

# **Current Trends and Proposed Legislation Pose Enhanced CFIUS Risks and Timing Considerations for Foreign Investment Transactions in the United States**

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## **Summary**

Legislation has now been introduced in the US Congress that would significantly expand the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) to a broader scope of transactions and, for some types of foreign investments and deals, CFIUS reviews could become mandatory instead of voluntary. The notable recent trends and the very real possibility that legislation will be enacted soon to expand and strengthen the role of CFIUS could increase regulatory hurdles and pose timing challenges for all transactions involving foreign investments in US businesses.

## **In Depth**

### **Introduction**

The Committee on Foreign Investment in the United States (CFIUS) is a US inter-agency committee authorized under current law to review transactions that could result in control of a US business by a foreign person (“covered transactions”) in order to determine the effect of such transactions on US national security. Under its current regulations, CFIUS typically reviews transactions voluntarily notified to it by transaction parties. Parties to M&A deals have increasingly sought CFIUS clearance for their transactions, in light of an apparent trend by CFIUS to impose longer and higher levels of scrutiny, resulting in some notable deals recently being blocked by CFIUS or abandoned by parties facing CFIUS challenges. Coinciding with this trend, legislation has now been introduced in the US Congress that would significantly expand the jurisdiction of CFIUS to a broader scope of transactions and, for some types of foreign investments and deals, CFIUS reviews could become mandatory instead of voluntary. The notable recent trends and the very real possibility that legislation will be enacted soon to expand and strengthen the role of CFIUS could increase regulatory hurdles and pose timing challenges for all transactions involving foreign investments in US businesses.

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## Legislation Introduced to Expand the Role of CFIUS

The new bill, entitled the Foreign Investment Risk Review Modernization Act (FIRRMA) and introduced with prominent bipartisan support in Congress, would reform CFIUS by enlarging the scope of foreign investments subject to CFIUS review and by revising the review process, including a requirement for mandatory filings under certain conditions. Following is a summary of the key changes that FIRRMA would make.

### Expanded Authority of CFIUS under FIRRMA

Under the current statute, only those transactions in which a foreign entity gains control over a US business are subject to CFIUS review. FIRRMA, if passed, would drastically expand the purview of CFIUS scrutiny to include the following types of transactions:

- The “contribution... by a United States critical technology company of both intellectual property and associated support to a foreign person” through business arrangements, including joint ventures. This provision would expand the jurisdiction of CFIUS review to ventures outside of the United States involving a US critical technology company. Further, FIRRMA would include a broad definition of “critical technology” to include “technology, components, or technology items that are essential or could be essential to national security.”
- Any non-passive foreign investment in a US critical technology or infrastructure company or any change in a foreign entity’s investment rights with respect to a US business that results in a non-passive foreign investment. Non-passive investments would include investments in which a foreign investor has a board seat or board observer rights, a say in company decision-making beyond voting shares and/or access to critical information. CFIUS would also be able to review any transactions in which a foreign investor changes from holding a passive investment to a non-passive one—a notable expansion beyond the current scope of CFIUS reviews.
- Any infrastructure investment located near a US military base or US government facility involving national security.
- Any transaction designed to circumvent CFIUS review.

Under FIRRMA, transactions exclusively involving countries that are treaty-allies of the United States or that have mutual defense treaties with the United States would potentially be exempt from the expanded CFIUS provisions.

### Updated CFIUS Review Process

FIRRMA would create an expedited process for reviewing certain transactions through a new filing called “declarations,” which would be shorter versions of the formal joint voluntary notice currently required for CFIUS reviews. Declarations would be mandatory for transactions involving “acquisitions of a voting interest of at least 25 percent in a United States business by a foreign person in which a foreign government owns, directly or indirectly, at least a 25-percent voting interest.” CFIUS would also be able to mandate declarations based on factors such as the sector of the proposed transaction, difficulty repairing potential national security breaches created by the transaction and the

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availability of information about the transaction through other means. Whether a declaration was required or voluntarily filed, within a 30-day period of filing CFIUS would “endeavor” to clear the transaction, to require the filing of a formal notice, or to initiate review of the transaction.

FIRRMA would also change the timeline for CFIUS proceedings. Currently, there is a 30-day review period for all initial transaction reviews, followed by a possible further 45-day investigation. Under FIRRMA, the initial review period would be 45 days, and the 45-day investigation could be extended by up to an additional 30 days. This could significantly increase the time CFIUS spends investigating potential transactions, but it may also reduce the need for foreign entities to withdraw and refile CFIUS notices once they get close to the end of the initial 30-day review period—a practice that has become more common under current practice.

## **Particular Possible Impact on Chinese Investments**

Though the bill does not explicitly mention China, Rep. Robert Pittenger (R-NC) specifically confirmed that, as has been widely reported, [FIRRMA is aimed at China](#). In 2016, Chinese investment in US businesses spiked to a record high of \$45.6 billion, up significantly from \$15 billion invested in the United States in 2015, and specifically including increased investments in electronics, transportation and infrastructure. The official backgrounder accompanying the bill cites China’s increasing levels of foreign direct investment in high-technology companies as a cause for security concern and a motivating factor behind FIRRMA. FIRRMA enjoys support from the US national security establishment and legislators of both parties, who have voiced uniform concern about China’s access to US critical technologies.

Even under the current law, CFIUS oversight has increasingly focused on prominent Chinese investment in US technology businesses. In 2017, President Trump, acting on a recommendation by CFIUS, blocked the acquisition by a Chinese-backed fund, Canyon Bridge Capital Partners, of Lattice Semiconductor, a US manufacturer of computer chips. This is the fourth transaction ever to have been blocked by a President pursuant to CFIUS recommendation. Other Chinese-owned companies have reportedly abandoned plans to acquire US businesses, including a US mobile hotspot business and a US aluminum manufacturer, due to concerns that CFIUS would not approve these transactions. Should FIRRMA become law, joint ventures, which have become a common arrangement for US companies to do business in China, will also be subject to CFIUS scrutiny.

## **CFIUS Considerations for Deal Teams**

While FIRRMA has strong bipartisan support in Congress and expected support from President Trump, its final form, passage and timing are not certain. If FIRRMA is enacted in its present form, the broadened scope of subject transactions and the enhanced review authority of CFIUS will mean that parties to deals should plan carefully for the new and different levels of scrutiny. The new definition of “critical technology” will encompass far more transactions than under current CFIUS practice. The expanded jurisdiction and criteria for CFIUS reviews may add costs and delays to transactions that fall within the broadened scope. Parties to prospective transactions should become familiar with the evolving procedures employed by CFIUS, and they should monitor these related legislative developments to be able to plan accordingly for the significant expansions to CFIUS reviews.

*Julia Cohen contributed significantly to the authorship of this article.*

National Law Review, Volumess VII, Number 321

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