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**Research Report**

## CFIUS and China in the post-COVID environment

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### **CFIUS and China in the post-COVID environment**

by

Mario Mancuso\*

The COVID pandemic and China's response to it have intensified US suspicions and greatly strengthened—inside the executive branch, in Congress, in the public—the appetite for a tougher line with China. This shift has not abated with the new Presidential administration.

The [Committee on Foreign Investment in the United States \(CFIUS\)](#) is uniquely positioned to deal with China: because CFIUS reviews the impact of certain FDI transactions on US national security, it has the power to approve, condition or frustrate Chinese investments into the US.

If not calibrated, however, post-COVID China suspicions may distort CFIUS's focus to the long-term detriment of US national security. Therefore, CFIUS should discipline its risk analysis, find ways to improve the clarity of its communications with the private sector and judiciously exercise its powers to preserve its long-term institutional ability to carry out its vital national security mission. There are at least four ways in which CFIUS should continue to adapt its approach:

- *Healthcare data under the microscope.* CFIUS has historically been interested in reviewing transactions with non-US investors involving US healthcare businesses where the personal health information of US citizens might be compromised. Today, CFIUS is enlarging its focus to include transactions that may compromise US genomic data. In addition to supporting China's drive to become a global leader in biotech and precision medicine, certain member agencies of CFIUS believe that China may use such genomic data—together with previous US data exploitations—to target individuals with negative US national security consequences.
- *Supply chain resilience.* CFIUS has shown increased interest in reviewing transactions that produce or deal in products critical to US supply chains, including especially pharmaceutical ingredients, minerals, advanced packaging, high-capacity batteries, and semiconductors. The premise of this policy interest is the strategic importance of resilience in an era of intense competition with China. But not all of these transactions involve the same risks, or to the same

degree. CFIUS should redouble its efforts to make careful fact-specific determinations of the risk profile of (i) a given transaction, including with respect to the industry sector, nature of the national security vulnerabilities of the US business, and (ii) the prospective foreign buyer.

- *China without illusions.* CFIUS is now less inclined to distinguish among different types of Chinese buyers (e.g., state-owned enterprises versus private companies) and between mainland Chinese and Hong Kong buyers for purposes of its “threat” profile assessments in M&A transactions. This is not to say that these distinctions are irrelevant. Rather, these distinctions are less salient in the context of a CFIUS review—an approach that may surprise business executives who have long used these distinctions to assess other types of legal risk (e.g., corruption risks) with respect to Chinese counterparties. Thus, one should expect that Chinese (and Hong Kong) private companies and investment funds will receive as much scrutiny as Chinese state-owned or affiliated actors. CFIUS should clarify for the private sector the basis for these short-form prudential judgements. While full transparency is unrealistic, it should be possible for CFIUS to provide clarity to the private sector by tethering its policy approach to information that is unclassified and/or already public, but not necessarily widely known. For example, the US executive branch could increase transparency on its general views on how market players in China operate by reference to China’s own official statements in this regard (e.g., [Opinion on Strengthening the United Front Work of the Private Economy](#)). This additional clarity would help the private sector better understand the likely salience of CFIUS for a contemplated transaction.
- *CFIUS as an enforcer.* While CFIUS may compel parties to file with it, CFIUS has historically lacked sufficient means to do so, except in the most pressing cases. Today, however, CFIUS is better configured and better resourced to “pressure test” its jurisdictional authority by reaching out to transaction parties pre- or post-closing with respect to transactions that were not notified to it. This is an important tool that the [CFIUS’s new office of Monitoring & Enforcement](#) should use to strengthen the systemic incentives for parties to comply with the CFIUS legal regime. Nevertheless, CFIUS should use this tool judiciously. In cases where non-notified transactions have been completed, certain legal rights will have been acquired by foreign persons. These rights may provide a legal basis to challenge CFIUS’s authority on constitutional and other grounds. While such legal challenges are rare and an uphill battle for plaintiffs, any credible threat of colorable litigation puts significant institutional pressure on CFIUS.

As with other crises, COVID has forced US security planners to think about new vectors of risk. Given CFIUS’s unique contribution to US security, it should carefully calibrate its risk post-COVID framework and resist a reflexive, sweeping approach that could undermine long-term US security interests. A more nuanced framework—with clearer communication and a judicious institutional posture—will better advance US security interests and may help reduce the policy gap between the US and its allies on Chinese investment issues.

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\* The Honorable Mario Mancuso ([mario.mancuso@kirkland.com](mailto:mario.mancuso@kirkland.com)) is a former US Under Secretary for Industry and Security, CFIUS decision-maker and senior Pentagon official; he is currently a Senior Visiting Fellow for International Security at the Hudson Institute and a senior partner at a leading international law firm. The analysis of this *Perspective*

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draws on, *inter alia*, Mario Mancuso, *A Dealmaker's Guide to CFIUS* (2019). The author would like to thank Mark Feldman, Chase Kaniecki and Joachim Pohl for their helpful peer reviews.

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