

CFIUS Update

July 2018

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There have recently been several significant developments regarding legislation intended to overhaul the national security review process conducted by the Committee on Foreign Investment in the United States (CFIUS) with respect to foreign direct investment into the United States. On June 18, 2018, the US Senate passed its version of the Foreign Investment Risk Review Modernization Act (FIRRMA), which is legislation designed to reform and modernize the CFIUS process to better address evolving national security threats. The US House of Representatives then passed its version of FIRRMA on June 26, 2018. Additionally, on June 27, 2018, President Trump announced that he intends to rely on FIRRMA—rather than impose separate investment restrictions—to address the investment-related technology-theft issues identified earlier this year by the US Trade Representative’s Section 301 investigation into China.

Senate and House Pass CFIUS Reform Legislation

With strong bipartisan support, both houses of the US Congress have passed their versions of the CFIUS reform legislation. The Senate passed its version of FIRRMA (S. 2098) on June 18, 2018, by a vote of 85-10, after it was added by amendment to the National Defense Authorization Act for Fiscal Year 2019 (NDAA) (S. 2987).¹ On June 26, the House passed its version of FIRRMA (H.R. 5841) by a vote of 400-2.² The House version of FIRRMA is standalone legislation—it was not included within the House version of the NDAA.

FIRRMA was originally introduced in both the Senate and the House on November 8, 2017. Since introduction, the versions of the bills have evolved in a number of notable respects. Perhaps most significantly, the final versions in both chambers removed a provision that would have expanded CFIUS’s jurisdiction to include certain technology transfers by US companies abroad, such as through joint venture arrangements. In response to objections raised by industry, the bills were modified to instead address national security concerns via a new export control process administered by the US Commerce Department (which regulates dual-use controls under the Export Administration Regulations) to protect “emerging and foundational technologies.”

A conference committee has started the process of reconciling the differences between the Senate and House versions of the legislation. Both chambers would then need to vote to pass the reconciled version. It is expected that the reconciled bill could reach the President’s desk for signature as early as August.

¹ <https://www.congress.gov/bills/115/congress/senate/bills/2987/text>

² <https://www.congress.gov/bills/115/congress/house/bills/5841/text>

The following are some of the key provisions of the Senate and House versions of FIRRMA, including notable differences between the two:

- **Expanded CFIUS Jurisdiction for Sensitive Transactions:** Both versions of FIRRMA expand the current definition of “covered transactions”—i.e. transactions subject to CFIUS jurisdiction. They take differing approaches, however, for addressing substantively sensitive transactions such as investments in critical infrastructure and critical technology companies. The Senate bill gives CFIUS jurisdiction to review any foreign investment (even if it does not rise to the level of control)—other than a “passive investment”—in a US critical technology or critical infrastructure company, with CFIUS having the authority to exempt investors from certain countries. By contrast, the House version focuses on “sensitive transactions involving countries of special concern.” Such sensitive transactions include those that would allow the foreign investor involvement (other than through voting its shares) in substantive decision making of the US business regarding sensitive personal data of individuals (which has been an area of increasing CFIUS sensitivity and is not addressed in the Senate version of FIRRMA), critical technologies, critical infrastructure, or material non-public technical information. Countries of special concern include those subject to an arms embargo and specified in the CFIUS regulations, those deemed state sponsors of terror, and countries subject to specific export restrictions (currently, China, Russia, and Venezuela).
- **Broad Authority to Review Real Estate Transactions:** Both versions of FIRRMA expand CFIUS’s jurisdiction by capturing certain US real estate transactions, irrespective of whether they are part of a broader investment in a US business. Both the Senate and House versions of FIRRMA allow CFIUS to review the purchase or lease of, or concessions related to, real estate that is located in close proximity to US military installations or that includes, or is located in, an air or maritime port. The Senate bill also provides jurisdiction in cases of proximity to land border crossings and US government facilities that are sensitive for national security purposes.
- **Abbreviated “Declaration” Filings:** Both versions of FIRRMA provide for a new “declaration” process, which allows for shorter filings than a traditional CFIUS notice and a potentially expedited process for obtaining CFIUS clearance of a transaction. While some declarations are voluntary, they would be mandatory under certain circumstances. The House and Senate versions differ on when the declarations will be mandatory. The Senate version requires declarations for certain foreign government-backed transactions involving an investment in a critical infrastructure or critical technology company, whereas the House version requires declarations for certain government-backed transactions involving the release of critical technologies.
- **Filing Fees:** There is currently no filing fee associated with a CFIUS review, but both versions of FIRRMA provide for the imposition of filing fees. The House version caps CFIUS fees at the lesser of one percent of the value of the transaction or \$300,000 (adjusted for inflation). The Senate version provides a list of criteria for CFIUS to consider when determining the fee, and allows for the imposition of an additional fee when requested to prioritize the handling of filings.
- **Timing of Review:** FIRRMA expands the statutory timeline for the CFIUS process. Both bills expand the initial review period from 30 calendar days to 45 calendar days and retain the 45-day investigation time period. The Senate version allows for the possibility of one 30-day extension to the process, whereas the House version only provides for a possible 15-day extension of the process. The Senate version also requires CFIUS to comment on a notice within ten business days of receipt and accept a formal filing within ten business days (the House version is silent on these points). Given that the pre-filing and acceptance processes have often been taking longer as the CFIUS caseload has increased over the past few years, if this provision is included in the final bill it would likely bring more clarity and predictability to the process before the formal review begins.

The Trump Administration has explicitly expressed support for the Senate version of FIRRMA, though it objects to its ZTE-related provisions (which do not pertain to the CFIUS process).³

³ https://www.whitehouse.gov/wp-content/uploads/2018/06/saps2987s_20180626.pdf

President Trump Backs FIRRMA to Address Investment-Related Concerns Raised in Section 301 Investigation Regarding China

On March 22, 2018, President Trump signed a memorandum directing US government agencies to take certain actions concerning China-origin products and investment based on the findings of the US Trade Representative's investigation of China's "Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation" under Section 301 of the Trade Act of 1974.⁴ The memorandum directed the Secretary of Treasury "to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States." Subsequently, the White House stated that it would announce investment restrictions pursuant to the findings in the Section 301 investigation by June 30, 2018. It was thought that the Treasury Department might announce, via executive action pursuant to the International Emergency Economic Powers Act (IEEPA), new restrictions on Chinese investment in the United States and on technologies that can be sold to China.

Instead, however, President Trump announced on Wednesday, June 27, that CFIUS's to-be-expanded powers under FIRRMA provide the best means to deal with concerns about predatory investment from China.⁵ Additionally, President Trump directed the Commerce Department to review its export control regime to consider issues pertaining to transfers of critical technologies and make any changes needed to defend US national security and technological leadership.

Developments regarding CFIUS and FIRRMA remain fluid. We note that the June 27 announcement leaves open the possibility of further related action by the Trump Administration. In fact, the announcement explicitly states that if Congress fails to pass "strong FIRRMA legislation that better protects the crown jewels of American technology and intellectual property from transfers and acquisitions that threaten our national security," President Trump would direct the "Administration to deploy new tools, developed under existing authorities, that will do so globally."

We will continue monitoring developments.

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⁴ <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-actions-united-states-related-section-301-investigation>

⁵ <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-investment-restrictions>