
June 29, 2018

President Trump Decides Not to Impose New Foreign Investment Restrictions against China; Opts Instead to Support CFIUS Reform Legislation in Congress

As an outgrowth of the Section 301 investigation that was conducted by the Office of the U.S. Trade Representative concerning China's laws, policies, practices and actions related to technology transfer, intellectual property and innovation, President Trump issued a Presidential Memorandum on March 22, 2018 that directed the Secretary of the Treasury to report to the President within 60 days concerning recommended measures "to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States." Despite strong support on the part of some U.S. officials for having the President invoke his emergency powers under the International Emergency Economic Powers Act to impose new foreign investment restrictions based on national security grounds, and despite longstanding rumors that restrictions specifically targeted against investments from China in U.S. industry sectors related to China's Made in China 2025 initiative were likely, President Trump announced on June 27 that he would not act unilaterally, provided that Congress passes legislation to reform the current interagency process for reviewing foreign investments that raise national security issues.

Specifically, in a Presidential statement released by the White House on June 27, President Trump said that he had reviewed with his advisers the pending legislation to reform the interagency foreign investment review process overseen by the interagency Committee on Foreign Investment in the United States ("CFIUS"). The President noted that he had determined that this legislation – the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA") – "will provide additional tools to combat the predatory investment practices that threaten our critical technology leadership, national security, and future economic prosperity" and, with rigorous implementation, would provide a means of "addressing the concerns regarding state-directed investment in critical technologies identified in the Section 301 investigation." President Trump's statement also noted, however, that if Congress fails to pass FIRRMA, he will act unilaterally to protect "the crown jewels of American technology and intellectual property from transfers and acquisitions that threaten our national security." In addition, President Trump said that he had directed the Secretary of Commerce to lead an assessment of changes needed to the U.S. export control system to "defend our national security and technological leadership," and he had also directed a number of his cabinet secretaries "to engage with our allies and partners to support their efforts to combat harmful technology transfer and intellectual property theft."

We are tracking the CFIUS reform legislation closely, and we will be reporting on this legislation in depth when its ultimate form becomes clearer. FIRRMA passed the Senate on June 18 as part of the National

Defense Authorization Act for Fiscal Year 2019 (“FY 2019 NDAA”), and a different version of FIRRMA passed the House of Representatives as a stand-alone bill on June 26. It appears that the House is prepared to accept incorporation of FIRRMA in the FY 2019 NDAA, but there are a number of issues to be worked out between the two versions of FIRRMA that have been adopted, as well as a broader range of issues to be resolved between the House and Senate concerning the FY 2019 NDAA as a whole. Efforts to resolve the differences between the House and Senate versions of FIRRMA are further complicated by the fact that, while the White House seems generally satisfied with both bills, the Trump Administration has said that it is firmly opposed to a provision in the Senate bill that seeks to reverse the recently announced settlement between the Commerce Department and ZTE and reimpose a broad export denial order against ZTE.

Currently, the chances of CFIUS reform legislation being passed by Congress and signed by the President within the next several months appear to be good. Despite all the statements from Trump Administration officials and members of Congress concerning the need to address foreign investment from China, neither version of FIRRMA singles out any particular country for special treatment by CFIUS. Although a number of key changes brought about by FIRRMA will not go into effect until implementing regulations have been issued, FIRRMA appears likely to bring about fundamental changes in the CFIUS landscape, including the broadest expansion in CFIUS jurisdiction since this interagency committee was reconstituted in 1988. Subject to implementing regulations, FIRRMA seems likely to expand CFIUS review powers to include

- noncontrolling foreign investments in any U.S. business that is considered a critical technology company or a critical infrastructure company (subject to an exception for “passive investments,” which is defined narrowly); and
- the purchase or lease of real estate located either at a port or in close proximity to a U.S. military base or other U.S. government facility that is sensitive from a national security perspective.

In addition, it appears likely that FIRRMA will

- extend the statutory time line for CFIUS reviews (from a current maximum time frame of 75 days to a new maximum of either 105 or 120 days, not counting the ability of parties to pull and re-file);
- for the first time require filings with CFIUS for certain foreign investment transactions (probably investments that involve an acquisition of a substantial interest in a U.S. critical technology company by a foreign person in which a foreign government holds a substantial interest, directly or indirectly); and
- for the first time authorize CFIUS to impose filing fees on transaction parties.

As noted above, we will continue to monitor developments related to the CFIUS reform legislation, and we will provide further updates.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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