Overview
The Foreign Investment Risk Review Modernization Act (FIRRMA), the ambitious CFIUS reform bill introduced in November 2017, has received significant congressional attention in 2018 and appears to be primed for passage this year, with some revisions from the version that was introduced last year. On June 18, 2018, the Senate passed its version of FIRRMA as Title XVII of the National Defense Authorization Act of 2019 (H.R. 5515). On June 26, 2018, the House passed its version of FIRRMA (H.R. 5841) as a stand-alone bill. Both versions of FIRRMA have been updated in substantial part to allay US business concerns with some of the more far-reaching aspects of the version of FIRRMA that was introduced last year. On June 27, President Trump urged Congress to move quickly to pass the legislation. The president’s statement came as he rejected the idea that he had previously floated in the context of the ongoing Section 301 investigations about introducing additional investment restrictions against China under other legal authorities.

Overview of FIRRMA as Revised
Under current law, CFIUS’s jurisdiction is limited to the review of mergers, acquisitions, or takeovers that could result in “foreign control” over a US business. As we covered in a previous advisory, FIRRMA aims to close perceived gaps in the CFIUS process by giving the Committee the authority to review several additional categories of investments.

Technology Transfers and US Export Controls
The most significant revision to FIRRMA is in the area of US government regulation of technology transfers. In its original form, FIRRMA would have authorized CFIUS to review any transfers of “intellectual property and associated support” to a foreign person by a US critical technology company, other than those that occur through an “ordinary customer relationship.” This provision was criticized by many US companies, as it would have inserted CFIUS review into many US outbound technology investments and potentially put US investors at a competitive disadvantage. Further, this provision was criticized as duplicative of authorities that already exist in the US export control regime.

As revised, the Senate and House versions of FIRRMA no longer create an additional category of CFIUS review for these transactions. Instead, FIRRMA as revised would require the creation of a new interagency process to identify and monitor “emerging and foundational technologies” that are “essential to the national security of the US.” Under both versions of FIRRMA, the Secretary of Commerce would be required to establish appropriate export controls for any identified technologies. At a minimum, the Secretary must require countries subject to an embargo by the US to apply for a license to export the technologies.

The House version of FIRRMA goes even farther on export controls by including comprehensive export control reform legislation to replace the Export Administration Act of 1979, which lapsed in 1994 and has been kept alive through the International Emergency Economic Powers Act (IEEPA). The House FIRRMA bill would also update the existing US anti-boycott regime and sanctions regarding missile proliferation and chemical and biological weapons proliferation. The Senate version of FIRRMA does not address export control reform, the US anti-boycott regime, or proliferation sanctions.
Both versions of FIRRMA would authorize CFIUS to review additional foreign investments in US “critical technology” or “critical infrastructure” companies. The Senate version would extend CFIUS review to any investments in these companies other than “passive investments,” with the opportunity for CFIUS to exclude investors from a “white list” of favored countries to be identified in forthcoming CFIUS regulations. The House version takes the converse “black list” approach. It would extend CFIUS review to transactions that could result in involvement in substantive decision-making or access to material nonpublic technical information – but only with respect to investors from selected “countries of special concern,” which is defined as designated state sponsors of terrorism and countries subject to US arms embargoes and other selected export restrictions. Both versions of FIRRMA would give CFIUS substantial discretion in defining “critical technology” and “critical infrastructure.”

Real Estate Purchases, Leases and Concessions

Both versions of FIRRMA would authorize CFIUS to review the purchase or lease of, or concessions related to, real estate that is located at a land, air, or maritime port, or is in close proximity to a US military installation. (CFIUS review of “concessions” at airports and other port facilities was not part of the version of FIRRMA introduced last year.) Similar to critical infrastructure and critical technology investments, the Senate version authorizes CFIUS to exclude transactions involving investors from a “white list” of favored countries to be identified in forthcoming CFIUS regulations. The House version, on the other hand, takes the “black list” approach described above.

Closing CFIUS “Loopholes”

As a technical matter, the current CFIUS review process is voluntary. Companies choose to seek CFIUS’s preapproval of covered transactions because of the significant economic downside to an after-the-fact CFIUS review that may result in mandated changes to a transaction. In addition, under current rules companies have the discretion to construct transactions in a manner that avoids foreign control (and, thus, CFIUS jurisdiction). Some critics of CFIUS have characterized these features of CFIUS as “loopholes” that allow for evasion of the Committee’s review.

Both the Senate and House versions of FIRRMA would address these perceived loopholes in a number of ways:

- For the first time, FIRRMA would mandate that parties to certain categories of covered transactions (including where a foreign government-owned entity would acquire a “substantial interest” in a US business) file with CFIUS. Parties would have the option to conduct these filings through an abbreviated “declaration” process or through submission of a typical written notice.
- FIRRMA would also formally extend CFIUS jurisdiction to transactions “intended or designed to evade or circumvent” the CFIUS review process.
- CFIUS jurisdiction would also be extended to any transaction involving “any change in the rights” of a foreign person in a US business that could result in foreign control of a US business or a non-passive investment in a critical technology or critical infrastructure business.

Declarations as Alternative to Standard Filings

Under both versions of FIRRMA, parties to covered transactions would have the option to file short-form declarations with CFIUS for at least some transactions, in the hopes of securing CFIUS approval in a shorter timeframe and after providing less information than would be required under a standard filing. Some have expressed skepticism that this change will result in a more efficient process, as CFIUS would retain the ability to require parties to submit a standard filing in any case in which a short-form declaration has been filed.

China-Specific Restrictions?

Neither version of FIRRMA imposes any China-specific investment restrictions. That said, under both the “white list” proposed in the Senate version and the “black list” approach in the House version, Chinese investments would (along with investments from other disfavored countries) trigger expended CFIUS jurisdiction in certain areas, described above. In addition, the Senate version would create a new periodic reporting requirement on Chinese investments in the US, including an analysis of Chinese investment patterns against China’s “Made in China 2025” plan.

Next Steps

We expect some additional deliberation on CFIUS reform, as Congress hammers out differences between the House and Senate versions of FIRRMA. However, with multiple endorsements from President Trump and officials from his cabinet and strong congressional backing, some version of FIRRMA seems likely to be enacted in 2018, and perhaps as soon as later this summer.
Once FIRMA passes, changes to CFIUS will likely take some time to come to fruition, as CFIUS will have to implement the changes through regulation and other guidance. Under the Senate version of FIRMA, the key substantive changes to CFIUS would not take effect until 30 days after CFIUS, through the Department of the Treasury, certifies that “the regulations, organizational structure, personnel, and other resources necessary to administer the new provisions are in place.” While the House version does not contain a similar certification requirement, we think that there is likely to be some delay in implementation regardless of whether this provision is included.

We will continue to keep you informed of CFIUS developments. If you have any questions, please contact Stewart Baker at +1 202 429 8402, Brian Egan at +1 202 429 8009, Judy Wang at +1 202 429 6471, or Evan Abrams at +1 202 429 3052 in our Washington office. Further commentary is available on the Steptoe International Compliance Blog. You can also follow us on Twitter (@SteptoeIntReg).

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