

Congress to Expand Scope of Foreign Investments and Transactions Needing CFIUS Review

On May 22, the Senate Banking Committee and House Financial Services Committee are each expected to consider and approve similar but not identical pieces of legislation to modernize the jurisdiction and operation of the **Committee on Financial Investment in the United States** (CFIUS). CFIUS is a federal interagency committee that presently reviews and must approve “any merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign control” over a United States business.¹

Background

Created in 1950 as part of the Defense Production Act, CFIUS was designed to stop a foreign power from coming into control over key pieces of defense technology, infrastructure or supply chains and thus disrupt the United States’ unfettered ability to pursue its national security interests. CFIUS’s mandate remains unchanged today, but our national security interests have evolved since the post-war era. Congress’s present interest in updating the CFIUS authorizing statute (which was last updated in 2007) is primarily a response to China’s express interest in gaining a technological advantage over other countries, including the United States, through a program called “technology transfer” to further its state interests. On March 18, 2018, the United States Trade Representative published a detailed report finding that “[t]he Chinese government regards technology development as integral to its economic development and seeks to attain domestic dominance and global leadership in a wide range of technologies for economic and national security reasons.”² Many countries, including the United States and China, believe that national security in the 21st century is, more than ever before, a function of developing, controlling and deploying new technologies (e.g., artificial intelligence, blockchain applications, cybersecurity) before other geopolitical actors.

Proposed Legislative Changes

While there are differences between the Senate and House versions (**S. 2098** and **H.R. 5841**) of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), both bills endeavor to strike a balance between updating CFIUS’s authorities to deal with China’s technology transfer interests and other foreign risks, on the one hand, and preserving the United States’ ability to attract foreign direct investment (FDI) on the other.

For its part, the Senate Banking Committee will **consider a bipartisan amendment** from Chairman Mike Crapo (R-Idaho) and Ranking Member Sherrod Brown (D-Ohio) that will make the following changes to CFIUS’s authorities:

- The bill would preserve the existing “covered transaction” test of whether a foreign person will come to control a U.S. company but would expand the scope to include: (i) a foreign person’s investment in, including lease of, real estate located near U.S. airports, seaports, or military installations; (ii) a foreign person’s investment (regardless of whether it results in control) in any “United States critical technology company” or “United States critical infrastructure company,” or any change in the rights of such foreign person with respect to an existing

¹ 50 U.S.C. § 4565.

² U.S. Trade Representative, Findings of the Investigation Into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974 10 (2018), *available here*.

investment in such company; and (iii) any transaction deemed to be structured so as to avoid being a covered transaction. Qualified exceptions would be made for certain passive investments and investments made by foreign persons in certain white-listed countries (e.g., NATO nations), but purchases of claims in bankruptcy would now be covered. The term “critical technologies” is defined by reference to technologies listed in U.S. export control laws.

- The legislation would create a light filing “declaration” process (different from a full-blown “written notice”) for simple transactions that are unlikely to result in a formal second-stage investigation. It would also permit parties to stipulate that a transaction is a “covered transaction” and that a party is a “foreign government-controlled transaction,” thus speeding up CFIUS’s review. CFIUS would have 30 days to review a declaration; it would now have 45 days for its initial review of a written notice.
- The bill observes the distinct roles of CFIUS and the export control laws and tries to avoid duplicative reviews. It would require the president to create an interagency process, inclusive of the intelligence community, to identify, on an ongoing basis, “emerging and foundational technologies” that are essential to U.S. national security but are not “critical technologies” as defined under the “covered transaction” test. The bill would also update export controls for such technologies in a manner consistent with the updates to CFIUS proposed in the legislation.
- To address practical concerns about maintaining speedy resolution for transactions in light of an increased workload (more applications and writing numerous new regulations), CFIUS would be authorized to charge a filing fee, centralize its interagency operations in the Treasury Department, and hire new staff.

The House Financial Services Committee will consider **an amendment to** its own version of FIRRMA (H.R. 5841) on the same day. The legislation is similar in many respects, but perhaps the biggest difference is that the House bill does not contain an exception from “covered transactions” for passive investments in critical technologies and infrastructure. Instead, the bill would require CFIUS scrutiny of any “sensitive transaction involving countries of special concern” if the transaction would result in the foreign person’s ability to obtain sensitive personal data or control over critical technologies. In effect, the bill considers where the foreign investor is located or organized, not whether the foreign person’s investment is passive or active. There are also small differences in the length of the CFIUS review periods, including a shorter review period for the new light filing declaration as well as some other variances from the Senate bill.

Potential Impact on Interested Parties

If both committees approve their respective versions of FIRRMA, and if subsequently they are able to resolve differences between the two bills, there is a considerable chance that FIRRMA could become law this year. It could be attached to the **National Defense Authorization Act**, a must-pass piece of defense legislation that will very likely be enacted in the third or fourth quarter of 2018.

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FIRRMA should be of significant interest to operating companies that develop or control technology or infrastructure that could be considered critical to U.S. national security interests, to investment vehicles with foreign investors, and, more generally, to any U.S. company that wishes to attract FDI. Funds with passive foreign investors should pay special attention to whether and how the two chambers resolve their differences concerning “covered transactions.”

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This memorandum is intended to provide you with general information regarding Foreign Investment Risk Review Modernization Act of 2018. This memorandum is not intended to provide specific legal or tax advice. If you have any questions or if you need legal advice as to a specific benefit plan or employment law issue, please contact one of the following members of the Brownstein Hyatt Farber Schreck Employee Benefits Executive Compensation Group or Employment Law Group: