

# CFIUS Developments: House of Representatives Hearing and Presidential Signing Statement on Defense Authorization Act

December 15, 2017

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We write to offer our perspective on two developments relevant to the Committee on Foreign Investment in the United States (“CFIUS”).

## House of Representatives Hearing on CFIUS

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Yesterday, the Monetary Policy and Trade Subcommittee of the House Committee on Financial Services held an open hearing entitled “Examining the Operations of the Committee on Foreign Investment in the United States (CFIUS).” The hearing occurred as Congress is considering legislation, the Foreign Investment Risk Review Management Act (“FIRRMA”), to reform CFIUS led by Senator John Cornyn (R-TX) in the Senate and Congressman Robert Pittenger (R-NC) in the House. On the same day, Treasury Secretary Steven Mnuchin endorsed FIRRMA, saying “I support the goals of FIRRMA, which will help to ensure that CFIUS has the tools necessary to protect the national security of the United States, while simultaneously maintaining our open investment environment. I stand ready to work with Senators Cornyn, Feinstein, and Burr, the committees of jurisdiction, and other Members of Congress as this important legislation advances.” We previously reported on a related hearing held by the Senate Committee on Banking, Housing, and Urban Affairs [in a prior alert](#).

Members participating in yesterday’s hearing included Subcommittee Chairman Andy Barr (R-KY), as well as Congressmen Pittenger, French Hill (R-AR), Warren Davidson (R-OH), Brad Sherman (D-CA), Tom Emmer (R-MN), Bill Foster (D-IL), Trey Hollingsworth (R-IN), and Al Green (D-TX). The members heard from a panel of five witnesses: three former senior officials from U.S. government agencies that participate in CFIUS, the President of the Organization for International Investment, and a China and cybersecurity expert from the Council on Foreign Relations.

The hearing did not focus solely on Senator Cornyn’s reform bill, but rather took a broader look at the CFIUS process, with a particular focus on: (1) CFIUS’s role within the greater U.S. national security structure, (2) the evolving nature of national security threats to the United States, and (3) opportunities for CFIUS to address those threats.

The hearing began with witnesses noting that CFIUS historically has succeeded in striking a balance between the need to encourage foreign direct investment in the United States and the

need to protect sensitive U.S. technologies and expertise from falling into the wrong hands. The witnesses also noted that CFIUS operates alongside other U.S. national security-related authorities and processes, such as the Department of Commerce's Export Administration Regulations ("EAR"), which control exports of dual-use products, to address national security-related risks whether or not they arise in the context of acquisitions of U.S. businesses.

At the same time, the witnesses acknowledged that developments since the last major CFIUS reform legislation—the Foreign Investment & National Security Act of 2007—merit consideration of whether CFIUS's role and operation can and should be enhanced. Specifically, the hearing touched on China's efforts to compete with the United States economically, militarily, and politically. The witnesses focused in particular on Chinese policies in several key sectors—including the semiconductor, artificial intelligence, and automated manufacturing sectors—and the challenges those policies present for U.S. national security.

Chairman Barr asked the panelists how policymakers might respond to these concerns. The witnesses emphasized the important role that CFIUS already plays, concluding that the Committee should remain one element of the larger U.S. national security framework. The witnesses also emphasized the need to ensure CFIUS has sufficient resources to adjudicate and address national security risks, as well as to reduce timeframes for review for those transactions that do not present risks. On the substance of the review, some witnesses suggested that CFIUS should focus more concretely on overseas joint ventures, and looking at trends with certain buyers and countries pursuing or aggregating technologies and capabilities through multiple acquisitions over time. These issues also are addressed by FIRRMA, but the hearing itself did not undertake a close examination of the legislation.

In sum, yesterday's hearing—which Chairman Barr noted will be the first of a series of hearings on CFIUS that will continue through 2018—reinforced the importance of CFIUS as one tool to address risks to U.S. national security. It also highlighted the need for the Committee to have the resources to perform its essential function. We will continue to provide updates on CFIUS-related developments and discussions in Congress as the reform legislation progresses.

### **Presidential Signing Statement on NDAA**

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Separately, we also wanted to note an objection made by President Trump in his December 12, 2017 signing statement for the FY 2018 National Defense Authorization Act ("NDAA"), which authorizes annual U.S. defense expenditures. Section 1069 of the FY 2018 NDAA directs the Secretaries of Defense, State, and Treasury, as well as the Director of National Intelligence, to make recommendations to Congress to "improve the effectiveness of the interagency vetting of foreign investments that could potentially impair the national security of the United States." This section reflects an effort by the Senate and House NDAA conferees to invite additional U.S. government stakeholders—other than the Department of Defense—to enhance U.S. national security, especially related to technology and industry.

However, in his December 12, 2017, signing statement, President Trump objected to Section 1069, stating that it could "potentially dictate the position of the United States in external military and foreign affairs." While we note that Section 1069 is expected to play a secondary role in the development of U.S. national security policy when compared to efforts such as Senator Cornyn's CFIUS reform bill, President Trump's signing statement suggests that the Administration seeks to retain a primary role for the Executive Branch in shaping future U.S.

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policy in this area. Of arguably greater significance, if the agencies (i.e., the Departments of Defense, State, and Treasury) make the report requested under the legislation, it could provide greater formal insight into how the Trump Administration views the intersection of foreign investment and national security issues as Congress deliberates over CFIUS reform.

We hope that you find this analysis useful. Please do not hesitate to contact the following members of our CFIUS practice group if you would like to discuss any aspect of the foregoing in further detail:

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