

Cross Border Business Law Blog

New U.S. Law on Foreign Investment Further Complicates Future Chinese Investments in the United States

By Paul Hoff on 8.13.18 | Posted in CFIUS, China, Foreign Investors

On August 13, 2018, the President signed into law new legislation that will impose heightened oversight of investments by Chinese persons in U.S. businesses. The Foreign Investment Risk Review Modernization Act (FIRRMA) provides greater specificity about the types of investments that the Committee on Foreign Investment in the United States (CFIUS), an inter-agency committee of the U.S. government, may review and in turn block due to their potential threats to the national security of the U.S. The new law affects foreign direct investments from any country, but China is one of the countries it is particularly likely to affect.

The following are among the new law's most important changes to U.S. control of foreign investment that a Chinese investor may want to consider:

Adding Specificity to the Types of Transactions Subject to Review

1) Under the preexisting law, CFIUS could review for national security concerns transactions that would result in foreign "control" of a U.S. business. Under the new law, a transaction could fall within the authority of CFIUS to review even if the foreign investor does not obtain control of the U.S. business, if (1) the foreign investor will have a representative on the governing board of the U.S. business; or (2) the foreign investor will have access to, or involvement in the use of, technical information involving U.S. critical infrastructure, critical technology, or sensitive personal data that could be exploited to threaten national security. A variety of U.S. businesses, including financial, insurance, and health care companies, may store significant amounts of sensitive personal data.

2) The new law affirms CFIUS's previous practice of reviewing real estate transactions if a property's close proximity to a military installation could pose a threat to national security, and expands coverage to include real estate leases and concessions. It also specifically lists any real estate transactions involving an air or maritime port as transactions that fall under CFIUS' scope of review, while excluding real estate transactions in urbanized areas or involving only a single housing unit.

Further Defining Threats to National Security

3) If a transaction is subject to CFIUS review, the new law specifies CFIUS should consider the impact on national security of foreign investments in critical technology, critical infrastructure, vulnerability to cyberattacks, or manipulation of personal data to endanger national security. It bolsters an emerging willingness by CFIUS to consider broadly whether the investment (1) involves a “country of special concern,” that is seeking to acquire a type of critical technology or critical infrastructure “that would affect United States leadership in areas related to national security;” (2) involves a foreign person who has a history of poor compliance with U.S. law; (3) threatens national security because of the cumulative effect of all recent foreign investment in a critical area; or (4) otherwise involves foreign control of U.S. industries and commercial activity that could adversely affect U.S. national security, including the retention of U.S. personnel with critical knowledge or skills.

4) CFIUS could and has previously considered at least most of these factors, and this language reaffirms its authority to do so. Still, the new law could encourage CFIUS to expand upon the importance placed on these factors when reviewing a transaction. Although China is not mentioned by name, Congress most likely had China, among others, in mind while composing this list.

5) The law reiterates in several places that heightened scrutiny should be given to deals involving a foreign government. For example, the submission of notices to CFIUS has generally been voluntary. Now, a new provision requires a foreign investor to file at least an abbreviated notice when a foreign government will have a substantial interest or control over the investment, and the investment itself will be a substantial one in a U.S. business involving critical infrastructure, critical technology, or sensitive personal data.

6) The scope of critical technology that CFIUS must assess for national security concerns now extends to any technologies the Commerce Department labels, under a new procedure, as emerging or foundational. This adds to the other criteria of critical technology already in the law.

Adding to Controls on Exports of Technology

7) Collaborative arrangements between a U.S. and foreign person that involve the transfer of U.S. technology to foreigners will not be subject to CFIUS review, as some in Congress initially proposed. Instead, any such arrangements will be subject to the enhanced export control rules of the Commerce Department. In addition to all existing export licensing requirements for technology, the Commerce Department will also have to issue a specific license before any Chinese participants in collaborative arrangements can access technology labelled as emerging or foundational.

Effective Dates and Enhanced Congressional Oversight

8) Some of the new law's provisions are now in effect, while others will not take effect until CFIUS issues regulations further explaining and implementing the law's provisions. For example, the rules may explain more precisely the meaning of "critical infrastructure," and add additional instances when parties to a transaction must submit an abbreviated notice to CFIUS. CFIUS has up to 18 months to issue the regulations. Even prior to the implementing rules, however, some of the new provisions may influence the way CFIUS reviews transactions, because they only clarify existing CFIUS policies and authorities. In some cases, investors may want to reconsider the timing of their U.S. transactions in light of when relevant portions of the law will become effective. In other cases, the delayed effective date of portions of the new law may not be so relevant.

9) The new law contains requirements for CFIUS and other Executive Branch agencies to provide more information to Congress regarding foreign direct investments. It requires the Commerce Department to provide Congress with a report every two years specifically on Chinese foreign direct investments. These provisions suggest Congress is likely to increase oversight of CFIUS review of Chinese acquisitions in particular.

Effect of New Law is Likely to be Mixed

This summarizes just some of the new law's many provisions. The full implications of the law's changes are not yet entirely clear, and will not be until CFIUS issues its required regulations. Overall, the law's impact may not be as hostile to foreign investment as once feared. The new law states that the U.S. should continue "to enthusiastically welcome" foreign direct investment because of its benefits to the United States. It affirms that CFIUS should not consider the effect of foreign investment "absent a national security nexus." The new laws and implementing regulations may add desirable clarity in some areas.

In some cases, no notice to CFIUS may be necessary, and in other cases, it will now be possible to submit a simplified notice to CFIUS to determine whether a more extensive notice is required. Even under the new law, CFIUS is unlikely to object to many transactions it reviews. In some areas, the new law may place limits on how expansively CFIUS interprets its authority.

Still, the new law is likely to lead to more assertive actions by CFIUS, and to cause increased attention on Chinese investments. The law significantly complicates the analysis any Chinese investors must make when considering a proposed U.S. investment. Each case will require earlier and deeper considerations of the national security implications of the proposed U.S. investment before proceeding with the transaction.

Tags: CFIUS, CFIUS investigation, China, Chinese investors, Commerce Department, Committee on Foreign Investment in the United States, Congress, Critical Infrastructure, critical technology, export licensing requirements, FIRRMA, foreign direct investments, foreign

New U.S. Law on Foreign Investment Further Complicates Future Chinese Investments in the United States



government, foreign investment, Foreign Investment Risk Review Modernization Act, national security concern, real estate transactions