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# CFIUS Developments: House and Senate Committees Hold Markup of CFIUS Reform Legislation

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CFIUS

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### Summary

We are writing to report the latest developments related to legislative reform of the Committee on Foreign Investment in the United States (“CFIUS”).

On Tuesday, May 22, 2018, the Senate Committee on Banking, Housing, and Urban Affairs (“Senate Banking Committee” or “SBC”) held a markup of S. 2098—the Foreign Investment Risk Review Modernization 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 CFIUS. The SBC markup included unanimous passage of a Manager’s Amendment proposed by Chairman Mike Crapo (R-ID) and Ranking Member Sherrod Brown (D-OH). Our report on an earlier discussion draft of the Manager’s Amendment is available [here](#). A number of significant amendments subsequently were included in the Manager’s Amendment, and therefore were not considered at the markup. Following debate on additional amendments not included in the Manager’s Amendment, the Senate Banking Committee unanimously reported S. 2098 out of committee. Our reports on prior SBC FIRRMA hearings are available [here](#) and [here](#).

The House Committee on Financial Services (“House Financial Services Committee” or “HFSC”) also held a markup of H.R. 5841—the House version of FIRRMA. That bill also was unanimously reported out of committee, reflecting the strong bipartisan support for FIRRMA in the House. Our reports on prior HFSC FIRRMA hearings are available [here](#), [here](#), and [here](#).

Now that FIRRMA has been reported favorably out of the committees of jurisdiction, attention will turn to the process for consideration of the legislation in the full House and Senate. As we previously reported, the sponsors of the Senate bill plan to attach FIRRMA to the Senate version of the National Defense Authorization Act for Fiscal Year 2019 (“NDAA”), which is considered “must pass” legislation. On the House side, we understand that the leadership has decided not to attach FIRRMA to the House version of the NDAA. Rather, H.R. 5841 is expected to come to the House floor as a standalone bill. The House Armed Services Committee and the House Permanent Select Committee on Intelligence are expected to review and potentially modify provisions of the House bill of interest to them before H.R. 5841 reaches the House floor. Once the Senate has passed the NDAA (containing FIRRMA) and the House has passed a standalone version of FIRRMA, the bills are expected to be reconciled in conference on the NDAA, with the House conferees relying on the standalone version of FIRRMA as the House position in negotiations with the Senate conferees.

Set forth below is a more detailed report on these two markup sessions.

## Senate Banking Committee Markup

The SBC markup was well attended, and Chairman Crapo cited the attendance as indicative both of the bipartisan commitment to action and of the overall importance of the CFIUS reform effort. Members participating in the markup included Chairman Crapo and Ranking Member Brown, as well as Bob Corker (R-TN), Patrick Toomey (R-PA), Dean Heller (R-NV), Ben Sasse (R-NE), Tom Cotton (R-AR), David Perdue (R-GA), Thom Tillis (R-NC), Jack Reed (D-RI), Robert Menendez (D-NJ), Jon Tester (D-MT), Mark R. Warner (D-VA), Elizabeth Warren (D-MA), Heidi Heitkamp (D-ND), Joe Donnelly (D-IN), Brian Schatz (D-HI), Chris Van Hollen (D-MD), and Catherine Cortez Masto (D-NV).

Although it received little discussion at the markup, the Manager's Amendment proposed by Chairman Crapo and Ranking Member Brown was passed unanimously and introduced a number of important updates. Key provisions adopted as part of the Manager's Amendment include the following:

- Timing of CFIUS Acceptance and Review: The Manager's Amendment requires CFIUS to provide comments on draft filings and accept complete formal filings within ten business days of submission, provided that the parties stipulate that the proposed transaction is a covered transaction. This represents a significant procedural improvement to the CFIUS filing process and a meaningful change from prior versions of the bill, which did not set timelines for feedback on draft notices and acceptance of formal notices. The Manager's Amendment also calls for Congressional reporting requirements for CFIUS to report on its compliance with these timelines.
- Mandatory Declarations: The Manager's Amendment significantly narrows a provision requiring mandatory short-form filings, or "declarations", for transactions that directly or indirectly result in a foreign government acquiring a substantial interest in a U.S. business, limiting the scope of that provision only to critical infrastructure or critical technology companies.
- Bi-annual Reporting on Chinese Direct Investment: The Manager's Amendment requires the Secretary of Commerce to produce, through 2026, a bi-annual report on Chinese direct investment in the United States. The report will be required to cover specific types of direct investment and describe foreign party interest in the investment up to and including the ultimate beneficial owner. Chinese government investment in the United States also must be included in the report. Compared to prior versions of the bill, the Manager's Amendment allows the Secretary of Commerce additional time to produce the first report and adds a sunset provision.
- Increased Cooperation with Allies: The Manager's Amendment includes provisions to facilitate coordination among various U.S. agencies and U.S. allies, including the establishment of a formal process for the exchange of information related to the protection of the national security of the United States and its allies.
- Emerging Technology Advisory Board and Reporting: The Manager's Amendment calls for an advisory board to assist the interagency process with respect to identifying emerging and foundational technologies. The Manager's Amendment further requires the Secretary of Commerce to submit a semi-annual report to the relevant Congressional committees on the Department's activities to identify and control emerging and foundational technologies not currently subject to export controls.

- Scaled Filing Fees: The Manager's Amendment grants CFIUS authority to set a fee scaling mechanism for funding of the CFIUS review process. Factors to be considered as part of the fee scale include the effect of the fee on small businesses and the priority of the filing to CFIUS.
- Passive Investments: The Manager's Amendment continues to exclude certain "passive investments" from the Committee's jurisdiction and outline the criteria used to determine whether an investment is passive for CFIUS purposes. In addition, the Amendment retains the special accommodations for private equity investment funds to clarify the extent to which foreign limited partners in a fund with a U.S. general partner can engage in fund decision-making but still remain passive for CFIUS purposes.
- Recusal Mechanism: The Manager's Amendment retains a provision for CFIUS to establish recusal procedures for its members when they have a conflict of interest with a particular transaction, and to report those procedures to Congress.
- Real Estate Transactions: The Manager's Amendment would broaden CFIUS jurisdiction to cover all real estate transactions that could give foreign governments the ability to collect sensitive information on U.S. national security sites. This marks an expansion of CFIUS jurisdiction when compared to prior versions of the bill, which previously outlined jurisdiction over real estate transactions that are in "close proximity" to sensitive U.S. military installations or other U.S. government facilities.

Apart from the passage of the Manager's Amendment, the SBC markup debate focused on two additional amendments introduced by Sens. Toomey and Van Hollen, respectively. Sen. Toomey's amendment would have required Congress to review and approve "major" CFIUS rulemakings. Sen. Toomey characterized the amendment as a safeguard to ensure legislative oversight of national security investment issues by requiring majority Congressional pre-approval of any "major" CFIUS rule. Democrats on the Committee, including Ranking Member Brown, as well as Sens. Warren, Heitkamp, Warner, and Menendez, expressed concern regarding the delays that such review would introduce into the rulemaking process, as well as with respect to the sufficiency of existing review mechanisms such as the Congressional Review Act. Sen. Toomey ultimately withdrew the amendment in the interest of maintaining the bipartisan spirit otherwise surrounding FIRRMA.

Separately, Sen. Van Hollen offered an amendment that would prohibit the President from modifying sanctions against a Chinese telecommunications company until the President certifies to Congress that the company (i) has not violated U.S. law for 365 days, and (ii) is cooperating with all U.S. government investigations, if any, into its activities. Sen. Van Hollen framed his amendment as an attempt to ensure that sanctions against companies that violate U.S. laws cannot be arbitrarily withdrawn by the Executive Branch. The amendment ultimately passed by a 23-2 vote.

### **House Financial Services Committee Markup**

The HFSC markup of H.R. 5841 also was well attended, with participation from Chairman Jeb Hensarling (R-TX) and Ranking Member Maxine Waters (D-CA), as well as by Carolyn Maloney (D-NY), Andy Barr (R-KY), Gwen Moore (D-WI), Roger Williams (R-TX), Brad Sherman (D-CA), Tom Emmer (R-MN), David Scott (D-GA), Bill Huizenga (R-MI), Ed Royce (R-CA), Ed Perlmutter (D-CO), Warren Davidson (R-OH), Denny Heck (D-WA), Al Green (D-TX), and Emanuel Cleaver (D-MO).

Like the SBC session, the HFSC markup reflected strong bipartisan support for CFIUS reform. House members raised a number of concerns, including: (i) ensuring CFIUS possesses adequate resources to respond to any increased case load; (ii) ambiguities and potential gaps arising from the definitions of “critical technology” and “critical infrastructure”; (iii) the expansion of CFIUS jurisdiction, with some arguing that the bill is overbroad while others argued that the expansion is insufficient; (iv) whether the imposition of filing fees would be compliant with existing international agreements or subject U.S. businesses to retaliation; and (v) concerns about the appropriate amount of delegated authority Congress should provide to the Executive Branch.

Amendments adopted during the session include the following:

- **Entertainment and Media Industries:** Rep. Sherman introduced an amendment that would have required CFIUS (i) to consider as part of its national security analysis whether the transaction could “result in substantial direct or indirect censorship, including with respect to the distribution of entertainment or information products, within the United States,” and (ii) to report to Congress on transactions that may have censorship implications. Rep. Sherman withdrew the amendment with respect to the first requirement, but the Committee approved the remaining part of the amendment requiring a report.
- **Filing Fees:** Some members, including Ranking Member Waters, questioned the bill’s ability to ensure an efficient regulatory system when the bill as proposed did not provide a dedicated source of funding for CFIUS. Chairman Hensarling initially remarked that there is strong bipartisan support to ensure that CFIUS has adequate resources to cope with expansion of its jurisdiction, but also observed that this question most appropriately should be addressed through the normal appropriations process. The Committee ultimately adopted an amendment offered by Rep. Maloney that permits CFIUS to collect a fee equal to 1 percent of the value of a covered transaction, with the fee capped at \$300,000 and with an annual adjustment for inflation.
- **Effect on U.S. Workforce:** The Committee approved an amendment from Rep. Sherman that would require CFIUS to consider the effect of a transaction on the U.S. workforce, including whether the investment could deprive the United States of jobs and skills that are considered critical to national security.

Amendments that were rejected (including those that were voted down by voice vote, but remain officially pending a record vote) included amendments that would: address concerns that the definition of critical technology may not include certain technology fundamental to federal elections; require the President to provide Congress with a report if the President exercises his authority to block a transaction *and* that decision is based on anything other than CFIUS’s recommendation); extend the bill’s requirements regarding non-passive investments to include any investment, even if non-controlling, in critical infrastructure or critical technology; and provide CFIUS with the ability to provide waivers for countries that maintain a regulatory review system comparable to CFIUS because the waiver incentivizes allied countries to cooperate on national security threats.

At the conclusion of the session, the bill was unanimously reported out of committee.

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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:

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