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## Congress Introduces Bill to Expand CFIUS's Review Authority

A bipartisan group of U.S. lawmakers introduced identical bills in the House and Senate on Wednesday to broaden the authority of the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”), an interagency committee that reviews foreign investments in U.S. companies, to determine whether such investments pose a risk to national security. The proposed bill, called the Foreign Investment Risk Review Modernization Act (“FIRRMA”), would broaden CFIUS’s jurisdiction to include review of certain joint ventures and minority investments, and represents the most significant effort to revise the CFIUS process since the passage of the Foreign Investment and National Security Act of 2007.

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Although FIRRMA does not mention China by name, this latest reform effort is motivated by the view among key U.S. national security figures that the Committee is ill-equipped to handle new threats to U.S. national security posed by foreign investment, especially from China.<sup>1</sup> Senator John Cornyn, one of the bill’s co-sponsors, said in a statement announcing the legislation that “[b]y exploiting gaps in the existing CFIUS review process, potential adversaries, such as China, have been effectively degrading our country’s military technological edge by acquiring, and otherwise investing in, U.S. companies.”<sup>2</sup> The bill’s supporters have cited as examples of such activities minority investments by Chinese parties in technology start-up companies engaged in developing commercial technologies that also may have defense or intelligence applications. FIRRMA is designed to plug these perceived gaps by broadening CFIUS’s review authority to include such transactions.

### Overview of the CFIUS Review Process

CFIUS was established by President Gerald Ford in 1975 to monitor foreign direct investment in the United States. In 1988, Ronald Reagan delegated to the Committee the authority to review foreign transactions, following passage of the Exon-Florio Amendment, 50 U.S.C. § 2170, which amended Section 721 of the Defense Production Act of 1950 and granted the President authority to block foreign investment in the United States when “the transaction threatens to impair the national security of the United States.” 50 U.S.C. § 4565(b)(2)(B)(i)(I).

Pursuant to current Treasury Department regulations, CFIUS has the authority to review any “covered transaction,” defined to mean “any transaction . . . by or with any foreign person, which could result in control of a U.S. business by a foreign person.” 31 C.F.R. § 800.207. CFIUS construes the terms “foreign national” and “U.S. business” broadly. The term “foreign national” includes foreign governments and foreign entities, as well as entities controlled by foreign governments and foreign entities, 31 C.F.R. § 800.216, while the term “U.S. business” includes “any

<sup>1</sup> David McLaughlin, Saleha Mohsin, and Billy House, *China U.S. Buying Spree Prompts Move to Toughen Deal Reviews*, BLOOMBERG (Oct. 26, 2017), <https://www.bloomberg.com/news/articles/2017-10-26/china-s-u-s-buying-spre-prompts-move-to-toughen-deal-reviews>.

<sup>2</sup> Press Release, Cornyn, Feinstein, Burr Introduce Bill to Strengthen CFIUS Review Process, Safeguard National Security (Nov. 8, 2017), available at <https://www.cornyn.senate.gov/content/news/cornyn-feinstein-burr-introduce-bill-strengthen-cfius-review-process-safeguard-national>.

entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States.” *Id.* § 800.226. CFIUS has the authority to impose mitigating measures, up to and including the blocking of a potential transaction and unwinding of a completed transaction, if it determines that the transaction poses a threat to U.S. national security.

## Significant Reforms Introduced by FIRRMA

FIRRMA proposes several major changes to key aspects of the Committee’s review authority and process.

- **Extends CFIUS’s jurisdiction to any non-passive foreign investments in a U.S. “critical technology company” or “critical infrastructure company.”** CFIUS currently has jurisdiction to review only transactions that result in “foreign control” of a U.S. business. While the scope of that jurisdiction is already extremely broad, it does not currently extend to transactions that result in technology transfers, such as the licensing of intellectual property, or to joint ventures that occur outside the context of a controlling investment. FIRRMA would expand CFIUS’s jurisdiction to such transactions that involve a “critical technology company” or “critical infrastructure company” unless the transaction involved a purely “passive investment.” A “passive investment” is one in which the investor has no:
  - Access to any non-public technical information of the U.S. business;
  - Access to any nontechnical information not available to all investors;
  - Board or board observer rights;
  - Involvement in substantive decision-making of the U.S. business; or
  - Parallel strategic partnership or other material financial relationship with the U.S. business.

Few investments in critical technology or infrastructure companies are likely to be deemed “passive” because of the expansiveness of the definition. At the same time, CFIUS would have the authority to exempt certain otherwise covered transactions if *all* foreign investors are from countries that meet certain criteria, such as countries that have a mutual defense treaty or a mutual agreement to safeguard national security as pertaining to foreign investment with the United States.

- **Broadens the definition of “critical technology” to include emerging technologies.** The legislation would expand CFIUS’s authority to review a greater range of technology deals. Currently, the term “critical technology” is defined to include items covered by the United States Munitions List, items on the Commerce Control List, certain nuclear related materials, and items covered by the Select Agents and Toxins regulations. 31 C.F.R. § 800.209. The proposed bill would expand the existing definition of “critical technology” to include “[o]ther emerging technologies that could be essential for maintaining or increasing the technological advantage of the United States over countries of special concern with respect to national defense, intelligence, or other areas of national security, or gaining such an advantage over such countries in areas where such an advantage may not currently exist.” Such broad language would provide CFIUS with greater latitude to conclude that a particular transaction implicates “critical technology” and, therefore, may pose a risk to U.S. national security.
  - Requires consideration of additional factors. CFIUS currently is required by statute to consider a list of twelve factors when evaluating the national security risk posed by a particular transaction. FIRRMA would add several new factors to that list, including whether the covered transaction would be likely to:
    - Contribute to the loss of or have other adverse effects on technologies that provide a strategic national security advantage to the United States;

- Create new, or exacerbate existing, cybersecurity vulnerabilities; or
  - Expose 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.
- **Extends the review process for most investors.** The CFIUS review process begins when parties to a covered transaction make a voluntary filing to CFIUS, or when CFIUS otherwise becomes aware of a covered transaction and determines to undertake a review. 31 C.F.R. § 800.401(a), (b). If parties opt to make a CFIUS filing, they must make a detailed submission to CFIUS that includes extensive information about the transaction and detailed information about the parties involved. *See id.* § 800.402(c). Under current law, CFIUS has 30 days to complete its initial review of the transaction, upon completion of which CFIUS may either clear the proposed transaction or proceed to a more detailed, 45-day follow-up investigation. Under the proposed bill, the initial 30-day review period would be extended to 45 days. The 45-day investigation that follows the initial review period would remain unchanged, but the bill would allow an additional 30-day investigation to be added in “extraordinary circumstances.” The net effect would be to extend the maximum review period from 75 days to 120 days. (In practice, both currently and under FIRRMA, review could take longer as CFIUS often requires re-filing, which restarts the clock.) Further, for transactions the Committee determines “may pose a risk” to national security, CFIUS could suspend the transaction until CFIUS completes its review.
  - **Makes certain filings mandatory.** Currently, the CFIUS regime is an entirely voluntary process, meaning that no party is obligated to make a filing and seek preclearance. Under FIRRMA, parties would be obligated to make filings before closing under certain circumstances, including where certain factors about the target entity’s business are met or where a deal involves an acquisition of 25% or more voting interest in a U.S. target by a foreign entity in which a foreign government owns 25% or more voting interest.
  - **Imposing a filing fee.** Parties currently do not pay a fee to submit a transaction to CFIUS for review. FIRRMA proposes a filing fee of up to the lesser of \$300,000 or 1% of the transaction value.

For pending transactions, or those contemplated in the immediate future, it is important to note that transactions that are completed before enactment of FIRRMA would not be subject to the new law, and some of the key provisions would not take effect until 30 days after the Secretary of the Treasury certifies that the new regulations, and the organizational resources called for by the bill, are in place.

## Conclusion

FIRRMA, represents the most significant effort to revise the CFIUS process in more than a decade. Although this bill appears to have substantial bipartisan support in both the House and the Senate, as well as the apparent support of the Trump Administration, it must now proceed through the Congressional committee process before it can be enacted into law. This could result in further changes, and will almost certainly delay enactment of the bill. However, should FIRRMA ultimately be enacted, it could present significant new obstacles to foreign investment in the United States.