

House and Senate Committees Unanimously Clear Bills That Would Greatly Expand CFIUS Authority

Senator John Cornyn (R-Texas) and Rep. Robert Pittenger (R-North Carolina) have led a bipartisan, bicameral effort to reform the Committee on Foreign Investment in the United States (CFIUS or the Committee) review process, which led to the November 2017 introduction of the Foreign Investment Risk Review Modernization Act (S. 2098/H.R. 4311, FIRRMA for short).

The initial draft raised significant concerns from the business community, particularly its provision that would have applied CFIUS authority to transfers involving critical technologies (either outbound or domestic transfers involving any US person “controlled” in some form by a foreign person) as part of non-ordinary course business collaborations.¹ While the current draft legislation does not give CFIUS authority over critical technology transfer, this remains a focus of the Administration. The White House announced “[t]o protect our national security, the United States will implement specific investment restrictions and enhanced export controls for Chinese persons and entities related to the acquisition of industrially significant technology.”² The proposed investment restrictions and enhanced export controls will be announced by June 30, 2018, and they will be implemented shortly thereafter. We will follow up on this development in a subsequent alert.

Since November 2017, both the House and Senate have held numerous hearings on FIRRMA and floated a number of revised drafts of the legislation. Importantly, the bill sponsors also secured the strong support of the Trump Administration. The effort achieved an important milestone on Tuesday, May 22, when the House Financial Services Committee and the Senate Banking Committee each unanimously passed their versions of FIRRMA. The House and Senate versions of the CFIUS reform legislation both expand the authority of CFIUS and contain provisions targeting “emerging technologies” not covered under current law. However, the two bills contain differences that will eventually need to be worked out between the two chambers. This publication describes some of the key components and major differences between the two bills, leaving aside for the time being the many procedural differences that exist (e.g., filing fee requirements, extended timelines and suspensory review periods).

¹ Squire Patton Boggs, [CFIUS Reform: Proposed Legislation to Expand National Security Reviews](#), November 2017; Squire Patton Boggs, [Proposed CFIUS Law Will Impose New Export Controls On US Businesses](#), February 2018.

² White House Press Release, [Statement on Steps to Protect Domestic Technology and Intellectual Property from China’s Discriminatory and Burdensome Trade Practices](#), May 29, 2018.

1. Expanding CFIUS Authority With New “Covered Transactions”

Both versions intend to increase the “covered transactions” that fall within the authority of CFIUS. Currently, covered transactions include only those investments that result in control of a US business by a foreign person. Both versions will add to CFIUS’s authority by including the following types of transactions as covered transactions:

- a. **Real estate with proximity concerns.** This includes any real property acquisition except for single resident units or properties in “urbanized areas” (as defined by the Census department) with proximity concerns to any area deemed sensitive for national security reasons (e.g., military facilities), or is located at, or will function as part of, a land, air or sea port.
- b. **Non-controlling minority investments.** This includes non-controlling minority investments in US businesses that operate in US critical technologies. (Passive investments are exempt; both bills redefined “passive investment” extremely narrowly.) Other than minority investments involving US critical technologies, the Senate and House bills differ on other types of non-controlling minority investments that would fall within CFIUS’s authority. The Senate version would include non-controlling minority investments in US critical infrastructure, while the House version would include non-controlling minority investments in US businesses that possess sensitive US personal data.

2. Whitelist/Blacklist Concepts

Both the House and Senate versions limit (or exempt) the new covered transactions (real estate and non-controlling minority investments) for only investors from certain countries, but approach it from different angles.

- a. **Whitelist exemption (Senate version).** Under the Senate bill, the expanded covered transactions noted above would not apply to investors from countries identified by CFIUS as meeting certain factors, such as shared interests with the US, NATO membership and adherence to arms control treaties.
- b. **Blacklist inclusion (House version).** On the other hand, the House will subject only “countries of special concern” to the expanded covered transactions. These countries would include any foreign country subject to certain export restrictions on military end-use items (currently China, Russia and Venezuela); any state sponsor of terrorism (Iran, North Korea, Syria and Sudan); and countries that are subject to a US arms embargo or named as a country of special concern in subsequently drafted CFIUS regulations.

3. Different Approaches to Mandatory Filings

Under the Senate version, mandatory filings would be required for any investment resulting in a “substantial interest” (to be defined by future CFIUS regulations) in a US critical infrastructure company or US critical technology company by a foreign person in which a foreign government has, directly or indirectly, a substantial interest. Identified countries on the whitelist, however, would be excluded from the mandatory filing requirements. Under the House version, mandatory filings are instead required for any investment of a “substantial interest” in a US business by a foreign person in which a foreign government has, directly or indirectly, a “substantial interest” (as that term is to be later defined by CFIUS).

4. Emerging Technologies and the New Export Control Process

The November 2017 draft FIRRMA received criticism for its attempt to regulate, through CFIUS, the transfer of emerging or foundational technologies, transferred as part of a business collaboration (such as joint ventures with non-US partners). These technologies are defined in both bills as those technologies “essential to the national security of the United States,” but that are not controlled under existing export control laws. The current Senate and House version removed the initial provision giving CFIUS authority to control such transfers and instead created an interagency process (with Commerce, Defense, Energy, State and others as necessary) to identify these technologies. The bills then require Commerce to develop an authorization process for transfers of such technology (although the procedures differ among each version). Items identified in the interagency process will also be viewed as critical technologies under FIRRMA.

Conclusion, Legislative Posture and Outlook

The unanimous votes in the Senate Banking and House Financial Services Committees highlight the desire among lawmakers to pass CFIUS reform legislation this Congress. House and Senate lawmakers have expressed a desire to send President Trump a CFIUS reform bill to sign before the traditional month-long August recess. The day after the Senate Banking Committee approved FIRRMA, the Senate Armed Services Committee attached the legislation to the Fiscal Year 2019 National Defense Authorization Act (NDAA), which is widely considered to be must-pass legislation. Congress has passed an NDAA every year for more than 50 years, typically doing so late in the year. Notably, the House voted on its version of the NDAA on Thursday, May 24, and did not include the CFIUS reform language. It is still possible that FIRRMA moves as a standalone piece of legislation in both the House and the Senate, which would result in a conference committee being formed to resolve the differences in the bills. Meeting the August goal will be difficult regardless of the path FIRRMA takes. However, there appears to be no unconquerable legislative obstacle on its path to eventual passage by the end of this Congress.

We are continuing to monitor these developments and will provide ongoing updates on the CFIUS reform process. In the meantime, we are available to address any questions about how the legislative reform will impact your organizations.

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