STROOCK
SPECIAL BULLETIN

CFIUS Reform Easily Passes Senate

Legislation Breaks New Ground

June 19, 2018

Acknowledging that "the national security landscape has shifted" since 2007 – the last time Congress rewrote the laws governing the Committee on Foreign Investment in the United States (CFIUS) – as has "the nature of the investments that pose the greatest potential risk to national security," the Senate approved legislation on June 18, 2018 that would expand the scope of CFIUS reviews, invite reviews on new threats, streamline the process, and adopt a risk-based approach to reviews – an approach focused on investments from "countries of special concern."

The bill – S. 2098, the Foreign Investment Risk Review Modernization Act of 2018, was embedded in the National Defense Authorization Act for 2019. It must still be approved by a House-Senate conference and signed by the President before it can become law, but its chances of enactment are good. CFIUS is the multi-agency government panel that reviews foreign acquisitions to assess their impact on national security. Following review, the President can veto or unravel deals deemed to threaten U.S. national security.

The legislation would make a number of changes to the CFIUS process – including an abbreviated, voluntary "declarations" process for low-risk transactions, coupled with mandatory reviews for investments in critical technology and critical infrastructure companies by foreign government-controlled investors. It would lengthen initial reviews (from 30 to 45 days) but limit subsequent investigations to 45 days plus *one* 30-day extension in "extraordinary circumstances."[1] The bill also instructs CFIUS to "establish a mechanism" to identify and monitor "non-notified" and non-declared covered transactions, signaling a more aggressive presence for CFIUS in the marketplace.

The sponsors long ago dropped a controversial provision that would have extended CFIUS jurisdiction to outbound transfers of intellectual property. In its place, however, the bill would establish a multi-agency process for identifying and controlling export of "emerging and foundational" technologies.

The bill also breaks new ground in several areas:

1. It would authorize reviews of real estate transactions in close proximity to sensitive government installations, airports, and

[1] The apparent purpose of this provision is to constrain CFIUS from lengthening reviews without good cause. We anticipate that parties will likely still have the option of withdrawing and refiling (with CFIUS approval) in appropriate cases.

seaports, regardless of whether they involve acquisition of a "U.S. business," and extend reviews for the first time to commercial leases and "concessions" – a term undefined in the bill but likely incorporating arrangements such as parking lot concessions, retail kiosks, restaurants, and even easements that give foreign persons broad access to buildings and grounds.

2. It would authorize reviews of "[a]ny … investment (other than a passive investment) by a foreign person in any U.S. critical technology company or U.S. critical infrastructure company that is unaffiliated with the foreign person," and thus, for the first time, reach investments that fall short of control.

3. Material changes that put a foreign person in control of an entity have long been recognized as covered transactions – but the Senate bill acknowledges that there can be risk to the national security in "changes in rights" that accompany investment in critical technology or critical infrastructure companies.[2] It would therefore authorize reviews of "[a]ny *change in the rights* that a foreign person has with respect to a U.S. business in which the foreign person has an investment," if that change could result in – foreign control of the business, or a non-passive investment [*whether or not controlling*] in an unaffiliated U.S. critical technology or critical infrastructure company.

It also would, for the first time, expressly acknowledge that investments from hostile countries (*e.g.*, countries subject to a U.S. arms embargo) inherently present greater national security risk than investments from allied countries, encouraging vigorous reviews of investments from "countries of special concern," while exempting real estate transactions and critical technology/critical infrastructure investments by investors from countries identified as low risk – *e.g.*, NATO allies. The clear target is Chinese investment, since China is the only country subject to a U.S. arms embargo that is heavily invested in the U.S.

The bill would encourage CFIUS to look beyond the deal in front of them to consider "the potential national security impact of *cumulative market share* or a *pattern* of recent foreign acquisitions in any one type of infrastructure, energy asset, critical material, or critical technology." This means that a transaction that presents no significant risk in and of itself may nevertheless be blocked because (for example) foreign persons already own or control most of the supply chain for the technology under review.

It is worth noting that many of the policy initiatives in the bill can be achieved by CFIUS with or without new legislation. For example, the bill asks CFIUS to consider whether a transaction might facilitate "malicious cyber-enabled activities by foreign governments" and the impact of a transaction on "foreign access to personally identifiable information, genetic information, or other sensitive data." The reality is that CFIUS has focused on data access and cybersecurity for years. In this respect, therefore, the bill serves to ratify current policy.

It also sets the stage for filing fees. As introduced, the bill would have authorized CFIUS to impose filing fees up to $300,000 or 1% of the value of the transaction, whichever is less. The bill as passed would set up a process for setting fees, but sets no caps. The House bill, as approved by the Financial Services Committee, would reinstate the caps.

[2] The term "critical technology company" means a U.S. business that "produces, designs, tests, manufactures, or develops one or more critical technologies" (including "components" of critical technologies) and that the term "critical infrastructure company" reaches businesses that "primarily" provide services to entities that operate *within a critical infrastructure sector* or subsector. The language therefore reaches suppliers and vendors – even if the suppliers and vendors are themselves engaged in relatively pedestrian pursuits – *e.g.*, suppliers of specialized sheet metal, sanitation workers, or operators of airport newsstands.

Either way, it is virtually certain that CFIUS filings will come at a price once the bill is enacted. Plainly the sponsors reason that the filing fee is unlikely to discourage filings, and that the safe haven provided by a "no action" letter is worth the price of admission.

The Senate bill is not the last word. House and Senate conferees must still strike a compromise, and some of the provisions in the Senate bill may be trimmed back. Although the expected announcement of restrictions on Chinese investment may stifle some of the calls for new legislation, however, there is much more to this legislation, and there will be much to be discussed post-enactment.

For More Information

Chris Griner
202.739.2850
cgriner@stroock.com

Chris Brewster
202.739.2880
cbrewster@stroock.com

Gregory Jaeger
202.739.2820
gjaeger@stroock.com

Anne Salladin
202.739.2855
asalladin@stroock.com

Shannon Reaves
202.739.2882
sreaves@stroock.com

Erin Bruce Iacobucci
202.739.2815
ebruce@stroock.com

New York
180 Maiden Lane
New York, NY 10038-4982
Tel: 212.806.5400
Fax: 212.806.6006

Los Angeles
2029 Century Park East
Los Angeles, CA 90067-3086
Tel: 310.556.5800
Fax: 310.556.5959

Miami
Southeast Financial Center
200 South Biscayne Boulevard, Suite 3100
Miami, FL 33131-5323
Tel: 305.358.9900
Fax: 305.789.9302

Washington, DC
1875 K Street NW, Suite 800
Washington, DC 20006-1253
Tel: 202.739.2800
Fax: 202.739.2895

www.stroock.com

This *Stroock Special Bulletin* is a publication of Stroock & Stroock & Lavan LLP. © 2018 Stroock & Stroock & Lavan LLP. All rights reserved. Quotation with attribution is permitted. This Stroock publication offers general information and should not be taken or used as legal advice for specific situations, which depend on the evaluation of precise factual circumstances. Please note that Stroock does not undertake to update its publications after their publication date to reflect subsequent developments. This Stroock publication may contain attorney advertising. Prior results do not guarantee a similar outcome.

Stroock & Stroock & Lavan LLP provides strategic transactional, regulatory and litigation advice to advance the business objectives of leading financial institutions, multinational corporations and entrepreneurial businesses in the U.S. and globally. With a rich history dating back 140 years, the firm has offices in New York, Los Angeles, Miami and Washington, D.C.

For further information about *Stroock Special Bulletins*, or other Stroock publications, please contact publications@stroock.com.