



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE July 17, 2024

TO Joint Corporations, Elections & Political Subdivisions Interim Committee

FROM Katie Adams, Staff Attorney

SUBJECT 25LSO-0116, Foreign adversary ownership or control of business entities.

25LSO-0116, Foreign adversary ownership or control of business entities

25LSO-0116, Foreign adversary ownership or control of business entities, authorizes the Wyoming Secretary of State to administratively dissolve, terminate, or revoke the authority of a business entity that “[i]s owned or controlled by a foreign government or foreign nongovernment person determined to be a foreign adversary by the United States secretary of commerce and specified in 15 C.F.R. 7.4(a).”¹ In 15 C.F.R. 7.4(a), the United States Secretary of Commerce designates China, Cuba, Iran, North Korea, Russia, and the Maduro Regime (in Venezuela) as foreign adversaries.² Below is a brief discussion of a possible legal issue that the bill draft may implicate should it be enacted.

The Supremacy Clause

The Supremacy Clause of the United States Constitution provides that the laws of the United States “shall be the supreme Law of the Land” notwithstanding any state law to the contrary.³ The Wyoming Constitution similarly provides that the United States Constitution “is the supreme law of the land.”⁴

¹ The language in 25LSO-0116 is modeled after language in Wyoming’s recently enacted critical infrastructure statutes. W.S. 19-13-501(a)(iv)(A) (defining “designated country or person”).

² 15 C.F.R. 7.4(a).

³ U.S. Const. art. VI, cl. 2.

⁴ Wyo. Const. art. 1, § 37.

Because the laws of the United States “shall be the supreme Law of the Land,”⁵ Congress may “pre-empt, *i.e.*, invalidate, a state law through federal legislation.”⁶ There are generally three different types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption.⁷ “Express” preemption occurs when Congress uses express language in a federal statute to preempt state law.⁸ But even if a federal statute does not expressly refer to preemption, Congress may implicitly preempt state law “either through ‘field’ pre-emption or ‘conflict’ pre-emption.”⁹

“Field” preemption occurs when Congress “intended ‘to foreclose any state regulation in the *area*,’ irrespective of whether state law is consistent or inconsistent with ‘federal standards.’”¹⁰ “In such situations, Congress has forbidden the State to take action in the *field* that the federal statute pre-empts.”¹¹ By contrast, “conflict” preemption occurs where it is impossible to comply with both the state and federal law, “or where ‘the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹² Whether a state law “is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”¹³

The Committee on Foreign Investment in the United States (CFIUS)

25LSO-0116 implicates the federal statute governing the Committee on Foreign Investment in the United States (CFIUS), 50 U.S.C. § 4565. The United States Department of the Treasury describes CFIUS as “an interagency committee authorized to review certain transactions involving foreign investment in the United States and certain real estate

⁵ U.S. Const. art. VI, cl. 2.

⁶ *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015).

⁷ *Id.* at 376–77; *Murphy v. NCAA*, 584 U.S. 453, 477 (2018).

⁸ *Oneok, Inc.*, 575 U.S. at 376. *E.g.*, *Morales v. TWA*, 504 U.S. 374, 378, 383–84 (1992) (concluding the federal Airline Deregulation Act expressly preempted states “from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes”).

⁹ *Oneok, Inc.*, 575 U.S. at 376–77.

¹⁰ *Id.* at 377 (citation omitted). *E.g.*, *Arizona v. United States*, 567 U.S. 387, 400–01 (2012) (concluding an Arizona statute prescribing a criminal penalty for failure to complete or carry an alien registration document as required by federal law was preempted because “the Federal Government has occupied the field of alien registration” with a full set of standards, including the penalty for noncompliance).

¹¹ *Oneok, Inc.*, 575 U.S. at 377.

¹² *Id.* (citation omitted). *E.g.*, *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472 (2013) (concluding a state law requiring drug manufacturers to supplement the warnings included in FDA-approved labels on generic drugs was preempted because the state law was inconsistent with (*i.e.* in conflict with) federal law prohibiting drug manufacturers from altering the composition or labeling approved by the FDA).

¹³ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

transactions by foreign persons, in order to determine the effect of such transactions on the national security of the United States.”¹⁴

CFIUS is comprised of the following members (or their designee): the Secretary of the Treasury (Chairperson); the Secretaries of Homeland Security, Commerce, Defense, State, Energy, and Labor (nonvoting); the United States Attorney General; the Director of National Intelligence (nonvoting); and the heads of any other executive department, agency, or office, as the President of the United States determines.¹⁵

CFIUS reviews what are referred to as “covered transactions” to determine their effect on national security and take any necessary actions in connection with a transaction to protect national security.¹⁶ Regarding business investments, a “covered transaction” includes:

- (1) any merger, acquisition, or takeover that is proposed by or with any foreign person that could result in foreign control of any United States business;
- (2) any other investment by a foreign person in any unaffiliated United States business that involves critical infrastructure or critical technologies or that maintains or collects sensitive personal data of United States citizens; and
- (3) any change in the rights that a foreign person has with respect to a United States business, if that change could result in foreign control of a United States business or an investment described in (2).¹⁷

The applicable definition of “foreign person” is broad, meaning (1) any foreign national, foreign government, or foreign entity; or (2) any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity.¹⁸ “Control” means the power (direct or indirect, whether exercised or not exercised) to determine, direct, or decide important matters affecting an entity, subject to regulations prescribed by CFIUS.¹⁹

CFIUS review may be initiated several different ways. A party to a covered transaction may voluntarily initiate a review by providing CFIUS with written notice of the transaction or by providing CFIUS with a declaration regarding the transaction.²⁰ In addition, parties to specified types of covered transactions are required to provide a declaration to CFIUS.²¹ Finally, the President or CFIUS may unilaterally initiate review.²²

¹⁴ U.S. Dept. of the Treasury, CFIUS, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> (last visited July 10, 2024).

¹⁵ 50 U.S.C. § 4565(k)(2), (3).

¹⁶ 50 U.S.C. § 4565(b).

¹⁷ 50 U.S.C. § 4565(a)(4). “Covered transaction” also includes several types of real estate transactions. *Id.*

¹⁸ 31 C.F.R. § 800.224(a).

¹⁹ 50 U.S.C. § 4565(a)(3).

²⁰ 50 U.S.C. § 4565(b)(1).

²¹ *Id.*

²² *Id.*

To address national security risks, CFIUS may: (1) suspend a proposed or pending covered transaction while it is under review or investigation; (2) negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any risk to national security; and (3) refer a covered transaction to the President.²³ CFIUS action must be based upon a risk-based analysis, including an assessment of the threat, vulnerabilities, and consequences to national security.²⁴

Furthermore, the President may suspend or prohibit any covered transaction that threatens to impair national security, provided specified requirements are met.²⁵ The President has 15 days to decide whether to take such action after an investigation is completed or CFIUS refers a transaction to the President.²⁶ Before suspending or prohibiting a covered transaction, the President must consider various factors²⁷ and find that both of the following conditions are met: (1) there is credible evidence that a foreign person that would acquire an interest in a United States business or its assets might take action that threatens to impair the national security; and (2) provisions of law other than the CFIUS statute and the International Emergency Economic Powers Act do not provide adequate and appropriate authority for the President to protect national security.²⁸ The United States Attorney General has authority to enforce the President’s decision to suspend or prohibit a covered transaction.²⁹

CFIUS recently determined a transaction in Wyoming posed national security risks, and in May 2024, the President “issued an order prohibiting the purchase and requiring the divestment of certain real estate operated as a cryptocurrency mining facility located within one mile of Francis E. Warren Air Force Base [], as well as requiring the removal of certain improvements and equipment at the property by MineOne Partners Limited, which is ultimately majority owned by nationals of the People’s Republic of China; MineOne Cloud

²³ 50 U.S.C. § 4565(l)(1)–(3).

²⁴ 50 U.S.C. § 4565(l)(4)(A).

²⁵ 50 U.S.C. § 4565(d)(1).

²⁶ 50 U.S.C. § 4565(d)(2).

²⁷ 50 U.S.C. § 4565(d)(5). Factors for consideration include domestic production needed for national defense; the capability and capacity of domestic industries to meet national defense requirements; the control of domestic industries and commercial activity by foreign citizens; the potential effects of the transaction on sales of military goods, equipment, or technology to any country; the potential effects of the transaction on United States international technological leadership in areas affecting national security; the potential national security-related effects on United States critical infrastructure and critical technologies; and the long-term projection of United States requirements for sources of energy and other critical resources and material. 50 U.S.C. § 4565(f).

²⁸ 50 U.S.C. § 4565(d)(4).

²⁹ 50 U.S.C. § 4565(d)(3) (authorizing the United States Attorney General to seek appropriate relief, including divestment relief, in the United States district courts). For additional background information on CFIUS, see U.S. Dept. of Treasury, CFIUS, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius>; Congressional Research Service (CRS), In Focus, CFIUS (Updated May 17, 2024), <https://crsreports.congress.gov/product/pdf/IF/IF10177>.

Computing Investment I L.P.; MineOne Data Center LLC; and MineOne Wyoming Data Center LLC (collectively MineOne), as well as their affiliates.”³⁰ CFIUS referred the transaction to the President after receiving a public tip, investigating the transaction, and determining that it would not be possible to enter into a negotiated mitigation agreement with MineOne that would sufficiently address the national security risks involved.³¹

Implicit Preemption

Although the statutes that create CFIUS do not contain an express preemption provision, a question could be raised whether a state law that authorizes administrative dissolution, termination, or revocation of business entities owned or controlled by a foreign entity might be implicitly preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³²

In prior conflict preemption cases, “the [United States] Supreme Court has invalidated state attempts to layer regulations onto areas related to foreign relations and national security where Congress has established a federal process.”³³ In *Crosby v. National Foreign Trade Council*, the United States Supreme Court held that a Massachusetts law restricting the authority of Massachusetts agencies to buy goods or services from companies doing business with Burma was invalid under the Supremacy Clause of the United States Constitution because it threatened to frustrate federal statutory objectives.³⁴ The federal statute at issue imposed direct sanctions on Burma, authorized the President of the United States to impose further sanctions subject to conditions, and directed the President to develop “a comprehensive multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.”³⁵ In its preemption analysis, the Court generally reasoned that the Massachusetts law was an obstacle to the accomplishment of Congress’s objectives because it imposed “a different, state system of economic pressure against the Burmese political regime” that undermined the flexibility provided to the President under the federal statute.³⁶

³⁰ U.S. Dept. of the Treasury, Press Releases, Statement on the President’s Decision Prohibiting the Acquisition by MineOne Cloud Computing Investment I L.P. of Real Estate, and the Operation of a Cryptocurrency Mining Facility, in Close Proximity to Francis E. Warren Air Force Base (May 13, 2024), <https://home.treasury.gov/news/press-releases/jy2335>.

³¹ *Id.*

³² *See Oneok, Inc.*, 575 U.S. at 376.

³³ Kristen E. Eichensehr, Essay, CFIUS Preemption, Harvard Law School National Security Journal, Vol. 13:1, 14 (Jan. 7, 2022), available at <https://harvardnsj.org/wp-content/uploads/2022/01/HNSJ-Vol-13-Eichensehr-CFIUSPreemption.pdf> (discussing CFIUS preemption issues related to a 2021 Texas law prohibiting “companies and Texas governmental entities from entering into agreements relating to critical infrastructure with companies that have certain ties to China, Iran, North Korea, or Russia”).

³⁴ *Crosby*, 530 U.S. at 366.

³⁵ *Id.* at 369.

³⁶ *Id.* at 373–85.

A recent case, *Yifan Shen v. Simpson*, is instructive on CFIUS preemption even though the case pertains more specifically to United States real estate transactions involving foreign persons than business investments (as noted above, CFIUS reviews both types of transactions). The plaintiffs in that case claimed that Florida statutes restricting foreign ownership of property violate the Equal Protection Clause, the Due Process Clause, the Fair Housing Act, and are preempted under the Supremacy Clause of the United States Constitution.³⁷ In August 2023, the United States District Court for the Northern District of Florida denied the plaintiffs' motion for a preliminary injunction, concluding that the plaintiffs failed to show a substantial likelihood of success on any of their claims.³⁸ The plaintiffs appealed and in February 2024, the Eleventh Circuit Court of Appeals granted a limited injunction to the plaintiffs on the ground that there was a substantial likelihood of success that the statutes are preempted by the CFIUS statute.³⁹

The *Yifan Shen v. Simpson* case has captured the interest of many parties. The United States filed a brief supporting the plaintiffs, while Attorneys General in Idaho, Arkansas, Georgia, Indiana, Mississippi, Missouri, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, and Utah filed an amicus brief supporting the defendants.⁴⁰ The question of preemption by CFIUS is one reason for the national attention.

The Eleventh Circuit Court of Appeals held oral arguments on April 19, 2024. The decision on appeal is pending. Of course, any decision of the Eleventh Circuit would not be binding in Wyoming, but it may still be instructive on CFIUS preemption issues.

Another case, *Alario v. Knudsen*, is currently being litigated in federal court regarding a Montana bill banning TikTok Inc. within the State of Montana.⁴¹ In November 2023, the United States District Court for the District of Montana granted the plaintiffs (TikTok and a group of TikTok users) a preliminary injunction enjoining the effective date of the Montana bill on several grounds, including conflict preemption because there were ongoing negotiations between CFIUS and TikTok.⁴² The preliminary injunction ruling is currently on appeal in the Ninth Circuit Court of Appeals.⁴³ On April 10, 2024, the federal

³⁷ *Yifan Shen v. Simpson*, No. 4:23-cv-208-AW-MAF, 2023 U.S. Dist. LEXIS 152425, at *5 (N.D. Fla. Aug. 17, 2023).

³⁸ *Id.* at *5, 9.

³⁹ *Yifan Shen v. Commissioner*, No. 23-12737, 2024 U.S. App. LEXIS 2346 (11th Cir. Feb. 1, 2024).

⁴⁰ *Yifan Shen v. Simpson*, at *5 n.2.

⁴¹ *Alario v. Knudsen*, No. CV 23-56-M-DWM, 2023 U.S. Dist. LEXIS 213547, at *1 (D. Mont. Nov. 30, 2023).

⁴² *Id.* at **1–2, 45–47.

⁴³ CRS, Legal Sidebar, Montana's TikTok Ban Goes Before the Ninth Circuit (May 17, 2024),

<https://crsreports.congress.gov/product/pdf/LSB/LSB11166>.

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district court issued an order in the case regarding a discovery dispute and indicated that a trial schedule would be set by separate order.⁴⁴

Given these cases and preemption principles, one question is whether the authority of the Wyoming Secretary of State to dissolve, terminate, or revoke the authority of a business entity could directly conflict with a prior approval by CFIUS. For example, CFIUS might approve a covered transaction that results in a business entity being controlled or owned by a foreign government or foreign nongovernmental person specified in 25LSO-0116. The CFIUS approval might involve an agreement or conditions to mitigate risks to national security. Despite the CFIUS approval, the Wyoming Secretary of State would have authority under 25LSO-0116 to dissolve, terminate, or revoke the authority of the business entity. Accordingly, 25LSO-0116 could be argued to stand as an obstacle to the objectives of the CFIUS statute, which aims to balance the risks and benefits associated with foreign investment in United States businesses.⁴⁵ To avoid a direct conflict between the authority of CFIUS and the authority of the Wyoming Secretary of State, the Committee may wish to consider including an exception in 25LSO-0116 for ownership or control that has been approved by CFIUS.

Another question is whether, where CFIUS has not reviewed a covered transaction, a decision by the Wyoming Secretary of State to administratively dissolve, terminate, or revoke the authority of a business entity would nevertheless interfere with the objectives of Congress with respect to foreign investment in United States businesses. An argument could be made that any concerns about foreign control or ownership of a business entity should be referred to CFIUS in the first instance, before the Wyoming Secretary of State makes a decision to dissolve, terminate, or revoke the authority of the business entity. But a counterargument could be made that, where CFIUS has not conducted any review, the State is entitled to fill the gap to protect its interests and citizens.

Please note that LSO cannot predict how a court would rule on whether 25LSO-0116 violates the Supremacy Clause of the United States Constitution. Furthermore, this area of the law is complex and evolving.⁴⁶ This memorandum is intended only to identify potential issues that may be raised during consideration or after enactment of the bill draft. If the Committee needs additional information or has any questions, please let me know.

⁴⁴ *Alario v. Knudsen*, No. CV 23-56-M-DWM, 2024 U.S. Dist. LEXIS 65859, at *16 (D. Mont. Apr. 10, 2024).

⁴⁵ See 50 U.S.C. § 4565.

⁴⁶ See CRS, In Focus, CFIUS (Updated May 17, 2024), <https://crsreports.congress.gov/product/pdf/IF/IF10177> (“Congressional and stakeholder debate over CFIUS activities has intensified amid growing concern that certain foreign investments by firms directed, controlled, or funded by a foreign government, notably [China], raise additional national security risks. These debates involve oversight of CFIUS reforms mandated by Congress in 2018. The 118th Congress is considering various legislation to address perceived jurisdiction gaps and evolving priorities.”).