. If the transaction has closed, the President can order that the non-U.S. buyer divest its stake in the U.S. business. To address these risks, companies can submit a voluntary notice to obtain “safe harbor” for a transaction to close without fear of CFIUS intervention.

CFIUS’s national security review centers on whether the non-U.S. buyer poses a threat to U.S. national security and whether the U.S. business exposes a U.S. national security vulnerability. In recent years, Chinese investment, particularly by state-owned or -sponsored entities, has been a focus of scrutiny from the threat perspective. Still, CFIUS concerns can and do arise with investors from various nationalities.

As noted above, the types of U.S. businesses that have been a focus of CFIUS reviews has evolved. Certain U.S. industries have been a fairly consistent focus of the Committee such as the defense, high-technology and energy industries. However, CFIUS has also recently taken interest in investments in other areas, including those in the food, agriculture, insurance and information-related sectors.

With that context in mind, 16 members of the U.S. Congress submitted a letter to the GAO on September 15, 2016, requesting that this investigative arm of the U.S. government review CFIUS to ensure that it is effectively assessing “the growing scope of foreign acquisition in strategically important sectors” and determine whether it has sufficient statutory authority to address these risks. As an example, the letter identified Dalian Wanda’s completed and proposed investments acquisitions of U.S. movie studios Legendary Entertainment and Paramount Studios, and the AMC and Carmike theatre chains. They cited

growing concerns about China's efforts to censor topics and exert propaganda controls on American media, and they implied that these investments could be used to further such efforts.

Consequently, non-U.S. parties seeking to invest in the U.S. film and entertainment industry and their counterparties should not assume that CFIUS does not apply to the transaction due to the nature of the U.S. investment. Instead, these parties would be wise to consider CFIUS risks throughout the deal process. This includes assessing the feasibility of the transaction from a CFIUS perspective, conducting diligence, negotiating appropriate terms and conditions, and submitting a notice to CFIUS, as necessary. These measures will reduce the uncertainty regarding CFIUS risks in a pending transaction and facilitate the accomplishments of each party's goals.

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