The Upcoming Role of CFIUS In the Westinghouse Bankruptcy

By **Anthony Michael Sabino**

The recent Chapter 11 filing of Westinghouse Electric is virtually assured of being no ordinary bankruptcy case. *In re Westinghouse Electric Company*, No. 17-BK-10751 (Bankr. S.D.N.Y.) (Ch. 11) (Wiles, B.J.), filed March 29, 2017. This subsidiary of Toshiba of Japan is one of the few builders of nuclear reactors in the world. The critical technology that Westinghouse holds, while ostensibly devoted to peaceful purposes, could, in the wrong hands, be perverted to dreadful ends.

The last concern is reflected in reports that the Trump administration is intensely interested in this Chapter 11, and is determined to prevent Westinghouse's atomic secrets from falling into the possession of the People's Republic of China. See Jacobs, Mohsin & Dlouhy, "Trump Team Takes Steps to Keep Chinese from Westinghouse," Bloomberg.com (April 5, 2017). And the means by which the federal governments might intervene in the Westinghouse bankruptcy is the Committee on Foreign Investment in the United States, better known as CFIUS.

This component of the Executive Branch is best understood by examining its statutory underpinnings, which, one would agree, are fairly lucid. CFIUS, as constituted today, largely took shape via the 1988 passage of the "Exon-Florio" amendments to the Cold War era's Defense Production Act of 1950, codified at 50 U.S.C. App. §2158, et seq. (as amended). In 2007, slight modifications to the animating statutes mildly reshaped the Committee to the form that will, in all likelihood, make itself known in the Westinghouse bankruptcy. See 50 U.S.C. App. §2170(a), et seq.

The crucial pivots upon which CFIUS turns are, first, jurisdiction over a "covered transaction," defined as any "merger, acquisition or takeover ... by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States." 50 U.S.C. App. §2170(a)(3). Second, the Chief Executive is explicitly authorized to "suspend or prohibit any covered transaction that threatens to impair the national security of the United States." 50 U.S.C. App. §2170(d)(1).

If a proposed merger or acquisition implicates national security, the businesses in question are required to give written notice to the Committee. 50 U.S.C. App. §2170(b)(1)(C)(i). See *LTV Aerospace and Defense Co. v. Thomson-CSF, S.A. (In re Chateaugay Corp.)*, 155 B.R. 636, 645 n.10 (Bankr. S.D.N.Y. 1993) (*LTV I*), affirmed, 198 B.R. 848 (S.D.N.Y. 1996) (*LTV II*). If CFIUS deems an investigation is justified, then its inquiries must commence no later than 30 days after that body receives the notice. 50 U.S.C. App. §2170(b). See also Exec. Order 12,661, 54 F.R. 779 (Jan. 9, 1989). The Committee then has 45 days in which to complete its work. 50 U.S.C. App. §2170(b)(2)(C).

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CFIUS is chaired by the Secretary of the Treasury, and its members include the Secretaries of State, Defense, Homeland Security, Commerce, Energy, and Labor, the Attorney General, the Director of National Intelligence, and, as the Chief Executive deems appropriate, other relevant officials. 50 U.S.C. App. §2170(k). See also *LTV I*. Thus, in the current Westinghouse bankruptcy, key players shall no doubt be Treasury Secretary Steven Mnuchin, as joined by Attorney General Jeff Sessions, Secretary of State Rex Tillerson, and Wilbur Ross, the Secretary of Commerce.

Yet another significant player may be the Director of National Intelligence, Daniel Coats. The DNI was added to the Committee's roster in the aforementioned 2007 modifications to the operative statute (sensibly so, since the office did not exist at the time of the principal formulation of the group in 1988). See Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246. While the DNI is ex officio, and therefore cannot vote at CFIUS proceedings, nonetheless he plays a vital role in the Committee's deliberations.

The revamped statute explicitly directs the DNI to "expeditiously carry out a thorough analysis of any threat to the national security of the United States posed by any covered transaction." Said analysis must be provided to CFIUS within 20 days after the Committee receives notice of the transaction, notably a deadline which comports with the statutory 30 day timeframe in which the Committee must decide if a full investigation is warranted. 50 U.S.C. App. §2170(b)(4)(A) and (B).

Rest assured the DNI's involvement does not end at that 20-day marker. One, the analysis provided to CFIUS may be supplemented or amended as need be, and, two, the DNI is specifically directed to "ensure that the intelligence community remains engaged" in an ongoing review of the transaction at issue, and shares with the Committee any new knowledge thereby gained. Id. at (b)(4)(C).

Not surprisingly, and now particularly given the proactive role assigned to the intelligence community in CFIUS deliberations, "the CFIUS review process ... is generally protected from public disclosure, subject only to certain exceptions." *In re Global Crossing*, 295 B.R. 720, 722 (Bankr. S.D.N.Y. 2003) (ordering an in camera review of CFIUS materials, and not permitting public disclosure, "by reason of the national security nature of the information in question"). Moreover, the parties » Page 6

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to the transaction customarily provide confidential, detailed presentations to the Committee to address any national security issues. See, i.e., *LTV II*, supra, 198 B.R. at 853. All such revelations to CFIUS are exempt from any disclosure normally available pursuant to the Freedom of Information Act. 50 U.S.C. App. §2170(c). See also Exec. Order 12,661.

This will provide an interesting duality in the Westinghouse Chapter 11. Pursuant to nominal bankruptcy law, any bidder for the whole or parts of this debtor will have its proposal openly reviewed in the bankruptcy court. See 11 U.S.C. §363(a). Yet, in contradistinction, a foreign bidder for Westinghouse assets will discuss national security concerns with CFIUS behind a screen of confidentiality.

Once CFIUS completes its work and makes a report, the president then has 15 days in which to make a decision to allow or oppose the merger or acquisition. If opposed, the Chief Executive must then specify "there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security." 50 U.S.C. App. §2170(d).

If the president does decree the subject merger or acquisition is contrary to the interests of national security, then the Chief Executive may, inter alia, direct the attorney general to seek appropriate judicial relief to enforce any such executive decisions. 50 U.S.C. App. §2170(d). While such resort to the courts necessarily entails the involvement of the judicial branch, the president's final findings and actions in the name of national security are not subject to judicial review. 50 U.S.C. App. §2170(e). But compare *Ralls Corp. v. CFIUS*, 758 F.3d 296, 311 and 314 (D.C. Cir. 2014) (permitting a *procedural* due process claim to the CFIUS process, and distinguishing the *process* from the president's final actions).

Given that the statutes themselves authorize CFIUS to operate outside the limelight, it is not surprising that we have a paucity of judicial precedent to instruct us in these matters. Nevertheless, one example that is informative to the current Westinghouse Chapter 11 is *In re Global Crossing*, 295 B.R. 726 (Bankr. S.D.N.Y. 2003).

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There the debtor, a telecommunications company, proposed to exit bankruptcy by selling itself to two Far Eastern buyers. However, one of tentative purchasers was from Hong Kong, a territory "under the political control of the People's Republic of China." The bankruptcy court acknowledged that the presence of the Chinese government behind the scenes "plainly made securing approval from CFIUS ... difficult or impossible." Id. at 732. Ultimately, the Hong Kong buyer withdrew its portion of the bid, due to the shadow of a CFIUS intervention.

A more recent example comes from the immediately prior administration, which prohibited the takeover of a north-central Oregon wind farm by persons with Chinese affiliations. Then-President Barack Obama cited national security concerns, given that the energy plant was sited close to a sensitive U.S. Navy facility. See *Ralls Corp.*, supra, 758 F.3d at 306. In light of that recent history, one can presume that the same geopolitics and national security concerns that animated the former president may well influence the executive decisions of his successor when contemplating any participation by agents or affiliates of America's erstwhile trading partner in bidding for the assets of the reorganizing Westinghouse.

Admittedly, we are at a very early stage of the Westinghouse bankruptcy. Like most complex Chapter 11s, this proceeding most assuredly has many twists and turns ahead of it. Yet it is obvious that the national security interests attached to Westinghouse's nuclear technology will play a key role in either its restructuring as a viable concern or its sale, in whole or part, including its lines of business that hold the secrets of the atom.

It is a foregone conclusion that the Westinghouse reorganization will attract many interested parties to proceedings before the Southern District of New York bankruptcy court. And depending upon the president's level of opposition to potential foreign bidders, it is likely that CFIUS shall eventually play a pivotal role in the Westinghouse bankruptcy, all in the name of national security.