

Status of CFIUS Reform Legislation

New Legislation to Reform the Committee on Foreign Investment in the United States Remains a Strong Possibility

Key Points:

- Reform legislation sponsors appear willing to address some concerns with the original bill.
- FIRRMA's passage will depend on congressional priorities.

Introduction

Over recent months, Congress has held no fewer than eight hearings on the subject of foreign investment review by the Committee on Foreign Investment in the United States (CFIUS) or the leading reform bill that would alter how CFIUS operates, the Foreign Investment Risk Review Modernization Act (FIRRMA), introduced in the House and Senate late last year with bipartisan sponsors and supporters. Meanwhile, the administration has repeatedly expressed its support for FIRRMA, as reflected among other sections in the White House's statement that the bill "would achieve the twin aims of protecting national security and preserving the longstanding United States open investment policy."¹ More recently, FIRRMA's sponsors have indicated a willingness to address certain concerns expressed by some of the bill's skeptics, which could increase the likelihood that FIRRMA or a version of FIRRMA will pass this year.

Latham & Watkins has previously provided an analysis of how FIRRMA, as introduced, would change current CFIUS practices. (See prior [White Paper](#) for more information.) This short *Client Alert* supplements that analysis by identifying issues that FIRRMA's sponsors may be likely to address in light of the bill's reception, and then explains how CFIUS reform might progress procedurally.

FIRRMA's Reception

Hearing witnesses in both the House and Senate expressed considerable support for CFIUS reform and for FIRRMA specifically. Supporters highlighted concerns about foreign acquisition of sensitive technologies as a result of what many view as a concerted effort by the Chinese government to acquire "key technology with an eye towards taking the lead in the industrial markets of the future,"² as well as more general concerns about CFIUS' institutional capacity to review all of the transactions warranting review, both of which FIRRMA addresses.

At the same time, however, others have raised significant questions about the extent to which FIRRMA would expand CFIUS' jurisdiction, suggesting in particular that FIRRMA's extension of CFIUS review to include US outbound investments goes too far. One version of this view holds that restricting outbound

investment simply helps foreign competitors of US businesses, who will take the place of constrained US firms. A related concern holds that existing export controls regulations are already sufficient to protect against the export of sensitive technologies, and so CFIUS' jurisdiction should be not expanded to become redundant with export control laws. Some have also questioned whether FIRRMA would hurt US emerging companies that need foreign investments, given that FIRRMA as drafted would extend CFIUS review to "any type of arrangement" by a "critical technology company" that involves the transfer of "both intellectual property and associated support" to a foreign person.³

FIRRMA's sponsors appear prepared to address such concerns. Not least of all, Representative Pittenger has stated that he would support some modifications to it.⁴ Similarly, the office of Senate sponsor John Cornyn has reportedly worked with US business interests that have expressed concerns about the extent of CFIUS' jurisdiction under FIRRMA as introduced. According to some reports, a revision to or new version of FIRRMA is expected at any time, though nothing is yet publically available.⁵ It is possible a revised version might delineate more clearly the respective scope of CFIUS review and export controls, to avoid uncertainty and potential bureaucratic confusion. It also seems possible that FIRRMA's sponsors might clarify CFIUS' expanded reach over "critical technologies" that are not acquired through equity investments but rather are the subject of partnerships or arrangements involving US emerging companies. Likewise, FIRRMA might be altered to some degree to protect the competitiveness of US businesses making outbound investments, without undermining national security.

Potential Next Legislative Steps

Working backwards from Congress' August recess, moving on FIRRMA would require that the relevant House and Senate committees schedule markups in the near future. It is also conceivable that another bill could be introduced on the Senate side, which could see a reincarnation of the Brown-Grassley bill or some other variation. Whereas the House sponsors are members of the Financial Services Committee, the Senate sponsors are not on the committee of jurisdiction, and next steps in the Senate will thus depend heavily on what the Senate Banking Committee's Chair, Senator Crapo, elects to move forward.

Senator Crapo's comments opening the Senate Banking Committee's FIRRMA hearings made clear that, like FIRRMA's proponents, he too questions whether the "laws, regulations and policies currently exercised by CFIUS" are adequate to "protect U.S. technology from illicit transfers as they did in the past." He also emphasized a need to ensure that reform legislation "not create a situation where it chills a wide range of commercial activities," especially those that have been controlled through export control laws.⁶ Importantly, the fact that Senator Crapo's staff has been actively engaged in the reform legislation suggests that something will move out of committee. Whether through a manager's amendment to Cornyn-Feinstein, a new bill, or some other legislative vehicle, then, it seems reasonable to expect that the sum and substance of FIRRMA may advance in the Senate.

Assuming a bill progresses in both chambers in the next month or so, this would leave time for reconciling differences between the House and Senate versions in order to pass legislation before legislative activity slows considerably as the 2018 elections approach. Of course one cannot say with certainty that a version of FIRRMA will pass this year. But the fact that CFIUS reform enjoys bipartisan support (distinguishing it from much congressional business), as well as the administration's support, suggests there is a real chance. Further, given the largely favorable reception that CFIUS reform has received during congressional hearings, and especially that FIRRMA's sponsors have signaled that they aim to address at least some of the concerns raised by business groups, the possibility of some kind of CFIUS reform legislation passing this year seems substantial.⁷

Latham will continue to monitor related developments and will provide further updates.

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Endnotes

- ¹ The White House, Statement by the Press Secretary Supporting the Foreign Investment Risk Review Modernization Act, Jan. 24, 2018. FIRRMA's supporters have repeatedly noted Treasury Secretary Mnuchin's support for the bill and Treasury's Assistant Secretary for International Markets and Investment Policy testified in favor of FIRRMA before the Senate Banking Committee on January 25. Defense Secretary Mattis, Commerce Secretary Ross, and Attorney General Sessions are reported to support "the goals of" FIRRMA. See, e.g., Statement by Representative Robert Pittenger, House Financial Services Monetary and Trade Subcommittee Hearing, Dec. 15, 2017.
- ² Opening Statement by House Financial Services Monetary and Trade Subcommittee Chair Andy Barr, Dec. 15, 2017.
- ³ FIRRMA § 3(a)(5)(B)(v).
- ⁴ In response to press reports of a possible "softening" or certain provisions of FIRRMA, Pittenger stated: "Those reporters should have called me. There will be no softening of our legislation." He also indicated, however, that in response to concerns from some US businesses about unwarranted limits on outbound investments: "Are we listening to input? Yes. Will we make appropriate tweaks and adjustments to not inadvertently clamp down on legitimate investment? Yes." See Congressman Robert Pittenger, Press Release, Feb. 8, 2018, available at <https://pittenger.house.gov/media-center/press-releases>.
- ⁵ See, e.g., *Anti-China Bill Being Softened After U.S. Companies Complain*, NY Times, Feb. 8, 2018.
- ⁶ Statement of Senator Mike Crapo. Committee on Banking, Housing, and Urban Affairs, Jan. 18, 2018.
- ⁷ The Administration's recent imposition of tariffs on Chinese goods introduces some uncertainty here. Trade conflict with China could well overshadow CFIUS reform. But it is also possible that the Administration will place even greater emphasis on FIRRMA as one means of limiting Chinese participation in US markets.