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CFIUS Developments: House of Representatives Hearings to Evaluate CFIUS Reform

January 11, 2018

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We are writing to share our report of two Congressional hearings held this week that are relevant to the ongoing legislative discussion concerning potential reform of the Committee on Foreign Investment in the United States (CFIUS).

House Committee on Financial Services Hearing on CFIUS

On January 9, the Monetary Policy and Trade Subcommittee of the House Committee on Financial Services held an open hearing entitled “Evaluating CFIUS: Challenges Posed by a Changing Global Economy.” The hearing was the Subcommittee’s second since Congress began its consideration of the Foreign Investment Risk Review Management Act (FIRRMA), legislation introduced by Senator John Cornyn (R-TX) in the Senate and Congressman Robert Pittenger (R-NC) in the House to reform CFIUS. As we have [reported previously](#), Treasury Secretary Steven Mnuchin—who also serves as CFIUS Chairman—publicly endorsed FIRRMA on December 15, 2017. The bill has since acquired support from other Cabinet leaders of CFIUS member agencies, including Defense Secretary James Mattis and Attorney General Jeff Sessions.

Members of Congress participating in the January 9 hearing included Subcommittee Chairman Andy Barr (R-KY) and Subcommittee Ranking Member Gwen Moore (D-CA), as well as Warren Davidson (R-OH), Al Green (D-TX), Denny Heck (D-WA), French Hill (R-AK), Daniel Kildee (D-MI), Mia Love (R-UT), Alexander Mooney (R-WV), Robert Pittenger (R-NC), Bill Posey (R-FL), Brad Sherman (D-CA), and Roger Williams (R-TX). The Members heard from a panel of five witnesses: a former Director of National Intelligence, two former senior officials of U.S. government agencies that participate in the CFIUS process, a Resident Scholar of the American Enterprise Institute, and a Director for the Project on Chinese Business and Political Economy at the Center for Strategic and International Studies.

The hearing considered the role of CFIUS within the current global economy, with an emphasis on perceived national security threats from Chinese investment in the United States. Within that context, the hearing focused on whether to expand the Committee’s jurisdiction, how to address foreign investments in early-stage technology companies, and the extent to which CFIUS receives sufficient funding to perform its functions in the current environment.

At the outset of the hearing, both Members and witnesses emphasized that any modernization or reform of the CFIUS process should continue to balance the benefits of foreign investment—

including Chinese investment—against the risks that such investments may pose to national security. Witnesses agreed that foreign investment is critical to American technological innovation and that such innovation in turn is a cornerstone of the United States’ national security strategy. The challenge, the witnesses said, comes in using foreign investment to promote economic growth while shielding sensitive technology from potential adversaries.

The Subcommittee heard testimony on China’s focus on strategic investments into early-stage technologies in such fields as artificial intelligence, semiconductors, and robotics. The witnesses echoed views widely expressed within the U.S. national security community that the acquisition of emerging technologies in these areas, even if the technologies initially are focused on commercial applications, ultimately could both enhance China’s military posture and diminish the ability of U.S. companies to compete in the high-tech market.

While Members generally agreed that current U.S. regulatory processes inadequately address these risks, the hearing did not evince a consensus as to the appropriate prescription. Some witnesses suggested that Congress should expand CFIUS’s jurisdiction to cover technology transfers more broadly, including by reviewing American outbound investment and by prohibiting inbound investment from foreign companies found to have received stolen U.S. intellectual property. But most witnesses expressed reservations regarding an expansion of CFIUS jurisdiction noting, among other things, that such an expansion would increase substantially the number of transactions that CFIUS must review. It also would cause the CFIUS process to overlap with existing export controls, such as the Export Administration Regulations and the International Traffic in Arms Regulations. The emerging theme was that, rather than reform CFIUS, Congress instead should reassess the current export control regime, with a view toward better protecting emerging technologies and transfers of sensitive intellectual property.

Although the hearing focused primarily on emerging technologies, Members and witnesses also emphasized the importance of other issues addressed by the proposed legislation. These include granting CFIUS express authority to consider the acquisition of personal data when conducting national security assessments. Members and witnesses also emphasized that, regardless of whether FIRRMA expands CFIUS’s jurisdiction, Congress should provide additional resources to CFIUS to ensure that transactions are rigorously reviewed in a transparent, timely, and predictable fashion.

CFIUS Reform Discussed at House Armed Services Committee Hearing on China’s Pursuit of Technology

Also on January 9, the Emerging Threats and Capabilities Subcommittee of the House Armed Services Committee held an open hearing entitled “China’s Pursuit of Emerging Technologies.” Members participating in the hearing included Subcommittee Chairwoman Elise Stefanik (R-NY) and Subcommittee Ranking Member James Langevin (D-RI), as well as Ralph Abraham (R-LA), Ro Khanna (D-CA), Doug Lamborn (R-CO), Rick Larsen (D-WA), Beto O’Rourke (D-TX), Austin Scott (R-GA), Jackie Speier (D-CA), and Brad Wenstrup (R-OH). The Members heard from a panel of three witnesses: a Deputy Director and Fellow for the Technology Policy Program at the Center for Strategic and International Studies, a Senior Research Fellow for the Asia Studies Center at the Heritage Foundation, and a Director and Senior Fellow for the Technology and National Security Program at the Center for a New American Security.

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The hearing focused on recent Chinese investment aimed at establishing Chinese technological superiority in artificial intelligence, quantum computing, and biotechnology advancements such as human genome sequencing. As part of the discussion, the Members asked the witnesses to recommend how CFIUS might better protect U.S. industry from Chinese attempts to obtain U.S. technologies in support of China's development goals. The witnesses responded by first noting that CFIUS, in its current format, provides a flexible approach to balancing the need for foreign investment with the need to protect U.S. national security. One witness also commented that the U.S. should share the lessons it has learned through its CFIUS experience with allies such as Germany and Japan, which are developing their own respective versions of CFIUS.

With respect to U.S. CFIUS reform, the witnesses proposed that Congress expand CFIUS's jurisdiction to cover smaller minority investments and alternative investment vehicles such as joint ventures. The witnesses disagreed as to whether CFIUS should additionally designate a list of sensitive technologies that might trigger heightened CFIUS scrutiny with respect to a covered transaction. While one witness suggested that such a list might improve the Committee's ability to track especially sensitive technologies across multiple transactions, the others suggested that this would create undue regulation and could discourage industry from investing in potentially useful new technologies. In all cases, Members and witnesses focused on how CFIUS, as a gatekeeper for inbound investment, could be leveraged as part of a broader reform effort that goes beyond the transactional space to protect U.S. technology leadership and independence.

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We hope that you find this report useful. Please do not hesitate to contact the following members of our CFIUS practice if you would like to discuss any aspect of the foregoing in further detail:

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