

Foreign Investment Risk Review Modernization Act (FIRRMA)

July 3, 2018

Some Members of Congress, the Trump Administration, and some U.S. businesses have raised concerns over continued U.S. technological leadership to support national defense and economic security due to growing foreign, primarily Chinese, investments in U.S. high-tech companies. These and other concerns motivated the House and the Senate to adopt measures, both known as the *Foreign Investment Risk Review Modernization Act of 2018* (FIRRMA). The bills would amend the current process for the Committee on Foreign Investment in the United States (CFIUS) (under P.L. 110-49) to review, on behalf of the President, the national security implications of foreign direct investments in the United States.

The Senate version (S. 2098) of FIRRMA was added as Title XVII to the Senate version of the National Defense Authorization Act for Fiscal Year 2019 (S. 2987, and as incorporated into the Senate amendments to H.R. 5515), which passed the Senate on June 18, 2018.

The House version (H.R. 5841) of FIRRMA was passed by the House as a stand-alone bill on June 26, 2018. It is expected that the provisions will go to [conference](#) to be reconciled in the coming weeks. The House and Senate measures would represent the most comprehensive revision of the foreign investment review process under [CFIUS](#) since previous revisions were enacted in 2007.

Since its inception in 1975, CFIUS has operated at the nexus of shifting concepts of national security and a changing global economic order that is marked in part by such emerging economies as China and state-led firms that are playing a more active role in the global economy. The CFIUS process grants the President the authority to block or suspend proposed or pending foreign “mergers, acquisitions, or takeovers” of “persons engaged in interstate commerce in the United States” that threaten to impair the national security. To exercise his authority, the President must conclude that (1) other U.S. laws are inadequate or inappropriate to protect the national security; and (2) must have “credible evidence” that the foreign interest exercising control might take action that threatens to impair U.S. national security. CFIUS currently does not review joint ventures or new business ventures, the latter often referred to as “greenfield investments.” The [U.S. export control system](#), which addresses certain outbound transactions, operates separately from CFIUS, although the Secretaries of Commerce, Defense, and State, whose departments are involved in administering export controls, are permanent members of CFIUS.

Proposed changes to CFIUS could recast the current law’s generally open approach to foreign investment that largely focuses reviews and investigations on the potential impact of individual investments on

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national security, to a more assertive role that emphasizes both U.S. economic and national security interests, particularly relative to the development of dual-use leading-edge technology.

Overall, the changes range from provisions that would codify existing administrative actions to provisions that would expand the scope of transactions that fall under CFIUS' jurisdiction and distinguish foreign investments by country. Specifically, investment transactions involving "countries of special concern," would face a higher level of scrutiny, though the criteria for that designation by CFIUS differ between the House and Senate bills.

The House and Senate versions of FIRRTA differ in a number of ways, but key provisions would

- Broaden CFIUS' role by including for review certain real estate transactions in close proximity to a military installation or U.S. government facility or property of national security sensitivities; joint ventures (House version); any nonpassive investment in U.S. businesses involved in critical technology or critical infrastructure; any change in foreign investor rights regarding a U.S. business; transactions in which a foreign government has a direct or indirect substantial interest; and any transaction or arrangement designed to evade CFIUS regulations.
 - Allow for CFIUS to discriminate among foreign investors by country of origin in reviewing investment transactions by labeling some countries as being a country of special concern—one that poses a "significant threat to the national security interests of the United States" (Senate version), or a country that is subject to export restrictions, is a state-sponsor of terrorism, or is subject to an arms embargo (House version).
 - Shift the filing process for foreign firms from voluntary to mandatory in certain cases and provide for a two-track method for reviewing investment transactions with some transactions requiring a declaration to CFIUS and receiving an expedited process, while transactions involving investors from countries of special concern would require a written notification of a proposed transaction and receive greater scrutiny.
 - Lengthen most time periods for CFIUS reviews and investigations and for a national security analysis by the Director of National Intelligence.
 - Provide for more staff to handle an expected increased work load and provide for additional funding for CFIUS through a filing fee structure for firms involved in a transaction (Senate version) or a combination of a \$20 million annual appropriation and a fee structure (House version).
 - Provide for additional factors for consideration that CFIUS and the President can use to determine if a transaction threatens to impair U.S. national security.
 - Formalize CFIUS' use of risk-based analysis to assess the national security risks of a transaction by assessing the threat, vulnerabilities, and consequences to national security related to the transaction.
 - Modify CFIUS' annual confidential report to specified Members of Congress and nonconfidential reports to the public to provide for more information on foreign investment transactions.
 - Mandate separate reforms related to export controls, with requirements to establish an interagency process to identify so-called "emerging and foundational technologies"—such items would also fall under CFIUS review of critical technologies—and establish controls on the export or transfer of such technologies. (The House version includes more extensive export control revisions.)
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President Trump [reportedly](#) endorses the enhanced CFIUS process that would result from the adoption of FIRRMA in lieu of proposing new [restrictions](#) on foreign investment, including from China as part of the [U.S. investigation into Chinese practices](#) related to technology transfer and intellectual property rights.

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