

## What Attys Need To Know About The Evolving CFIUS Bill

By **Chelsea Naso**

*Law360 (May 23, 2018, 7:51 PM EDT)* -- Lawmakers are busy adjusting proposed legislation that aims to modernize the Committee on Foreign Investment in the United States, with the most recent draft editing language that covers issues like intellectual property transfers, judicial reviews and proximity in real estate transactions.

The U.S. Senate Committee on Banking, Housing and Urban Affairs voted unanimously Tuesday to advance an amended version of the Foreign Investment Risk Review Modernization Act, or FIRRMA, a bipartisan bill introduced in November, in a bid to stem foreign investment in critical U.S. technologies and infrastructure.

"[Tuesday's] action represents a very serious, bipartisan effort to address steps by China and other nations to acquire technologies and know-how key to U.S. national security," Sen. Mike Crapo, R-Idaho, the chairman of the Senate Banking Committee, said in a statement.

The amended bill brings about a number of potential alterations and clarifications to FIRRMA, moving the bill one step closer to overhauling the CFIUS process.

"The current law is premised on the concept of control and there's a recognition that relying on the concept of control doesn't allow us to fully capture what's necessary to protect national security in today's world," said Stroock & Stroock & Lavan LLP special counsel Anne Salladin.

Here, Law360 reviews what lawyers need to know about how the potential changes to the bill could alter the CFIUS process.

### **More Focused Coverage of Outbound Tech Moves**

The original version of FIRRMA sought to expand the reach of CFIUS to include more types of transactions and investments in an effort to address concerns that emerging and foundational technologies are being snapped up by foreign players without so much as a review by the interagency committee.

In the process, the first draft of the bill also ensnared outbound transfers of technology even in situations that do not involve an acquisition of a U.S. company, like what may happen in a joint venture, said David Fagan, a Covington & Burling LLP partner and co-chair of the firm's cross-border investment and national security practice.

The amended version pulls back some of that power from CFIUS.

"The idea was to broaden the aperture of CFIUS and the types of transactions it could see, with one of those being this idea that essentially you would have CFIUS serve an export function too. That's no longer in the bill," Fagan said.

Instead, the latest draft calls for a new export control process for "emerging" and "foundational" technologies that would be established by the president and the departments of Commerce, Defense, Energy and State. The amended version also gives the Department of Commerce the ability to oversee transfers of covered technologies.

"They took that tech transfer provision out of the original legislation's definition of a covered transaction," said Brian Curran, a CFIUS-focused Hogan Lovells partner. "They shifted the tech transfer review process from CFIUS into a more traditional but beefed-up process that would be conducted largely under the existing export control regime."

The revamped proposal for the process change offers a little more predictability to companies, said Michael Leiter, a partner in Skadden Arps Slate Meagher & Flom LLP's national security and CFIUS practices.

"It's not as though this aspect ends up being nonregulated, but as a general matter business is more comfortable with Commerce doing export control issues because it's a little more transparent," he said. "It's a little more predictable. CFIUS has great value and is a very important process, but it's not one that provides a degree of systematic review that the export control system is really set up for."

### **Deal Parties Will Keep Access to Judicial Review**

Parties to a deal have little recourse if a presidential decision supports a CFIUS finding that there are national security risks with the transaction and blocks it, but they can challenge the process in a judicial review if they believe there was an issue, under the current process.

The original version of FIRRMA introduced in November, however, would have made it more difficult to bring a judicial review regarding much of the CFIUS process. That provision has also been adjusted, Fagan said. Under the latest draft of the legislation, deal parties would be able to bring civil actions in the D.C. Circuit to challenge the CFIUS process.

"The first version of FIRRMA really would have significantly limited the ability of parties to pursue judicial review of the process CFIUS administers, and that essentially has been driven out of the bill," Fagan said.

Judicial reviews are rare but not unheard of. Ralls Corp., a U.S.-based company owned by two Chinese nationals that was blocked in 2012 from acquiring four Oregon wind farm companies, brought litigation that centered on whether the parties were afforded due process during the CFIUS review process and not on changing the outcome of the transaction.

"You had a bill that would have really changed the status quo from what parties could pursue on judicial relief, and now it's essentially maintaining it," Fagan said.

## **Some Exclusions Apply in Real Estate Proximity Issues**

CFIUS has recommended transactions be blocked due to a company's physical proximity to a sensitive U.S. location — such as Ralls' acquisition of four wind farms, one of which was near a U.S. Navy training base — but FIRRMA aims to take real estate reviews one step further by including real estate purchases and leases in its reach.

That means acquisitions or rentals of just property, not even necessarily a business, could land in front of CFIUS for a review.

"Under current law, there is an argument that a vacant lot isn't engaging in interstate commerce and therefore isn't a U.S. business potentially subject to foreign control. FIRRMA would broaden CFIUS's jurisdiction to say if a foreigner purchases or even leases a vacant lot that's near a port or a national security facility, CFIUS can review it," Curran said.

But the latest version of FIRRMA working its way through the Senate does offer a few exceptions to the rule. The amended version now excludes the purchase of a single housing unit or real estate in "urbanized areas" from CFIUS review, according to a client alert co-authored by Fagan.

--Editing by Brian Baresch and Alanna Weissman.