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CFIUS Developments: House Subcommittee on Digital Commerce and Consumer Protection Hearing on CFIUS Reform

April 30, 2018

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We are writing to report on the latest Congressional hearing related to reform of the Committee on Foreign Investment in the United States (“CFIUS”).

On April 26, 2018, the Digital Commerce and Consumer Protection Subcommittee of the House Committee on Energy and Commerce (the “Subcommittee”) held an open hearing entitled “Perspectives on Reform of the CFIUS Review Process.” The hearing was the Subcommittee’s first since Congress began consideration of the Foreign Investment Risk Review Management Act (FIRRMA), a bill introduced by Senator John Cornyn (R-TX) in the Senate and Congressman Robert Pittenger (R-NC) in the House to reform CFIUS. As [we reported previously](#), FIRRMA remains an active legislative subject, and other House and Senate committees are carefully reviewing the bill’s contents. We expect the debate in Congress over the coming weeks to play a key role in shaping the ultimate form of the bill.

Members participating in the April 26 hearing included Chairman Bob Latta (R-OH) and Ranking Member Jan Schakowsky (D-IL), as well as Gus Bilirakis (R-FL), Larry Bucshon (R-IN), Michael Burgess (R-TX), Jeff Duncan (R-SC), Gene Green (D-TX), Brett Guthrie (R-KY), Joe Kennedy III (D-MA), Adam Kinzinger (R-IL), Leonard Lance (R-NJ), David McKinley (R-WV), Mimi Walters (R-CA), and Peter Welch (D-VT). Witnesses participating in the hearing included two current administration officials, Richard Ashooh, Assistant Secretary for Export Administration at the U.S. Department of Commerce, and Heath Tarbert, Assistant Secretary for International Markets and Investment Policy at the U.S. Department of Treasury, as well as a panel of policy analysts and former U.S. government officials with a range of professional experiences. The hearing focused on whether CFIUS has sufficient tools to address national security risks that arise through foreign investment and how CFIUS’s mandate should interact with U.S. export controls.

At the conclusion of opening statements, Chairman Latta framed the discussion by asking Assistant Secretaries Talbert and Ashooh to define the proper relationship between export controls and CFIUS and to assess whether current legislative proposals strike the right balance. As [we have reported previously](#), this question has been central to Congress’s consideration of FIRRMA, as the bill in its original form would expand CFIUS’s jurisdiction to include certain outbound transfers of technology and intellectual property that do not constitute a “U.S. business” under existing law. In response to Chairman Latta’s question, Assistant Secretary Talbert stated that CFIUS and export controls “are complementary and mutually reinforcing

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tools,” and that Congress should strengthen both regimes to enhance U.S. national security. Assistant Secretary Ashooh agreed, emphasizing that “[s]trengthening CFIUS through FIRRMA, while ensuring that export administration and CFIUS remain distinct, will enable even stronger protections to U.S. technology.” According to Assistant Secretary Ashooh, the latest draft of FIRRMA reflects these objectives by carving out provisions related to export controls while seeking to preserve coordination between the two processes. Ashooh’s comments reflect our understanding of the current state of play regarding FIRRMA, with momentum gathering in favor of addressing outbound transfers of potentially sensitive technology through an enhanced export control process, rather than through CFIUS.

This shift was welcomed by other former U.S. officials who participated in the hearing. As one former U.S. export official explained, a broad jurisdictional grant to CFIUS “ha[s] the virtue of being simpler,” but “more tailored controls . . . address the threats more directly and thus with fewer collateral harms.” Assistant Secretary Ashooh’s comments echoed this sentiment, noting that although it is difficult to track emerging technologies, the Department of Commerce has devoted substantial resources to improving controls in this area. For example, under existing law, U.S. authorities may designate categories of emerging technologies to immediately control their export or transfer while the Department of Commerce evaluates national security implications. Most witnesses agreed that combined with certain elements of FIRRMA, such as mandatory CFIUS filings for certain transactions and improved cooperation with allies, enhancements to the existing export control process can adequately protect against transfers of sensitive technology that may harm U.S. national security.

In light of the Subcommittee’s jurisdiction over broader economic issues, some Subcommittee members also questioned whether FIRRMA should be amended to require CFIUS to apply a broader definition of “national security” that includes economic, public health, and safety considerations. One witness suggested that Congress should amend FIRRMA to include an “economic net benefit test” and expand CFIUS’s jurisdiction to include all greenfield investments, regardless of proximity to sensitive military locations. Assistant Secretary Talbert explained that the administration has rejected this approach, and most witnesses strongly preferred keeping FIRRMA squarely focused on national security.

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We will continue to keep our clients and friends apprised of developments related to CFIUS reform legislation.

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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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