

Two decades have passed since the beginning of 21<sup>st</sup> century and the third decade will soon start. What will change the future of US transportation industry with a global impact? One of significant changes happened in 2019 was the newly proposed US Treasury regulation under 31 CFR 800 and 802, ending their comment periods on October 17, 2019. The regulation clarified how the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”)<sup>1</sup> would be implemented. It mandated an effective date on or before the February 13, 2020.

What’s FIRRMA?

It is a supplemental enabling federal law that was enacted to address the US national security concerns arising from the inbound foreign direct investments into US (“US FDI”).

After the World War II, when the international trades become a part of rebuilding the global economy, the US congress passed the Defense Production Act of 1950 (“DPA”)<sup>2</sup>. Subsequently, amended by the Foreign Investment and National Security Act of 2007<sup>3</sup> and its implementing regulation became effective on November 14, 2008. Among others, it codified and improved the process of a multi-federal-agency committee led by the US Treasury Department known as the Committee on Foreign Investment in United States (“CFIUS”), which had been empowered to advise the office of US president on the national security concerns arising from US FDI.

Why FIRRMA?

Prior to FIRRMA, the scope of CFIUS review under the section 721 of DPA authority was limited to the transactions mainly resulting in a foreign person controlling a US business with potential national security consequences. This narrow scope of the covered transactions excluded non-controlling minority interests, asset acquisition without a US business, and any startup US businesses.

Unfortunately, the global commercial activities sped up its pace and robust cross-border transactions are no longer rarity. Many cross-border business transactions no longer need to take a controlling interest in the US businesses in order to influence the direction of the targeted enterprises. CFIUS’ limitations appear ineffective in protecting the US national security interest as originally intended.

The shift of global dominance of economic power away from US and Europe to Asia during last 50 years and the rising global power of China became major factors in US trade policy decisions. Based on the annual CFIUS report to US Congress on November 22, 2019, CFIUS

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<sup>1</sup> H.R.5515-538 TITLE XVII

<sup>2</sup> 50 U.S.C. 4565

<sup>3</sup> H.R. 556/ P.L. 110-49

investigated 114 deals involving Chinese investors during 2016 and 2017. It is a significant percentage since CFIUS investigated less than 200 deals per year. Further, there were three deals, one each during 2016, 2017 and 2018, recommended to the office of US president for a national security decision regarding these US FIDs and all three deals were blocked. Two of these deals involved Chinese investors.

What elements of FIRRMA would affect the US Transportation Industry?

Beyond any transactions result in a foreign person with a controlling interest of US Business, FIRRMA expanded the scope of CFIUS' authority by adding the review of specific topical and functionality of US FDIs involving: 1) critical technologies; 2) critical infrastructures<sup>4</sup>; and, 3) sensitive personal data.

US airports and maritime ports are listed by US Department of Transportation as critical infrastructures as appendix<sup>5</sup> in the proposed regulation. The real estate transactions involving locations within the critical infrastructures, locations within one mile<sup>6</sup>, 1 to 100 miles, and missile fields and offshore ranges are considered the covered sites<sup>7</sup> subject to CFIUS review, wherein the location could reasonably provide the foreign person the ability to collect intelligence on activities being conducted at the subject facility.

Also, any business owning, operating, manufacturing, supplying or servicing to the critical infrastructures across the transportation industry as identified in the subsection 2 of the critical infrastructure list are under same scrutiny.

These expended scope of review will reach most of commercial entities in Aviation, Airport, Shipping, Maritime industry, logistics facilities within the list of critical infrastructures in US. US critical infrastructures need improvements and rebuilding to meet the demand of 21<sup>st</sup> century. The situation dictates an open flow of funding to meet the demand of capital expenditure and US FDI is a critical source.

FIRRMA's saving grace sections?

The proposed regulation introduced formally the concepts of: 1) excepted investors<sup>8</sup>; 2) excepted real estate investors; and 3) excepted foreign states<sup>9</sup>. It's a means to qualify the foreign investors based on known relationships to USA, and may except them from the statutory scrutiny. If a foreign state has an established process to analyze its foreign investments for national security risks, and coordinates with the United States regarding the

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<sup>4</sup> 31 CFR 800.212

<sup>5</sup> 31 CFR 800 Appendix A

<sup>6</sup> 31 CFR 802.204

<sup>7</sup> 31 CFR 802.211

<sup>8</sup> 31 CFR 800.220

<sup>9</sup> 31 CFR 800.219

investment security risks, CFIUS would consider these factors in determining the eligibility of the foreign state in its excepted foreign state status.

The Subpart J of the regulation and its subsequent proposed list naming these excepted foreign investors, by the US treasury department, should be able to expedite the CFIUS process for those to be named on the lists. The need for risk management for a sustainable growth in the Global market place necessitates the US infrastructures to be updated to meet and exceed the 21<sup>st</sup> century standards. FIRRMA just may be the tool to facilitate the US needs. Let's welcome the new era with the new regulation from US Treasury in 2020.

Happy new decade!

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