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## Congress Accelerates Toward CFIUS Expansion

For the first time in more than a decade, legislation to expand the scope of business transactions scrutinized by the Committee on Foreign Investment in the U.S. (CFIUS) is gaining momentum in Congress. Lawmakers on both sides of the aisle have for years sounded the alarm over the national security and economic risks posed by increasing foreign investment in U.S. companies. To address those concerns, they are now rallying behind the Foreign Investment Risk Review Modernization Act of 2017 (FIRRMA). The legislation would drastically increase the type and number of transactions that would be subject to review and substantially alter the process for filings. These changes have real implications for a range of industries and investors, including many that have historically paid little attention to CFIUS.

### **CFIUS “Modernization” Generating Momentum**

The recently attempted acquisitions of Lattice Semiconductor, MoneyGram and other U.S. companies by Chinese entities have accelerated congressional calls for CFIUS “modernization”—despite the fact that those deals were ultimately blocked or abandoned due to objections. Advocates of reform argue that CFIUS and the Foreign Investment and National Security Act of 2007 (FISMA) have not kept pace with evolving national security and economic threats posed by foreign acquisitions and other investments. In addition, members of Congress and administration officials see a need to address the rise of transactions being structured to evade or circumvent CFIUS review.

Following eight months of negotiations with the administration over reforms, Sen. John Cornyn (R-TX) and Rep. Robert Pittenger (R-NC) introduced FIRRMA with significant bipartisan support on Nov. 8, 2017. The identical companion bills, which outline dozens of reforms over 79 pages, notably expand the jurisdiction of CFIUS to include certain joint ventures, minority position investments, and real estate transactions near military bases or other sensitive national security facilities. They also update the definition of “critical technologies” to include emerging technologies that could be essential for maintaining the U.S. technological advantage over countries of concern. A more comprehensive review of reforms is included in the following sections.

Since introduction, FIRRMA has been cosponsored by 11 senators and 32 members of the House. In addition, CFIUS modernization has been the focus of four hearings over the last three months in the Senate Banking and House Financial Services committees. The Financial Services Subcommittee on Monetary Policy and Trade had planned a hearing this week specifically to discuss FIRRMA, but it was postponed due to changes to the floor schedule. Still, the discussion has spread well beyond the primary committees of jurisdiction. The need for CFIUS modernization has been raised at hearings held by the armed services, commerce, foreign affairs, finance, and intelligence committees, among others. Likewise, in addition to Treasury Secretary Mnuchin, who serves as the chairperson of CFIUS, Attorney General Sessions, Defense Secretary Mattis and Commerce Secretary Ross have all voiced support for CFIUS reforms. To that end, some believe consideration of FIRRMA is a question of when, not if.

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## **Comprehensive Overhaul and Expansion**

While CFIUS scrutiny of foreign investments has already increased in recent years absent legislative mandates, FIRRMA would undoubtedly broaden the mandate of CFIUS, expanding its purview to cover new types of transactions and making significant changes to its authorities and processes. Highlights from the range of proposed reforms in FIRRMA include, among others:

- Expands the definition of what constitutes a “covered transaction” for certain non-passive transactions, particularly in the critical technology and infrastructure arena. To that end, the transfer of “intellectual property and associated support” by a U.S. critical technology company to a foreign person, including through a joint venture or other arrangement, would be covered and subject to CFIUS review. This can be read to even include technology licensing agreements.
- Expands CFIUS jurisdiction over passive investments by eliminating the safe harbor whereby passive investments for less than 10 percent of the interest in the U.S. business do not require review.
- Establishes new factors CFIUS may consider in its review, including whether the transaction: reduces U.S. technological and industrial advantages relative to specific industries and countries of “special concern”; increases U.S. government costs of acquiring equipment necessary for defense, intelligence, or national security; increases U.S. reliance on foreign suppliers to meet defense requirements; or exposes sensitive data of U.S. citizens.
- Requires any purchase or lease by a foreign person of real estate (including commercial real estate) located in “close proximity” to a military installation or any other sensitive U.S. government facility to undergo a CFIUS review.
- Makes it explicit that CFIUS can suspend or place conditions on transactions while still under review and establishes a requirement for monitoring transactions where no notice is submitted to CFIUS by the parties but where information is “reasonably available.”
- Requires CFIUS to formulate a plan for monitoring compliance with mitigation agreements and authorizes it to take remedial measures or seek injunctive relief if conditions are not met.

FIRRMA also establishes a more limited process through which parties can appeal CFIUS actions in the courts and permits CFIUS to assess filing fees for any transaction where a notice is filed. Currently, CFIUS does not assess fees on parties involved in filings. The fees would be capped at 1 percent of the value of the transaction or \$300,000, whichever is less.

## **The Carrot: Light Filings and Expedited Consideration**

FIRRMA also includes reforms to expedite clearance of more benign investments. For example, it would authorize CFIUS to exempt certain otherwise covered transactions if all foreign investors are from a “white listed” country that meets certain criteria, such as being a U.S. treaty ally and having a mutual investment security arrangement with the U.S. It also establishes a new process for submitting short-form “light filings”—called “declarations”—containing high-level information regarding the transaction. In response to such a declaration, CFIUS would either: (1) clear the transaction; (2) request a full notice be filed; or (3) initiate a unilateral review to further examine the implications of the transaction. FIRRMA provides that CFIUS shall “endeavor” to take such action within 30 days of the declaration.

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- While filings to CFIUS have historically been voluntary, the filing of declarations would be mandatory in certain instances, such as transactions involving the acquisition of a 25 percent or greater voting interest in a U.S. business by a foreign entity that is 25 percent or more controlled by a foreign government. FIRRMA also grants CFIUS discretion to issue regulations requiring declarations be filed based on certain criteria, such as the industry of the company being acquired.

Separately, FIRRMA would extend the initial 30-day review period to a 45-day review period, which would reduce the need for parties to withdraw and refile notices in cases where additional time is needed to review the transaction. In extraordinary circumstances, the Secretary of the Treasury would also be permitted to extend an investigation for an additional 30 days.

### **Conclusion and Key Takeaways**

FIRRMA has been praised by some for balancing the need to expand the scope of CFIUS reviews to address evolving national and economic security risks while promoting a free and open investment environment. To that end, FIRRMA does not include more controversial and protectionist provisions offered by other members of Congress, such as the establishment of an “economic benefits” test that would take into account the impact on jobs, wages and the overall economy.

That being said, FIRRMA still amounts to a significant broadening of the mandate of CFIUS and some stakeholders are registering concerns that the legislation could hamper legitimate commercial activity, negatively impact the ability of U.S. companies to conduct business in markets abroad, and have an overall chilling effect on foreign investment in the U.S. In addition, we have heard expectations that filings to CFIUS could quadruple as a result of the legislation. Given the possibility that FIRRMA could be enacted this year, it is important that stakeholders carefully analyze the impacts of the legislation and appropriately engage in the policymaking process.

Brownstein Hyatt Farber Schreck has a proven track record of success helping clients navigate the politically perilous and evolving policy landscape around foreign investment in the U.S. This includes having worked on a range of acquisitions, mergers and other transactions that occasioned political and public interest and were reviewed by CFIUS. We encourage you to reach out to one of the professionals below to answer any questions or provide policy guidance based on a combined wealth of expertise and experience in this arena.

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