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CFIUS Reconstructed: The Foreign Investment Risk Review Modernization Act of 2017

The proposed Foreign Investment Risk Review Modernization Act would bring substantial changes to CFIUS review.

Key Points:

- FIRRMA could speed review of certain transactions.
- It would provide for increased scrutiny of transactions from countries of concern.
- It would expand the scope of activities subject to CFIUS review.

Senator John Cornyn (R-Texas) and Representative Robert Pittenger (R-North Carolina) recently introduced identical legislation in the Senate and House that would change the way the United States government reviews foreign investment in US businesses. With co-sponsors from both political parties in both chambers, the Foreign Investment Risk Review Modernization Act of 2017 (FIRRMA)[1] represents a bipartisan effort to strengthen the legal authorities of the Committee on Foreign Investment in the United States (CFIUS or Committee) and to restructure the CFIUS review process substantially. FIRRMA's ambitious remodeling of the existing CFIUS framework warrants careful attention in the next legislative session by all parties engaged in business activities involving foreign investment in the US, and even by some whose activities are not currently within CFIUS' jurisdiction. This *White Paper* first provides relevant background as context for the legislation and then highlights important ways in which FIRRMA would restructure CFIUS review. Latham will provide updates to this analysis as events surrounding CFIUS reform unfold in coming months.

Background and Current Challenges

Appreciating the full scope of the changes that FIRRMA would bring requires an understanding of both the existing CFIUS architecture and of the broader political and market dynamics that motivate changes to it.

Background

First established in 1975 by Executive Order 11858, the Committee on Foreign Investment in the United States responded to then-growing concerns that the Organization of the Petroleum Exporting Countries (OPEC) investments in US assets were politically motivated.[2] The Committee was accordingly charged with analyzing trends of foreign investment and considering proposals for changes in the law to the extent foreign investment in US assets had major negative national security implications. Throughout the 1970s and 1980s,

concerns over foreign investment focused on hard assets, such as ports and energy infrastructure, and the effects of such sales on the US economy, though concerns at that time extended to technologies such as semiconductors. In 1988, Congress passed the so-called "Exon-Florio" provision of the Defense Production Act of 1950 (DPA), enacted as Section 721 of the DPA, reflecting increasing concerns with foreign investment in certain kinds of US firms (at that time especially by Japanese buyers). This provision authorized the President to block foreign acquisitions that threatened national security, provided that existing US law did not adequately protect national security already and that there was credible evidence that a transaction would indeed impair national security. The President delegated his authority to administer the provision to CFIUS, through Executive Order 12661. Following enactment of Section 721, the Treasury Department issued implementing regulations, many of which remain in place today. Those regulations allowed parties to a transaction subject to CFIUS' jurisdiction to provide "notice" as a means of seeking clearance of the transaction, and as an alternative to the possibility that the Committee might undertake to stop a transaction.[3] A few years later, the 1992 "Byrd Amendment" to Exon-Florio required CFIUS to investigate proposed mergers, acquisitions, or takeovers specifically where the foreign acquirer was controlled by or acting on behalf of a foreign government.[4]

The Foreign Investment and National Security Act of 2007 (FINSA), an amendment to Section 721, formally established CFIUS by statute — with representation from the Departments of Defense, Homeland Security, and Energy, among others. FINSA codified many aspects of the Committee's current structure, responsibilities, and processes. It broadly authorized the President to review mergers, acquisitions, and takeovers by or with any foreign person that could result in foreign control of anyone engaged in interstate commerce, and to do so specifically for the purpose of determining the national security implications of such a transaction. FINSA also specified the factors that CFIUS is to consider when assessing those implications. In 2008, the Treasury Department revised its regulations "Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons" to account for the changes enacted by FINSA.[5] FINSA and its 2008 implementing regulations thus establish the existing CFIUS review framework.

The CFIUS Process

At its core, FINSA, like the authorities preceding it, requires CFIUS to consider whether a transaction subject to the Committee's jurisdiction — a "covered transaction" — may threaten the national security of the United States. For transactions posing such a threat, FINSA requires CFIUS either to identify acceptable measures the transacting parties can take to mitigate that threat, or to recommend that the President block the threatening transaction.

A covered transaction is any transaction that results or could result in control of a "US business" by a foreign person through any form of merger, acquisition, or joint venture. This includes the acquisition of a US business even if already owned by a foreign entity, such as a US subsidiary of a foreign corporation, as well as a US "branch office" of a foreign corporation (or other assets of a foreign corporation constituting a US business). A US business for CFIUS purposes is any entity that is "engaged in interstate commerce in the United States."[6] As a general matter, FINSA and its implementing regulations do not distinguish among foreign acquirers, or among the assets to be acquired: A transaction is "covered" for the purposes of CFIUS' jurisdiction if it involves the foreign acquisition of a US business no matter the country of the foreign person or the type of asset potentially acquired.

The process for assessing a covered transaction and resolving any national security risk it may pose consists of up to three stages — "review,"[7] "investigation,"[8] and presidential decision.[9] In most cases, this process is initiated when the parties to a covered transaction file a CFIUS notice, although occasionally, the process is initiated unilaterally by the Committee. Where the parties to a transaction initiate CFIUS review by providing a voluntary notice of the transaction to the Committee, that notice — once formally accepted by the Committee

— starts a 30-day clock for CFIUS to complete a national security review to determine, as a threshold matter, whether the transaction might impair the national security of the United States. During this initial review stage, the Director of National Intelligence undertakes an analysis to assess "any threat to the national security."[10] As part of that analysis, the Director of National Intelligence must consider the views of all relevant intelligence agencies, and must provide its written "threat assessment" to CFIUS no later than 20 days after the date on which the Committee accepted the notice.

While the central mission of CFIUS is to identify transactions involving foreign persons that may impair the national security of the US, the concept of "national security" is not defined in FINSA or in the CFIUS regulations. However, the statute lists a dozen "factors" that are to inform the President's decision whether to block a transaction on national security grounds, factors that in turn guide the Committee's national security review. These factors include, for example, the energy requirements of the US and the security-related effects of a transaction on major energy assets; the control of domestic industries and of commercial activity by foreign persons; the domestic production needed for national defense and the capability of domestic industry to meet the production requirements for the national defense; and the effects on critical infrastructure.[11]

If any member of CFIUS believes that the covered transaction threatens to impair US national security and that the potential threat has not been mitigated during the review process, or if the Committee concurs in a recommendation by the designated "lead agency" favoring an investigation,[12] CFIUS moves to the second stage, the national security investigation.[13] A national security investigation is required also whenever a covered transaction would result in the control of a US business or US assets by a foreign government (as opposed to a foreign person), and when a transaction would result in foreign control of US "critical infrastructure" wherever the Committee determines that the acquisition of that critical infrastructure "could" impair the national security and that the potential to impair national security has not been mitigated during the review stage.[14]

If none of these conditions requiring a national security investigation applies, such as for example when the Committee concludes as a result of the review that a transaction poses no potential threat to the national security at all — or else when any such threat has been mitigated during the review period by measures the parties to the transaction agree to take — then the Committee may conclude the matter and notify the parties. That notification in effect constitutes approval of the transaction, though strictly speaking CFIUS does not affirmatively approve so much as decide not to recommend a block of a transaction. Otherwise, where an investigation is necessary to assess a potential and yet-unmitigated national security threat, that investigation must be completed within 45 calendar days.[15]

Here again, review of a covered transaction may end during this second stage, upon a determination by the Committee that any national security threat has been mitigated by steps the parties to the transaction agree to take in order to have the transaction approved. As this suggests, a crucial part of the CFIUS clearance process, at all stages, is the exploration and potential negotiation between CFIUS and the transacting parties of conditions surrounding the transaction (and subsequent business arrangement resulting from the transaction) that would "mitigate" the national security risks sufficient for CFIUS to approve the transaction.

Where the Committee determines that mitigation steps — to which the parties to the transaction agree to be bound — are available to address threats to the national security, it will then conclude its review and notify the parties that the Committee will take no further action. Again, this notification is tantamount to CFIUS approval. But in the absence of mitigation satisfactory to address national security threats, the Committee will recommend that the President "suspend or prohibit" the transaction.[16] The President's consideration of CFIUS' recommendation to suspend or prohibit the transaction, then, constitutes the third and final stage of

CFIUS review.[17] Under FINSA, the President has 15 calendar days to resolve the matter by adopting the Committee's recommendation to stop the transaction, although the President is not obligated to follow such a recommendation. To block a transaction, the President must conclude that there is "credible evidence" the transaction would impair the national security, and that other US laws cannot protect the national security under the given circumstances, findings based on information provided to the President by the Committee.[18]

It is rare for CFIUS to send a case to the President for resolution. Parties to a transaction that poses a national security threat usually take steps to mitigate those threats, or else they abandon the proposed transaction altogether. Proceeding to a presidential determination blocking the transaction is widely viewed as stigmatizing, and such a result can lower the market value of the assets subject to the transaction. Thus, parties are inclined to abandon such transactions rather than proceed where the Committee would, after all, recommend a block anyway. Indeed, since the 1990s, in only four instances has a transaction subject to CFIUS review proceeded to the presidential determination stage, as a result of which the President blocked the transactions.[19]

CFIUS in Practice

While current CFIUS practices of course reflect the provisions of FINSA and its implementing regulations, those practices by no means reduce to the statutory and regulatory text. Rather, current practices also reflect a number of informal developments — attributable to CFIUS' own priorities, as well as its institutional strengths and challenges — against the backdrop of political and market dynamics that have changed in the decade since FINSA was enacted.

For example, although CFIUS' national security review is limited to 30 calendar days, in fact CFIUS often will engage with parties before it "formally accepts" a party's notice of a transaction. The regulations explicitly anticipate such advance consultation "at least five business days" before the filing of the formal CFIUS notice. In practice, parties have typically waited for CFIUS staff to indicate that they should proceed to formally file — although up until recently that "go-ahead" came relatively quickly. More recently, CFIUS has used the pre-filing consultation period, however, to prolong the 30-day period for national security reviews substantially. Advance consultation provides CFIUS with more time to understand a proposed transaction and to assess the potential national security threats of it; 30 days often is far too little time for CFIUS to start and finish a national security review, especially given the requirement that such a review include an analysis by the Director of National Intelligence.

While it can be frustrating in practice, this informal, advanced consultation often has some benefits to the parties to a proposed transaction as well. For one thing, it may give them an opportunity to gauge in advance how CFIUS might respond to the transaction, what potential mitigation steps might be necessary, and/or how to make their formal notice more complete. Finally, advanced consultation may also give parties an opportunity to decide not to move forward with a transaction, based on preliminary reactions, thereby avoiding any negative consequences of a CFIUS filing that is unlikely to find ultimate approval.

For another example, parties to a proposed transaction raising national security risks have increasingly in the past two years withdrawn their filing by the end of the investigation period, with the Committee's tacit encouragement, and then refiled the notice. This so-called "pull and refile" mechanism restarts the Committee's review and investigation periods, or in other words restarts the 30-day and 45-day clocks. Here again, this practice reflects the institutional realities that CFIUS review — especially the time required to explore potential mitigation measures, including the time it takes for parties themselves to determine what mitigation steps they are able and willing to take — often requires more than 75 days. And here too again, a longer period is advantageous not just to the Committee, but to the parties to the

transaction as well, who often require more time to explore mitigation. Taken together with pre-notice consultation, the practice of withdrawing and refiling shows that the Committee and transacting parties have found ways to ensure time sufficient for thorough CFIUS review.

Beyond process, although FINSA and its implementing regulations are facially neutral with respect to the country of the would-be buyer or investor, in practice CFIUS review involves different levels of scrutiny depending on the country of origin of the foreign person that would acquire a US business. Presumably this has always been the case, at least to some extent, with parties from closely allied countries seeking to acquire a US business or assets within the US receiving less scrutiny than other parties. In any event, available data from recent years strongly suggests that CFIUS has focused particularly on proposed transactions involving Chinese acquisitions. China has ranked first in the number of transactions filed with the Committee in every year since 2011, and by increasing amounts.[20] In part, that fact reflects increasing Chinese investment in the US.

CFIUS has not reviewed Chinese transactions more than any others simply as a matter of transaction volume, however. There are reasons to conclude CFIUS has examined those transactions with considerable scrutiny as well. In fact, all four of the transactions blocked by the President, including one in 2017 (by President Trump) and one in late 2016 (by President Obama), involved Chinese investors. Perhaps more revealingly, information recently released by CFIUS show that most transactions involving Chinese investors were allowed to go forward *only* with mitigation measures in place.[21] Given its finite and mostly fixed institutional resources against a steady workload, the increasing focus on Chinese acquisitions may mean that CFIUS has fewer resources to clear transactions in "easier" cases quickly.

CFIUS appears increasingly focused not just on certain buyers, but also on particular technologies, such as new semiconductor technologies. Although FINSA and its implementing regulations refer generically to national security threats without distinguishing among different kinds of threats, in recent years the Committee appears to focus not only on perceived internal threats arising from foreign ownership of assets located within US borders — the kind of concern that motivated the original establishment of CFIUS in the 1970s — but increasingly on potential threats associated with foreign purchasers appropriating US technologies that could, in turn, be used to threaten the US externally. For the purposes of CFIUS review today, the acquisition of certain US technologies, not simply foreign influence on US interstate commerce as such, is considered a paramount potential threat to the national security.

Challenges

While current CFIUS practices reflect reasonable efforts to adapt to a changing world, trends over the last decade to some extent undoubtedly stress the existing CFIUS framework. These trends include acquisition markets for which national boundaries are increasingly insignificant, the increased globalization of emerging companies, rapid technological advances, risks posed by an increasingly cyber-connected world, and increased national security threats posed by China. Such trends tax CFIUS' current institutional capacities, motivating proposals for reform.

For their part, parties subject to CFIUS review may lament the time required to complete the process, especially when CFIUS filings are backlogged, as they are today.[22] Put differently, while on one hand the Committee has adopted informal practices that give it and transacting parties sufficient time to complete CFIUS review, on the other hand those parties may object to the total length of time required. Parties subject to CFIUS' jurisdiction may likewise find frustration in the reputational and accompanying economic harm that a long review might cause to a company or to an asset to be acquired. As a CFIUS filing requires legal fees transacting parties may also object to the economic costs associated with providing notice to the Committee and for whatever give and take is required during the course of review,

particularly about the feasibility of potential mitigation alternatives for transactions raising national security concerns, which often requires considerable give and take. Even parties to very straightforward CFIUS cases — those involving the acquisition of a US business with no likely national security implications and by a foreign purchaser from a US ally — may view the costs of CFIUS review as onerous, on the grounds that there is little point to CFIUS review for such transactions in the first place even though they currently constitute a covered transaction and may desire to file to clear the air completely with respect to their transaction.

But of course, the Committee is required to perform its statutory responsibilities, and can do so only with its existing resources and tools. While CFIUS member agencies have dedicated staffs for CFIUS review, those staffs are not large. As a very practical matter, at the outset of any CFIUS review, the parties to a proposed transaction know more about it than CFIUS members do, and thus the government is in the initial position of catching up with respect to the relevant facts of the matter. And thorough national security investigations by their nature are often time-consuming, especially given that internal government consultation with multiple intelligence entities is required. Finally, with respect to potential steps transacting parties may take to mitigate any national security concerns, CFIUS is not well positioned to take any affirmative role in mitigation, such as by actively monitoring mitigation measures itself. As a result, the burden of feasible mitigation rests largely on transacting parties themselves.

Meanwhile, threats to US national security have not become simpler since 1975, or even since FINSA's passage in 2007. Instead, developments such as the movement of foreign capital into the US since the last recession, recent experience with large-scale data breaches in governmental and non-governmental data systems in the US, and China's policy to acquire semiconductor technologies and its recent creation of investment funds for that purpose, to name a few, make CFIUS' mission more difficult yet arguably more important too. Thus, FIRRMA's introductory section expressing the "sense of Congress" states that while the US should continue to welcome foreign investment enthusiastically, "the national security landscape has shifted in recent years, and so have the nature of the investments that pose the greatest potential risk to national security," warranting a "modernization" of CFIUS' authorities and processes.

Proposed Reforms

FIRRMA seeks to address these challenges. Some of its provisions would better align CFIUS' statutory authority with the Committee's current practices. Others would reshape the CFIUS process more fundamentally. With respect to the latter, perhaps above all, FIRRMA would alter significantly the largely "one size" approach underlying the current statutory framework. It would provide for greater or lesser Committee scrutiny depending not only on the nationality of the proposed foreign acquirer, but adjusted also according to the nature of the asset and, to some extent, even according to the specific type of activities transacting parties would undertake. This proposed legislation would also increase CFIUS' institutional resources, as well as CFIUS' jurisdiction and responsibilities.

Variable Scrutiny

Among its most noteworthy changes, FIRRMA would bring explicit heightened scrutiny for transactions involving foreign buyers from, in FIRRMA's language, any "country of special concern." FIRRMA does not list these countries, but they might be designated by implementing regulation, or instead might be designated informally among CFIUS members themselves. In any event, this proposed change directs the Committee to apply a higher level of scrutiny to transactions involving such countries, which FIRRMA characterizes as countries that pose "a significant threat to the national security interests of the United States."[23] In short, FIRRMA formally prioritizes transactions involving would-be buyers from countries deemed to raise particular national security concerns.

FIRRMA's sliding scale would work in both directions as well. The legislation also authorizes the Committee by regulation to exclude from the definition of "covered transaction" certain transactions where all of the foreign persons involved are organized under the laws of a nation with which the US has a mutual defense treaty or a mutual arrangement to safeguard national security with regard to foreign investment. In other words, while transactions involving buyers from countries of special concern would require greater scrutiny, transactions involving buyers from allied countries and countries that have committed to safeguard US national security may find little or categorically no scrutiny from CFIUS.

FIRRMA would require CFIUS to prioritize not just on the basis of the foreign investor's nationality. The legislation would also require the Committee to focus on transactions that have an effect on a foreign person's investment in — and thus access to — a US "critical technology company" or "critical infrastructure company."[24] Expanding FINSA's definitions, FIRRMA characterizes "critical technologies" as those that are "essential or could be essential to national security," including defense articles on the US Munitions List and other export-controlled items, and other emerging technologies that "could be essential for maintaining or increasing the technological advantage of the United States over countries of special concern with respect to national defense."[25] FIRRMA defines a United States critical infrastructure company, again more broadly than FINSA, as a US business that "owns, operates, or primarily provides services systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security."[26]

Beyond Equity Investments

FIRRMA would also extend CFIUS' jurisdiction to reach certain transactions beyond acquisitions. In particular, the Committee would review any transaction involving the purchase or lease of property (not necessarily from a US business) in close physical proximity to sensitive US government facilities, including, but not limited to, military installations. In addition, FIRRMA would require CFIUS review for transactions in which a US critical technology company contributed intellectual property and associated support to a foreign person through "any arrangement" which is to say not only acquisitions but including arrangements like joint ventures.

FIRRMA would also require CFIUS clearance of *any* investment, even those that do not give the investor "control," in any US "critical technology company" or "critical infrastructure company," wherever the investment would give the buyer nonpublic technical information, information in a US business not available to other investors in that business, membership or observer rights on the board of directors, or any involvement other than through voting shares in the substantive decision-making involving the US business. But with respect to these new categories requiring CFIUS review — as well as other types of "covered" transactions, as noted above — FIRRMA also authorizes the Committee to exempt buyers from certain countries from review, depending on whether a country has a mutual defense treaty with the US, a mutual arrangement to safeguard national security, or qualifies in light of other considerations. In other words, FIRRMA's variable scrutiny depending on the investor's nationality would apply to CFIUS' enhanced jurisdiction over transactions other than equity investments as well.

Expanded Criteria for Evaluating National Security Risks

FIRRMA would also significantly expand the factors CFIUS considers in evaluating whether a transaction poses a national security risk. For instance, it adds to the factors in current law requiring consideration of the domestic production needs for national defense requirements to include as well "whether the covered transaction is likely to result in the increased reliance by the United States on foreign suppliers."[27] FIRRMA similarly adds to the provision in existing law requiring an assessment of "the potential national security-related effects on United States critical technologies" consideration also whether the transaction

"is likely to contribute to the loss of or other adverse effects on technologies that provide a strategic national security advantage to the United States."[28]

Beyond such revisions to existing criteria, FIRRMA would also delineate a number of new factors CFIUS must consider when determining whether a covered transaction may affect national security, factors that highlight the importance of protecting several types of information. These additional criteria would require CFIUS to consider:

- The extent to which a covered transaction would increase the costs of systems necessary for national defense, intelligence, or other national security functions
- The effects of a foreign person's cumulative market share of any type of infrastructure, energy asset, critical materials, or critical technology
- The history of a would-be investor's compliance with US laws, including those related to exports and the protection of intellectual property
- The extent to which a transaction could jeopardize the protection of personally identifiable information or other sensitive information about US citizens from a foreign person or foreign government that might exploit that information
- Whether the covered transaction is likely to create any new cybersecurity vulnerability or exacerbate existing cyber vulnerabilities
- Whether a transaction could give a foreign government a new capability to engage in malicious cyber activities directed against the US, including those designed to affect the outcome of any election
- Whether the transaction involves a country of special concern with a demonstrated or declared goal of acquiring a critical US technology
- Whether the transaction is likely to facilitate criminal or fraudulent activity affecting national security
- Whether the transaction is likely to expose information concerning national security or sensitive information concerning the procedures or operations of federal law enforcement agencies with national security responsibilities

As this list makes clear, FIRRMA's modernization emphasizes the importance of information and informational vulnerabilities, not just hard assets, as central to the protection of US national security, particularly with respect to buyers that have not respected US laws and especially those from countries with express or revealed intentions to misappropriate sensitive information.

Procedural Changes

FIRRMA would also lengthen the CFIUS review process, extending the initial review period from 30 to 45 days, and allowing CFIUS to extend a national security investigation for 30 days beyond the existing 45-day period where "extraordinary circumstances" require. Thus, the post-notice CFIUS clock would expand from 75 days currently to either 90 or 120 days from the time of filing to the end of the national security investigation. At the same time, though, FIRRMA could shorten the CFIUS review process in simpler cases. The legislation thus proposes a new and abbreviated "declaration" procedure, as an alternative to notice for parties who elect to use it. A declaration would have to be filed at least 45 days before the transaction in question. Its contents would be specified by implementing regulation, but FIRRMA provides

that in issuing such regulations CFIUS "shall ensure that such declarations are submitted as abbreviated notifications that would not generally exceed 5 pages in length."[29] The advantage of filing an abbreviated declaration would be the possibility of a quicker answer from CFIUS. FIRRMA provides that CFIUS "shall endeavor" to take action on a declaration within 30 days of its receipt, by either indicating that it has concluded its review or providing another of several potential responses specified in the bill. In other words, FIRRMA would provide a potential fast track for straightforward cases, though the Committee would retain the option of directing the parties to file a conventional notice anyway.

This new "declaration" procedure would be employed not only when parties choose to streamline the review process. Interestingly, it would also be mandatory in certain cases, as a mechanism to give CFIUS notice whenever a foreign government has at least a 25% voting interest in the foreign investor and the transaction involves acquiring a voting interest of at least 25% in a US business. In those instances, in particular, the parties to a transaction *must* submit a declaration. In addition, FIRRMA provides that the Committee can mandate the submission of a declaration with respect to any covered transaction as prescribed by regulation based on a number of factors. A mandatory declaration too would have to be filed at least 45 days before the deal closes. Thus, the declaration procedure would provide for more streamlined processes in simpler CFIUS cases where the parties could voluntarily file a short declaration in lieu of notice with the possibility of receiving clearance without further CFIUS review, but also where the parties in a particular category of cases, must file a declaration, followed by traditional notice.

Enhanced Tools and Resources, including New Filing Fees

While CFIUS review may result in a given transaction moving forward subject to conditions intended to mitigate risks to US national security, in practice the Committee itself has very limited capacity to oversee mitigation measures on an ongoing basis. Thus CFIUS may require mitigation with respect to the form or scope of the transaction in question — and indeed often does so — but CFIUS is much less likely to approve of transactions that would require Committee members themselves to oversee mitigation measures for an indefinite period, that is, through monitoring or other affirmative activities performed by the Committee, even though FINSA allows CFIUS to monitor mitigation agreements and even though CFIUS may require third-party monitoring as well.

FIRRMA would change that. It too provides for the possibility of mitigation conditions or compliance plans, including a requirement for a written plan for monitoring compliance with any mitigation agreement. Monitoring plans, to include descriptions of how compliance will be monitored including the frequency of compliance reviews, would be assigned to a specific CFIUS member. Perhaps most importantly, given reasonable contracts, FIRRMA would also encourage the Committee to rely on third-party independent monitors, and to develop case-by-case resolutions where parties to a transaction subject to mitigation fail to comply with mitigation plans.

But FIRRMA would also increase the resources CFIUS would have to undertake its expanded responsibilities.[30] The legislation would not only allow for increased hiring authority for Committee members, but also require the President to assess whether CFIUS requires additional resources to perform the new responsibilities FIRRMA assigns to it. FIRRMA in the meantime would also authorize CFIUS to collect new filing fees, up to the lesser of 1% of the value of a covered transaction or US$300,000. It would create a new Treasury fund for those filing fees, and authorize the CFIUS chair to transfer "any amount" in the new fund to any agency or department that is a Committee member, to supplement other amounts already appropriated to that member, "for the purpose of addressing emerging needs."[31] Filing fees could thus be used to cover the costs of the Committee's increased responsibilities.

Open Questions

In a number of important ways FIRRMA would clarify, alter, or expand current CFIUS practices. And yet, the 79-page bill leaves open certain questions, and raises still others. Just as the particulars of FINSA's implementation were established through regulation, the same would be true for many of the new provisions of FIRRMA. Thus, were this legislation, or a version of it, enacted, it would remain to be seen, for example, how countries of special concern are identified, exactly how the new declaration process would work, how CFIUS would expand monitoring of mitigation agreements, exactly how it would assess cyber threats, and more generally how the Committee would expand its personnel and other resources to perform its enhanced responsibilities to assess threats to critical technologies, and so on. But while FIRRMA leaves open such issues, the legislation's general reorientation of the CFIUS process — towards greater focus on certain parties, countries, and types of transactions as well as greater emphasis on protecting information and national security technologies — is clear.

Next Steps

FIRRMA's introduction in the House and Senate of course marks just the beginning of the legislative process, and it is too early to know what FIRRMA's legislative fate may be, either within or beyond the congressional committees of relevant jurisdiction. And just weeks before its introduction, an alternative bill was introduced into the Senate, the "United States Foreign Investment Review Act of 2017 (S.1983)," also with bipartisan sponsorship (Sens. Sherrod Brown (D-Ohio) and Charles Grassley (R-Iowa)). That said, FIRRMA's bicameral introduction and bipartisan support, which includes Senator Diane Feinstein (D-California), as well as reports that some of FIRRMA's sponsors worked with the Administration on the bill before it was introduced, all provide some reason to expect a version of FIRRMA to move during upcoming months. Those with an interest in CFIUS are well advised to monitor this significant legislative development. Future Latham & Watkins *Client Alerts* will supplement this analysis as the legislation moves forward.

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Endnotes

1 Foreign Investment Risk Review Modernization Act of 2017, S. 2098, 115th Congress, 1st Sess. (Nov. 8, 2017), [hereinafter "S. 2098"].

2 *See generally* James K. Jackson, *The Committee of Foreign Investment in the United States (CFIUS)*, Congressional Research Service (CRS) 7-5700, Oct. 11, 2017.

3 31 C.F.R. Part 800 (2008).

4 National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484), § 837(a), 106 Stat. 2315.

5 31 C.F.R. Part 800 (2008).

6 31 C.F.R. § 800.226 (2008).

7 31 C.F.R. § 800.502 (2008).

8 31 C.F.R. § 800.505 (2008).

9 31 C.F.R. § 800.506 (2008).

10 Foreign Investment and National Security Act (FINSA) of 2007, Pub. L. 110-49, §721(b)(4), 121 Stat. 246.

11 FINSA, *supra* note 10, at §721(d)(f).

12 FINSA requires Treasury, to designate, as appropriate, a CFIUS member agency to take the lead on behalf of the Committee in connection with a proposed transaction. The "lead agency" chosen is generally thought to have the strongest understanding of the transaction's potential security implications and often takes the lead on discussions with the parties and negotiation of mitigation measures.

13 31 C.F.R. § 800.503 (2008).

14 31 C.F.R. § 800.503(b)(2) (2008).

15 31 C.F.R. § 800.506 (2008).

16 31 C.F.R. § 800.506 (2008).

[17] Although not utilized in practice, the CFIUS regulations also contemplate the possibility that CFIUS can send a report to the President not recommending a prohibition of the transaction, but instead requesting presidential resolution where the CFIUS members themselves cannot agree, or in still other cases where the Committee requests that the President make a determination.

[18] FINSA, *supra* note 10, at § 721(d)(4)(A), (B).

[19] In 1990, President Bush directed the China National Aero-Technology Import and Export Corporation (CATIC) to divest its acquisition of MAMCO Manufacturing. In 2012, President Obama ordered Ralls Corporation (owned by Chinese nationals) to divest a US wind energy farm, located near a DOD facility, that Ralls had acquired without notice to CFIUS. President Obama also blocked a transaction in 2016 between a Chinese investment firm and Aixtron, a Germany-based firm with assets in the United States. In 2017, President Trump blocked the acquisition of a semiconductor corporation by a Chinese investment firm.

[20] *See generally* CFIUS, *Annual Report to Congress for CY 2013* (Feb. 2015), CFIUS, *Annual Report to Congress for CY 2014* (Feb. 2016), CFIUS, Annual Report to Congress for CY 2015 (Aug. 2017).

[21] *See* Latham & Watkins, LLP, *Client Alert*, *10 Takeaways From the CFIUS Annual Report to Congress* (Oct. 3 2017).

[22] *See generally supra* note 20 (reports discussing an increase in notice filings).

[23] S. 2098 § 3.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at § 15.

[28] *Id.*

[29] *Id.* at § 5.

[30] *Id.* at § 19.

[31] *Id.*