

President Trump Tentatively Looks to FIRRMA to Expand US Foreign Investment Reviews

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In large part as a response to China's national industrial goals and subsequent Chinese acquisitions of U.S. and European companies that are technology leaders in key industries, the U.S. government and a number of European governments are seeking to expand the scope of their national security reviews of foreign investments. Below, we outline ongoing developments affecting U.S. national security reviews of inbound foreign investment.¹

FIRRMA Moves Ahead

The Senate and House have recently passed their respective versions of the Foreign Investment Risk Review Modernization Act (FIRRMA) legislation that was originally introduced in November 2017 with significant bipartisan support. FIRRMA is expected to expand both the range of transactions over which the Committee on Foreign Investment in the United States (CFIUS) has jurisdiction and the number of transactions brought to the attention of CFIUS. On June 18, 2018, the Senate passed its version of FIRRMA as an attachment to the National Defense Authorization Act for fiscal year 2019 and on June 26, 2018, the House passed H.R. 5841 containing its version of FIRRMA.

The original FIRRMA legislation² has been amended considerably since it was introduced. Of particular note, in response to objections from U.S. businesses, the current legislation no longer extends CFIUS jurisdiction to licensing of intellectual property to foreign parties or the establishment of offshore joint ventures involving the transfer of U.S. technology (though under current CFIUS rules, joint ventures are already subject to CFIUS jurisdiction if they involve the contribution of a "U.S. business" — *i.e.*, more than solely intellectual property).

Since their introduction in November 2017, the Senate and House versions of FIRRMA have diverged considerably. The Senate version appears to be more complete, as it leaves fewer issues undefined, and it may enjoy greater bipartisan support. The amended version of FIRRMA passed by the House has already moved toward the Senate version. Congress is expected to form a conference committee to reconcile the differences in the legislation and put forth a final bill for vote by both the House and the Senate. The White House has indicated that it will seek to participate in the reconciliation process and is pushing for swift passage. The final bill will likely more closely track the current Senate version.

Key elements of FIRRMA, as well as distinctions between the Senate and House versions of the legislation, include the following:

- **Expansion of CFIUS Jurisdiction.** Currently CFIUS reviews "covered transactions," defined generally as transactions that could result in foreign control of U.S. businesses. Under FIRRMA, the definition of covered transactions could be expanded to include more business activities.

¹ See our forthcoming client alert, "Expanding the Scope of National Security-Focused Foreign Investment Reviews in Europe," for an update on developments in the United Kingdom, France and the European Union.

² See our November 10, 2017, client alert, "[Legislation Proposes Sweeping New Foreign Investment Review Authorities](#)," for an overview of the original provisions of FIRRMA.

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- **Investments in Critical Technology Businesses.** FIRRMA intends to reduce the flow of technology from the United States by increasing CFIUS' reviews of investments in "critical technologies," which CFIUS has traditionally defined as technologies subject to various export control regimes. Under FIRRMA, critical technologies would also include new categories of emerging and foundational technologies, to be identified through CFIUS regulations.

In the Senate version of FIRRMA, any foreign investment (other than a passive investment) in a U.S. critical technology company would be a covered transaction. Theoretically, this extends CFIUS jurisdiction well beyond its current limit of transactions that could result in foreign control. This expansion, however, is limited by the exemption for "passive investment," which the Senate bill goes to great lengths to define in limited contexts.³

Investment funds with foreign participation can also qualify as passive investors if, in addition to meeting the foregoing conditions, the general partner or other manager is a nonforeign person, and any foreign investors involved as limited partners, advisory committee members or in similar roles have no authority over investment decisions by the fund, management of the fund's portfolio holdings, or the selection or compensation of the fund's management.

In the House version of FIRRMA, equity and contingent equity investments — including noncontrolling investments — by foreign investors from (or controlled by) certain "countries of special concern" (currently including China, Russia, Venezuela, Iran, North Korea, Syria and Sudan, though others may be added) would be covered transactions if the investor could influence the U.S. business' use, development, acquisition or release of critical technologies.

- **Investments in Critical Infrastructure Businesses.** As with critical technology investments, the Senate bill extends CFIUS jurisdiction over any foreign, nonpassive investments in U.S. critical infrastructure. A critical infrastructure company is one that owns, operates or provides services to

an entity that operates in a critical infrastructure sector or subsector. "Critical infrastructure" is defined by the Senate, consistent with current CFIUS regulations, as systems or assets so vital that their incapacity or destruction would have a debilitating effect on U.S. national security.

- **Access to Personal Information.** The House bill extends CFIUS jurisdiction to transactions by investors from, or controlled by, countries of special concern (as defined above) that would enable the foreign investor to obtain sensitive personal data of U.S. citizens that could be exploited to threaten U.S. national security. This codifies, at least with respect to the identified countries, a growing interest of CFIUS in recent years.
- **Real Estate Transactions.** CFIUS, in its reviews of acquisitions, already considers the proximity of the U.S. properties to sensitive military and government facilities. FIRRMA expands this practice by including within the scope of CFIUS jurisdiction — in addition to purchases of business-associated real estate that are already covered transactions — purchases of vacant land, leases and other concessions that are located in close proximity to U.S. military installations or that include, or are located in, air and sea ports. The Senate bill also includes proximity to (i) land ports (*i.e.*, border crossings from Canada and Mexico) and (ii) U.S. government facilities that are sensitive for reasons relating to national security.
- **Short-Form Declarations.** FIRRMA establishes new "declarations" of transactions, which are short (generally limited to five pages) overviews of transactions that should bring more transactions to the attention of CFIUS, while also allowing CFIUS to "triage" its caseload and devote more attention to the transactions CFIUS determines are likely to be sensitive. Declarations may offer some foreign investors a shorter path to CFIUS clearance. In other cases, however, they could lengthen the process. CFIUS has to review and respond to these declarations within 30 days. CFIUS' response to a declaration could be to require the filing of a full CFIUS notice.

Declarations are generally voluntary, with some exceptions:

- **Senate Version.** Short-form declarations will be mandatory for transactions that result in a foreign government directly or indirectly acquiring a "substantial interest" in a U.S. business involved in critical infrastructure or critical technology. However, substantial interest does not include (i) voting

³ The Senate defines a passive investment in a critical technology or critical infrastructure business as one that (i) is not an outright acquisition; (ii) does not afford the investor access to a business' material nonpublic technical information; (iii) does not give the investor the right to name directors, board observers or similar positions on a business' governing body; (iv) does not provide any involvement, other than the voting of shares, in the management, governance or operation of the business; (v) is not made in parallel with some other material strategic relationship between the investor and the business; and (vi) meets any other criteria CFIUS may establish by regulation.

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interests of less than 10 percent or (ii) passive interests in critical technology or critical infrastructure businesses; and declarations would not be required by government-controlled investors from certain designated countries (described below).

- **House Version.** Foreign government-controlled companies are required to submit declarations only if their investments would result in the “release” (not defined) of critical U.S. technology.
- **Exemptions for Friendly Countries.** In the Senate bill, a number of exemptions are made for investors from countries that (i) have foreign investment review processes and associated international cooperation that align those countries’ security interests with those of the United States, (ii) are members of the North Atlantic Treaty Organization (NATO) or are designated as close non-NATO allies, or (iii) meet other criteria to be established by CFIUS. The Senate would exempt investors from such countries from the expansion of CFIUS jurisdiction over investments in critical technology businesses, investments in critical infrastructure businesses and real estate transactions with proximity concerns.
- **CFIUS Resources.** CFIUS has traditionally received no dedicated funding from the U.S. government. As a result, the staff resources within CFIUS member agencies have not kept pace with the rapid increase in CFIUS filings in recent years. Both the Senate and House versions of FIRRMA contemplate appropriations specifically supporting CFIUS activities. Each version also seeks to avoid the need for appropriations, however, by imposing a filing fee — with the amount to be determined via regulation and use of a sliding scale based on several factors — for CFIUS notices. The House version of FIRRMA caps CFIUS fees at the lesser of 1 percent of the value of the transaction or \$300,000 (adjusted for inflation), while the Senate version allows for imposition of an additional fee when requested to expedite the handling of filings.
- **Reporting of CFIUS Outcomes.** Today, unless the parties to a transaction disclose the results of their engagement with CFIUS or the U.S. president is called upon to decide whether a transaction can proceed, the public will never know that CFIUS considered a particular transaction. FIRRMA would require CFIUS, as part of its annual report to Congress, to list the transactions for which full notices were filed, the nature of the subject U.S. business and the results of the CFIUS case.

Given these and other differences between the Senate and House bills, FIRRMA’s final provisions remain subject to further negotiation through the reconciliation process. In addition, many FIRRMA provisions require a number of key definitions, conditions and the like to be established through regulations to be promulgated by the Treasury Department. We expect uncertainties about these provisions to persist for some time even after the law is enacted; when the law governing CFIUS was last amended in 2007, it took 16 months for implementing regulations to be issued.

Presidential Action Targeting Chinese Investment on Hold

On March 22, 2018, President Donald Trump announced the completion of an investigation by the U.S. trade representative (USTR), pursuant to Section 301 of the Trade Act of 1974 (Section 301), of China’s laws, policies, practices and other actions relating to technology transfer, intellectual property and innovation. The USTR report⁴ identified forced technology transfers by U.S. businesses operating in China, intellectual property license provisions that discriminate against U.S. technology owners, expanding Chinese acquisitions of U.S. and European technology and Chinese cyber intrusions into U.S. businesses.

As part of President Trump’s response to these findings,⁵ he directed the secretary of the treasury to work with other officials to propose executive branch action “to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States.” Leaving no doubt as to the meaning of “address concerns,” the section of the presidential memorandum is titled “Investment Restrictions.”

On June 27, 2018, President Trump announced that rather than impose separate executive actions under Section 301, he would rely on FIRRMA, and executive branch efforts would focus on the swift implementation of the bill.⁶ The president warned, however, that if the final version of FIRRMA is too weak, his administration would pursue other executive action under existing authorities. In addition to Section 301, these authorities would likely include presidential powers under the International Emergency Economic Powers Act. This threat could also be used as a bargaining chip in ongoing trade negotiations with China.

⁴ The USTR report is [available here](#).

⁵ President Trump’s response is [available here](#).

⁶ President Trump’s statement is [available here](#).

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