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Update on CFIUS and Foreign Investment Regulation:

President Affirms Support for FIRRMA and CFIUS, not IEEPA, to Manage Foreign Investment Risks

House of Representatives Formally Passes FIRRMA

June 27, 2018

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We write to report on two important developments regarding the Foreign Investment Risk Review Modernization Act (FIRRMA), a bi-partisan effort to reform the Committee on Foreign Investment in the United States (CFIUS), and the broader policy debate within the U.S. government on regulatory mechanisms to address foreign investment, particularly from China.

On June 27, 2018, the White House issued an [official statement](#) expressing the President's intent to rely on CFIUS reform to address foreign investment concerns identified in the U.S. Trade Representative's investigation under Section 301 of the Trade Act of 1974. As we [previously reported](#), the Trump Administration has been considering various means of addressing perceived national security threats that it believes arise from China's strategic acquisition of cutting-edge technologies and intellectual property. Those considerations received widespread public attention earlier this week, as multiple press articles reported that the Administration was readying broad action under the International Emergency Economic Powers Act (IEEPA) to restrict or prohibit Chinese investment into certain sectors linked to China's "Made in China 2025" industrial plan. President Trump publicly refuted those reports on Tuesday, June 26, preceding the announcement made today.

In addition, on June 26, the U.S. House of Representatives passed its own version of FIRRMA (H.R. 5841), setting the stage for a reconciliation with the version passed in the Senate — and expressly backed by the Administration — on June 18 (S.B. 2098). We previously reported on the House and Senate versions [here](#).

These developments are described in more detail below.

White House Statement Supporting FIRRMA/CFIUS

It has been widely reported that the Administration was divided over how to address the Section 301 findings as they related to prospective Chinese investment in the United States and technology transfers from the United States to China. The divide reportedly was between Secretary of Treasury Steven Mnuchin, on the one hand, and the President's key trade advisors, U.S. Trade Representative, Ambassador Robert Lighthizer, and the White House Director of Trade and Industrial Policy, Peter Navarro, on the other. The Treasury Department favored the enhanced authorities that will be afforded to CFIUS, as well as the enhanced export control process, under FIRRMA, while the President's trade advisors favored the use of emergency

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powers under IEEPA to implement immediate restrictions and controls. The President's statement articulates clear support for the CFIUS/FIRRMA path for now, while leaving the door open to the utilization of other authorities, such as IEEPA, if Congress does not pass FIRRMA or the President determines that the legislation is ineffective.

As the President explained in his statement this morning,

Congress has made significant progress toward passing legislation that will modernize our tools for protecting the Nation's critical technologies from harmful foreign acquisitions. This legislation, the Foreign Investment Risk Review Modernization Act (FIRRMA), will enhance our ability to protect the United States from new and evolving threats posed by foreign investment while also sustaining the strong, open investment environment to which our country is committed and which benefits our economy and our people.

After reviewing the current versions of FIRRMA with my team of advisors — and after discussing them with many Members of Congress — I have concluded that such legislation will provide additional tools to combat the predatory investment practices that threaten our critical technology leadership, national security, and future economic prosperity. Therefore, upon enactment of FIRRMA legislation, I will direct my Administration to implement it promptly and enforce it rigorously, with a view toward addressing the concerns regarding state-directed investment in critical technologies identified in the Section 301 investigation.

Should Congress fail to pass strong FIRRMA legislation that better protects the crown jewels of American technology and intellectual property from transfers and acquisitions that threaten our national security — and future economic prosperity — I will direct my Administration to deploy new tools, developed under existing authorities, that will do so globally.

In addition to urging Congress to enact FIRRMA, the statement notes that the President has directed his Administration to initiate a review of export controls and to engage with U.S. allies to prevent intellectual property theft and harmful technology transfers. We understand that the Administration already is actively pursuing this issue with allies.

House of Representatives Passes FIRRMA

The President's statement comes just one day after the U.S. House of Representatives passed its own version of FIRRMA (H.R. 5841) to complement a version passed in the Senate on June 18 (S.B. 2098). The bill passed by the House is not a radical departure from the version reported out of the House Committee on Financial Services on May 22, a report of which is available [here](#), but it includes a significant number of changes, some — but not all — of which bring the House bill closer to the language of the Senate version now incorporated into the Senate draft National Defense Authorization Act (NDAA). These include:

- The addition of a provision allowing CFIUS to collect a filing fee. The House version's filing fee language is similar in most respects to the Senate version, but the House version also allows fees to be collected for declaratory filings (whereas the Senate version is limited to standard filings) and caps the amount at 1 percent or \$300,000, to be adjusted in subsequent years for inflation.

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- Changes to the timing requirements of both standard filings and the new declaratory filings, including lengthening the review period for standard filings to 45 days and for declaratory filings to 30 days. These changes align with the Senate version of FIRRMA.
- Adjustments to the covered transaction definition to more closely align the House and Senate descriptions of some jurisdictional categories, including the real estate jurisdictional expansion and the clarification that changes in rights can constitute a covered transaction.

This version of the House bill also continues to refine the definition of “Sensitive Transactions Involving Countries of Special Concern.” This proposed jurisdictional expansion parallels, but is arguably more expansive than, the Senate version’s jurisdictional expansion to cover non-passive, non-controlling foreign investments in critical technology and critical infrastructure companies. As currently drafted, the provision would allow the Committee to review investments by foreign entities with certain connections to countries of special concern, if that investment would allow the foreign entity to access or influence the use of U.S. citizen personal data or critical technologies or influence the management or operation of U.S. critical infrastructure. Countries of special concern would include countries subject to export restrictions, state sponsors of terrorism, and countries subject to an arms embargo that are also specified in regulations prescribed by the Committee. This list would include China, Russia, Venezuela, North Korea, Iran, Sudan, and Syria, and could include a significant number of other countries, depending on CFIUS regulations.

The latest House bill also expands the definition of “foreign government-controlled transaction” to include entities domiciled or having their principal place of business in a country of special concern that is a non-market economy, presumably with the intended effect of having all Chinese transactions be designated as foreign government-controlled for the purposes of CFIUS’s analysis. This is in contrast with the Senate version, which does not expressly suggest that all actors within any one country will be deemed to be government-controlled, and instead leaves it to CFIUS to further define the term.

We also note that the House bill remains ambiguous regarding its effective date, one of several issues that will need to be addressed as the bill moves forward in Congress.

Differences between the House and Senate versions of FIRRMA will be addressed during the reconciliation process, which we expect to begin in the coming weeks. As noted above, the Senate version is supported directly by the Administration, and it was passed as part of the NDAA, which is a “must pass” piece of legislation. The House version is a stand-alone bill. Thus, we expect that the Senate version will be the foundational text, but the House may negotiate for aspects of its version as the NDAA progresses towards a final piece of legislation for approval by both chambers. While there is not a date certain for the passage of the NDAA, we understand that the House and Senate leadership hope to press for passage by the end of July. Thus, it is possible that FIRRMA may be enacted as soon as this summer, and the executive branch is already actively working on potential regulations.

Analysis and Outlook

Many observers are understandably relieved that the President’s statement suggests his Administration will not, as originally anticipated, soon invoke IEEPA to ban Chinese investment in certain industry sectors linked to the Made in China 2025 plan. As the Administration itself has

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realized after a vigorous internal debate, the government already possesses — and is actively strengthening — capable, flexible tools to address risks from foreign investment and technology transfers. These include, first and foremost, the CFIUS process and the export control regime. In our view, these authorities are capable of addressing national security risks while still allowing Chinese investment and technology transfers that do not pose national security issues and which benefit U.S. companies and communities.

As it relates to the CFIUS process itself, we expect the process and overall environment for Chinese investment in technology sectors that align with the Made in China 2025 plan to remain challenging. Importantly, however, the door is not closed. While the environment is certainly challenging, CFIUS has approved numerous Chinese transactions over the last year, and there has been a more discernable effort within CFIUS to leverage its mitigation tools to protect national security while still enabling transactions to proceed. This has been an encouraging trend, but transaction parties must also carefully discern where there might be room for mitigation and which transactions, given the U.S. government's evolved analysis of threats and vulnerabilities, may be unrealistic to complete.

As the last week has demonstrated, it also is important to note that the policy environment related to foreign investment and export controls remains dynamic, especially as those issues relate to Chinese transactions. The President's announcement makes clear that the support for CFIUS, rather than IEEPA, as a principal tool to address the perceived risks of technology transfers is not etched in stone; there is a clear reservation that the Administration could pivot again to IEEPA. In the meantime, once FIRREA is passed, we expect the Administration to vigorously implement its enhanced CFIUS authorities and export controls to their fullest extent to address perceived threats from Chinese acquirers and limit the transfer of sensitive leading-edge technologies to China.

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This obviously has been a fluid policy and legal area, and we expect it will remain dynamic in the coming months. We will continue to keep our clients and friends apprised of developments in the areas of CFIUS, investment and trade controls.

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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:

<u>Mark Plotkin</u>	+1 202 662 5656	mplotkin@cov.com
<u>David Fagan</u>	+1 202 662 5291	dfagan@cov.com
<u>Stuart Eizenstat</u>	+1 202 662 5519	seizenstat@cov.com
<u>Alan Larson</u>	+1 202 662 5756	alarson@cov.com
<u>Peter Lichtenbaum</u>	+1 202 662 5557	plichtenbaum@cov.com
<u>John Veroneau</u>	+1 202 662 5034	jveroneau@cov.com
<u>Steve Rademaker</u>	+1 202 662 5140	srademaker@cov.com
<u>Heather Finstuen</u>	+1 202 662 5823	hfinstuen@cov.com
<u>Brian Williams</u>	+1 202 662 5270	bwilliams@cov.com
<u>Zachary Mears</u>	+1 202 662 6000	zmears@cov.com
<u>Chris Adams</u>	+1 202 662 5288	cadams@cov.com
<u>Meena Sharma</u>	+1 202 662 5724	msharma@cov.com
<u>Jonathan Wakely</u>	+1 202 662 5387	jwakely@cov.com
<u>Ingrid Price</u>	+1 202 662 5539	iprice@cov.com
<u>Ruchi Gill</u>	+1 202 662 5131	rgill@cov.com
<u>Peter Komorowski</u>	+1 202 662 5780	pkomorowski@cov.com

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