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CFIUS Reform
Proposed Legislation to Expand National Security Reviews

The Foreign Investment Risk Review Modernization Act of 2017 ("S. 2098/H.R. 4311" or FIRRMA) was introduced in Congress on November 8, 2017 to institute "a modernization of the processes and authorities" of the Committee on Foreign Investment in the United States (CFIUS or the "Committee"). (FIRMMA, § 2(4), H.R. 4311, 115th Cong., Nov. 8, 2017.) This bill addresses recent calls to reform the process in which the US conducts national security reviews over investments and acquisitions in US business by foreign persons.

Overview: Key Changes to CFIUS

FIRRMA would amend key provisions and definitions in the current CFIUS implementing statute, Section 721 to the Defense Production Act of 1950, 50 U.S.C. § 4565, as amended (Section 721). The proposed legislation would implement sweeping changes to the current CFIUS structure, but, in general, it greatly expands CFIUS's authority and scope of review to analyze national security implications of foreign investments. The key changes of FIRRMA are:

- Covered transactions over which CFIUS has authority would include three new areas previously outside CFIUS's authority:
  - Pure real estate acquisitions that have proximity concerns to US government installations
  - All minority investments in US critical technology or infrastructure companies, along with an expansive redefinition of the term "critical technology" (see below)
  - All transfers of technology and accompanying support by any US critical technology company as part of a collaboration (strategic partnership, joint venture, R&D initiative) with a foreign person
- The above additional new areas of authority would not apply to investors from "identified countries" that meet the criteria – to be determined by CFIUS – that are favorable to US national security interests (e.g., mutual defense treaties).
- The national security factors that CFIUS must assess in its review are nearly doubled and include new concepts, such as "Critical Materials," and "technology and industrial leadership" over certain countries.
- The new definition of critical technologies covers any technology products that CFIUS, in its discretion, considers to be "emerging technologies."
- The passive investment exemption to covered transactions, that is those investments outside of CFIUS's authority, would be narrowed. Potentially, anything beyond merely voting shares could subject an investment to CFIUS authority.
- FIRRMA also instituted sweeping procedural changes, such as the introduction of mandatory filings and filing fees, an abbreviated "declaration" filing instead of the more in-depth notice filing, and an extension of the CFIUS review timeline by an additional 45 days. (Note, CFIUS is not required to come to a decision after its review of abbreviated filings under FIRRMA as it is for reviews of voluntary notice filings.)

Legislative Outlook: Gaining Momentum

Currently, with bipartisan support, FIRRMA has real momentum and Congress will likely be considering CFIUS reform legislation in the near- to medium-term. The legislation has support in both the House and the Senate, and the bill is even reported to have support from the White House.[1]

Senator John Cornyn (R-TX), the bill's chief architect and an influential member of Senate Leadership, has supposedly met with private stakeholders to build outside support for the legislation, but it is unclear what sectors of the economy are supporting the bill. Already, the technology community has spoken out about the unpredictable and expansive authority CFIUS would have over potentially any collaboration between a US technology company and foreign company under FIRRMA.[2]

The timing of Congressional consideration remains uncertain. While Senator Cornyn originally hoped the Senate Banking Committee would mark up FIRRMA before the end of the year, the committee's chairman, Mike Crapo (R-ID), wants more time to build "a common agreement" around the legislation before he schedules a vote.[3] Chairman Crapo also pushed back against the notion that the White House had signed off on the bill. *Id.* Rep. Pittenger (R-NC), the lead sponsor of FIRRMA in the House, would not speculate on timing when asked by reporters, only commenting on the growing concerns raised by recent acquisitions by Chinese companies (a common theme among FIRRMA supporters). *Id.* In this regard, the bill may be seen by lawmakers as a symbolic vote against China.

1 *The New York Times*, "Targeting China's Purchases, Congress Proposes Tougher Reviews of Foreign Investments," November 8, 2017; and *Inside U.S. Trade*, "Cornyn, Pittenger ready to introduce bills strengthening CFIUS reviews," October 27, 2017.

2 *Reuters*, "IBM urges lawmakers to "narrow" bill targeting Chinese investment," November 14, 2017.

3 *Inside U.S. Trade*, "Sen. Crapo puts the brakes on Cornyn's 'urgent' push for CFIUS upgrades," November 17, 2017.

However, this thinking may be akin to cutting of one's nose to spite their face because of the increased burdens and uncertainty the pending legislation puts on business and foreign investment from any country – essentially putting US businesses at a disadvantage to their foreign rivals, the same foreign rivals FIRRMA may be seeking to protect against (see footnote 2).

There will be opportunities for lawmakers to amend the legislation, but we expect the proponents of the bill will work to limit amendments in order to ensure the language of the bills that pass in the House and Senate are as similar as possible.

Key Concern: Expansive Oversight Over Technology Businesses

FIRRMA raises multiple issues, but none appear to have triggered more concerns than the proposed expansive authority that CFIUS would hold over potentially all business collaborations involving a transfer of technology from a US "critical technology company" (i.e., potentially any US technology company regardless of whether any existing laws restrict the technology's export). This extends CFIUS authority over potentially any joint venture, research and development collaboration, or other strategic partnership that a US business enters with a foreign company **from any country**.

Under the existing CFIUS structure, transactions involving the acquisition of control over companies with "critical technologies" receive heightened scrutiny, but under FIRRMA, relevant companies' collaborations with other businesses alone would be subject to CFIUS review. FIRRMA's inclusion of "emerging technologies" (to be defined by CFIUS) in the definition of critical technologies provides CFIUS with broad discretion to determine whether any new product or technology – even one that is not subject to export restrictions under existing laws – is an emerging technology and thus subject to the additional CFIUS oversight. This concept of "emerging technologies" creates an inherent uncertainty that any business collaboration involving a new technology could be swept into CFIUS regulatory scrutiny without the parties' having any warning.

Leaving aside FIRRMA's increased regulatory burdens by way of filing fees, increased duration of CFIUS reviews and increased scope of review, the CFIUS authority over any collaboration involving technology transfers presents a realistic chill to US innovation. This expansive oversight creates an obstacle to business that can wall off the US technology sector from the benefits of global competition and collaboration. Although we may have an edge in technology leadership now, this may suffer if the world continues to compete and collaborate without the US.

To the extent industry groups have yet to make themselves heard on this bill, they are losing time, as the behind-the-scenes negotiations over the bill are already underway. At a minimum, even if not enacted, FIRRMA is indicative of rising areas of concern and the direction CFIUS reviews are likely headed. Interested parties may benefit from a detailed assessment of how each proposed change could affect their operations. We have prepared a detailed assessment concerning the legislation and potential impact on capital infusion and job creation in the US, and those parties interested in the full analysis should contact us.

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