

Can You Ever Come Back from a Presidential Block? The Latest in the Nippon Steel/U.S. Steel Saga

A photograph of a modern building's curved glass facade, showing multiple stories of windows reflecting the sky. The building is on the right side of the page, partially overlapping the title.

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When former President Biden blocked the acquisition by Nippon Steel of U.S. Steel in January on national security grounds, many assumed that was the end for a transaction that would have combined a Japanese powerhouse company with one of the most well-known companies in U.S. history. But we live in unprecedented times: recently, stories emerged that Nippon Steel was considering recasting the acquisition as an “investment,” which President Trump characterized as “something very exciting [for] U.S. Steel” in a joint press conference with Japanese Prime Minister Shigeru Ishiba. No deal that has been blocked by a President has ever been resuscitated under his successor, and there are some indications that the President and Prime Minister may have overstated Nippon Steel’s interest in such a move. But if it were to take place, would an investment in U.S. Steel by Nippon Steel at this stage represent a new page in the Committee on Foreign Investment in the United States (“CFIUS”) playbook?

Then-President Biden’s block of the transaction was controversial. After the announcement of the block, Nippon Steel and U.S. Steel jointly filed an action in federal appeals court challenging Biden’s executive order for violating due process and statutory procedural requirements (the relevant statute prohibits judicial review of a Presidential decision to block a transaction, so the parties are limited to procedural challenges). The joint Nippon Steel-U.S. Steel press release characterized Biden’s decision as being heavily politicized and noted that “no transaction involving a Japan-based company of any kind has ever been blocked by the President on national security grounds.” Nor, the parties argued, “have other acquisitions of American steel

facilities ever been blocked, even when the acquiring entities were located in countries that posed a direct national security threat to the United States, such as Russia.” This is true. The Nippon Steel-U.S. Steel transaction is the ninth ever blocked by the President after CFIUS review. Seven of the eight prior blocked transactions were proposed acquisitions by a Chinese acquirer. The one outlier is a proposed acquisition by a Singaporean acquirer, Broadcom, but it occurred in the controversial semiconductor space.

None of the prior eight blocked deals were revived; the respective parties, to our knowledge, did not even try. The potential attempt to do so by Nippon Steel would thus be unprecedented. We are not aware of any express prohibition within the relevant statutes or regulations that prohibits a President from revisiting a different iteration of a transaction that has been blocked by a previous President. The fact that no one has ever done it likely relates to parties not wanting to pursue a transaction that has been publicly deemed a threat to U.S. national security by the President. But could such a gambit actually succeed if the parties were willing to try it?

First, turning an acquisition into an investment would not automatically let the parties escape CFIUS review. Under the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”) and its implementing regulations, CFIUS has the power to review non-controlling investments in some circumstances, and the power to call in transactions for review, even if the parties do not file a notification. If a foreign company is taking a non-controlling interest in a U.S. company that involves “critical technologies,” or “critical infrastructure,” or that collects or maintains “sensitive personal data” of U.S. citizens, CFIUS can review that investment so long as the investment affords the foreign investor with (i) access to material nonpublic technical information, (ii) board membership or observer rights, or (iii) any involvement in substantive decisionmaking.

U.S. Steel’s steel production likely amounts to critical infrastructure under FIRRMA. As such, even a minority investment by Nippon Steel would be within the jurisdiction of CFIUS if it acquired any of the rights or access described above. We don’t know the details of any investment Nippon Steel might make, but it seems fairly unlikely it would be willing to relinquish involvement in the operations of U.S. Steel and make a purely passive investment.

Assuming then, that CFIUS would review any Nippon Steel investment, would the transaction be cleared? CFIUS’ review would depend on the nature of the investment being made, but Nippon Steel’s apparent willingness to alter the terms of the transaction, plus the retention of U.S. majority ownership of U.S. Steel, may mean there is more room for the parties to reach a mitigation agreement with CFIUS that permits the investment to go forward. And even if CFIUS continued to have concerns about the transaction and recommended a block, President Trump may view permitting such a transaction as beneficial in the broader relationship with Japan (indeed, his press conference with Prime Minister Ishiba may have been intended to put pressure on the parties), and might take a certain amount of pleasure in reversing another of his predecessor’s decisions.

Regardless of what happens next, the Nippon Steel-U.S. Steel relationship appears likely to continue to be singular. Stay tuned!



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