

U.S. Senate and House of Representatives Agree on Final CFIUS Bill; Likely Passage This August

July 24, 2018

U.S. House of Representatives and Senate conferees reached agreement on the Foreign Investment Risk Review Modernization Act (FIRRMA), which will significantly expand the jurisdiction and operational mandate of the Committee on Foreign Investment in the United States (CFIUS or the Committee). FIRRMA has strong bipartisan support and is expected to pass as part of the National Defense Authorization Act for Fiscal Year 2019 (NDAA). The NDAA will likely be voted on in the House this month (July) and in the Senate shortly thereafter, likely in August. While many important provisions of FIRRMA, including certain provisions broadening the scope of transactions subject to CFIUS review and provisions related to the filing of mandatory declarations, will not go into effect until implementing regulations are adopted, many provisions will become effective immediately upon enactment. The bill also authorizes CFIUS to establish pilot programs for any provisions that do not go into effect immediately.

Some of the bill's major provisions include the following:

Expansion of transactions subject to CFIUS jurisdiction.

The bill expands the scope of "covered transactions" subject to CFIUS review to include the following:

- Real estate transactions: The purchase or lease by, or a concession to, a foreign person of private or public real estate located within the United States that either (1) is located within or will function as part of an air or maritime port or (2) is in close proximity to a U.S. military installation or another U.S.

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Practice Areas

Foreign Ownership, Control or Influence (FOCI)
International Trade
National Security

Government facility or property that is sensitive for reasons relating to national security; could reasonably provide the foreign person the ability to collect intelligence on activities being conducted at such an installation, facility, or property; or could otherwise expose national security activities at such an installation, facility, or property to the risk of foreign surveillance.

- Critical technology, critical infrastructure, and sensitive personal data companies: Certain investments in critical technology and critical infrastructure companies and companies that maintain or collect sensitive personal data of U.S. citizens will be subject to CFIUS jurisdiction if the investment could afford the foreign person access to material nonpublic technical information, board membership or observer rights or the right to nominate a board member, or certain substantive decision-making involvement (other than through voting of shares). Indirect investments by a foreign person through an investment fund that affords the foreign person membership as a limited partner on an advisory board or committee of the fund are excluded from this provision as long as certain criteria are met.
- Changes in a foreign person's rights: Any change in the rights that a foreign person has with respect to a U.S. business in which the foreign person has an investment if the change could result in foreign control of the U.S. business or an investment in a critical technology company, a critical infrastructure company, or a company that maintains or collects sensitive personal data of U.S. citizens as described above.
- Evasion / circumvention: Any transaction, transfer, agreement, or arrangement designed or intended to evade or circumvent CFIUS review.

Voluntary and Mandatory Declarations.

The bill allows parties to a covered transaction to submit short-form "declarations" in lieu of a notice. Declarations will provide basic information regarding the transaction and generally will not exceed five pages in length. Within 30 days of the submission of a declaration, the Committee will either (1) request that the parties file a written notice; (2) inform the parties that it is unable to complete action with respect to the transaction on the basis of the declaration alone; (3) initiate a unilateral review of the transaction; or (4) notify the parties in writing that the Committee has completed all action with respect to the transaction.

Subject to certain exceptions, declarations will be mandatory for any transaction that involves an investment that results in the direct or indirect acquisition of a substantial interest in a critical technology company, a critical infrastructure company, or a company that maintains or collects sensitive personal data of U.S. citizens by a foreign person in which a foreign government has a direct or indirect substantial interest. The term "substantial interest" will be defined in the implementing regulations but will not include voting interests of ten percent or less. The bill also authorizes CFIUS to require the submission of declarations for covered transactions involving critical technology companies. Declarations will not be mandatory for an investment by an investment fund provided that certain criteria are met.

Information sharing domestically and with allies.

The bill allows for the disclosure of confidential information important to the national security analysis or actions of the Committee to any domestic governmental entity or to any foreign governmental entity of a U.S. ally or partner to the extent necessary for national security purposes. The bill contemplates the establishment

of a formal process for the exchange of information with governments of U.S. ally and partner countries.

Extended timing for reviews and investigations.

The bill changes the review period from 30 days to 45 days and allows the Committee to extend an investigation for one 15-day period in “extraordinary circumstances” (to be defined by the Committee in regulations).

Unilateral initiation of reviews.

The bill allows the Committee or the President to unilaterally initiate a review of a previously reviewed transaction if the parties materially breach a mitigation agreement or condition, regardless of whether the breach was intentional.

Identification of non-notified and non-declared transactions.

The bill requires CFIUS to establish a process to identify covered transactions for which a notice or a declaration is not submitted and for which information is reasonably available.

Suspension of transactions.

The bill allows the Committee to suspend a proposed or pending covered transaction that may pose a risk to U.S. national security while the covered transaction is under review or investigation.

Mitigation agreements and conditions.

The bill allows CFIUS to enter into and impose mitigation agreements and conditions in cases where a party to a covered transaction has voluntarily chosen to abandon the transaction to effectuate such abandonment and mitigate any U.S. national security risks. The bill also allows CFIUS to enter into and impose mitigation agreements and conditions with respect to a covered transaction that has been completed in order to mitigate any interim U.S. national security risks while CFIUS conducts its review. The bill will prohibit the Committee from entering into any mitigation agreement or imposing any condition unless the Committee determines that the agreement or condition resolves the national security concerns posed by the covered transaction. The bill also requires the Committee to formulate plans for monitoring parties’ compliance with mitigation agreements.

Judicial review.

The bill allows parties to challenge CFIUS actions and findings by bringing a civil action only in the U.S. Court of Appeals for the D.C. Circuit and establishes procedures for the review of privileged or protected information in judicial proceedings.

Annual report.

The bill requires the Committee to include in the unclassified version of its annual report information regarding the number of notices and declarations filed during the applicable reporting period, the amount of time the Committee took in accepting and responding to notices and declarations, the number of investigations and reviews that were conducted, and other related information.

Hiring authority.

The bill establishes senior level positions at each CFIUS member agency and department and provides CFIUS agencies and departments with special hiring authority to appoint candidates directly to positions in the competitive service in order to carry out their CFIUS-related functions.

Funding.

The bill requires the President to assess the extent to which the expansion of CFIUS's responsibilities under FIRRMA requires additional resources and to request such additional resources in the President's annual budget request. The bill also appropriates \$20 million to a new "Committee on Foreign Investment in the United States Fund" for each of fiscal years 2019 through 2023 to enable the Committee to carry out its functions.

Filing fees.

The bill authorizes CFIUS to assess and collect a filing fee for each covered transaction for which a notice is submitted. The filing fee will be based on the value of the transaction, taking into account the effect of the fee on small business concerns, the expenses of the Committee, the effect of the fee on foreign investment, and other matters that the Committee deems appropriate. The filing fee may not exceed the lesser of \$300,000 or one percent of the value of the transaction.

Pilot programs.

The bill authorizes CFIUS to conduct pilot programs to implement any of provisions of FIRRMA that do not become immediately effective upon enactment. The scope and procedures for any such pilot program will be published in the *Federal Register*.

Report on Chinese investment.

The bill requires the Secretary of Commerce to submit to Congress and CFIUS a biannual report on foreign direct investment transactions made by Chinese entities in the United States. The report will include the total foreign direct investment from China in the United States; a breakdown of such investments by value, NAICS code, investment type and government vs. non-government investments; a list of companies incorporated in the United States through Chinese government investment; information regarding U.S. affiliates of entities under Chinese jurisdiction; an analysis of Chinese investment patterns and the extent to which those patterns align with the objectives of China's Made in China 2025 plan; and other related information.

Congressional briefing on foreign efforts to influence democratic institutions and processes.

Within 60 days of enactment, FIRRMA requires the Secretary of the Treasury or his designee to provide a Congressional briefing on (1) transactions reviewed by CFIUS during the five-year period preceding the briefing that the Committee determined would have allowed foreign persons to inappropriately influence democratic institutions and processes within the United States and other countries, and (2) the disposition of such reviews, including any steps taken by the Committee to address the risk of allowing foreign persons to influence such democratic institutions and processes.

National security factors to be considered.

The bill provides Congress's sense that the Committee may consider the following factors when considering national security risks:

- whether a covered transaction involves a country of special concern that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect United States leadership in areas related to national security;
- the potential national security-related effects of the cumulative control of, or pattern of recent transactions involving, any one type of critical infrastructure, energy asset, critical material, or critical technology by a foreign government or foreign person;
- whether any foreign person engaging in a covered transaction with a United States business has a history of complying with United States laws and regulations;
- the control of United States industries and commercial activity by foreign persons as it affects the capability and capacity of the United States to meet the requirements of national security, including the availability of human resources, products, technology, materials, and other supplies and services, and in considering "the availability of human resources," construing that term to include potential losses of such availability resulting from reductions in the employment of U.S. persons whose knowledge or skills are critical to national security, including the continued production in the United States of items that are likely to be acquired by the Department of Defense or other Federal departments or agencies for the advancement of the national security of the United States;
- the extent to which a covered transaction is likely to expose, either directly or indirectly, personally identifiable information, genetic information, or other sensitive data of U.S. citizens to access by a foreign government or foreign person that may exploit that information in a manner that threatens national security; and
- whether a covered transaction is likely to have the effect of exacerbating or creating new cybersecurity vulnerabilities in the United States or is likely to result in a foreign government gaining a significant new capability to engage in malicious cyber-enabled activities against the United States, including such activities designed to affect the outcome of any election for Federal office.

Although the bill stops short of explicitly incorporating these national security factors into the statute, they provide an indication of Congress's underlying policy rationale for many of the bill's provisions and are likely to inform the implementing regulations that CFIUS ultimately adopts.

Emerging and foundational technologies.

While not technically part of FIRRMA, a related provision in the NDAA requires the President to establish an interagency process to identify emerging and foundational technologies that are essential to the national security of the United States but do not otherwise fall within the definition of "critical technologies" under FIRRMA. The provision requires the Secretary of Commerce to establish appropriate controls under the Export Administration Regulations for the export, reexport, or in-country transfer of emerging and foundational technologies, taking into account lists of countries to which exports from the United States are restricted and

the potential end uses and end users of the technology. At a minimum, a license will be required for the export, reexport, or in-country transfer of such technologies to or in a country subject to an embargo, including an arms embargo, imposed by the United States. This will include China along with other countries subject to broader U.S. trade embargos. Applicants submitting applications for a license or other authorization by or on behalf of a joint venture or other similar arrangement may be required to identify, in addition to any foreign person participating in the arrangement, any foreign person with significant ownership interest in a foreign person participating in the arrangement.

Wiley Rein Experience

Wiley Rein has an unparalleled ability to assist clients on investments that raise national security concerns. We have more than two decades of experience handling matters involving CFIUS and the Defense Security Service (DSS) and have counseled clients in transactions that involve nearly every industry sector subject to CFIUS review. Our attorneys and consultants have served in nearly every CFIUS department, including the U.S. Departments of Treasury, Homeland Security, Justice, Defense, State, and Commerce, as well as the National Security Council. Senior Public Policy Advisor Nova J. Daly, who served as the Deputy Assistant Secretary for Investment Security and Policy at Treasury from 2006 to 2009, ran the CFIUS process, oversaw the reviews of over 350 cases, and negotiated the Foreign Investment and National Security Act of 2007 (FINSAs) and implemented its regulations. Partner Daniel B. Pickard is a CFIUS expert and provides comprehensive guidance on multiple trade and investment issues, including compliance with the National Industrial Security Program (NISP) as well as on foreign ownership, control, or influence (FOCI) issues.