Thursday, June 28, 2018

This week, there were reports that the Trump Administration would use emergency powers to restrict Chinese investment in the United States. On Wednesday, the White House backed away from that position after the House of Representatives passed a bill on Tuesday expanding and increasing the powers of the Committee on Foreign Investment in the United States (CFIUS). The bill is called the Foreign Investment Risk Review Modernization Act (FIRRMA).

The 400-2 passage in the House shows an overwhelming bipartisan momentum behind FIRRMA and signals that the bill is likely to be on the President’s desk for signature as soon as the House and Senate reconcile their versions. The timing of the actions is not coincidental. It appears that the Trump Administration has decided to let Congress take the lead on increasing scrutiny of foreign investments.

We have reported on the proposed content of FIRRMA (here and here), and the list of the bill’s main points have been recited throughout the law-blogging world. However, now that the bill is on the brink of passage, we believe it is worth examining three key elements that will have significant impact on foreign investors and U.S. companies.

**Exemptions from the CFIUS Process**

It will come as good news for certain investors that the bill may make it easier for numerous U.S.-allied countries to invest in the United States. The draft bill authorizes CFIUS to exempt from its review transactions in which all foreign persons involved are from a country identified by the Committee (i) as having processes which effectively safeguard national security interests the country shares with the U.S.; (ii) is a NATO member country or is a major non-NATO ally; or (iii) as adhering to nonproliferation control regimes. That likely creates a list of candidates for exemption to include:

- The NATO Countries;
- Australia;
- New Zealand;
- South Korea;
- Japan; and
- The Philippines

Investments from that group of countries comprise the majority of foreign direct investment in the United States, particularly as we understand that Chinese investment in the United States has dropped 90%.

**Expansion of Covered Transactions**

FIRRMA will significantly expand CFIUS’s authority to review inbound foreign investments, particularly in technology, even where those investments do not result in control of the U.S. company by a foreign entity. The
definition of “covered transactions,” that is, transactions which CFIUS has jurisdiction to review, would be expanded to include any investment (other than a passive investment) by a foreign person in any U.S. critical technology company or U.S. critical infrastructure company, regardless of whether such investment would result in foreign control. It also would include the purchase or lease of real estate located at a land, air or maritime port, or that is in close proximity to a military installation or other sensitive government facility.

**Enhanced Export Controls**

Beyond the changes to CFIUS’s mandate, FIRRMA would also require the update and enhancement of U.S. controls on exporting leading-edge technologies. Currently, U.S. export controls lag behind emerging technology. Much of the straight-from-science-fiction developments coming out of Silicon Valley and elsewhere are simply not contemplated by the years-old regulations.

FIRRMA would require a group of executive agencies, led by the Secretary of Commerce, to identify “emerging and foundational technologies” that “are essential to the national security of the United States.” The bills do not specifically list technologies to target, but we can expect that robotics, autonomous vehicles, and artificial intelligence will be at the top of the list. None of those technologies are specifically controlled under current U.S. export regulations.

While the expansion of CFIUS powers would likely be implemented fairly directly through regulation, FIRRMA’s export control changes would be promulgated through changes to the Export Administration Regulations already in place. Because the export control changes would require changing or adding to complex and nuanced rules, as well as years of established practice by exporters, it is possible, even likely, that changes by that route may take years to take any major effect.

**The Takeaway**

A wide variety of companies will be affected by FIRRMA. U.S. companies developing new technology or exporting controlled items, and non-U.S. companies considering investments in the United States will need to make planning adjustments based on the changes we see coming out of Congress this Summer.

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