The Upcoming Role of CFIUS
In the Westinghouse Bankruptcy

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) (Wilkes, 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 dreadul 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 & Blouhy. "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.

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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. §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 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).

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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).

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 in 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.