

## COVINGTON

# CFIUS Developments: Senate Committee on Banking, Housing, and Urban Affairs Hearing to Examine CFIUS Reform

January 22, 2018

CFIUS

---

On January 18, 2018, the Senate Committee on Banking, Housing, and Urban Affairs (“the Committee”) held a hearing to consider the Foreign Investment Risk Review Management Act (FIRRMA), a bill introduced by Senator John Cornyn (R-TX) in the Senate and Congressman Robert Pittenger (R-NC) in the House to reform the Committee on Foreign Investment in the United States (CFIUS). As we have reported [previously](#), FIRRMA has acquired support from the leaders of several CFIUS member agencies, including Defense Secretary James Mattis, Attorney General Jeff Sessions, and Treasury Secretary Steven Mnuchin, who also serves as CFIUS Chairman. The hearing was the latest of several hearings in both Houses of Congress concerning CFIUS and FIRRMA.

Senators participating in the January 18 hearing included Chairman Michael Crapo (R-ID) and Ranking Member Sherrod Brown (D-OH), as well as Chris Van Hollen (D-MD), Doug Jones (D-AL), Robert Menendez (D-NJ), Brian Schatz (D-HI), Tim Scott (R-SC), Patrick Toomey (R-PA), and Elizabeth Warren (D-MA). The hearing focused on the national security risks associated with foreign acquisitions of emerging technologies, as well as the extent to which FIRRMA could affect foreign investment into the United States and the competitiveness of U.S. businesses abroad. In the context of these issues, the witnesses also debated whether current export control laws adequately limit the transfer of sensitive technology to non-allied countries.

Notably, Senator Cornyn himself testified before the Committee, underscoring his personal investment in FIRRMA. As Majority Whip, Senator Cornyn is among the Senate’s most influential members, and his personal commitment to the bill significantly increases the likelihood that some version of the legislation ultimately will be enacted into law.

Senator Cornyn opened the hearing by emphasizing the global context in which Congress must consider the need to modernize CFIUS. Although FIRRMA does not refer explicitly to China anywhere in its legislative text, Senator Cornyn repeatedly made clear that his motive in introducing the bill was to curb risks that he sees from Chinese investment and other commercial relationships that result in technology transfers to China. Senator Cornyn was blunt in his perspectives, as evidenced by the following quotes from his testimony:

- Citing General Joe Dunford, Chairman of the Joint Chiefs of Staff, and CIA Director Mike Pompeo, Senator Cornyn alleged that “by 2025, China will pose the greatest threat to U.S. national security of any nation” and will be “a graver security risk than even Russia or Iran.”

## CFIUS

- “China has weaponized [investment] in order to vacuum up U.S. industrial capabilities from American companies that focus on dual-use technologies. China seeks to turn our own technology and know-how against us in an effort to erase our national security advantage.”
- “China poses a threat...unlike anything the U.S. has ever before faced—a powerful economy with coercive, state-driven industrial policies that distort and undermine the free market, married up with an aggressive military modernization and the intent to dominate its own region and potentially beyond.”

Senator Cornyn testified that he believes CFIUS’s authorities must be updated and augmented to counter threats from Chinese investment by, among other things, ensuring that CFIUS can review transfers of technology that may occur through outbound joint ventures or other commercial arrangements and through minority-position investments in early-stage technology.

Senator Cornyn also sought to debunk several arguments raised in the course of FIRRMA’s debate—that the bill represents regulatory overreach, that export controls are sufficient to address outbound technology transfers, and that the legislation will overburden CFIUS and decrease its effectiveness. With respect to these claims, Senator Cornyn emphasized the importance of regulation in the national security space, and argued that the expansion of CFIUS to cover certain outbound technology transfers complements rather than duplicates existing export controls. He also affirmed that any expansion of CFIUS must come with sufficient funding to ensure the Committee can operate effectively and efficiently. “For the price of a single B-21 bomber,” the Senator claimed, “we can fund an updated CFIUS process and protect our key capabilities for several years. That is a down payment on long-term national security.”

The Committee also heard from a panel of four witnesses: Christopher Padilla, Vice President for Government and Regulatory Affairs at IBM Corporation and former Under Secretary for International Trade at the Department of Commerce; Scott Kupor, the Managing Partner of Andreessen Horowitz (a large venture capital firm) and Chairman of the Board of the National Venture Capital Association; Gary Clyde Hufbauer, Reginald Jones Senior Fellow at the Peterson Institute for International Economics; and James Mulvenon, General Manager of the Special Programs Division at SOS International. These witnesses focused on how best to protect critical technologies while encouraging foreign direct investment in the United States.

The witnesses agreed that China increasingly has sought to acquire emerging U.S. technologies in ways that may evade CFIUS review, such as through joint ventures or investments in early-stage companies that are developing technologies that may have applications with national security implications. The witnesses likewise agreed that maintaining the United States’ technological edge promotes U.S. economic growth, and that further investments into science and technology should be part of the government’s national security strategy. The witnesses disagreed, however, as to how an expansion of CFIUS’s jurisdiction would affect U.S. companies, particularly technology start-ups and U.S. multinational companies operating abroad.

Three witnesses expressed reservations about the economic impact of expanded CFIUS jurisdiction. Mr. Kupor argued that CFIUS jurisdiction should not extend to passive investments or investments in U.S. venture capital firms, which typically are structured as limited partnerships. Foreign investment in emerging technology companies is critical to those companies’ continued development, he explained, and the limited partnership structure typically utilized by venture capital and private equity firms adequately prevents foreign investors from accessing the technology of companies into which they invest. In Mr. Kupor’s view, such an

## CFIUS

expansion of CFIUS's jurisdiction would harm these industries by diminishing the United States' ability to compete for investment. Messrs. Padilla and Hufbauer echoed these concerns in a different context, arguing that expanding CFIUS jurisdiction to include outbound investment would disadvantage U.S. multinational companies relative to foreign companies that manufacture and distribute similar technology. To the extent the United States does restrict certain outbound investments through CFIUS, Mr. Hufbauer suggested that CFIUS should seek a coordinated approach with U.S. allies.

In line with some witnesses' concerns about FIRRMA's expansion to cover outbound investment, the witnesses also addressed the sufficiency of current export control laws to identify and limit the transfer of dual-use technologies and technological know-how. Messrs. Padilla and Hufbauer took the view that, by covering outbound transactions, FIRRMA would duplicate and undermine the existing export control system without significant benefit to national security. The solution, Mr. Padilla argued, is not to bring exports within the reach of CFIUS but, rather, to improve the U.S. system for identifying controlled technologies and coordinating with allies to limit the transfer of such technologies to U.S. adversaries. Mr. Mulvenon disagreed, arguing that it is difficult to identify proactively technologies that may become dual use, that export controls are enforced inconsistently, and that export control laws are inadequate to interdict the transfer of know-how through joint ventures. If the export control system is to be improved, however, Mr. Mulvenon suggested that the U.S. government might develop private partnerships to assist in identifying the most sensitive emerging technologies.

The Committee will continue its analysis of FIRRMA on January 25 with a hearing entitled "CFIUS Reform: Administration Perspectives on the Essential Elements."

\* \* \*

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

<a href="#"><u>Mark Plotkin</u></a>	+1 202 662 5656	<a href="mailto:mplotkin@cov.com"><u>mplotkin@cov.com</u></a>
<a href="#"><u>David Fagan</u></a>	+1 202 662 5291	<a href="mailto:dfagan@cov.com"><u>dfagan@cov.com</u></a>
<a href="#"><u>Stuart Eizenstat</u></a>	+1 202 662 5519	<a href="mailto:seizenstat@cov.com"><u>seizenstat@cov.com</u></a>
<a href="#"><u>Alan Larson</u></a>	+1 202 662 5756	<a href="mailto:alarson@cov.com"><u>alarson@cov.com</u></a>
<a href="#"><u>Peter Lichtenbaum</u></a>	+1 202 662 5557	<a href="mailto:plichtenbaum@cov.com"><u>plichtenbaum@cov.com</u></a>
<a href="#"><u>John Veroneau</u></a>	+1 202 662 5034	<a href="mailto:jveroneau@cov.com"><u>jveroneau@cov.com</u></a>
<a href="#"><u>Roger Zakheim</u></a>	+1 202 662 5959	<a href="mailto:rzakheim@cov.com"><u>rzakheim@cov.com</u></a>
<a href="#"><u>Damara Chambers</u></a>	+1 202 662 5279	<a href="mailto:dchambers@cov.com"><u>dchambers@cov.com</u></a>
<a href="#"><u>Heather Finstuen</u></a>	+1 202 662 5823	<a href="mailto:hfinstuen@cov.com"><u>hfinstuen@cov.com</u></a>
<a href="#"><u>Meena Sharma</u></a>	+1 202 662 5724	<a href="mailto:msharma@cov.com"><u>msharma@cov.com</u></a>
<a href="#"><u>Jonathan Wakely</u></a>	+1 202 662 5387	<a href="mailto:jwakely@cov.com"><u>jwakely@cov.com</u></a>
<a href="#"><u>Ingrid Price</u></a>	+1 202 662 5539	<a href="mailto:iprice@cov.com"><u>iprice@cov.com</u></a>
<a href="#"><u>Peter Komorowski</u></a>	+1 202 662 5780	<a href="mailto:pkomorowski@cov.com"><u>pkomorowski@cov.com</u></a>

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to [unsubscribe@cov.com](mailto:unsubscribe@cov.com) if you do not wish to receive future emails or electronic alerts.