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# CFIUS Developments: Senate Banking Committee Releases Draft Manager's Amendment to FIRRMA

May 15, 2018

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We are writing to report on the current status of the Foreign Investment Risk Review Modernization Act ("FIRRMA"), legislation to reform the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee"). FIRRMA, a bill introduced by Senator John Cornyn (R-TX) in the Senate and Congressman Robert Pittenger (R-NC) in the House, seeks to modernize and strengthen CFIUS to guard against U.S. national security risks that may arise from certain foreign investments. Our analysis of FIRRMA as originally introduced is available [here](#).

On Friday, May 11, 2018, the Senate Banking Committee, which is the Senate committee of jurisdiction with respect to CFIUS, circulated a draft Manager's Amendment (the "Amendment") to FIRRMA to facilitate discussion regarding the legislation. Consistent with our [prior report](#), we understand that the Amendment is the result of substantial negotiations within the Administration, including among the Departments of Commerce, Treasury, and Defense, and the Congressional committees of jurisdiction. The negotiations have focused principally on whether outbound technology transfers should fall within the jurisdiction of CFIUS, or instead within the export control processes administered by the Department of Commerce. In addition, as described in further detail below, there have been a number of other notable revisions to the bill as well.

As highlighted in the Senate Banking Committee's [press release](#) Friday afternoon, Senator Cornyn affirmed the committee's efforts to integrate feedback from Congress and the Administration. The fact that key stakeholders, including the Administration, Senator Cornyn, and the Senate Banking Committee, appear to have come to a consensus on a revised version of the bill increases the chances that FIRRMA ultimately will be enacted in some form. According to the press release, the Senate Banking Committee will hold a markup of the bill on Tuesday, May 22. Following the markup, we understand that the revised draft of FIRRMA will be attached to the National Defense Authorization Act for FY 2019.

### **Regulation of Outbound Technology Transfers**

Most notably, the Amendment removes provisions appearing in earlier versions of FIRRMA that would expand CFIUS's jurisdiction to review certain outbound transfers of intellectual property that do not involve the acquisition of a U.S. business, such as those which may occur through a joint venture. In its place, the Amendment mandates a new enhanced export control process for so-called "emerging" and "foundational" technologies. Specifically, the Amendment would require the President to establish, in coordination with the Departments of Commerce, Defense, Energy, and State, a "regular, ongoing interagency process to identify emerging and

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foundational technologies . . . that are essential to the national security of the United States” and not otherwise reviewable by CFIUS. This list of emerging technologies would be informed by intelligence from the Office of the Director of National Intelligence and CFIUS, and also would take into account concurrent development of similar technologies in other countries, as well as the effect that export controls may have on the development of such technologies in the United States.

The Amendment grants the Department of Commerce authority to control the export, re-export, or in-country transfer of the technologies identified through this interagency process. Although the Department of Commerce may determine the appropriate level of control based on several relevant factors, the Amendment prescribes that, at a minimum, a license shall be required before the transfer of any covered technology to a country subject to an embargo—including an arms embargo—imposed by the United States (this most notably would include transfers of technology to China). In the case of a joint venture or other collaborative arrangement, the Department of Commerce also may require the party seeking the license to disclose any foreign person with significant ownership interests in the foreign person participating in the arrangement.

Though designed to capture a broad range of transactions and technologies, FIRRMA would exempt the following transactions from the mandatory licensing requirements of this enhanced export control process:

- The sale or license of finished items and the provision of associated technology if the U.S. person that is a party to the transaction generally makes the finished item and associated technology available to its customers, distributors, or resellers;
- The sale or license to a customer of a product and the provision of integration services or similar services if the U.S. person that is a party to the transaction generally makes such services available to its customers;
- The transfer of equipment and the provision of associated technology to operate the equipment if the transfer could not result in the foreign person using the equipment to produce certain critical technologies;
- The procurement by the U.S. person that is a party to the transaction of goods or services, including manufacturing services, from a foreign person that is a party to the transaction if the foreign person has no rights to exploit any technology contributed by the U.S. person; and
- Any contribution and associated support by a U.S. person that is a party to the transaction to an industry organization related to a standard or specification, whether in development or declared, including any license of or commitment to license intellectual property in compliance with the rules of any standards organization.

Finally, the Amendment includes provisions to facilitate coordination with other U.S. agencies and allies. In addition to authorizing the Secretary of State to propose adding emerging technologies identified through the interagency process to the list of technologies controlled by multilateral export control regimes, the Amendment requires the Secretary of Commerce to report to CFIUS at least every 180 days regarding the process.

## Other Notable Provisions

In addition to the enhanced export control process described above, the Amendment includes several other key revisions worth noting:

- **Real Estate.** The Amendment retains the provision granting CFIUS jurisdiction over certain real estate acquisitions in proximity to sensitive U.S. military installations or other U.S. government facilities. However, the Amendment now exempts the purchase of any “single housing unit” or any real estate in “urbanized areas” as defined by the Census Bureau.
- **Judicial Review.** As introduced, FIRRMA would have insulated nearly all acts of CFIUS from judicial review, substantially curtailing transaction parties’ ability to challenge the process administered by CFIUS. The Amendment omits this more restrictive language and provides that parties may challenge Committee actions by way of a civil action in the U.S. Court of Appeals for the D.C. Circuit. In addition, the revised bill establishes procedures for the review of privileged or classified information by requiring *ex parte* and *in camera* review of such information.
- **Mandatory Declarations.** The Amendment retains provisions 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. critical infrastructure or critical technology company. However, the revised version of the bill includes two exceptions to this requirement. First, a foreign government-owned entity need not submit a declaration for “passive investments,” which include acquisitions of certain non-controlling interests in investment funds or any acquisition of a voting interest of less than 10 percent in the U.S. business. Second, the Amendment authorizes CFIUS to create a list of countries exempt from the required submission of mandatory declarations.
- **Passive Investments and Investment Funds.** The Amendment retains much of the original language of FIRRMA excluding certain “passive investments” from CFIUS’s jurisdiction and codifying a strict definition of “passive investment.” However, the criteria that would disqualify an investment from being deemed passive have been adjusted in various ways that have the overall effect of expanding the passivity definition. For example, the Amendment removes the provision that would have disqualified an investment from being passive if it gave access to nontechnical information that is not available to all investors and adds materiality requirements to several provisions. In addition, the Amendment makes special accommodations for private equity investment funds, excluding such funds from future regulations that would allow the Committee to create a bright line test for passivity based on the size of the investment and clarifying that a limited partner’s participation in an investment fund can still be passive even if the limited partner engaged in some restricted types of decision-making related to the fund.
- **Timing of Review.** The Amendment establishes timing requirements similar to those in the original draft of FIRRMA, including a 45-day review and a 45-day investigation, but provides for just one additional 30-day extension that may only be authorized by the Deputy Secretary of the Treasury (or equivalent deputy head of the co-lead agency) in extraordinary circumstances. Earlier versions of the bill would have provided for two such 30-day extensions. The Amendment does not require CFIUS to respond to draft filings or accept notices within any defined period of time. For declarations, however, the Amendment requires CFIUS to act within 30 days after receipt of the declaration; in earlier versions, CFIUS would only “endeavor” to respond within 30 days. The

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Amendment also would retain language clarifying that CFIUS can refer a matter to the President for action at any time, and need not wait for the statutory period to expire.

- **Filing Fees.** The Amendment removes language requiring fees in the amount of 1 percent of the value of the transaction or \$300,000, whichever is less. In its place, the Amendment grants CFIUS authority to set appropriate fees, taking into consideration factors such as the effect of the fee on small businesses, the effect of the fee on foreign investment, and the expenses of the Committee associated with its required activities.
- **Effectiveness.** The Amendment provides that much of the bill would become effective upon enactment, but certain items—including notably the jurisdictional aspects of the bill and filing fees—will not take effect until 30 days after “publication in the Federal Register . . . that the regulations, organizational structure, personnel, and other resources necessary to administer the new provisions are in place.”

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We will continue to keep our clients and friends apprised of developments related to the CFIUS reform legislation.

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

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