

Proposed CFIUS Law Will Impose New Export Controls On Businesses CFIUS拟议法案将对企业实施新的出口管制

The Foreign Investment Risk Review Modernization Act of 2017 (S. 2098/H.R. 4311, FIRRMA for short) was introduced in Congress to reform the national security review of foreign acquisitions of US businesses by the Committee on Foreign Investment in the United States (CFIUS or the Committee). However, FIRRMA extends well beyond this purpose of reviewing acquisitions by giving CFIUS authority over technology transfer transactions – both export and domestic.

The proposed legislation will give CFIUS authority over a US business' technology transfers both to an organization outside the US and to a US organization that is "controlled" by a non-US person. As a result, every company that produces military or controlled dual-use items will need to consider CFIUS review for foreign and domestic technology transfer transactions. This aspect of the proposed legislation is troubling because it establishes a duplicate government approval process, requires review of technology transfer that the existing export control agencies have determined not to require a license, and imposes a new level of "know your customer" due diligence to understand the ownership of a US recipient.

Further, organizations that develop innovative and emerging technologies also must consider CFIUS review, even though their technology is not controlled for export purposes. Over the last 20 years, the most innovative technologies (e.g., various artificial intelligence [AI] applications, information security and encryption technology, nanotechnology, etc.) have been developed, not by the US government or government-sponsored research, but by purely commercial companies – and, in particular, small venture-backed commercial start-ups in Silicon Valley and other technology hubs around the country. However, while many of these emerging technologies may not be listed with an Export Control Classification Number (ECCN) on the Commerce Control List (CCL), they may require CFIUS review under the proposed legislation. As to these decontrolled technologies, including EAR99 technologies, not only does this proposed increase in CFIUS authority add another export control authority in addition to current controls, but it would also create oversight over their transfer. Such a proposal stands to negatively impact US innovation and, indirectly, its technology advantage.

为对外资并购美国企业相关的国家安全审查进行改革，美国外国投资委员会（简称为“CFIUS”或“外资委”）向国会介绍了《外商投资风险评估现代化法案（2017年）》（S. 2098/H.R. 4311，简称为“FIRRMA”）。但是，FIRRMA这部法案赋予给CFIUS对技术转让交易（包括出口交易和国内交易）并购审查的权限远远超出了上述目的。

拟议立法将赋予CFIUS对美国企业将技术转让给非美国境内组织以及非受美国人“控制”的美国组织进行管辖的权限。结果，每一家生产军用或两用物项的公司都需要考虑就对外国和对国内的技术转让交易进行CFIUS审查。拟议立法的该等规定是棘手的，因为它设置了双重的行政审批程序，在现有出口管制机构已认定不要求许可证的情况下要求对技术转让进行审查，且为了解一个美国接受方的所有权而对关于“了解客户”的尽职调查实施了新的要求。

其次，开发创新技术和新兴技术企业也必须考虑CFIUS的审查，即使他们控制技术的目的并不在于出口。过去的20年里的最具创新的技术（例如各种人工智能[AI]应用、信息安全和加密技术、纳米技术等）都不是由美国政府开发或资助的，而是由纯粹的商业公司、尤其是硅谷的初创企业小型风投以及全国各地的其他技术中心开发或资助的。然而，虽然其中诸多新兴技术可能并未被列以商业控制清单（CCL）中的出口管制分类号（ECCN），但是根据拟议立法它们却可能需要CFIUS审查。对于包括EAR99技术在内的这些解除控制的技术，除了目前的控制措施之外，这一拟议立法赋予CFIUS的权限会导致增加另一个出口管制机构对其转让产生监督。这一拟议立法会对美国的创新产生负面影响，并间接影响其技术优势。

Current Scope of CFIUS and Export Control Agencies

Under the current CFIUS implementing statute, Section 721 of the Defense Production Act of 1950, CFIUS has authority over “covered transactions,” which are defined as the acquisition of “control” by a “foreign person” over a “US business.” CFIUS authority is thus limited to only certain foreign investments in the US that meet this definition. Currently, Section 721 does not give CFIUS authority over technology transfers between US and foreign persons (i.e., exports) or domestic technology transfers. Review of exports are left to other executive agencies that have the expertise to evaluate the transfer and to determine the impact on national security, foreign policy and other policy and releasability considerations.

The transfer of technology by a US business is subject to US export controls: the Export Administration Regulations (EAR), administered by the US Department of Commerce, Bureau of Industry and Security (BIS), and the International Traffic in Arms Regulations (ITAR), administered by the US Department of State, Directorate of Defense Trade Controls (DDTC). Under the EAR and the ITAR, a license, approved agreement, exception or exemption is required to export controlled technology to a foreign person, whether within or outside the US. The requests for approval submitted to these agencies are reviewed by government personnel who understand the technology, policy considerations and releasability guidelines, typically involving review by the Department of Defense, Defense Technology Security Administration and, in appropriate cases, stakeholders in the Armed Services, Department of State, the Intelligence Community and others.

Expansion of CFIUS Authority Over Already Regulated Export Activities

FIRRMA would expand the definition of a covered transaction, and thus CFIUS’s authority, to include the following: any contribution “of both intellectual property and associated support” to a foreign person as part of “any type of arrangement” if the US business “produces, trades in, designs, tests, manufactures, services, or develops one or more critical technologies, or a subset of such technologies” (i.e., a “Critical Technology Company”).

Essentially, FIRRMA empowers CFIUS – as a new export licensing agency – to conduct an interagency review of all covered technology transfers. In addition, FIRRMA would give CFIUS authority to exempt “identified countries,” under its discretion, from this new authority. Accordingly, CFIUS will create the equivalent of a license exception for certain countries, possibly similar to an EAR license exception (e.g., license exceptions for Country Group B Shipments [GBS] or Strategic Trade Authorization [STA]).

CFIUS和出口管制机构的当前权限

在CFIUS现行立法《国防生产法案（1950年）》第721条下，CFIUS有权管辖“受管辖交易”，其定义是“外国人”通过并购取得对“美国企业”的“控制”。因此，CFIUS的权限仅限于符合上述定义的特定的在美外商投资。当前，第721条并未授权CFIUS对美国与外国之间的（即出口）或国内的技术转让进行管辖。对出口的审查权被授予给其他擅长于对转让进行评估并确定该等转让对国家安全、外国政策或其他政策和可释放性等因素的影响的行政机构。

美国企业的技术转让受限于下述美国出口管制：美国商务部工业和安全局（BIS）依据《出口管理条例》（EAR）进行管理以及美国商务部国防贸易管制局（DDTC）依据《国际武器贸易条例》（ITAR）进行管理。在EAR和ITAR这两部条例下，如出口受管制技术给不论位于美国境内还是境外的外国人，需取得许可、经批准的协议、例外或豁免。提交的批准申请会由了解技术、政策因素以及可释放性指南的政府人员审查，其中尤其会由国防部国防技术安全管理局以及视具体情况，由武装部队、国务院、情报机构和其他机构的相关人士审查

CFIUS对已受管制的出口活动扩大管辖

FIRRMA这部法案将扩大“受管辖交易”的定义范围，基于此，CFIUS的权限包括：当一家“生产、买卖、设计、测试、制造、服务或开发一项或多项关键技术或该技术的一部分的美国企业（即“关键技术公司”）将“知识产权及其配套支持”作为“任何类型的安排”的一部分贡献给外国人的。

从本质上讲，FIRRMA授权CFIUS——作为一个新的出口许可机构——对所有受管辖技术交易进行跨部门的审查。此外，FIRRMA授权CFIUS可对“特定国家”予以豁免。因此，CFIUS将为某些国家设置相当于许可证例外的情况，可能类似于EAR许可证例外（例如，B组国家运货[GBS]或战略贸易授权[STA]的许可证例外）。

The proposed legislation also leaves much open to CFIUS interpretation. What exactly qualifies as an “arrangement” or “contribution” is not clear, but FIRRMA’s description of these concepts seems extremely broad. For example, the legislation states that arrangements include any contribution “other than through ordinary customer relationship ... such as a joint venture.” However, this language would likely include joint development agreements, technology licenses and other joint collaborations and initiatives. FIRRMA would thus give CFIUS authority over almost any technology transfer involving foreign persons that fall outside of ordinary course buy/sell transactions by a US company that falls within the broad definition of a Critical Technology Company.

Because CFIUS is an interagency body, technical reviews are often carried out by its member agencies – such as the Department of Commerce (through BIS). As a result, a CFIUS review of a transfer of controlled technology under FIRRMA would likely be handled by the same export control agency that would handle it outside of the CFIUS process, duplicating the regulatory review of such transfers. Alternatively, CFIUS could have other agency members handle the review of a technology transfer, but such a scenario would likely result in inefficiencies and inconsistent results, as the institutional expertise on technology transfers resides with the export control agencies. So, under either scenario involving a CFIUS review of already controlled technologies, the result is either duplicative or inefficient and inconsistent.

Deals by Every US Company Operating in Controlled Technologies Will Be Subject to CFIUS Review

The definition of a Critical Technology Company includes any company dealing in already controlled technologies. This includes any company dealing in Defense Articles or Defense Services under the ITAR or dealing in certain technologies on the CCL under the EAR. The EAR covered technologies include ECCNs on the CCL that are controlled for any of the following reasons: national security, chemical and biological weapons proliferation, nuclear nonproliferation, missile technology, regional stability, surreptitious listening, as well as certain agents and toxins and if controlled pursuant to multilateral regimes. Also included are nuclear-related products regulated by the Nuclear Regulatory Commission Controls.

However, unlike the existing export controls regime, which triggers a licensing requirement based on the technology to be exported, the CFIUS review proposed by FIRRMA would be triggered by the type of company engaged in the technology transfer. That is, every technology transfer by a Critical Technology Company is potentially subject to CFIUS review, even if the technology being transferred is not a critical technology. Accordingly, a decontrolled technology transfer (e.g., EAR99 technology) by a Critical Technology Company could be subject to CFIUS review under the proposed legislation.

拟议立法还有许多空白留待CFIUS解释。一项“安排”或“贡献”的准确定义并不清晰，而FIRRMA这部法案对这些概念的描述又似乎太过宽泛。例如，该立法规定安排包括任何“正常客户关系以外的如合资”的贡献。然而，这句话似乎涵盖了共同开发协议、技术许可和其他联合的合作和举措。因此，FIRRMA这部法案赋予了CFIUS的权限几乎涵盖了所有符合“关键技术公司”这一广泛定义的一家美国公司在日常经营范围之外向外国人购买/出售任何技术转让的交易

由于CFIUS是一家跨部门的机构，技术性的审查通常是由它的子部门，例如商务部（通过其工业和安全局（BIS））开展的。其结果是，一项FIRRMA法案下的对受控制技术的转让的CFIUS审查很有可能是由同一个出口管制部门在CFIUS程序之外开展的，导致对该等转让的重复性监管审查。或者，CFIUS可以让其他子部门处理对技术转让的审查，但这种情形很有可能导致效率低下以及结果相左，因为长期以来出口管制部门才是技术转让相关的专家。

美国每一家受控制技术公司的交易都将受到CFIUS审查

“关键技术公司”的定义包括任何对已受控制技术进行交易的公司。上述定义包含了对《国际武器贸易条例》（ITAR）规定的国防物品或国防服务进行交易的公司或对《出口管理条例》（EAR）规定的商业控制清单（CCL）上的特定技术进行交易的公司。《出口管理条例》（EAR）中的“受控制技术”包括商业控制清单（CCL）中的出于以下任一目的控制的出口管制分类号（ECCN）：国家安全、化学和生物武器扩散、防止核扩散、导弹技术、区域稳定、窃听以及出于多边制度加以管制的某些药物和毒素。此外还包括核管理委员会管制的核相关产品。

现行的出口管制制度基于拟出口技术设置了许可证要求，而与之不同的是，FIRRMA法案提出的CFIUS审查则将由从事技术转让的公司类型引发。这意味着，“关键技术公司”的每一技术转让都可能受限于CFIUS审查，即使该等拟转让的技术不属于关键技术。相应地，“关键技术公司”进行的对“解除控制技术”的转让在拟议立法规定下也可能受限于CFIUS审查。

Deals by US Companies In Emerging Technologies Will Be Subject to CFIUS Review

FIRRMA adds to the current definition of critical technology by including the concept of “emerging technologies,” defined under FIRRMA as any technology that CFIUS deems “essential for maintaining or increasing the technological advantage of the US over countries of special concern with respect to national defense, intelligence, or other areas of national security, or gaining such an advantage over such countries in areas where such an advantage may not currently exist.” (Emphasis added.)

This definition under FIRRMA would give CFIUS discretionary authority to deem certain technologies that are not listed on the US Munitions List, CCL or any other list, as emerging technologies. Indeed, under FIRRMA, CFIUS is the arbiter as to which technologies are “emerging technologies.” As a result, any US organization with new or innovative technology will need to consider seeking CFIUS clearance for its transfer of technology if the technology has a potential military or intelligence application, or simply provides an advantage over some country of “special concern” (to be defined in CFIUS’s discretion).

Domestic Technology Transfers Will Be Subject to CFIUS Review

FIRRMA would establish a new form of government approval for domestic technology transfers. Currently, under the ITAR and EAR a business organized to do business in the US is a US person. This is true even if the company is partly or wholly owned by a non-US person. There are numerous examples of US companies that are vital to our defense industrial base and critical infrastructure of the US but are foreign owned in whole or in part. Under FIRRMA, these US companies would be treated as foreign persons, and transfers of technology of the type described above would be subject to CFIUS clearance. That is because for CFIUS purposes a “foreign person” includes any entity that is directly or indirectly “controlled” (a concept broadly interpreted beyond majority holdings to include minority holdings or special voting rights) by a foreign person.

FIRRMA Adds an Additional Layer to “Know Your Customer” Due Diligence

The treatment of a US company as a foreign person for the purpose of transferring technology adds an entirely new compliance burden on US companies. Now, prior to making even a domestic technology transfer, a US company must undertake diligence to know if there is, or could be, foreign control of the recipient. Because of the broad concept of “control” for CFIUS purposes, companies would need to determine whether the recipient organization has even small foreign ownership interests. Over 10% voting interest is often considered controlling by CFIUS standards, and CFIUS will even find control when there is less than 10% foreign voting interest coupled with other indicia of control.

Current export compliance knows your customer measures are not structured to identify triggering foreign interests in a CFIUS context. Not only will many companies need to revamp their internal controls, but additional compliance resources will also certainly be required to address the proposed changes.

美国公司对新兴技术的交易将受到CFIUS审查

FIRRMA在当前的关键技术的定义范围中添加了“新兴技术”这一概念。FIRRMA这一法案将“新兴技术”定义为任何被CFIUS认为“对美国维持或提高相较于特别关注的国家在国防、情报或其他国家安全领域的技术优势、或者率先在这些国家尚无优势的领域取得优势而至关重要的技术。”（此处强调）

根据FIRRMA的这一定义，CFIUS有权决定将未列入美国军火清单、商业控制清单（CCL）或任何其他清单的某些技术视为新兴技术。事实上，在FIRRMA法案下，CFIUS是哪些技术属于“新兴技术”的裁决者。因此，任何具有新技术或新兴技术的美国组织在该等技术具有潜在的军事或情报用途或仅仅是对一些“特别关注”国家具有优势（由CFIUS自行裁量）时，则需在技术转让时寻求CFIUS放行。

美国国内技术转让将受到CFIUS审查

FIRRMA法案将对国内技术转让设置一种新的行政审批。当前，《国际武器贸易条例》（ITAR）和《出口管理条例》（EAR）规定了在美国设立并开展业务的企业是美国人，即使该企业是由非美国人部分或全部持有的。无数例子表明美国公司对我们的国防工业基地和美国关键基础设施起到至关重要的作用，虽然他们全部或部分为外资的。在FIRRMA法案下，该等美国公司会被视作外国人，而且其上述类型的技术转让将以CFIUS的放行为前提。这是因为对于CFIUS而言“外国人”包括任何由外国人直接或间接“控制”（这一概念被广泛解释为不仅包括多数持股，还包括少数持股或特殊投票权）的实体。

FIRRMA对“了解客户”尽职调查增加了新的层面的要求

为转让技术之目的，将美国公司作为外国人处理，给美国公司带来了全新的合规负担。现在，即使在进行国内技术转让之前，美国公司必须尽力调查以确定接收方是否存在外资控制的情况。由于CFIUS对“控制”这一概念定义广泛，公司需要确定接收方组织是否存在哪怕很小量的外资所有权。根据CFIUS的标准，超过10%的投票权通常被认为是控制权，CFIUS甚至会在外国投票权少于10%但有其他控制权时认定具有控制。

当前，“了解客户”的出口合规措施不用于确定CFIUS规定的具有触发性的外国利益。许多公司不仅需要改进它们的内部控制，而且还需要额外的合规资源来解决拟议变更。

FIRRMA Will Chill Cross-border Cooperation and Innovation and Will Deprive Our Military of the Best Technologies and Solutions

The FIRRMA changes discussed herein appear to be based on outdated concepts of US technological dominance. FIRRMA will likely be a tremendous setback in the efforts made through export control reform to improve US competitiveness and innovation and US military access to the best technologies and capabilities. The historical narrative of US export control reform was strengthening controls around a smaller set of items. However, the driving force was to avoid the trend of non-US industry becoming "ITAR free" because of the extraterritorial impact of the ITAR on non-US business. This is a reality that was learned all too well in the space industry after commercial communications satellites were moved to ITAR, resulting in the assisted development of a European satellite industry.

While the proposed legislation is certainly well intended, we expect that the changes will have a chilling effect on future technology transfer and cooperative arrangements to develop and extend critical existing technologies, and perhaps, more importantly, to advance and fund new emerging technologies.

Conclusion

The proposed CFIUS authority over any arrangement, collaboration or venture involving technology transfers presents a realistic chill to US innovation. This expansive oversight creates an obstacle to US businesses that can wall off the US technology sector from the benefits of global competition and collaboration. These expansions have already raised concerns among US technology companies that operate globally, with one leading technology company stating that FIRRMA would turn CFIUS into a "super export control agency"¹. Our concern is that FIRRMA in its proposed structure will do more to harm US national security interests in the long run than it will to protect them.

Contacts

George Grammas

Co-chair, International Trade Practice Group
Partner, Washington DC
T +1 202 626 6234 | T +44 207 655 1301
E george.grammas@sqirepb.com

Jack Deschauer

Chair, Defense Public Policy Practice Group
Partner, Washington DC
T +1 202 457 6338
E jack.deschauer@sqirepb.com

FIRRMA将冷却跨境的合作和创新且将剥夺美国军队的最佳技术和解决方案

本文探讨的FIRRMA法案带来的变化似乎基于美国技术主导地位的这一过时概念。FIRRMA法案对于通过出口管制改革提高美国竞争力和创新能力以及提高美国军队获得最好的技术和能力而取得的成果可能是一个巨大的退步。过去对美国出口管制改革的描述是对一小部分物品加强管制。然而，出于《国际武器贸易条例》(ITAR) 对非美国业务的域外影响，其驱动力是为了避免非美国企业的“免ITAR规制”的趋势。众所周知，在商业通信卫星转移到ITAR之后，航天工业中得到了很好的发展，从而促成了欧洲卫星工业的辅助发展。

虽然拟议立法的初衷是好的，但我们预计这些变化将对未来针对开发和扩展现有关键技术、可能更重要的是推动和资助新兴技术相关的技术转让和合作安排产生冷却的影响。

结论

拟议CFIUS对任何涉及技术转让的安排、合作或合资具有的管辖权限对美国的创新具有现实的冷却影响。这种广泛的监管对美国企业造成障碍，阻碍美国科技行业从全球竞争与合作中受益。这种权限扩张已经在全球运营的美国科技公司中引发了担忧，一家领先的科技公司称FIRRMA法案将把CFIUS变成“超出口管制机构”(见脚注1)。我们担心的是，从长远的角度来看，FIRRMA法案的拟议规定中将更多地损害美国国家安全利益，而非保护它。

联系人

Daniel F. Roules/陆大安

合伙人，上海
T 86 21 6103 6309
E daniel.roules@sqirepb.com

Lindsay Zhu/朱桔

合伙人，上海
T 86 21 6103 6303
E lindsay.zhu@sqirepb.com

¹ Statements by Christopher Padilla, Vice President for Government and Regulatory Affairs, IBM Corporation, testifying before the Senate Banking, Housing, and Urban Affairs Committee, January 18, 2018. The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations, nor should they be considered a substitute for taking legal advice.

Christopher Padilla, IBM公司政府和法规事务副总裁于2018年1月18日所述，参议院银行、住房和城市事务委员会作证。此更新的内容并非旨在对个别情况提供相关的法律建议，也不是与该等情况相关的法律意见，亦不应被视为是法律建议的替代方案。