

CFIUS Approves Chinese Investment in U.S. Plane Maker

On Tuesday, March 1, *The Wall Street Journal* reported that the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) approved a Chinese investment in Icon Aircraft, Inc. (“Icon”), a California-based maker of small recreational vehicles.

According to *The Wall Street Journal*, CFIUS began reviewing the transaction last November after shareholders notified the Committee that Icon’s controlling Chinese shareholder was improperly transferring technology to China.

Icon was founded in 2006 by a former Air Force pilot. Its only product is the A5, a carbon-fiber airplane with foldable wings capable of land and water takeoffs and landings. According to Icon’s website, the plane is designed for recreational use.

In 2015, a Chinese government-backed investment company, Shanghai Pudong Science and Technology Investment Company (“PDSTI”), made a small investment in Icon. Over the next couple of years, PDSTI’s investment grew to 47%.

Icon’s U.S. shareholders eventually became concerned that PDSTI was planning to shutter Icon’s U.S. operations and transfer its technology to China, so they notified CFIUS. The U.S. shareholders told CFIUS that Icon’s aircraft could be modified to function as a militarized drone. Icon responded to these claims by noting that the aircraft is made from commercial, off-the-shelf products and wholly unsuited for military applications. Icon further claimed that PDSTI’s investment saved the company from collapse, and that the U.S. shareholders were improperly weaponizing CFIUS.

After reviewing the transaction, CFIUS appears to have determined that the Chinese investment did not give rise to a national security risk, and it cleared the transaction without imposing mitigation.

TAKEAWAYS:

1. CFIUS does not block all Chinese transactions. On the surface, the Icon transaction appears to be exactly the type of investment that CFIUS was created to block. A Chinese government-backed investment company acquires a small stake in an aircraft startup, slowly grows its stake until it has a dominant position, and then transfers the technology to China. But CFIUS does not block transactions simply because they raise red flags or fit a pattern. CFIUS reviews each transaction on a case-by-case basis and decides whether to block or mitigate a transaction based on the facts and circumstances of each transaction. Here, CFIUS likely scrutinized the technology, materials, and manufacturing processes used by Icon to manufacture its recreational airplane and concluded that Icon did not have any sensitive technology or know-how that surpassed what is currently available in China. Because of the current geopolitical climate, it is easy to believe that no Chinese companies can invest in the United States without having their transactions blocked by CFIUS. The Icon decision is a helpful reminder that not all China transactions get blocked.
2. It's hard to stay off the non-notified team's radar. CFIUS has a non-notified team that searches for transactions that were not filed with the Committee. If the non-notified team finds a transaction that may have national security consequences, it can request a filing. It is becoming harder and harder for transaction parties to stay off the non-notified team's radar. CFIUS is no longer a secret. Most sophisticated companies and investors know about CFIUS and how it works. Accordingly, foreign buyers should think carefully about the risks before choosing to forgo a CFIUS filing. If a foreign buyer does not obtain a safe harbor letter from CFIUS, the buyer is exposed to the possibility that a competitor or hostile shareholder group could try to use the CFIUS process to derail the investment years later.



Authors



Tyler McGaughey
Partner, Yuanda
Washington, D.C.
+1 202-282-5306

tmcgaughey@winston.com