# Foreign Direct Investment in an "America First" Administration: Public Affairs Analysis and Checklist for Chinese Investors

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The year 2017 will be filled with energy and uncertainty for Chinese entities looking to invest in the United States or acquire U.S. corporations. This is because of a number of factors, most notably the policies and rhetoric of the administration of President Donald J. Trump, who was elected based on a political campaign of economic nationalism and protectionist rhetoric. While the focus of this analysis is Chinese investment into the United States, cross-border issues and tensions around trade are also relevant to the overall climate.

In this white paper, APCO Worldwide provides its global public affairs insight and offers specific recommendations for Chinese entities who seek to expand in the United States – which by many measures remains the top destination for investors. Yet, even before Trump's rise, APCO's research found that 75 percent of Chinese executives believe entering the U.S. market is challenging.

Our counsel is based upon two premises:

i) foreign entities must develop a strategy to communicate a compelling business case for their transaction and tangible ways in which it will contribute to the improvement of U.S. – based businesses and the U.S. economy, while allaying concerns on employment, social and environmental impact, national security, and

ii) foreign entities must develop relationships to help weather potential risks to deal completion and criticism from a variety of passionate stakeholders and opponents to a specific transaction. An essential factor in success is understanding the issues and stakeholders in the United States landscape that potentially need to be engaged by a Chinese entity, in contrast to those involved in a similar transaction within China.

In his inaugural address, President Trump issued a strong message that his administration was going to adopt a very clear policy of "America first." He deemed this as a necessary departure from prior administrations' policies so as to reverse the "carnage" that he observed in the American economy. The basic outlines of the "America first" policy that President Trump presented included elements of both domestic and foreign policy aligned with his campaign promises:

- A wholesale review of America's trade deals
- An energy policy framework to maximize U.S. natural resources and limit foreign oil dependence
- A foreign policy refocused on national security and destroying ISIS (and other radical terror groups)
- A new spending bill to "rebuild" America's military with a particular focus on cyberwarfare
- Empowered law enforcement officers in America's cities and along the country's borders

At campaign rallies and in interviews, Trump made it very clear that he was vehemently opposed to the practice of U.S. companies shipping jobs, capital and innovation abroad, especially if it involved the destruction of American manufacturing strength. This position has been extremely appealing to many individuals in the middle and lower classes who have experienced economic stagnation since the 1970s, in terms of income and job loss as well as the deterioration of their communities. The actions Trump has advocated to respond to this situation include renegotiating or withdrawing from trade treaties, threatening tariffs, demanding reciprocity and "fair trade", public shaming of companies and/or offering tax incentives to invest and keep jobs in the United States, restrictions on work visas and immigration, and tax proposals to reward exporters and penalize imports. This new situation is creating significant business uncertainty and reputational risk for American companies that have built global supply chains, business processes and overseas investments.

On the other hand, President Trump's view on foreign direct investments (FDI) into the United States is rather undefined. This may indicate Mr. Trump's personal equivocation on this matter, but also a realization that his supporters may value jobs and investment (even if it is foreign capital).

At this point, it is important to consider the background of this specific situation. At the macro level, a Trump Administration will likely reshape U.S. trade policy through several key efforts:

1. President Trump, by Executive Order on January 24, 2017, withdrew the United States from the Trans Pacific Partnership (TPP). Some TPP signatories, including New Zealand, have publicly suggested TPP could go ahead without the United States. Others have also pointed to regional trade frameworks that were already under negotiation and could quickly step in to fill the void left by the TPP, like the RCEP (Regional Comprehensive Economic Partnership), the proposed free trade agreement between ASEAN nations and their six Free Trade Agreement partners.

2. Trump has indicated that he will pursue bilateral trade deals with individual countries rather than multi–party engagements. The United Kingdom, for example, has pushed hard to secure Trump's support for a U.S.-UK trade deal amidst Britain's withdrawal from the European Union (a marked shift from the Obama Administration's pre-Brexit referendum statement that a bilateral UK trade deal would be at the back of the line for the United States).

3. President Trump has announced his plans to renegotiate the North America Free Trade Agreement (NAFTA) with Mexico and Canada. Trump has threatened to withdraw from the agreement if he is unable to get "American workers a fair deal."

4. Trump has also stated that he will use all efforts to end "unfair trade practices" and push for reciprocity on the treatment of U.S. businesses on trade and investment issues. While the specifics of this pledge are still to be defined it may involve tariffs, border taxes, litigation and restrictive foreign investment policies to punish nations that are perceived as detrimental to the U.S. economy.

5. The Trump Administration has put forward a trade strategy document for 2017, which indicated that decisions of the World Trade Organization arbitration panel may be treated as non-binding by the United States. This suggests a potentially significant paradigm shift in how the United States engages its international partners over trade disputes.

Each of these efforts may impact future Chinese investment in the United States, from a practical point of view but also by shaping the public conversation around these investments.

## CONSIDERATIONS FOR FDI

Chinese outbound investment hit record levels in 2016, including $46 billion of FDI into the United States, most of which was acquisitions by privately–owned companies and investors, according to Rhodium Group. Chinese businesses also committed to $7 billion in capital expenditures for U.S. greenfield projects. Two Chinese deals were blocked on national security grounds, while other proposed transactions failed due to other reasons such as financing or rival bidders. This should be taken in the larger global context that deal-making is very robust but faces heightened complexities and regulatory enforcement: Globally, M&A volumes reached nearly $4 trillion, but over 1,000 deals worth $800 billion collapsed in 2016.

The U.S. outlook for M&A and FDI in 2017 is supported by expectations that the Trump administration and the Republican Congress will be able to enact significantly lower corporate tax rates and pare back the regulatory burden on businesses. Their intention is to increase investment in the United States – keep U.S. companies from relocating or hoarding cash abroad for tax reasons, and drive higher economic growth and exports – policies which could also attract FDI flows. While President Trump's unabashed stance of "buy American, hire American" is supported by many ordinary voters, research conducted by APCO Worldwide also shows that a plurality of the U.S. public consider a company to be American if it has U.S. operations. The public also say it is good policy for President Trump to recognize foreign companies that are investing and building up their U.S. businesses.

**Chinese firms must be extremely conscious of the dramatically changed circumstances in which they find themselves as potential investors and acquirers.**

A key theme throughout President Trump's rise to power is that China (and certain other countries such as Germany) has taken advantage of the United States. His promise to his supporters has consistently been to rectify this "outrage."

One of Trump's most likely weapons will be the Committee on Foreign Investment in the United States ("CFIUS"). This is an interagency committee, chaired by the U.S. Department of the Treasury, which is authorized to evaluate whether a transaction will have an effect on the national security of the United States. To do so, CFIUS looks at a broad range of factors such as whether the target company owns and operates critical infrastructure, owns property near U.S. government facilities, or impacts the national transportation system. The definition of national security has been stretched, with CFIUS review of Chinese acquisitions of a food company (Smithfield Foods) and a hotel property (the New York Waldorf-Astoria), among others.

The number of CFIUS reviews has also been growing significantly over time. In 2016, CFIUS reviewed over 170 transactions, a record number. In addition, CFIUS increased efforts to identify transactions that were not voluntarily submitted for review, so some of the filings reflect cases where the parties were "invited" to file by CFIUS.

Chinese transactions have been of increasing interest to CFIUS. Between 2012 and 2014, CFIUS reviewed 68 transactions involving Chinese entities (both state owned and private sector), more than double the reviewed transactions involving Germany, France and The Netherlands combined. In 2016, the proposed acquisition of Lumileds by a Chinese consortium was abandoned at the request of CFIUS. Even President Obama became involved in another 2016 case after CFIUS recommended that a Chinese investment fund abandon its proposed acquisition of a German tech company, Aixtron. The parties chose not to follow CFIUS' recommendation and to submit the matter to the White House, which led to the first presidential order "pre-emptively blocking the acquisition of a U.S. business" (although the target company's headquarters was not even in the United States).

In the coming months, President Trump may encourage the significant expansion of the definition of "national security" or may expand the type of criteria used to evaluate transactions. Consequently, there may be a significant increase in the number of potential direct investments which are affected. For example, in 2016, CFIUS' request that San'an Optoelectronics LLC, a Chinese semiconductor company, abandon its acquisition of Global Communications Semiconductors LLC, demonstrated an increased concern about defense applications of technology. CFIUS has the power to block a specific transaction or to order mitigation (which may include recommending that the President block the transaction if sufficient mitigation is not achieved). Given that key Trump appointees will be serving on CFIUS, it is clear that this will be a likely instrument for affecting his trade and investment policies.

A potential hint regarding the future direction of CFIUS comes from recent reports prepared for Congress by the U.S.-China Economic and Security Review Commission ("USCC"), a bipartisan body established by Congress to investigate national security and trade issues. In November 2016, the commission issued a report recommending that Congress "amend the statute authorizing [CFIUS] to bar Chinese state-owned enterprises from acquiring or otherwise gaining effective control of U.S. companies". The term "control" was defined broadly as "ownership of a majority or dominant minority of a company's voting interest" that would allow the state entity to influence important matters of that company. The USCC's view was based on its belief that there is a high risk that Chinese state-owned enterprises, if allowed to gain control over U.S. companies, will use any "technology, intelligence and market power…in the service of the Chinese state to the detriment of U.S. national security." Chinese Foreign Ministry spokesman Geng Shuang responded that the report "again revealed the commission's stereotypes and prejudices."

In 2015, the commission had recommended that the law be amended to make as a condition for U.S. market access by Chinese investors, reciprocity for U.S. investors to China on a sector-by-sector basis so that there would be equal access. Separately, a bill was introduced in July 2016 to add the U.S. Department of Agriculture to CFIUS membership in response to several transactions in this sector that provoked concern. Members of Congress this year renewed calls to include USDA and the Food and Drug Administration (FDA) in the CFIUS process. Thus, it is clear that CFIUS will be central to Trump's engagement with China.

**Several knowledgeable observers have opined that Trump could find himself with a sympathetic Congress if he decides to increase CFIUS' review. They believe there is bipartisan support for more aggressive review of Chinese deals.**

This concept of reciprocity is increasingly gaining traction in the United States, along with the concept of bilateral treaties. Specifically, the Trump Administration seeks to allow only market access in the United States for Chinese investors to those sectors in which U.S. companies can similarly access China. In his speech to Congress on February 28, 2017, President Trump, while referring to trade (not investment), stated:

**I believe strongly in free trade, but it also has to be fair trade. It has been a long time since we had fair trade. The first Republican President, Abraham Lincoln, warned that the "abandonment of the protective policy by the American government will produce want and ruin among our people". Lincoln was right.**

In September 2016, 16 members of Congress, both Republican and Democrat, sent a letter to the U.S. Government Accountability Office requesting a review of CFIUS operations to determine whether the Committee had "effectively kept pace with the growing scope of foreign acquisitions in strategically important sectors in the U.S." The powerful Senate Minority Leader Chuck Schumer, Democrat from New York, recently wrote to the U.S. Treasury secretary and the U.S. trade representative urging them to do the same.

Another indication of thinking within the Trump Administration comes from the comments and writings of Peter Navarro, the head of Trump's newly formed National Trade Council. Probably of most relevance is Navarro's 2011 book entitled "Death by China". From Navarro's perspective, China is manipulating its currency in order to export more goods to the United States, damaging the U.S. manufacturing sector. He has attacked Mexico and Germany for doing the same. Navarro recently called the euro a mechanism for Germany to gain an economic advantage over its trading partners and has upped his criticism of German relations while calling for a more self-interested U.S. policy. In describing his hopes for the U.S. economy, Navarro stated that "we envision a more German-style economy where 20 percent of our workforce is in manufacturing." In addition to supporting a tax policy of "border adjustment" (a tax on all imports and credit for U.S. exports), Navarro also favors bilateral trade deals, which Trump recently described as sending individual countries a list of demands and then retaliating if they did not comply within thirty days. Navarro's views are in the minority among U.S. economists and he has been widely attacked by a number of leading thinkers as being misguided. He has reportedly also clashed with senior members of the administration – like National Economic Council Director Gary Cohn and Treasury Secretary Steve Mnuchin – over the direction of the administration's trade policy.

One other recent transaction that provides guidance is the recent Bayer-Monsanto merger where Bayer, a German-domiciled multinational company, promised $8 billion in new U.S. research and development directly to Trump. The deal was already considered contentious from an antitrust perspective as it would give the enlarged company 60 percent of the U.S. pesticides market. This case may signal that deal reviews, which already face a high bar of antitrust scrutiny from U.S. regulators and in some cases Congressional hearings, may now become more overtly political with direct White House involvement.

In contrast to some of the potential challenges, however, there is a real opportunity for Chinese entities to increase the success of a potential investment through relationship building with different arms of government in the United States. Ironically, a number of cases to date show that the optimal advocate is President Trump. If he can sell an inbound investment as a win for the United States that will create jobs and growth, then he may be happy to endorse such a transaction.

This soft diplomacy was clearly on display in the weeks preceding the inauguration when several notable Asian business leaders met with President-elect Trump. On December 6, Mayoshi Son, the CEO of Softbank, visited Trump Tower and pledged to invest $50 billion in the United States and create 50,000 jobs. Following the meeting, Son revealed that FoxConn was looking to invest $7 billion in the United States and create an additional 50,000 jobs. On January 9, Jack Ma, CEO of Alibaba, met with Trump and pledged to create over 1 million jobs in the United States. Thus, the strategy of going "straight to the top" and offering significant benefits to the United States clearly is a way to secure Trump's personal endorsement of a desired transaction.

Another opportunity is to develop ties with U.S. state and municipal governments. Governors and mayors are very eager for foreign direct investment in their communities. For many, this is a matter of economic and political survival to stem the decline of traditional manufacturing centers and industries in their states and the resulting tide of job losses. For more vibrant regions, investment is a matter of sustaining their competitive lead and expanding local prosperity. Thus, they are likely to be welcoming of Chinese foreign direct investment if the positive benefits can be communicated effectively for those states and cities. A good example of such advocacy can be seen in the campaigns which such local governments mounted to lure both domestic and foreign automotive companies when these manufacturers began to look outside of the Midwestern "rust belt" for opportunities to locate factories. Fortunately, Chinese entities have experience in their home market in dealing with regional governments in addition to the national authorities. However, the present state of the economy in certain states means that governors and mayors may actually become enthusiastic advocates if an investment involves job growth or job preservation, as well as significant capital investment.

## CONCLUSION

There is a tremendous benefit from developing clear communications and public affairs strategies intended to understand the U.S. landscape and influence U.S. audiences. This includes building relationships with key decision–makers well before a transaction is announced, as well as during and following the transaction. This strategy is especially true for Chinese-domiciled companies given that preconceptions in this time of heated rhetoric can be quickly formed and fueled by politicians, the media and business rivals. Further, "influencers" today are not just traditional leaders from Washington or Wall Street, but anyone with ability to mobilize constituencies through member organizations or online and social media activism. This includes conservative or liberal news commentators, NGOs, consumer advocates, business groups, labor unions, employees of affected businesses, industries and regions, or simply ordinary citizen activists. Developing trust in the Chinese entity among strategic American stakeholders is key.

## ACTIONS CHECKLIST FOR CHINESE INVESTORS

There are a number of initiatives that a potential Chinese investor or acquirer can take to prepare for a successful investment in the United States.

### 1. Prioritize Positive U.S. Impact

In this environment, it will be crucial for a foreign investor to emphasize the positive benefits for the United States resulting from the investment. This needs to be done in a public and specific fashion. Among the potential issues that could be highlighted:

- ☐ Impact on U.S. jobs and suppliers
- ☐ Facilities/plants/offices to be built or maintained
- ☐ Plans for retention of U.S. headquarters and management
- ☐ Corporate responsibility and compliance (environmental/health/HR/safety)
- ☐ Total investment in the United States. (and key communities)
- ☐ Support and contributions to local municipalities

### 2. Research and Analyze CFIUS Factors

Given the likely increased scrutiny that CFIUS may apply to Chinese investors, it will be important to reduce potential risks by investigating whether the U.S. target will likely raise any CFIUS concerns.

- ☐ Essential assets located near U.S. military facilities
- ☐ Impact on the U.S. transportation infrastructure
- ☐ Cybersecurity and technology related concerns
- ☐ National Security concerns (broadly defined)
- ☐ Market leadership or iconic brand
- ☐ Antitrust and other regulatory or political risks

### 3. Define Investor Identity

Given the anti-China tenor of the discussion in the United States, it will be important to communicate the identity and objectives of the Chinese investor. Specifically,

- ☐ Chinese investor profile, reputation and transparency
- ☐ Reasons for Chinese interest in target company
- ☐ Broader strategy, business fit and availability of financing
- ☐ Chinese investor understanding of U.S. market and target
- ☐ Corporate governance, ownership and management
- ☐ State Owned Enterprise or public sector control

### 4. Communicate Goodwill and Mutual Benefit

In this heated environment, it will be beneficial for a Chinese investor to proactively introduce itself and communicate key benefits of investment and its intentions to work together with the U.S. stakeholders for mutual benefit. For example, the Chinese investor should be prepared upon the announcement of its intention to engage:

- ☐ Elected representatives of target company (e.g. Members of Congress)
- ☐ Regulatory agencies that may have jurisdiction over the target company
- ☐ State and local officials of the target company (e.g. Governors, mayors, etc.)
- ☐ Partners of the target company (e.g. local charities, supply chain partners, key vendors)
- ☐ Local and national media that may naturally cover the target company

### 5. Develop Third Party Support

If possible, the Chinese investor should proactively identify and develop third-party endorsers who can advocate on behalf of the investor. A desirable third-party endorser, which could be a co-investor, will have the following characteristics:

- ☐ U.S. domicile and identity
- ☐ Real knowledge of the investor
- ☐ Credibility and reputation with key U.S. stakeholders
- ☐ Willingness to support the Chinese investor publicly
- ☐ Financial interest or other stake in a successful outcome

### 6. Identify Potential Deal Modifications

Prior to announcing the investment, a Chinese investor should consider potential deal modifications that could increase the odds of success and mitigate specific risks and reactions.

- ☐ Structural and behavioral remedies to allay concerns
- ☐ Potential divestments of specific assets
- ☐ Goodwill gestures and confidence building steps
- ☐ Retention of headquarters and management
- ☐ Increased U.S. investment and jobs commitments

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For further assistance on transaction communications and public affairs, please contact:

**Allen Shapard,** Public Engagement Strategies, New York, ashapard@apcoworldwide.com

**Jeff Zelkowitz,** Global Financial and M&A Practices, New York, jzelkowitz@apcoworldwide.com

**Gadi Dechter,** Global Public Affairs, Washington, gdechter@apcoworldwide.com

**Graham Ackerman,** Global Public Affairs, Washington, gackerman@apcoworldwide.com

**Amy Wendholt,** International Initiatives, London, awendholt@apcoworldwide.com

**James Robinson,** Managing Director, Shanghai, jrobinson@apcoworldwide.com

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