

House Weighs Export Controls, National Security At Hearing

By **Steven Trader**

Law360 (March 14, 2018, 9:19 PM EDT) -- The House Committee on Foreign Affairs during a hearing on Wednesday fielded comments and advice from former government officials on how best to update export control regulations and foreign investment reviews that would both protect national security and help maintain economic advantages.

The hearing Wednesday follows closely on the heels of bipartisan legislation introduced last month by Foreign Affairs committee Chairman Ed Royce, R-Calif., which would modernize U.S. export control laws while also allowing the Committee on Foreign Investment in the United States, or CFIUS, to continue to review certain acquisitions of U.S. businesses by foreign investors.

The question before the panel of former government employees-turned-lawyers was how best to modernize those export controls — rules that govern the export or transfer of commodities, information and technology and software and serves between the U.S. and foreign countries to accomplish various national security or policy objectives — while also making sure that cutting-edge technology originating from the U.S. is protected.

Former U.S. Department of Commerce Undersecretary for Industry and Security Mario Mancuso, now a partner at Kirkland & Ellis LLP, kicked off the hearing by pointing out that foreign direct investment was critical to U.S. economic vitality and helped resource national defense efforts. The U.S. share of FDI has declined in recent years, which could present long-term national security risks, Mancuso said.

However, certain transactions “do, in fact, present transaction-specific national security risks,” and therefore the policy question to consider in the context of FDI “is not how to balance economics and national security interests, but how to balance systemic and transaction-specific national security risks,” Mancuso said.

“Export controls and CFIUS have different, independently important and complementary responsibilities,” Mancuso told the lawmakers. “As Congress considers reforming one or both, it should focus its review primarily on gaps in resources as well as legal authorities.”

Kevin Wolf, a former assistant secretary for export administration at the Commerce Department’s Bureau of Industry and Security and now a partner at Akin Gump Strauss Hauer & Feld LLP, chimed in to say he never subscribed to the idea that export controls should balance national security concerns with economic concerns, as “national security concerns are not to be traded off for something else in a particular transaction.”

However, recognizing that excessive control can harm the U.S. defense industrial base, which results in harm to national security, Wolf suggested that the existing export control system could be enhanced with a regular and well-funded inter-agency effort to get information regarding new technologies that are critical to maintaining a U.S. advantage, and then publish final controls that are tailored to the end-users and destinations of concern.

The U.S. government should then work with relevant countries to develop common controls over new technologies so that they're controlled not just by the U.S. but its allies as well, and then provide resources to law enforcement agencies to make sure the export controls are being followed, Wolf said.

The discussion Tuesday regarding national security and export controls comes in the context of a broader push by lawmakers to overhaul and strengthen CFIUS' ability to review and police foreign investment, with versions of the Foreign Investment Risk Review Modernization Act being introduced by both the House and the Senate.

Alan Larson, a senior international policy advisor at Covington & Burling LLP and former undersecretary for economic, business and agricultural affairs at the U.S. Department of State, agreed with the importance of national security, but warned the Foreign Affairs committee Wednesday to avoid expanding CFIUS' mandate too much, or else risk reducing its effectiveness.

"It is important to manage the resources of CFIUS efficiently, so that it focuses especially intensely on transactions that are the most complex and may pose the most serious potential risks to national security," Larson said.

--Additional reporting by Benjamin Horney. Editing by Alanna Weissman.